FEDERAL MARITIME COMMISSION

No. 967

ALCOA STEAMSHIP COMPANY, INC.

v.

CIA. ANONIMA VENEZULANA DE NAVEGACION, ET AL.

No. 970

AGREEMENTS 8640 AND 8640-1, BETWEEN GRACE LINE, INC. AND CIA. ANONIMA VENEZOLANA DE NAVEGACION COVERING POOLING IN THE NORTH ATLANTIC-VENEZUELA TRADE

Decided September 5, 1962.

Agreement between Grace Line, Inc. and Cia. Anonima Venezolana de Navegacion (No. 8640 and No. 8640-1) not found unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, ports, or exporters from the United States and their foreign competitors, or any of them; not found to operate to the detriment of the commerce of the United States; not found to violate the Shipping Act, 1916; not found to be contrary to the public interest. The agreement is approved pursuant to the provisions of section 15 of the Shipping Act, 1916.

Docket No. 970 is discontinued, and Docket No. 967 is dismissed.

Elmer C. Maddy and *William L. Hamm* for complainant— intervener, Alcoa Steamship Company, Inc.

Odell Kominers, J. Alton Boyer and *Gordon Werner* for respondent, Grace Line, Inc

Renato C. Giallorenzi for respondent Cia. Anonima Venezolana de Navegacion.

Burton H. White and *Elliott B. Nixon* for intervener Royal Netherlands Steamship Company.

Thomas K. Roche and *Sanford C. Miller* for intervener Skips A/S Viking Line.

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

REPORT OF THE COMMISSION

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

BY THE COMMISSION:

There has been filed with us, pursuant to the terms of section 15 of the Shipping Act, 1916 (Act), an agreement between Cia. Anonima Venezolana de Navegacion (CAVN) and Grace Line, Inc. (Grace).[1]

Notice of the agreement was given and hearing was held. At the hearing, Alcoa Steamship Company, Inc. (Alcoa), Royal Netherlands Steamship Company (Netherlands), and Skips A/S Viking Line (Viking), complainant and interveners, respectively (hereinafter protestants), urged that the agreement be disapproved.

After termination of the hearing and filing of briefs by all the parties named above, and by Hearing Counsel, the Examiner issued an initial decision. He held that the agreement should be disapproved because (1) Grace and CAVN "have failed to overcome the burden on them of proving that proposed Agreement No. 8640, as amended by Agreement No. 8640-1, is lawful" and (2) "the evidence of record clearly demonstrates that the proposed agreement, if approved, would: create unjust and unfair discriminations which would prefer respondents (CAVN and Grace) over interveners (Alcoa, Netherlands, and Viking), favor ports served by Grace Line, prefer shippers, exporters and importers who use such ports, and prejudice shippers, exporters, and importers unable to use such ports, operate to the detriment of the commerce of the United States, and be contrary to the public interest, in violation of section 15 of the Shipping Act, 1916, as amended;

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[1] Section 15 provides in relevant part as follows:

*** every common carrier by water *** shall file *** with the Commission a true copy *** of every agreement with another such carrier *** controlling, regulating, preventing, or destroying competition ***. The Commission shall by order, after notice and hearing, disapprove, cancel, or modify any agreement *** 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, and shall approve all other agreements.

subject ports not served by Grace Line to undue and unreasonable prejudice and disadvantage in violation of section 16 of the Act." Exceptions were filed to the Examiner's initial decision and the matter was orally argued before us.

FACTS

(1) The agreement is in two parts, the primary agreement, which we have numbered 8640, executed October 6, 1961, and a clarifying addendum, which we have numbered 8640-1, executed November 8, 1961. Copies of both (collectively referred to as "the agreement") are attached as Appendix I.

(2) The agreement provides for its submission to this Commission, the Maritime Administration, and the Venezuelan Government, and that it shall not become effective until approved by them.

(3) The parties to the agreement are Grace and CAVN ("the flag lines"), and the agreement covers their freighting operations southbound from United States Atlantic ports to ports in Venezuela, including ports on Lake Maracaibo. The agreement provides *inter alia* for (1) a minimum number of sailings in the trade by each party, (2) for the pooling of cargo in excess of a specified percentage carried, (3) the pooling of all revenue earned in excess of a specified percentage, and (4) cooperation between the parties in certain areas of operation. Grace is a privately owned United States corporation, which operates subsidized United States flag vessels in the trade. CAVN is a Venezuelan corporation, the stock of which is held by agencies of the Venezuelan Government, and it operates Venezuelan flag vessels in the trade.

(4) Alcoa, Netherlands, and Viking (the protestants) are "third flag" operators in this trade, inasmuch as the ships they operate in the trade fly the flags of nations other than Venezuela or the United States.

(5) In large measure the proposed agreement represents an attempt by the American flag line, Grace, to counteract the effects of growing pressures and campaigns in Venezuela to ship via CAVN, the Venezuelan national line. In the past 10 or 15 years in South America there has been a growth of nationalism with a concomitant promotion of national steamship lines through legislation and governmental decrees. Increasingly during the last

775-794 O-65-24

few years, pressures have been exerted by various sources in Venezuela on importers to utilize the service of CAVN rather than the foreign lines. These pressures were exerted by the Venezuelan Government, as well as by a group known as the Pro-Venezuelan Organization which disseminates literature in an effort to attract cargo to the national line. In many instances the informal attempts to stimulate Venezuelan importers into patronizing the national line did not have the full effect desired. Without the imprimatur of official decree or legislation, private importers and in some instances even Government agencies resisted the pressures exerted. The lack of complete success of these informal persuasions can be seen by the fact that CAVN actually carried substantially less Venezuelan Government cargo in 1960 than it carried in the preceding year, dropping from 64.4% in 1959 to 48.3% in 1960 of the total volume of government cargo.

(6) Informal persuasions and suggestions, therefore, soon ripened into full fledged requirements imposed by governmental decrees. Thus, decree No. 166, dated September 28, 1959, required that commercial companies under contract to any Venezuelan Government agency for public works construction include in their contracts a clause binding them to the use of the vessels of CAVN. This decree has substantially fulfilled its objectives.

(7) The most serious of the decrees, however, have been Nos. 255 and 331. The former, dated March 18, 1960; sets forth certain classifications of commodities which were exempt from payment of import duties. Such classes of commodities, known as "exonerated" cargo, are:

(a) Machinery, utensils and other effects destined for use in industrial, agricultural or livestock development established or to be established in the country . . .

(b) Raw materials which are not produced in the country nor may become immediate substitutes for articles of national production;

(c) Raw materials or substitutes produced in the country in insufficient quantity or of appreciably deficient grade . . .

(d) Articles destined to be used as containers for national products.

(8) Decree 255 did not attempt to direct routing of exonerated cargo nor did it identify more specifically which commodities were covered by the decree. This lack of specificity in the provisions of Decree 255 was apparently due to a desire to retain a degree of flexibility for achieving the purpose of the decree—the development of the Venezuelan economy. The criterion for determining an exonerated commodity is the ultimate use to which it is to be put after importation into Venezuela. Thus, the same

commodity may sometimes be exonerated and at other times be subject to payment of duty. Decree 255 by itself did not upset the trade.

(9) The issuance of Decree 331, effective March 10, 1961, caused a major disruption in the trade. This decree imposed upon the commodities subject to exoneration a requirement that they be shipped via CAVN or its associates as a prerequisite to exoneration. Article 1 of Decree 331 states:

The total or partial exemption from import duties handled through this Ministry, as established in Executive Decree No. 255 of March 18, 1960 is predicated upon the obligation of the beneficiary to transport the machinery, utensils, raw material and other items which he may import by means of the CAVN or its associated services.

(10) The immediate result of Decree 331 was period of great confusion among shippers and consignees and the cancellation of bookings with non-CAVN carriers. In some instances shippers booked all cargo on CAVN vessels rather than attempt to distinguish exonerated from non-exonerated commodities. In practice, the determination as to exoneration is made at the discretion of the Venezuelan Minister of Formento (Development) on application for exoneration by the importer or shipper. The application requires the importer to designate the carrier recommended to transport the commodity and a copy of this application is sent to CAVN which is thus informed of the prospective shipment and can determine if it is able to carry it. The actual exoneration from duty occurs after the merchandise arrives in Venezuela, at which time the Minister of Finance effectuates the determination by the Minister of Formento that no duty shall be paid on the particular commodity.

(11) The effect of the Venezuelan Government's program on the carryings of the lines in the trade soon became clear. All lines lost cargo while CAVN increased sharply its participation in the trade. In 1960, the last year of operation before exonerated cargo was diverted to CAVN, participation in the trade from U.S. East Coast ports to Venezuela compared to participation in 1961, was as follows:

1960		1961	
Grace	35%	Grace	30%
CAVN	25%	CAVN	37%
Alcoa	18%	Alcoa	15%
Netherlands	10%	Netherlands	9%
Viking	4%	Viking	3%

(The full impact of Decree 331 is not shown for 1961, because the decree did not go into effect until March 10 of that year.)

(12) A further analysis of the trade before and after the restrictive decree tends to corroborate Grace's testimony that it, as the leading carrier in the trade, was suffering the most. Figures compiled by Grace excluding ports not served and excluding bulk wheat not carried by Grace show a sharp decline by Grace and comparatively low participation by the protesting carriers, as follows:

	1957	1958	1959	1960	1961
Grace	40 %	40.7%	33.2%	35.2%	29.8%
CAVN	21.6%	25.5%	24.2%	24.3%	37.3%
Alcoa	15.7%	8.3%	10.2%	10.5%	9.8%
Netherlands	10.5%	12.3%	9.7%	10.9%	10.6%
Viking	—	—	4.0%	5.5%	4.2%

(13) The effect of the decrees clearly emerges. The carryings of CAVN in the areas it served and cargo it carried in competition with Grace increased by a full 13% whereas Grace's participation declined 5.4% in one year. Other carriers suffered declines to a much smaller degree, i.e., Alcoa, .7%; Netherlands, .3%; Viking, 1.3%. The impact of the decrees on Grace especially and the other lines can be more readily appreciated when we consider that the trade as a whole has been shrinking. Again excluding bulk wheat and limited to ports served by Grace, the total volume of cargo in tons is as follows:

Year	Tons
1957	892,464
1958	691,000
1959	577,316
1960	437,366
1961	401,290

(14) Statistics for the critical months of 1961 again reveal the tonnage changes brought about by the decrees:

	Feb. 1961	March 1961	April 1961
Grace	37.2%	31.4%	31.1%
CAVN	24.0%	32.9%	36.6%
Alcoa	11.1%	11.2%	7.8%
Netherlands	11.6%	9.2%	12.8%
Viking	6.6%	3.0%	3.2%

By the end of 1961 the carryings of Grace had further declined while other lines had managed to show a slight recovery toward the 1960 levels. The comparatively slight nature of the decline in tonnage carried by the protesting carriers is shown by the following:

Average Tons Carried per Voyage

	Jan. 1-March 10, 1961	March 11-October 6, 1961
Alcoa	1330	1190
Netherlands	933	944
Viking	1124	954

These figures include bulk wheat, the removal of which would result in a larger decline for Alcoa. Netherlands, despite Decree 331, increased its average tonnage.

(15) Public Resolution 17, 73rd Congress, provides that when loans are made by the Export-Import Bank to foster the exportation of agricultural or other commodities, provision shall be made that such commodities shall be carried exclusively in vessels of the United States, unless waivers are obtained from the Maritime Administration. The Maritime Administration in a statement of policy issued on July 24, 1959 (see Appendix II) declared the policy it would follow in issuing waivers on Export-Import Bank cargo. Under this policy, recipient nation vessels may be authorized to carry up to 50% of such cargo under so-called "general waivers" provided that after investigation the Maritime Administration is satisfied that "parity of treatment is extended to U.S. Vessels in the trade of the foreign nation." Under Decree 331 Grace, of course, was not "extended parity of treatment" by the Venezuelan Government, and so long as the decree continued to exclude Grace from participation in exonerated cargo, CAVN could not expect to be granted "general waivers" by the Maritime Administration. However, the "association" of Grace would remove the onus of Decree 331, and CAVN would again become eligible to carry Export-Import Bank cargo under "general waivers."

Protestants, since they operated neither U.S. flag vessels nor Venezuelan flag vessels, could not carry Export-Import Bank cargo under "general waivers". Under the Maritime Administration statement of policy protestants could only carry Export-Import Bank cargo under so-called "statutory waivers". Such waivers are granted when no U.S. flag nor Venezuelan flag vessel is available to carry the particular shipment.

(16) Despite the desirability of "association", it was not until our predecessor, the Federal Maritime Board, proposed certain regulations to offset the Venezuelan decrees that the agreement here under consideration was worked out by Grace and CAVN These regulations, although never put into effect, were made

available to the Venezuelan Government through our Department of State in June, 1961. A copy is attached as Appendix III. Much of the proposed regulations was in general terms but their "action" provisions were clearly aimed at the discriminatory decrees of Venezuela "against vessels of United States registry", *i.e.* the vessels of Grace.

(17) For several years prior to the disruption caused by the issuance of Decree 331, discussions and negotiations in contemplation of a pooling arrangement between Grace and CAVN had been carried on periodically and informally. They were inclined toward a type of pool offering quota participation such as CAVN had executed with numerous foreign lines in other trades, including one with the Netherlands in the European trade. The issuance of Decree 331 made it essential that Grace reach some sort of arrangement with CAVN, and Manual Diaz, Grace's Vice President, was dispatched to Venezuela in late March 1961 to press negotiations with CAVN. Grace was concerned not only with the harm already occasioned by Decree 331. It feared that the "Ship Venezuelan" campaign which had not abated would cause the Venezuelan Government to extend the coverage of Decree 331 by withdrawing additional cargo from free competition. Communications sent Grace by its agent in Venezuela informed it that unless negotiations between Grace and CAVN were fruitful, additional decrees would be forthcoming which would further promote the participation of the national line. Apprehension about such decrees was shared by all carriers in the trade. The Venezuelan Government had in fact prepared another decree similar in nature to No. 331 which, if promulgated, would have been applicable to all cargo subject to Venezuela's import licensing requirements. Although the figure may be somewhat high, it was feared that the new decree together with 331 would eliminate 80% of all cargo in the trade from free competition. There is some indication that the issuance and implementation of the new decree has been withheld pending the conclusion of negotiations between Grace and CAVN.

(18) Under the foregoing circumstances, the renewed negotiations between Grace and CAVN culminated in the formulation of the agreement here under consideration. It is not a true pooling agreement but an instrument to secure for each party access to cargo which it would otherwise be denied. The fact that neither Grace nor CAVN wished to make payments or receive compensa-

tion because of the periodic adjustments so common to the usual type of pool explains the figures contained in paragraphs 5 and 6(b), which are the only provisions of the agreement that could result in a true pooling of revenue. Under them, revenue will be pooled 50-50 between the parties only from cargo which either party carries in excess of 42.5% of the total volume moving from New York to Venezuela or 50% of the total from other U.S. Atlantic ports to Venezuela. The 42.5% figure represents a compromise between the two carriers and is also the approximate five-year average participation by Grace in this trade. Grace and CAVN believe that these figures will not be attained and that there will be no payments between them. But if there are, the figures appear, at least prospectively, to be equitable. The levels of actual carryings by both carriers in this trade bear out their opinions that there is little probability that actual revenue pooling will occur under the agreement. Similarly, it appears unlikely that there will be pool payments under paragraph 6(b)'s provision for such payments in the event the average annual rate per revenue ton of either party exceeds by more than 10% the average annual rate of the other. There is no evidence indicating that such a wide discrepancy in rates between the two carriers will occur. Unless the trade drastically changes, therefore, payments if any between the parties, should be few and small.

(19) The major categories of cargo which are significant in this proceeding are (1) the so-called exonerated cargo, (2) cargo subject to import licensing requirements (generally equivalent to cargo under freight collect requirements), and (3) low import duty cargo (known as "aforo estadistico".) At the present time the only type of cargo which is subject to routing requirements is the first of these, exonerated cargo. This type, by virtue of Decree 331, must move on CAVN or on an associated service, unless CAVN grants a "waiver" to the shipper. The second type of cargo is cargo subject to Venezuelan Government decrees with respect to import licensing. While the record is not entirely clear on this point, it appears that this licensing procedure relates to control of monetary exchange, *i.e.*, to payment of freight charges in Venezuelan currency at destination rather than in dollars in the United States. By virtue of this licensing procedure a sizeable amount of shipments moving to Venezeula now do so on a freight collect basis. The exact percentage relationship which such commodities bear to the total volume imported into Venezuela has not been estimated with precision. Estimates varying from 20%

to 35% of the total appear in the record. Unless commodities on the import licensing list have been exonerated, however, every carrier may compete for them. There is only a vague suggestion that since the control of routing tends to be exercised by consignees in Venezuela there will, therefore, be a preference for the Venezuelan line as to this type of cargo. The third and less important classification of cargo is that which is subject to low import duties, known customarily as "aforo estadistico" cargo. Unless the Minister of Fomento chooses to designate such cargo for exoneration, it is open to all carriers. A final category for cargo not relevant here is that imported for the exploration of oil in Venezuela, which is exonerated, but not restricted to CAVN.

(20) Certain special type cargoes have been removed from free access to the various carriers as a result of the pressures of the "Ship Venezuelan" campaign. Thus contractors engaged in public works on behalf of the Venezuelan Government customarily insert clauses in their contracts which restrict carriage of imports to CAVN. However, the "Ship Venezuelan" campaign has not deprived the non-Venezuelan lines of appreciable cargo.

(21) Only exonerated cargo and cargo shipped to contractors for the Venezuelan Government are required to move via CAVN. The exonerated cargo now restricted to CAVN approximates 25% of the total movement. CAVN records indicate that in 1960 out of a total of 2 million tons imported into Venezuela from all over the world, 600,000 tons were exonerated, *i.e.*, 30%, but this figure is subject to considerable explanation. Over half of it, 308,000 tons, constituted bulk wheat; another 250,000 tons represented homogenous cargo such as fertilizer, copra, sesame seeds. Thus only 42,000 tons (2.1%) of the 1960 exonerated cargo were general commodities.

(22) The best available estimate of cargo covered by the agreement is 25% of the trade total and assuming that only Grace and CAVN can lift this percentage, it follows that about 75% of the total cargo in the trade is freely accessible to the other lines. There is no showing that the other lines have been or will be disadvantaged or unable to attract cargo in the 75% category. Indeed, despite the "Ship Venezuela" campaign, CAVN lost a substantial percentage of cargo consigned to the Venezuelan Government itself between 1959 and 1960, dropping from 64.6% to 48.3%. On the other hand, Netherlands' participation in such

cargo climbed from 1.5% to 3.9%, Alcoa's from .3% to 6.8% and Viking's from 2.4% to 13.1% while Grace's dropped from 8.3% to 4.3%. Figures for the first nine months of 1961 show CAVN rising to 61%, Netherlands slipping back to 2.2%, Alcoa climbing sharply to 22% (although a good portion of this might have been fertilizer), and Viking declining to 10%. There is no indication that cargo which was freely accessible was lost by Alcoa or the other protestants for reasons other than normal competitive selection, based on requirements of service. Alcoa admits losing oil equipment cargo to Grace by reason of the superior service offered by Grace.

(23) Analysis of the carryings of the protestants reveals that they can be expected to continue to secure substantial exonerated cargo if the agreement is approved. It is true that as an associate of CAVN it will no longer be necessary for Grace to rely on shippers obtaining waivers from CAVN, as they must continue to do if they are to ship via the three protestants. However, the protestants will certainly carry exonerated cargo in instances where CAVN cannot do so and Grace does not offer service either to the port of export or for the type of commodity to be lifted. The record indicates that shippers will probably have to rely on lines other than Grace when cargo is moving from South Atlantic ports and from Searsport, Maine, and on shipments of bulk wheat, an important commodity in this trade. Also there are significant exclusions from cargo subject to the proposed agreement, namely, "FIO" shipments, explosives, gold and silver bullion or coins, dry or liquid cargo in bulk, heavy lift pieces or packages exceeding 35 metric tons, mail, passenger baggage, automobiles (accompanying passengers, or shipped as baggage), and livestock. Bulk wheat moves in volume on an "FIO" basis and constitutes almost one-half of Alcoa's estimated carryings in the trade. Alcoa carries an estimated 1000 tons a month and also vigorously competes for other bulk commodities. Bulk wheat, which Grace does not carry, constitutes a sizeable portion of cargo for which CAVN has granted waivers. Thus, from New York City, out of 13,319,884 kilo tons waived by CAVN from February 14 to December 31, 1961, 3,000,000 constituted wheat. From Baltimore, in the same period, out of 25,485,417 kilo tons waived, some 25,414,839 were wheat.

(24) CAVN does not waive cargo to any particular carrier. It waives to the shipper, who then makes his own selection of a

carrier. The president of CAVN indicated that it will continue its present policy of granting waivers liberally, but intimated that should the agreement in question not be approved, CAVN may reconsider this liberal policy since, absent approval, CAVN will not have the access it desires to cargoes reserved to American flag vessels.

(25) Shippers with waivers will remain free to select any carrier even if this agreement is approved. The status of Grace as an associate of CAVN enables a shipper to utilize Grace if he so chooses without securing a waiver, but should he obtain a waiver he may select any carrier he wishes. While CAVN has in its own ships sufficient capacity to carry all cargo offered from New York, the record shows that CAVN has granted waivers from New York on 14,950,259 kilo tons of cargo. Where CAVN grants waivers, any carrier can secure the exonerated cargo, and Grace has and will have no special claim to it. Nor will exonerated cargo have to filter through Grace to other carriers, as it must through CAVN.

(26) Much exonerated cargo is of a type that Grace would not carry even if the shipper solicited that line instead of CAVN. Some of it Grace does not find attractive and does not carry at all, and it would be no more attractive to Grace if the agreement is approved than it is now. As already mentioned, Grace does not carry wheat in bulk, considering it incompatible with its berth service in this trade. Likewise, Grace finds fertilizer unattractive, and shippers do not usually come to it for carriage of that commodity. Additional commodities such as pulp, paperboard, or cardboard, which Alcoa claims are important articles subject to exoneration together with wheat and fertilizer are considered by Grace to be unattractive cargoes. These move largely from South Atlantic ports and from Searsport, Maine, which are ports not served regularly by Grace. Thus, even under the agreement there will remain a good deal of exonerated cargo that third-flag lines such as protestants will carry.

(27) To the extent that Grace may divert cargo from the protestants, such cargo does not constitute the lifeblood of their business. Of the 15 leading commodities carried by Alcoa in 1961, only four can be definitely identified as exonerated, namely, corn, newsprint, paperboard, and wheat. Six of such commodities, namely, bentonite, corn, oats, soda ash, sulphur and wheat move primarily from the Gulf, a trading area beyond the confines of

the proposed agreement and three more move from ports from which Grace offers no regular service, namely, newsprint, paper board and woodpulp. Bulk wheat appears to constitute almost half of Alcoa's participation in the trade. Netherlands was unable to state how much exonerated cargo it has carried and has made no calculations as to the effect of Decree 331. It appears unable to determine definitely which of the 15 leading commodities it is accustomed to carry have been exonerated. Netherlands acknowledges that it has probably carried exonerated cargo which CAVN was unable to carry because of limited capacity or lack of service to the port from which the cargo moved. Of the 15 most important commodities carried by Viking only three or four could be identified as exonerated. Certain commodities, such as paper board, feldspar, and aluminum sulphate, were lost by Viking because of inability of the shipper to obtain a waiver from CAVN. Viking vigorously sought out other cargo to replace these losses and was able to improve its position in the latter part of 1961.

(28) There is no evidence that the agreement will adversely affect any port interest. The Board of Commissioners of the Port of New Orleans and the Alabama State Docks Department failed to produce data as required in the prehearing conference. An employee of the former testified, as Alcoa's witness, that the agreement is "per se monopolistic and therefore contrary to the Shipping Act, 1916" and that "we also feel" that the agreement in conjunction with the Venezuelan Government decrees "will operate to the disadvantage of the Port of New Orleans" by adding Atlantic Coast sailings which can handle exonerated cargoes. An employee of the latter, also an Alcoa witness, testified it "fears" that "the concerted sales efforts" of Grace and CAVN "will draw Venezuelan tonnage away from Mobile" to Atlantic Coast ports, and that these lines may curtail or discontinue their service from Mobile. However, neither witness had any information as to the amount of traffic actually or potentially involved, or the traffic handled by the parties to this proceeding through their ports, and their claims were in no way substantiated.

(29) To the extent the Gulf is competitive for Venezuelan cargo, it is due to its geographical location, inland freight rate advantages, and specialized storage facilities for certain commodities. None of these will be affected by the agreement. In addition, it is inherently improbable that CAVN would divert Venezuelan Government cargo now moving out of the Gulf, where

CAVN has the exclusive control, to the Atlantic Coast where it would be accessible to Grace without waivers, and CAVN denies any such intention.

DISCUSSION AND CONCLUSIONS

As already noted, the Examiner concluded that the agreement should be disapproved. The underlying reason for this conclusion was the failure, in the Examiner's view, of Grace and CAVN to "overcome the burden on them of proving that the proposed agreement was lawful." The Examiner reasoned that under the provisions of Rule 10(o) of our Rules of Practice and Procedure, respondents "as proponents in quest of an order by the Commission approving the proposed agreement," had the burden of proving "that the proposed agreement is not violative of any of the statutory provisions specified in the order of the Commission instituting the investigation in Docket No. 970." We think this is an oversimplification of the problem, and a misconstruction of Rule 10(o) as applied to this proceeding. Upon a careful review of the record before us, we find that there is ample evidence on which to base a decision on the merits. In view of such evidence the case does not turn on, and it is unnecessary to discuss, questions involving burden of proof.

In rejecting the agreement, the Examiner also made the following conclusory statement:

> The evidence of record clearly demonstrates that the proposed agreement, if approved, would: create unjust and unfair discriminations which would prefer respondents over interveners, favor ports served by Grace Line, prefer shippers, exporters and importers who use such ports and prejudice shippers, exporters, and importers unable to use such ports, operate to the detriment of the commerce of the United States, and be contrary to the public interest, in violation of section 15 of the Shipping Act, 1916, as amended; subject ports not served by Grace Line to undue and unreasonable prejudice and disadvantage in violation of section 16 of the Act.

We disagree with this statement. It is without adequate foundation in the record and no specific supporting reasons for it are set forth in the Examiner's initial decision.

Agreements within the scope of section 15 of the Act are approvable unless we find them to be contrary to the provisions of that section. Section 15 in relevant part provides as follows:

> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement . . . 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, and shall approve all other agreements, modifications, or cancellations.

The agreement cannot be condemned upon any of the above grounds. A careful review of the agreement has convinced us, insofar as it is possible to predict, that neither party will employ it to impose oppressive conditions, or extort unreasonable payments. The agreement does not set up, nor will it set up a monopoly, or lessen competition between the parties to an objectionable extent, and it does not contain any specific provision which would be ground for disapproval.

The agreement is concerned with about 25% of the cargo moving in the southbound trade from United States Atlantic ports to Venezuela. It is apparent that the real basis for the Examiner's disapproval of the agreement is the theory that operations under it will result in the protestants being squeezed out of the trade, or at the least, being so seriously injured that there would be no real chance that they would long continue to serve the route; and that this would be unjustly discriminatory and unfair as between carriers, in violation of the Act, detrimental to the commerce of the United States, and contrary to the public interest. We find ourselves unable to conclude that this will or is likely to happen. The evidence does not show and we do not think the agreement will eliminate or seriously restrict Alcoa, Netherlands, or Viking as carriers on the route. It is not so intended, and is not reasonably likely to have that result.

This brings us to the basic question—what is the agreement intended to do, and what are its reasonably likely results? Article 10, which the Examiner rightly terms the "most important provision in the agreement", has become known in this proceeding as "the equal access clause." It reads:

COOPERATION

(10) In order that both lines may enjoy equal access to all cargoes as defined in Article 4, it is agreed that C.A.V.N. and Grace Line obligate themselves to comply with all necessary proceedings so that the legal or administrative regulations in force in the United States and Venezuela regarding the reservation and protection of cargo to their respective merchant marines are extended to both lines

This clause in particular, and the effectiveness of the entire agreement in general, operate to make Grace and only Grace an "associated service" of CAVN. The mutual benefit accruing to

Grace and CAVN through the "association" of Grace is immediately apparent when the impact of the legislation and decrees of their respective governments is considered. The association of Grace clears the way to participation by both lines in the carriage of cargo otherwise unaccessible to them. It is the fact that Grace alone is made an "associate" that is the crux of the controversy. The immediate benefit to CAVN is that when Grace, the only line flying the American flag in the trade, becomes an associated service of CAVN, the discrimination of Decree 331 against American-flag vessels disappears, and CAVN by the same token becomes "eligible" to carry up to 50% of Export-Import Bank cargo moving to Venezuela. To this Alcoa, Netherlands, and Viking cannot object, because the approval of this agreement has no bearing on their ability to carry Export-Import Bank cargo.

It is to be noted that the Examiner has not found that operations under the agreement are intended or reasonably likely to squeeze Alcoa, Netherlands, or Viking out of the trade. In the light of the oral testimony on behalf of the protestants, no such finding can be made. With commendable candor, witnesses whose interest pointed in the direction of such a finding in effect refused to say that if the agreement is approved their lines will cease operating in the trade, nor could they point to any specific curtailment of the service they render shippers that would result from such approval.

Mr. Bell, a director of Alcoa who is also its vice president and treasurer and has been with Alcoa approximately 20 years, was asked by his own attorney to state Alcoa's plans if the agreement is approved. He replied:

> We plan to do * * * our utmost to stay in the Venezuelan trade; no matter whether or not this pool goes through we hope to be able to stay in the Venezuelan trade. In other words, we have no plans for pulling out of the trade because of the pooling at the present time.

Mr. Kieft, managing director of Netherlands, who has served that company for 36 years, during much of which time he lived in the Caribbean area, was examined at length about the effect of the agreement on Netherlands' Venezuelan operation. In reply he testified that while the agreement represented a serious threat to Netherlands, the line has not, so far, considered withdrawing even from its "minor port" service in the trade or reducing its frequency. Inasmuch as this "minor port" service is much less profitable than Netherlands' service to major Venezuelan ports, it is a

fair inference that Netherlands is not considering abandoning or cutting down its major port service, either.

Mr. Dooley, vice president of Viking's general agent, who has had 15 years of maritime experience, said that Viking had "learned to live with" Decree 331, and that Viking's "main worry" was with the "possibility" of new decrees and regulations, rather than with the agreement itself. This witness in no way indicated that Viking is giving any consideration to abandoning or restricting its service if the agreement becomes effective. Viking's policy, as stated by this witness, of cutting conference rates 10%, and its payments of 2½% minimum and up to 10% maximum brokerage are certainly competitive advantages against CAVN, which follows conference rates, and Grace, Alcoa, and Netherlands who are conference members.

The failure of any of the protestants to submit testimony that the agreement would have specific results requiring that it be disapproved, is in itself strong evidence that such results cannot reasonably be foreseen. As heretofore stated, the Examiner did not make findings showing that Alcoa, Netherlands, or Viking will be driven from the trade or that their service will be impaired. He did say that they "fear" CAVN's and Grace's "increased competitive abilities", and indicated their fears were well founded—"these fears are not imaginary but may be reasonably deduced from existing facts". But evidentiary support for this deduction is lacking.

The language used by the Examiner appears to have been drawn from *West Coast Line, Inc. et al.* v. *Grace Line, Inc. et al.*, 3 F.M.B. 586, 595 (1951), wherein the Federal Maritime Board said that it was "only able to decide cases on the evidence of existing facts and the reasonable deductions to be drawn therefrom" and not on "speculative possibilities". The Board approved the agreement there involved notwithstanding a contention that there was a "reasonable possibility" that the proposed agreement might have an unjustly discriminatory or unfair result. It thus took the view, which we share, that something more than a fear of increased competition is necessary to justify a finding that an agreement is unjustly discriminatory or unfair as between carriers, contrary to the public interest, or otherwise merits disapproval under section 15 of the Act.

Apparently the Examiner was of the opinion that in the immediate future, CAVN and Grace as a result of this agreement will

be able to carry at least 78% of the cargo moving in the trade. He said that this was a "realistic estimate * * * neither unreasonable nor a maximum appraisal of their increased competitive abilities under the proposed agreement." We are unable so to conclude. The Examiner's discussion is based upon 1954-1960 figures for Grace, and 1961 figures for CAVN. He argues that Grace may be expected in the future to carry the 1954-1960 average (40.7%), and that CAVN should carry what it carried in 1961 (37.3%), a total of 78%. The two percentages are questionable, *per se.*, and are taken from different years. It cannot be reasonably said, for instance, that because Line "A" carried 50% of available traffic in one year, and Line "B" carried 50% the next year, the two lines together will carry 100% of available cargo thereafter. The Examiner's figure assumes that Grace, by escaping the impact of Decree 331 through association with CAVN, will recover not only the 5.4% it lost in 1961 but the 5.5% it had previously lost (1954-1960 average), a total of 10.9%, from carriers who lost to CAVN in 1961 a maximum of 2.6%. It assumes that CAVN, which apparently took away 5.4% from Grace in 1961 because it had the advantage of Decree 331 over Grace, will retain all that cargo when in actuality, as to Decree 331 cargo, CAVN and Grace will be on even competitive terms. There are other matters which militate against the dependability of the Examiner's estimate, such as the fact that P & O Line, which carried 5% plus of cargo from Atlantic ports in 1961, stopped service that year.

If the total cargo carried by Grace and CAVN combined should go to 78%, it would be difficult to consider this as the result of either the agreement or Decree 331, or both put together. The two lines together carried 76.2% (only 1.8% less) in 1954 before Decree 331 was issued, and 81.6% (or 3.6 more) in December 1961, when Decree 331 benefited only CAVN. Even if the percentage used by the Examiner should be borne out in the future, it by no means necessarily follows that protestants' revenues would shrink dangerously—they may well increase. The average annual cargo tonnage moving in this trade 1954-1959, inclusive, was over 649,000 tons. In 1957 it was almost 900,000 tons. As the record shows, the volume dropped sharply in 1960 (577,316 to 437,366 tons), and there was a further fall of more than 36,000 tons in 1961, the volume in the last year being 401,290 tons. The Alliance For Progress program, Venezuela's strong spirit for progress, and other factors indicate that cargo tonnage in this trade should increase, and it is by no means impossible that the

1954-1959 average may be equalled or even exceeded within a few years. If so, even comparatively small percentages of the total will yield increased revenue.

Apparently, the Examiner considered that the impact of the revenue loss, which he did not explicitly prophesy but upon which he seems to rely to support his conclusions, would be more severely effective on Netherlands than upon Alcoa or Viking. This may be true. Even so, the Examiner's inference that a relatively minor diversion of traffic might result in Netherlands' abandoning its valuable service to minor Venezuelan ports is hard to reconcile with the testimony of Mr. Kieft. Such an experienced operator would certainly be prepared in advance for reasonably foreseeable events, but he testified that "so far we have not considered withdrawing from that (minor port) service or reducing its frequency".

As we have indicated elesewhere, the results of future shipping operations are rarely, if ever, precisely predictable. This record, however, particularly in light of the evidence it contains with reference to the traffic in the trade, does not show that there will be any unjust or unfair discrimination between carriers as a result of this agreement.

The Examiner refers to the possibility of further measures by the Venezuelan government, which would be advantageous to CAVN and Grace, as if there were cogent evidence that such measures will be taken once this agreement has become effective. The evidence upon this point is inconclusive, and it appears at least as probable, and in fact somewhat more probable, that further measures would be taken only if the agreement is not approved, and under such circumstances, of course, they would not favor Grace but only CAVN. The evidence, in any event, will not support a finding as to what measures may be taken by any government in the future. A sound statement applicable to all countries in this regard is made in Netherlands' "Supporting Memorandum", as follows:

> The truth of the matter, as the Commission will surely appreciate, is that no one can predict what the Venezuelan Government will do in the future for the simple reason that that Government will take precisely that action which best suits its own national interests.

The application of this pithy truism would indicate that as a matter of enlightened self-interest, if this agreement becomes effective, the Venezuelan government will be unlikely to issue decrees under which the agreement might present objectionable fea-

775-794 O-65-25

tures which could cause us to reconsider and disapprove the agreement under the reserve powers of section 15. We are satisfied that the same considerations will also operate effectively against any "tightening up" on waivers by CAVN. It must be clearly understood that our approval of this agreement is not what the quoted Netherlands brief claims it is—"the equivalent of the Commission's giving a foreign government a blank check to control the routing of export commerce of the United States commerce to Venezuela." Nor is our decision reached as an attempt to "satiate the appetite of CAVN (or any steamship line) with U. S. Government-controlled cargo." This proceeding lies under section 15 of the Shipping Act, 1916. This section sets out the standards for approval or disapproval of agreements filed according to its terms. We here apply those standards and no others. We are not concerned here with any promotional provision of law, and our action is not affected by and does not affect decisions under section 19 of the Merchant Marine Act, 1920.

We are wholly unable to conclude that the reasonably probable operations under the agreement will, or are likely to, cause Alcoa, Netherlands, or Viking to withdraw from the trade or any part of it (such as service to minor Venezuelan ports), or to reduce the frequency of their service, or to take other action which might be considered a detriment to the commerce of the United States, or contrary to the public interest.

No evidence of record enables us to conclude that the agreement or operations under it will divert cargo from Gulf ports to Atlantic ports. The Examiner, to the contrary, apparently thought it would, but the testimony of the witnesses on behalf of the port authorities of New Orleans and Mobile fails to justify findings of port discrimination in violation of the Act. In order to justify conclusions of port discrimination, it must be found that the preferred port is actually competitive with the complaining port, that the discrimination complained of is the proximate cause of injury to the complaining port, and that the discrimination is undue or unjust. *The Port of New York Authority* v. *Ab Svenska Amerika Linen, et al.*, 4 F.M.B. 202, 205-6 (1953) and cases cited therein. The port testimony herein by no means meets this test. It simply expresses speculative possibilities upon the basis of which findings cannot be made, and which are inherently most improbable.

We are unable to conclude from any evidence of record that this agreement or operations under it will favor or prefer ports, or

shippers, exporters, or importers using them over others, or that shippers, exporters, importers, or ports will thereby be prejudiced or disadvantaged.

Hearing Counsel suggests that we require deletion of section 8 of the agreement providing for exchange of documents and data, because the transmission of certain information might constitute violation of section 20 of the Act. That point is met when we say, as we do, that nothing in our approval of the agreement shall be construed to permit either party to the agreement to disclose to or receive from the other party, information in violation of section 20. We lack authority to permit such action.

In conclusion, we do not find that the agreement (No. 8640 and 8640-1) is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, ports, exporters from the United States and their foreign competitors, or any of them; that it will operate to the detriment of the commerce of the United States; that it violates the Shipping Act, 1916, or any part thereof; or that it is contrary to the public interest.

Except to the considerable extent that proposed findings and conclusions are substantially embodied herein, they are denied as unsupported by reliable and probative evidence, contrary to the weight of the evidence, or irrelevant to this decision.

The said agreement is hereby approved. Our approval of the agreement in Docket No. 970 disposes of the issues in Docket No. 967, and it accordingly will be dismissed. An appropriate order will be entered.

APPENDIX I

AGREEMENT

An Agreement made this 6th day of October 1961 by and between the Cia. Anonima Venezolana de Navegacion (a Venezuelan Corporation) and any interest that they may control, hereinafter referred to as the CAVN., and Grace Line Inc. (a Delaware Corporation) and any interest that they may control, hereinafter referred to as the Grace Line, both common carriers by water in foreign commerce, subject to the United States Shipping Act, 1916, as amended.

WHEREAS, the CAVN and the Grace Line do both charge the just and fair freights and abide by the rules and practices of the Atlantic and Gulf-Venezuelan & Netherlands Antilles Conference; and,

WHEREAS, the CAVN and the Grace Line do desire to promote more efficient service for shippers and consignees, and to provide beneficial and fair cooperation in the southbound movement of general cargo from U.S. Atlantic ports to Venezuela;

NOW, THEREFORE, in consideration of the premises and mutual promises hereinafter contained and for good and valuable consideration, it is agreed and declared between the parties hereto as follows:

GEOGRAPHICAL SCOPE:

1) This agreement covers the freighting operations of the CAVN and the Grace Line on all cargo hereinafter described shipped southbound under local bills of lading from all ports or points on the Atlantic Coast of the United States, Maine to Key West, inclusive, and destined to all Venezuela maritime ports and those of Lake Maracaibo.

RATES

2) In accordance with established procedures currently in effect, all cargo handled under this agreement shall be handled in accordance with the contract/non-contract rates, rules and regulations established by the governing Conference, and in effect at the time shipments move provided however that should either party cease to be a member of or associated with such governing Conference, rates and regulations shall be as mutually agreed to by both the CAVN and the Grace Line.

SAILINGS AND CARGO CAPACITY:

3) The CAVN will offer a minimum of 48 sailings annually from New York to Venezuela (an approximately weekly service) and a minimum of 24 sailings annually from another port or ports, Maine through Key West, on the Atlantic Coast of the United States (an approximately fortnightly service) to Venezuela.

The Grace Line will offer a minimum of 48 sailings annually from New York to Venezuela (an approximately weekly service) and a minimum of 24 sailings annually from another port or ports, Maine through Key West, on the Atlantic Coast of the United States (an approximately fortnightly service) to Venezuela.

Each of the parties hereto will provide cargo capacity southbound from New York to Venezuela averaged over each quarterly period of three months, either equal to that tonnage presently employed at the signing of this agreement or in the alternative adequate to accommodate 42½% of the total cargo in the trade of the description set forth in Article 4.

In determining the cargo capacity to be provided by each party under this Article, fifty (50) cubic feet of the vessel's bale cubic capacity shall be deemed necessary to accommodate one revenue ton of pool cargo carried under deck.

If either party should fail to maintain the minimum number of sailings or the cargo capacity indicated, this pool will be adjusted in accordance with the terms of Article 9 hereunder.

CARGOES TO BE POOLED

4) All cargo shipped from ports on the Atlantic Coast of the United States, Maine through Key West, inclusive, on vessels owned or operated by the parties hereto under local bills of lading and destined to ports in Venezuela shall be included in this pool, except "FIO" shipments, explosives, gold and silver bullion or coins, dry or liquid cargo in bulk, heavy lift pieces or packages exceeding 35 metric tons, mail, passenger baggage, and automobiles accompanying passengers, or shipped as baggage and livestock.

LIMITATION OF POOL TO EXCESS CARGO

5) Except as hereinafter set forth in Article 6(b), only revenue derived by the parties hereto from cargo in excess of 42½% of the total kilo ton cargo movement in the trade from New York southbound to Venezuela, and in excess of 50% of the total kilo ton cargo movement in the trade from the other Atlantic ports, Maine through Key West, southbound to Venezuela, carried by either party hereto, respectively, shall be subject to this pool.

REVENUE TO BE POOLED

6)a) A revenue ton shall be considered as 40 cubic feet on cargo rateable per cubic foot; 2.240 pounds on cargo rateable per long ton; 2.000 pounds on cargo rateable per 2.000 pounds; 1.000 kilos on cargo rateable per metric ton; 500 board feet on cargo rateable on board measurement; 50 lineal feet on cargo rateable per lineal foot.

b) In the event that the average annual rate per revenue ton of either party exceeds by more than 10% the average annual rate per revenue ton of the other party on that cargo which constitutes up to 42½% of the total New York cargo moving to Venezuela and 50% of the total outports cargo moving to Venezuela, the party having such excess rate shall contribute to the other party a sum equal to 50% of the differential in their respective average rate per revenue ton above the 10% differential with respect to cargo which such party with such excess rate has carried up to the aforementioned limit of 42½% and 50% of the cargo moving in the above mentioned trades considering New York and outports separately.

c) To the extent that either party carries in excess of the allowed kilo ton percentages described in Article 5 above, such kilo ton overage shall be converted into a revenue ton overage by multiplying the same by a factor herein after defined.

The factor shall be determined for each line by dividing the total revenue tons carried by such party during any pool period by the total kilo tons carried by such party during such period.

Such revenue ton overage multiplied by the average revenue per revenue ton of both parties hereto during each pool period minus $16.00 per revenue ton (carrying-charge) shall be pooled.

CLAIMS FOR DAMAGED OR LOST CARGO

7) Claims for damage or loss of cargo will be for account of each respective carrier and will not be considered in any calculations of revenues to be pooled.

ACCOUNTING

8) The CAVN and the Grace Line agree to exchange their manifests, and/or freight lists at New York as soon as practical after each sailing from last port of loading on the U.S. Atlantic Coast, but not later than ten (10) days after each respective sailing.

It is agreed that freighted copies of bills of lading, manifests and other pertinent shipping records are to be available at the respective lines offices in New York for check by the other pool party upon request.

For the purposes of direct payment settlements and pool settlements the settlements for the period ending December 31, 1961 shall be considered as the final settlement for that year, and thereafter each settlement year shall end on and include December 31. Provisional settlements shall be made at the end of each three (3) months calendar quarter, that is, March 31st, June 30th, September 30th and December 31, of each year. All settlements under this agreement shall be made in United States currency and/or Venezuelan currency in the currency proportions as freight money is received in such respective currencies by the party making any direct payment or contribution to the pool. All settlements shall be made in New York within sixty (60) days following each provisional or final settlement date.

A yearly statement shall be prepared showing pooling calculations and settlements due, and a copy of this statement and of provisional statements shall be furnished to the United States Federal Maritime Board and Maritime Administration of the U.S. Department of Commerce, Washington, D. C. (or appropriate successor U.S. Government agency or agencies) and to such Venezuelan Government authorities as the CAVN may request.

DIVISION OF POOL REVENUE

9)a) The CAVN and the Grace Line shall each be entitled to 50% of the total pool income.

b) In the event that a party shall fail to maintain the minimum number of sailings per annum as specified in Article 3 above then the percentage of pool income payable to such party shall be reduced by 0.7% for each sailing deficiency and the share of the other party shall be correspondingly increased.

c) In the event that either party does not make available in any three month quarterly period cargo capacity either equal to the tonnage presently employed at the signing of this agreement, or in the alternative adequate to accommodate 42½% of the total cargo offered in the trade from New York to Venezuela the percentage of the trade which may be carried by the other

party free of this pool shall be increased 1% for each percent deficiency in capacity of the other party.

COOPERATION

10) In order that both lines may enjoy equal access to all cargoes as defined in Article 4, it is agreed that C.A.V.N. and Grace Line obligate themselves to comply with all necessary proceedings so that the legal or administrative regulations in force in the United States and Venezuela regarding the reservation and protection of cargo to their respective merchant marines are extended to both lines.

INITIATION OF AGREEMENT

11) This agreement shall be submitted for approval to the appropriate authorities of the Venezuelan Government and to the United States Federal Maritime Board in accordance with the provisions of Section 15 of the U.S. Shipping Act, 1916, as amended, and to the Maritime Administration of the United States Department of Commerce, Washington, D. C. (or to appropriate successor U.S. Government agency or agencies) and shall not be effective until it has been so submitted and approved by the appropriate authorities of the respective Governments.

When so approved, this agreement shall take effect with the first sailings immediately following full approval by both respective Governments.

CANCELLATION

12)a) This agreement may be cancelled at any time by mutual agreement of both parties.

b) This agreement may be cancelled by either party hereto by the giving of ninety (90) days written notice to the other party.

c) It is also agreed that if at any time after the execution of this agreement and during the period thereof the Government of the United States of America should adopt any new laws, regulations or other measures affecting the routing of cargo in the trades covered hereby which have the effect of according to the Grace Line treatment different from that accorded thereby to the C.A.V.N., then C.A.V.N. shall have the right to cancel this agreement by giving sixty (60) days written notice to the Grace Line.

It is also agreed that if at any time after the execution of this agreement and during the period thereof the Government of Venezuela should adopt any new laws, regulations or other measures affecting the routing of cargo in the trades covered hereby which have the effect of according to the C.A.V.N. treatment different from that accorded thereby to the Grace Line, then Grace Line shall have the right to cancel this agreement by giving sixty (60) days notice to the C.A.V.N.

d) C.A.V.N. on its part and Grace Line on its part, may cancel this agreement by giving written notice to the other, immediately on the determination that the other party has discontinued service (unless suspension occurs as provided in Article 13) effective from the date of the last sailing and it shall be considered a discontinuance should either party fail to maintain any sailings in the trade for thirty (30) days.

e) Any termination of this agreement not in accordance with the pro visions hereof and any modification of this agreement, shall not be vali or binding upon the parties unless and until it has been filed and approve by the Federal Maritime Board and/or the Maritime Administration of th United States Department of Commerce, Washington, D. C., (or by th appropriate successor U.S. Government agency or agencies) in accordanc with the provisions of Section 15 of the Shipping Act, 1916, as amended and/or in accordance with the contractual obligation of Grace Line to th United States; and also, unless and until it has been filed with and approve by the appropriate authorities of the Government of Venezuela.

f) In case of any termination or cancellation of this agreement, poo revenue and settlements shall be computed and made as of the date of sucl termination or cancellation.

SUSPENSION

13) Should either party hereto be unable to maintain the minimum sailings or to provide sufficient cargo capacity in the trade as required by this agreement due to outbreak of war, restraint of Governments, princes or people of any nation or the United Nations, or Act of God (other than ordinary storms or inclement weather conditions), earthquakes, explosions, fire, strikes or other industrial disturbances, riots, insurrection, sabotage, blockades, embargoes, epidemics, barratry, or piracy, or due to any other circumstances beyond the control of such party then the force of this agreement may be suspended by either of the parties upon prompt written notice of such party to the other, such suspension to continue during the period over which the maintenance of service is affected

ARBITRATION

14) Any controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the Rules of the Inter-American Commercial Arbitration Commission. This agreement shall be enforceable and judgment upon any award rendered by all or a majority of the arbitrators may be entered in any court having jurisdiction. The arbitration shall be held either in Caracas or New York as the parties may mutually agree.

SUCCESSORS

15) This agreement shall be binding upon each line, its successors and assigns.

NOTIFICATION

16) A copy of any notice regarding cancellation or suspension given hereunder shall be promptly despatched to the Federal Maritime Board and to the Maritime Administration of the United States Department of Commerce, Washington, D. C. by the party giving such notice.

CONSULTATION

17) Since the parties desire to mutually collaborate in the development of and the rendering of service in the trade, the parties shall make every effort to resolve any differences that might arise by mutual accord. To this

end, conversations between the parties shall be held at least once every six months.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their respective officers or representatives thereunto duly authorized, as of the day and year herein first above shown.

GRACE LINE INC.

por: ....
Manuel Diaz
Vice-President

por: ....
Robert C. Alsop
Assistant Secretary

AGREEMENT NO. 8640-1

ADDENDUM

It is hereby agreed that U.S. Federal Maritime Commission Agreement No. 8640, dated October 6, 1961 be amended as follows:

1) Article 2 is hereby amended to read as follows:

"2) In accordance with established procedures currently in effect, all cargo handled under this agreement shall be handled in accordance with the contract/non-contract rates, rules and regulations established by the Governing Conference, and in effect at the time shipments move."

2) Article 4 is hereby amended to read as follows:

"4) All cargo shipped from ports on the Atlantic Coast of the United States, Maine through Key West, inclusive, on vessels owned or operated by the parties hereto under local bills of lading and destined to all Venezuelan Maritime ports and those of Lake Maracaibo shall be included in this pool; *except* FIO shipments, explosives, gold and silver bullion or coins, dry or liquid cargo in bulk, heavy lift pieces or packages exceeding 35 metric tons, mail, passenger baggage, and automobiles accompanying passengers, or shipped as baggage and livestock.

3) Article 15 is hereby amended to read as follows:

"15) This agreement shall be binding upon each line, its successors and assigns. Notice of any assignment hereof, together with a copy of any applicable assignment agreement to which either CAVN or Grace Line is a party shall be filed by Grace Line with the Federal Maritime Commission."

4) This agreement shall be submitted for approval to the appropriate authorities of the Venezuelan Government, and to the United States Federal Maritime Commission in accordance with the provisions of Section 15 of the U.S. Shipping Act, 1916, as amended, and to the Maritime Subsidy Board and/or Maritime Administration, of the United States Department of Commerce, Washington 25, D. C., and shall not be effective until it has been so submitted and approved by the appropriate authorities of the respective governments.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their respective officers or representatives thereunto duly authorized as of the day and year first above shown.

GRACE LINE INC.

for: ....

Manuel Diaz
Vice-Presidente.

APPENDIX II

STATEMENT OF POLICY ON PUBLIC RESOLUTION 17 73rd CONGRESS

The Maritime Administrator has authorized the following statement describing the policies and procedures in administration of Public Resolution 17, 73rd Congress, 48 Stat. 500, 15 USC 616(a) as applied to credits of the Export-Import Bank of Washington. A statement of policies and procedures with respect to other agencies of the government will be issued as required.

1. SCOPE OF APPLICABILITY

Public Resolution No. 17 provides that where loans are made by an instrumentality of the government to foster the exporting of agricultural or other products, provision shall be made that such products be carried exclusively in vessels of the United States unless the Maritime Administration shall certify to the lending agency that such vessels are not available as to numbers, tonnage capacity, sailing schedule or at reasonable rate. The Resolution is considered generally applicable to credits of the Export-Import Bank for the purpose of financing the acquisition and shipment of United States products. The Bank includes in any such credit agreement a requirement that shipments be made in United States flag vessels, except to the extent a waiver of that requirement may be granted by the Maritime Administration, as outlined hereinafter. The Bank refers to the Maritime Administration any requests for waivers received by it and follows the decisions of the Maritime Administration with respect thereto.

2. TYPES OF WAIVERS

(a) WAIVERS OF U.S. FLAG REQUIREMENT ACCOUNT NON-AVAILABILITY

When it appears that U.S. vessels will not be available from the port or area of shipment to the foreign destination within a reasonable time or at reasonable rates, foreign borrowers, official or private, or their representatives in the United States may apply directly to the Maritime Administration, Office of Ship Operations, for waiver of the U.S. flag requirement with copy to Export-Import Bank. Oral requests for waiver shall be confirmed in writing. Applications shall include the number of the Export-Import Bank credit, the value of the goods to be shipped, place and date of shipment and appropriate explanation of the facts related to the necessity for waiver. The Maritime Administration will make such investigation as appears warranted to determine whether U.S. flag vessels are available and will reply in writing with approval or denial of the waiver or may request additional information. Copies will be sent to the Export-Import Bank.

Such waivers shall apply to the specific movements occurring during the period of U.S. flag non-availability as approved and the name of the ship, date of sailing, ocean freight and weight of cargo shall be reported to the Maritime Administration.

(b) GENERAL WAIVERS

In certain circumstances recipient nation vessels may be authorized to share in the ocean carriage of Export-Import Bank financed movements notwithstanding the availability of U.S. flag vessels, under so-called General Waivers. Such participation, representing a reduction of the U.S. flag share, may be granted when the Maritime Administration is satisfied that parity of treatment is extended to U.S. vessels in the trade of the foreign nation. When foreign borrowers, official or private, desire such general waivers in order to make partial use of their own national flag vessels application may be made to the Maritime Administration, Office of Ship Operations, directly or through the Export-Import Bank, for a general waiver applicable to the particular credit. When application is made by private interests, sponsorship by an official of the foreign government may be requested in order to obtain satisfactory understanding that the recipient nation undertakes to maintain conditions of fair and equitable treatment for U.S. flag shipping.

3. CONSIDERATIONS INFLUENCING APPROVAL OF APPLICATIONS FOR GENERAL WAIVERS

In the disposition of applications for general waivers under Paragraph 2(b) the Maritime Administration will take into consideration

(a) the treatment accorded U.S. flag vessels in the trade with the recipient nation, particularly whether U.S. flag vessels have parity of opportunity vis-a-vis national flag or other foreign flag vessels to solicit and participate in movements controlled in the foreign nation; parity in the application of consular invoice fees, port charges and facilities; also parity of exchange treatment including the privilege of converting freight collections to dollars as needed. Information will be sought from U.S. ship owners and other sources as to their experiences in the particular trade.

(b) the national policy of the United States as well as the purpose of the Export-Import Bank in authorizing the credit.

4. CONDITIONS OF GENERAL WAIVERS WHEN APPROVED

(a) Such waivers, if granted, shall apply only to vessels of recipient nation registry to the extent of their capacity to carry the cargo, based on normal flow of the traffic from interior through ports of shipment and not in excess of fifty percent of the total movement under the credit.

(b) General waivers will normally apply throughout the life of the credit, but may be reconsidered at any time by the Maritime Administration or the Export-Import Bank in the light of altered circumstances.

(c) The record of flag distribution between U.S and foreign vessels shall be based on (1) manifest weight in the case of bulk cargoes such as coal and grain (2) ocean freight revenue in the case of machinery, equipment and miscellaneous general cargo on liner vessels (3) such other unit as may be found suitable in exceptional circumstances.

(d) Applicants or their representatives in the United States shall provide reports of movements to the Maritime Administration, Office of Ship Operations, at monthly or other intervals as arranged, in the general form of enclosure hereto. The data to be included on these reports may be varied

by the Maritime Administration to meet specific circumstances of the movements from time to time.

5. EXPORTER CREDITS

(a) U.S. exporters who obtain so-called exporter credits or lines of credit from the Export-Import Bank may apply directly to the Maritime Administration, Office of Ship Operations, as provided in paragraph 2(a) above when it appears that U.S. flag vessels will not be available.

(b) Exporters may also apply for a general waiver for participation of recipient nation vessels as provided for foreign borrowers in paragraph 2(b) hereof and consideration will be given to such application along the lines set forth in the several paragraphs hereof to the extent they are applicable.

APPENDIX III

RULES AND REGULATIONS TO MEET CONDITIONS UNFAVORABLE TO SHIPPING; DISCRIMINATION BY THE GOVERNMENT OF VENEZUELA

WHEREAS, Circular No. 166, dated September 28, 1959, issued by the Government of Venezuela, provides that all private contractors who enter into public works contracts with the Venezuelan Government shall be required to use the steamships of Compania Anonima Venezolana de Navegacion whenever they find it necessary to bring in equipment and material from abroad; and

WHEREAS, Decree No. 331, dated February 9, 1961, issued by the Ministry of Development of the Government of Venezuela, provides, "Total or partial exoneration of import duties to be processed through this Ministry in accordance with regulations of Executive Decree No. 255 of March 18, 1960 is conditioned on the compliance, on the part of the beneficiary, with the obligation of transporting the machinery, tools, raw materials and other items imported, on Compania Anonima Venezolana de Navegacion or its associated services"; and

WHEREAS, under Decree No. 480, dated March 17, 1961, and Decree No. 492, dated April 6, 1961, issued by the Government of Venezuela, and under regulations effective pursuant to these Decrees, all freight charges upon imports into Venezuela included in the "List of Importations of the Controlled Market" must be paid in Venezuelan currency by the importer in Venezuela, and such importer is prohibited from remitting such charges abroad; and further, the non-Venezuelan transportation companies, including United States flag carriers, must collect such charges in Venezuelan currency, and are required to accept payment at a currency exchange rate fixed by the Venezuelan Government, but as to a portion of such charges, may exchange that portion into their own national currency or other currencies only at a relatively unfavorable free market exchange rate; and further, the "List of Importations of the Controlled Market" referred to in said Decrees No. 480 and No. 492, is contained in *Gaceta Oficia No. 680 Extraordinario*, dated March 29, 1961, as amended by *Gaceta Oficio No. 685 Extraordinario*, dated May 24, 1961, issued by the Government of Venezuela, and comprises an extensive list of commodities; and

WHEREAS, Compania Anonima Venezolana de Navegacion is a Venezuelan national flag line owned by the Venezuelan Government; and

WHEREAS, the effect of Venezuelan Circular No. 166 and Venezuelan Decree No. 331 is to completely foreclose United States flag and other flag vessels from competing for cargo subject thereto; the effect of Decrees No. 480 and No. 492, and the regulations thereunder, is arbitrarily to deprive exporters from the United States of control of the routing of any imports on said "List of Importations of the Controlled Market," and to transfer such control to Venezuelan importers, without regard to normal freely competitive commercial practices, to the benefit of Compania Anonima

Venezolana de Navegacion and to the detriment of other carriers, including United States flag carriers; and the further effect of Decrees No. 480 and No. 492, and the regulations thereunder, is to impose discriminatory currency exchange restrictions upon such other carriers; and

WHEREAS, the foregoing Venezuelan laws, rules, and regulations also cause diversion of cargo not otherwise subject thereto, due to uncertainty on the part of merchants as to the extent to which particular shipments are subject to such laws, rules, and regulations, and due to advantages of consolidated pier delivery, where only a portion of each consolidated shipment is subject thereto; and

WHEREAS, the total effect of said Venezuelan laws, rules, and regulations and competitive methods or practices is to cause an artificial diversion of cargo to Compania Anonima Venezolana de Navegacion and associated services, unrelated to normal freely competitive commercial practices; and

WHEREAS, during the base period______________________, on the basis of the weight of the cargo carried, Compania Anonima Venezolana de Navegacion carried __________% of the total exports from the United States carried by it and United States flag vessels from United States Atlantic Coast ports north of Hatteras to Venezuela, and __________% of the total of such exports carried from United States Gulf of Mexico ports to Venezuela; and

WHEREAS, it is reasonable to conclude that any freight revenue hereafter accrued to Compania Anonima Venezolana de Navegacion, for transportation of exports from the United States to Venezuela, in a proportion in excess of the above stated proportion accrued in the base period, is a result of a diversion of cargo to Compania Anonima Venezolana de Navegacion by said Venezuelan discriminatory laws, rules and regulations and competitive methods or practices; and

WHEREAS, the benefit or advantage hereafter derived therefrom by Compania Anonima Venezolana de Navegacion, after giving consideration to out-of-pocket handling costs, will be equal to at least 50% of that portion of the total freight revenue accruing to it for the transportation of cargo from the United States to Venezuela in excess of the above stated proportion accrued to Compania Anonima Venezolana de Navegacion in the base period; and

WHEREAS, the Federal Maritime Board has found that the said Venezuelan laws, rules and regulations and competitive methods or practices are discriminatory in favor of vessels of Compania Anonima Venezolana de Navegacion and associated services, and against vessels of other flags, including the United States flag; confer an unjust, unfair and undue advantage upon the owners, operators, agents, and masters of vessels of Compania Anonima Venezolana de Navegacion and associated services; and are detrimental to vessels of such other flags, including the United States flag, in the foreign trade from the United States to Venezuela, thereby creating a general or special condition unfavorable to shipping in that trade; and that said condition arises out of or results from Venezuelan laws, rules or regulations or from competitive methods or practices employed by owners, operators, agents, or masters of Venezuelan national flag vessels; and

WHEREAS, despite the requests of the United States Government, the Government of Venezuela has failed to remove these discriminations with respect to shipping in the foreign trade of the United States; and

WHEREAS, the Federal Maritime Board is authorized and directed pursuant to authority vested in it by section 19(1)(b) of the Merchant Marine Act, 1920, as amended (46 U.S.C. 876), to make rules and regulations affecting shipping in the foreign trade, not in conflict with law, in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally and which arise out of or result from foreign laws, rules or regulations or from competitive methods or practices employed by owners, operators, agents, or masters of vessels of a foreign country; and

WHEREAS, the Federal Maritime Board by General Order No. 88, adopted February 1, 1960 (46 C.F.R. §§ 206.302-206.303), provided:

"§206.302. Imposition of equalization fees or charges.

"The Federal Maritime Board, in order to counteract the adverse effect of fees or charges imposed by a foreign government which discriminates, directly or indirectly, against vessels documented under the laws of the United States, will impose equalizing fees or charges against vessels flying the flag of the discriminating country or vessels owned, operated, or chartered by shipping companies to which such foreign government has extended the same preferential treatment accorded to vessels flying the flags of the discriminating country, and/or the users of the services of said vessels.

"§206.303. Other off-setting regulations.

"If and when other discriminatory practices against vessels documented under the laws of the United States are found to exist, off-setting regulations will be imposed by the Federal Maritime Board";

and

WHEREAS, the Federal Maritime Board has found it necessary to adopt regulations affecting shipping in the foreign trade in order to adjust or meet said general or special condition unfavorable to shipping in the foreign trade from the United States to Venezuela;

NOW THEREFORE, pursuant to section 19(1)(b) of the Merchant Marine Act, 1920, as amended (46 U.S.C. 876), section 204 of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1114), sections 101 and 104 of the Reorganization Plan No. 21 of 1950 (64 Stat. 1273), and other pertinent laws, the Federal Maritime Board hereby prosposes to adopt the following regulations:

"1. The Federal Maritime Board has determined that the Government of Venezuela is engaged in discriminatory cargo routing practices against vessels of United States registry, in favor of national flag vessels of Compania Anonima Venezolana de Navegacion and in favor of other vessels chartered to or operated by Compania Anonima Venezolana de Navegacion or associated companies to which Venezuela has extended the same privileges and benefits as are accorded the vessels of Compania Anonima Venezolana de Navegacion. Snch national flag and other vessels are herein referred to as 'favored vessels.'

"2. The Federal Maritime Board has further determined that Compania Anonima Venezolana de Navegacion and associated services and the owner, operator, agent, and master of any favored vessel which carries exports from the United States to Venezuela, receive an unjust, unfair, and undue advantage from such discriminatory cargo routing practices, resulting in a condition unfavorable to shipping in the foreign trade of the United States, which arises out of or results from foreign laws, rules or regulations or from competitive methods employed by owners, operators, agents or masters of vessels of a foreign country.

"3. In order to meet or adjust such unfavorable condition and to offset the discriminatory benefit derived therefrom, the Federal Maritime Board will impose an offsetting charge against Compania Anonima Venezolana de Navegacion, its associated services, and the owners, operators, agents, or masters of their vessels, whenever it appears that the discriminatory cargo routing practices referred to herein have resulted in a diversion of cargo carried by United States flag vessels. Such diversion and the offsetting charge will be determined, as more specifically set forth.

"4. The owner, operator, agent, or master of any favored vessel which carries exports from the United States to Venezuela shall within four days (excluding Saturdays, Sundays, and holidays) after departure of the vessel from the last United States port of call file with the Federal Maritime Board, Washington 25, D. C., a complete manifest of all exports from the United States to Venezuela carried by such vessel. Such manifest shall show the name of the vessel; the owner, operator, agent, and master; the date of departure of the vessel from the last United States port of call; the anticipated first port and date of arrival in Venezuela; the total weight of the exports from the United States to Venezuela carried thereon, in pounds, and the total ocean freight revenue accruing to the carrier for the transportation of such exports from the United States to Venezuela, stated in United States dollars; and shall further show for each individual export shipment,

(a) The name of the shipper and of the consignee;

(b) The description of the shipment, including, where applicable, number and type of packages to be shipped, and the marks and numbers thereof; weight, in pounds; measurement, if expected to be rated on a measurement basis; and the applicable freight rates, in United States dollars; and

(c) The total freight revenue accruing to the carrier for the transportation from the United States to Venezuela, stated in United States dollars.

"5. The owner, operator, agent, or master of any United States flag vessel which carries exports from the United States to Venezuela shall, within four days (excluding Saturdays, Sundays, and holidays) after departure of the vessel from the last United States port of call, file with the Federal Maritime Board, Washington 25, D. C., a report showing the name of the vessel; the owner, operator, agent, and master; the date of departure of the vessel from the last United States port of call; the anticipated first port and date of arrival in Venezuela; the total weight of the exports from the United States to Venezuela carried thereon in pounds, and the total freight revenue accruing to the carrier for the transportation of such exports from the United States to Venezuela, stated in United States dollars.

775-794 O-65-26

"6. The Federal Maritime Board shall keep, for each calendar quarter, records of the total freight revenue from exports to Venezuela carried by Compania Anonima Venezolana de Navegacion and associated services separately from United States Atlantic Coast ports north of Hatteras, United States Atlantic Coast ports south of Hatteras, and the Gulf and Pacific Coasts of the United States, and similar records of the total freight revenue from exports to Venezuela carried on United States flag vessels. The Federal Maritime Board shall also keep current such totals for each quarter. The Federal Maritime Board, upon request, shall promptly make such totals available to authorized representatives of Compania Anonima Venezolana de Navegacion and associated services and the interested United States flag carriers.

"7. A diversion of cargo from United States flag vessels to favored vessels will be considered to have resulted from Venezuelan discriminatory cargo routing practices, whenever at the end of any calendar quarter it appears to the Federal Maritime Board that the proportion of the revenue accrued in that quarter by Compania Anonima Venezolana de Navegacion and associated services for transportation of exports from the United States to Venezuela, as against that accrued by United States flag carriers from the United States coastal district, is greater than the relative percentage proportions carried by favored vessels and United States flag vessels during the base period ______________________ in the same trade.

In the event the Federal Maritime Board finds such a diversion in any quarter, it shall impose upon Compania Anonima Venezolana de Navegacion, its associated services, and the owner, operator, agent, or master of any favored vessel, or any one or more of them an offsetting charge equal to 50 percent of the revenue accrued from cargo which has been diverted. Notice to any one of the foregoing shall constitute notice to each of them. Such charge shall be payable within ______ days after notice and shall bear interest at the rate of 6 percent per annum thereafter.

If, in any quarter next succeeding a quarter in which a diversion has been found and an offset charge determined, favored vessels accrue less than the relative percentage proportion of revenue based upon their carryings during the base period, said deficiency may be back no more than one quarter to reduce the charge previously determined. This subparagraph shall apply only if a satisfactory bond or other guarantee has been posted as hereinafter provided.

"8. The percentage relationships derived from the base period __________ __________ may be amended by the Federal Maritime Board when necessary to take into consideration any substantial variation in service, vessels, or equipment, of either favored vessels or of United States ships from existing service, or when otherwise necessary or appropriate to meet or adjust the said condition unfavorable to shipping in the foreign trade.

"9. In order to insure collection of any applicable charges or penalties resulting from these regulations, the Federal Maritime Board may require Compania Anonima Venezolana de Navegacion, or its associated services, or the owner, operator, agent, or master of any favored vessel, to post with it a bond or other guarantee, the form and amount of which shall be determined by the Federal Maritime Board.

"10. Any owner, operator, agent, or master who fails to comply with any provision of these regulations shall be subject to all applicable remedies and penalties provided by law, in addition to the offsetting charge herein provided.

"11. These regulations shall not apply with respect to the carriage of exports from the United States to Venezuela as to which the Federal Maritime Board hereafter finds that Venezuela does not or has ceased to employ or enforce its discriminating cargo routing practices The Federal Maritime Board hereby finds that the discriminatory cargo routing practices of the Government of Venezuela have no present impact with respect to the carriage of exports from United States Pacific Coast ports to Venezuela. The Federal Maritime Board finds that Compania Anonima Venezolana de Navegacion does not presently maintain a regularly scheduled service from United States Atlantic Coast ports south of Baltimore to Venezuela. These regulations shall not apply to the trade from United States Pacific Coast ports to Venezuela, or to the trade from United States Atlantic Coast ports south of Baltimore to Venezuela, until further notice.

"12. The Federal Maritime Board may from time to time by appropriate notice modify or amend or suspend these regulations in whole or in part if it finds that such action is required or appropriate in order to adjust or meet the discriminating cargo routing practices of Venezuela or to place the favored vessels on a parity with vessels of the United States in competing for cargo, or to reciprocate modification, amendment or suspension of the Venezuelan discriminatory cargo routing practices.

"13. If the Federal Maritime Board hereafter finds the offseting charge herein provided is insufficient to adjust or meet the discriminatory cargo routing practices involved, it will give consideration to increasing said charge."

Persons interested in the proposed regulations may file with the Secretary, Federal Maritime Board, Washington 25, D. C., U.S.A., written comments thereon and request for hearing if desired (original and fifteen copies), within __________ days after publication of this order in the *Federal Register*.

Dated: June ______, 1961

By the Board

(SEAL)

____

Secretary

ORDER

FEDERAL MARITIME COMMISSION

No. 967

ALCOA STEAMSHIP COMPANY, INC.

v.

CIA. ANONIMA VENEZOLANA DE NAVEGACION. ET AL.

No. 970

AGREEMENTS 8640 AND 8640-1, BETWEEN GRACE LINE, INC. AND CIA. ANONIMA DE NAVEGACION COVERING POOLING IN THE NORTH ATLANTIC-VENEZUELA TRADE

The Commission having on this day entered its report containing its findings and conclusions herein, which report is made a part hereof:

It is ordered:

(1) That agreements 8640 and 8640-1 be, and they are hereby approved;

(2) That Docket No. 967 be, and it hereby is, dismissed; and

(3) That Docket No. 970 be and it hereby is, discontinued.

By the Commission September 5, 1962.

(Sgd) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 870

PACIFIC COAST EUROPEAN CONFERENCE—EXCLUSIVE PATRONAGE CONTRACTS

DENIAL OF MOTION TO CLARIFY ROLE OF HEARING COUNSEL

Decided September 18, 1962

BY THE COMMISSION:

Respondents, Pacific Coast European Conference and its member lines, seek an order from the Commission precluding Hearing Counsel from taking "the position of a prosecutor in this proceeding by filing exceptions to the Examiner's Recommended Decision." Respondent goes even further; it "objects to any participation in this proceeding by Hearing Counsel," on the ground that "authority for the Commission to permit its own lawyers to participate in proceedings before the Commission itself, representing the 'public interest', does not exist in any statute."

The Federal Maritime Board has already rejected this same argument, in this very proceeding, then made in support of a motion to dismiss by these respondents. The argument is made again because respondents contend that the Board's denial of the motion to dismiss was arbitrary with no reasons given and that "the inference is inescapable that the Board evaded meeting the issues."

Respondents seek to give the impression that their objections to the participation of Hearing Counsel in Commission proceedings have never been met. To the contrary the same argument was made to our predecessor, the Federal Maritime Board in Docket 764, *Mitsui S.S. Co., Ltd.* v. *Anglo-Canadian Shipping Co., et al.,*

5 F.M.B. 74 (1956). The position was rejected there; and, upon review of the Board's decision in Docket 764,[1] respondent again made the same argument to the Circuit Court of Appeals. The Court relegated respondents contention to footnote 2 of its opinion and there stated:

> "Petitioners [respondents] questioning the standing of this Public Counsel, assert he was employed, not by the Board, but by the Federal Maritime Administration. We consider this unimportant, since the Board permitted this intervenor, whoever, he was to speak on behalf of the public. This was a matter within the Board's discretion."

Significantly, this case was a complaint proceeding in which Public Counsel had intervened. In such a case the adversary system traditional to Anglo-American jurisprudence can be reasonably expected to work its usual result of a full exposition of both sides of every issue. In a complaint case the Board's, and the Commission's Rules of Practice and Procedure allow the participation of Hearing Counsel only upon leave to intervene.

The instant proceeding is vastly different in nature and scope. It is an investigation instituted by the Commission itself. In such a proceeding, the exclusion of Hearing Counsel would leave respondents unopposed and free to state without fear of contradiction any and all contentions no matter how erroneous or frivolous they may be. No cross examination of witness, and no rebuttal testimony nor evidence would ever be produced. Indeed, the questions which themselves gave rise to the investigation would forever remain one-sided and incapable of impartial resolution. We find it difficult to believe that contentions for this result can be seriously made.

We are unimpressed by respondents' contentions concerning our lack of statutory authority. Review of the Rules of Practice of other federal administrative agencies reveals that "Hearing Counsel" or "Board Counsel" are extensively employed by other regulatory agencies, e.g., Securities and Exchange Commission, 17 C.F.R. § 201.17; Federal Power Commission, 18 C.F.R. § 1.1(f), 1.4, 1.8; Federal Communications Commission 47 C.F.R. §§ 1.76, 1.842, 1.846, 1.853, 1.854, 1.859; Civil Aeronautics Board, 14 C.F.R. § 302.30, 302.210, 302.215, 203.301; Interstate Commerce Commission, 46 U.S.C. 16 (11.).

Section 22 of the Shipping Act, 1916, contains the Commission's authority to conduct investigations "in such manner and by such

[1] The case was then styled *Anglo-Canadian Shipping Co., Ltd.* v. *U.S. and F.M.B.*, 264 F. 2d 405 (1959).

means, and make such order as it deems proper." We find it difficult to conceive of a broader grant, and it clearly suffices here. Since we reject respondents' contention regarding our lack of statutory authority to allow the participation of Hearing Counsel in this proceeding, we must consider their alternative request for clarification of Hearing Counsel's role.

Respondents contend that recent decisions of the Commission preclude *further* participation by Hearing Counsel in this proceeding and that he should not be allowed to file exceptions to the Recommended Decision. Respondents cite: Docket 882, *Unapproved Section 15 Agreements—South African Trade,* decided April 9, 1962; Docket 916—*Investigation of Practices, etc. West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Trade* (Grant of Petition of Hearing Counsel, July 11, 1962); and, Docket 896, *Unapproved Agreement—Coal to Japan/Korea,* decided August 2, 1962. It is respondents' contention that these decisions are inconsistent with Rule 3(b) of our Rules of Practice and Procedure, which respondents say provides merely that "Hearing Counsel" shall "actively participate in any proceedings to the extent that he deems required in the public interest." The rule to which respondents refer was superseded in its entirety by the present rule 3(b) which became effective April 4, 1954 (46 C.F.R. 201.42). The "new" rule provides:

> The Assistant General Counsel for Litigation [now, Director, Bureau of Administrative Proceedings] shall be a party to all proceedings governed by the rules in this part, except that in complaint proceedings under § 201.62 he may become a party only upon leave to intervene granted pursuant to § 201.74. The [Director, Bureau of Administrative Proceedings] or his representative shall be designated as 'Public Counsel' [now, hearing Counsel] and shall be served with copies of all papers, pleading, and documents in every proceeding governed by the rules in this part, whether a party of record or not. [Hearing Counsel] shall actively participate in any proceeding to which he is a party, to the extent required in the public interest, subject to the separation of functions required by Section 5(c) of the Administrative Procedure Act.

Were further clarification considered necessary, it was amply provided in Commission Order No. 1, Organization of the Federal Maritime Commission, amendment No. 1, effective January 16, 1962 (27 F.R. 677, 78), which provides:

> The *Bureau of Administrative Proceedings* acts as Hearing Counsel in all formal investigations, non-adjudicatory investigations, rule-making proceedings and any other proceedings initiated by the Federal Maritime Commission under the Shipping Act, 1916, and other applicable shipping acts; examines and cross-examines witnesses, prepares and files briefs,

motions, exceptions and other legal documents and participates in oral argument before the hearing examiners and the Federal Maritime Commission; acts as Hearing Counsel, where intervention is permitted, in formal complaint proceedings initiated under section 22 of the Shipping Act; reviews and concurs in all recommendations of other bureaus recommending the institution of formal proceedings; prepares all orders, notices and other documents which institute formal or informal Commission proceedings; furnishes consultative and advisory services and otherwise assists other bureaus in formulating procedures to be followed in connection with investigations and/or formal Commission proceedings; serves, with the concurrence of the Executive Director, as requested by the General Counsel and under his direction in matters of court litigation by or against the Commission arising out of violations previously adjudicated by the Commission.

Respondents have obviously misread the recent Commission decisions cited to us.[2] They contain nothing which is inconsistent with the Commission's Rules of Practice and Procedure nor which would require their revision under the Administrative Procedure Act. In each of the decisions cited the role of Hearing Counsel was discussed only with regard to the practice of requiring from Hearing Counsel particularizations of "charges" against respondents to Commission orders of investigation. In this regard the Commission defined the "primary mission" of Hearing Counsel as that of obtaining pertinent information in the discharge of his duty to the public interest to insure that all probative evidence relevant to the matters under investigation is developed to its fullest possible extent. To argue from this that Hearing Counsel may not after developing a full and complete record take any position regarding what that record demonstrates defies logic. Respondents would apparently have Hearing Counsel stand mute leaving them free to interpret the evidence and the law as they choose, thus depriving the Commission of the development of a full and complete record. This is absurd.

If we have appeared to devote undue time and attention to the "Issues" raised herein, it was done in the hope of laying them to rest finally.

Respondents motion is denied.

[2] We note that in both Docket 882 and Docket 896 Hearing Counsel filed, and the Commission accepted exceptions to the Examiner's decision. No decision by the Examiner has yet been rendered in Docket 916.

FEDERAL MARITIME COMMISSION

No. 990

ALASKA LIVESTOCK & TRADING CO., INC.

v.

ALEUTIAN MARINE TRANSPORT COMPANY, INC.

Decided September 18, 1962

Freight rate of $1.10 per cubic foot on grease wool in bags between Unalaska Island and Seattle, Washington found not to be unjust or unreasonable within the meaning of Section 18 of the Shipping Act, 1916. Order to be entered dismissing complaint.

William H. Bishop, President of Alaska Livestock and Trading Co., Inc., for Complainant.

Niels P. Thomsen, President of Aleutian Marine Transport Company, Inc., for Respondent.

INITIAL DECISION OF E. ROBERT SEAVER, EXAMINER[1]

The main question in this case is whether respondent's rate on wool from the Aleutians to Seattle is unjustly or unreasonably high.

Complainant, Alaska Livestock and Trading Co., Inc., is an Alaska corporation which operates a sheep ranch at Chernofski Bay on Unalaska Island in the Aleutian chain. Respondent, Aleutian Marine Transport Company, Inc., also an Alaska corporation, operates the *Expansion*, a small dry cargo vessel, in common carriage of general cargo and a few passengers between the Aleu-

[1] In the absence 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 Rules 13(d) and 13(h) of the Commission's Rules of Practice and Procedure.)

tion islands, the Alaska mainland, and Seattle, and in carrying mail between the Aleutians and Seward, Alaska.

The complaint alleges that the rate of $1.10 per cubic foot on grease wool, as shown in respondent's Freight Tariff No. 1-C, Item 430, is an unjust and unreasonable rate in violation of Section 18, Shipping Act, 1916, in that it is too high and also because the rate should be based on the hundredweight rather than the cubic foot. Complainant's contentions regarding the proper unit upon which the rate should be based are founded on the belief that the rate should be $1.10 per hundredweight. In other words, its interest in this matter stems from the amount of the rate rather than from other shipping matters that might be affected by a change in the freighting unit from a cubic to a weight basis. This was made clear in the course of the hearing. A rate of $1.10 per cubic foot is the equivalent of approximately $10. per hundredweight.

Neither side was represented by counsel at the hearing; but each appeared, *pro se*, by its President. Mr. William H. Bishop, complainant's President, appeared and testified on behalf of complainant. Mr. Niels P. Thomsen, respondent's President, appeared and testified on behalf of respondent. There were no other witnesses. Both of these gentlemen were completely forthright in the course of the hearing. For example, Mr. Bishop frankly acknowledged the value of respondent's service to this far outpost, despite his conviction that the rate on wool, southbound, is excessive.

There is little, if any. factual dispute between the parties. Respondent operates the *Expansion* as the "mail boat" on a twice monthly schedule between Seward, on the east, and points along the Aleutian chain as far west as Nikolski, on Umnak Island in the Aleutians, on the west. It also makes a monthly round voyage between these points and Seattle. Respondent carries the mail to and from these points in the Aleutians to Seward under a four year contract with the United States Post Office Department for which respondent is paid $190,000. per year. On September 1 1961, this payment was reduced from $243,000. to its present amount.

The *Expansion* has a cargo capacity of 250 tons (cubic tons of 40 cubic feet) all in a single hold. This hold is equipped to handle refrigerated cargo. The *Expansion* is one hundred and forty-eight feet long, has a beam of thirty-seven feet, and a draft of twelve feet. Patrons for her passenger space for twelve are available only during three or four summer months.

The scope of respondent's operation is small, and decreasing. Mr. Thomsen, founder and President, serves as master of the *Expansion.* Recently, the shoreside office was closed, and the paper work incident to the operation is now done on board the ship.

Aside from the mail, and shipments of frozen crab respondent has carried since last September, petitioner's wool, and that of another sheep rancher located at Nikolski, is the only available southbound cargo. Each of these two ranchers has one shipment of wool a year, in the spring or early summer, and they only patronize respondent occasionally. The wool is clipped in May, June and July and the entire clip—the annual shipment of each rancher—is about 100 bags of about 300 pounds and 27 cubic feet each. In most of the eight years since respondent entered the trade in 1954, these two ranchers have shipped their wool with contract carriers who, in the main, have operated barges with cargo northbound for the military. These operators carried the wool as backhaul cargo at rates less than the $1.10 per cubic foot shown in respondent's Freight Tariff No. 1-C, Item 430. Complainant has shipped the wool on respondent's vessel only three times, and the other rancher about the same: They only do so when one of the tramp carriers is not available.

Respondent is the only common carrier by water that has called at Chernofski Bay since respondent entered the trade in 1954. Alaska Steamship Company publishes a tariff which includes a rate on wool from Chernofski to Seattle; but they do not make calls at Chernofski or Nikolski, and have not done so for many years.

In support of it's contention that respondent's rate is excessive, complainant shows:

1. That Berger Transportation Company, predecessor of respondent as operator of the mail boat, charged $2.65 per hundredweight for transporting complainant's wool from Chernofski to Seattle, as a common carrier, in 1954.

2. Alaska Steamship Company has a tariff rate of $1.85 per hundredweight on wool on this route, plus a 10% surcharge. Complainant cites this tariff item to show the freighting unit used, not the rate.

3. That complainant's most recent shipment of wool, early in 1961, moved from Chernofski to Kodiak on respondent's vessel and thence to Seattle via Alaska Steamship Company. At that

time respondent did not call at Seattle, or any other ports south of Alaska. The charges for the transportation of 101 bags, being 33,547 pounds of wool, from Chernofski to Seattle, on that occasion, came to $2713.20, or about $8. per hundredweight. Respondent's present rate comes to about $10. per hundredweight.

4. Complainant also relies on the Act of Congress of August 10, 1939, ch. 637, as amended, 53 Stat. 1338, 39 U.S.C. 487a, under the terms of which the Postmaster General is authorized to enter into contracts for the carriage of mail between Seward and the Aleutians. This statute provides that the contractor shall "furnish and use in the service a safe and seaworthy boat of sufficient size to provide adequate space for mail, passengers and freight, * * *." Complainant contends that this statute is evidence of an intention on the part of Congress to provide the people along this remote mail route with monthly passenger and cargo service at "reasonable rates". He characterizes the $190,000. annual payment to respondent under the mail contract as a subsidy payment, and concludes that the rate on wool should be somewhat less than respondent's current rate, since respondent is calling at Chernofski in any event under the requirements of the mail contract.

Complainant acknowledged that respondent's service is preferable to that of contract carriers because of the regularity and frequency of the calls of respondent's ship. He also testified that the northbound service of respondent is of value, as the respondent brings the supply of fresh vegetables in; and that complainant has other northbound cargo aboard the mail boat nearly every month.

In 1955, the first year respondent transported complainant's wool, the rate from Chernofski to Seward was 75 cents per cubic foot. Since 1954, respondent's operating costs have increased 60 percent.

The total revenue on one shipment of complainant's wool, at a freight rate of $1.10 per cubic foot, would be approximately $3,000. The cost to respondent of loading and unloading the wool would be about $1500., and the cost of insurance about $500. If carried at a rate of $1.10 per hundredweight, the total revenue on one of complainant's shipments would be somewhat less than respondent's out-of-pocket costs.

Since September, 1961, when the annual payment under the Government mail contract was reduced from $243,000. to $190,000., respondent has experienced a net operating loss of a little over $6,000. per month. This does not reflect any experience in

connection with the wool trade, of course, because respondent has not carried any wool during this period. Respondent's President testified that the only reason it stays in the trade is because it has posted a $200,000. performance bond under the mail contract.

Under section 7(c) of the Administrative Procedure Act, 5 U.S.C. 1006(c) and Rule 10(o) of the Commission's Rules of Practice and Procedure, the burden of proving that the rate is unjust and unreasonable lies with the complainant. See *Bonnell Company* v. *Pacific Steamship Co.*, 1 U.S.M.C. 143 (1928.)

The rate of Berger Transportation Company in 1954 is too remote in time to be controlling in this case. While a comparison of a rate under study with rates of other carriers is an acceptable test of the reasonableness of the former, the persuasiveness of the test varies directly with the similarity of the circumstances surrounding the rates of the different carriers. The passage of eight years in these times of progressive inflation weakens the probative value of this comparison to the point where it is of little value, particularly where it has little or no support based on other evidence in the record.

The rate recently quoted by Alaska Steamship Company can not be considered because that company does not call at Chernofski, and has not done so for at least eight years. If anything, these facts tend to show that the wool trade in the Aleutians can not be very lucrative to carriers, or they would probably arrange to call there.

The fact that the rate of another carrier on wool from Chernofski to Seattle early in 1961 was the equivalent of approximately eight dollars per hundredweight does not establish that respondent's rate is unreasonably high. Respondent's rate to Seattle is the equivalent of about ten dollars per hundredweight. The services that gave rise to these charges early in 1961 are not available today. That service involved carriage by respondent from Chernofski to Kodiak and by Alaska Steamship Company from Kodiak to Seattle. At the time, there was no direct service between Chernofski and Seattle. A comparison of rates in these two situations is of only limited value, if any.

Complainant has not demonstrated that the Act of Congress cited by complainant, 39 U.S.C. 487a, was intended to amend the Shipping Act, 1916 by requiring the application of different standards as to the reasonableness of rates in the trade covered by the

mail contract. There is nothing in the language of the statute that touches upon the matter of rates. While the revenues from the mail contract would be taken into account in an assessment of respondent's profit experience, the cost of providing the service would likewise have to be considered. None of these factors was brought forward in this proceeding. The statutory authority in the Postmaster General to contract for the services of a boat "of sufficient size to provide adequate space for mail, passengers, and freight * * *" may be evidence of a congressional intention to assist in the provision of common carrier service to these distant islands. However, the statute has no direct bearing on the freight rates.

Respondent's rate on wool from Chernofski to Seward was 75 cents per cubic foot in 1954. Its rate of $1.10 from Chernofski to Seattle, a much greater distance, can not necessarily be considered an increase. It is recognized that this does not prove that the latter rate is reasonable; but the existence of this similar rate of such long standing is of some weight in support of the reasonableness of the present rate.

The fact that respondent has operated at a loss in this service may also be considered; and it supports the view that the rate is not too high. The fact that a carrier may lose money in its overall operation is of some value in determining the reasonableness of the rate on a particular commodity, although it is not controlling, of course. *Wool Rates from Boston to Philadelphia*, 1 U.S.M.C. 20 (1921.)

Respondent's Freight Tariff No. 1–C, introduced at the hearing by complainant, provides comparisons of respondent's rate on wool with its rate on other commodities that support the reasonableness of the former. The rate on general cargo (northbound) and every commodity listed (northbound) except "boats, canoes, and skiffs" is higher than the rate on wool. The only other commodity rate shown for southbound movement to Seattle is that on frozen seafood and this rate is the same as that on wool.

The value of the service provided by respondent is relatively high, because of the remoteness of the islands and because no other carrier provides regular service. The statutes do not create a regulated monopoly in this trade, as they do where operating certificates are required. Any American flag operator, with insignificant exceptions, is free to enter this trade.

The factors existing in this trade lead one to wonder why the one carrier and the two shippers have not negotiated together to arrive at a mutually agreeable rate on wool, and perhaps even some forward booking arrangement covering a reasonable period of time such as that covered in the mail contract. However, the testimony did not reveal that any such negotiations have taken place.

Taking the record as a whole, and particularly in view of the fact that the burden of proof lies with complainant, it is concluded that the rate of $1.10 per cubic foot on wool in bags in this trade is not unjust or unreasonable. An order will be entered dismissing the complaint.

ADDENDUM

A matter entirely outside the findings and conclusions that should be brought to the attention of the parties will be mentioned here, briefly. In the course of their dealings and during the hearing both parties treated respondent's rate on wool as being $1.10 per cubic foot in bags. The foregoing decision therefore treats this as respondent's rate. However, there appears to be a technical or typographical inaccuracy in the tariff published by respondent entitled Freight Tariff No. 1-C in that Item 430 quotes the rate "in bales" rather than "in bags." Apparently, rates on wool in bags are not necessarily the same as the rates on wool in bales. See *Wool Rates to Atlantic Ports*, 2 U.S.M.C. 337 (1940). It will be noted also that the n.o.s. rate, Item 300 (also $1.10 per cubic foot) applies only from Seattle northbound, and not from the Aleutians, southbound. Appropriate steps should be taken to clarify this uncertainty.

FEDERAL MARITIME COMMISSION

No. 909

HARBOR COMMISSION, CITY OF SAN DIEGO, CALIFORNIA

v.

MATSON NAVIGATION COMPANY

Decided September 25, 1962.

Respondent not shown to have given undue or unreasonable preference or advantage to Los Angeles nor to have subjected San Diego to undue or unreasonable prejudice or disadvantage, under section 16 First of the Shipping Act, by failure to provide a regular service between San Diego and Hawaii.

William R. Daly for complainant.

Edgar J. Langhofer for intervener San Diego Chamber of Commerce

George D. Rives for respondent.

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:

The Harbor Commission, City of San Diego, California (San Diego), in a complaint filed June 27, 1960, alleged that the respondent, Matson Navigation Company (Matson), by discontinuing in 1960 its inbound service to, and refusing to provide outbound service from, the Port of San Diego in the trade between the Pacific Coast and Hawaii, has given undue and unreasonable preference and advantage to the Port of Los Angeles and subjected San Diego to undue and unreasonable prejudice and disadvantage, in violation of section 16 First of the Shipping Act

1916.[1] The San Diego Chamber of Commerce intervened in support of this complaint.

San Diego seeks to require Matson to provide regularly scheduled service between San Diego and Hawaii. Matson contends there is insufficient cargo to warrant such service; that its past operations at San Diego were conducted at a loss; and that, aside from a lack of authority in the Commission to prevent a carrier from abandoning service, the proof fails completely to show a violation of section 16 First. The Examiner in an Initial Decision found that no violation of section 16 First was shown. San Diego took exception to this finding but we believe the Examiner was clearly correct.

FACTS

The facts as found by the Examiner are undisputed. The following statement is based largely on the Examiner's findings, though in somewhat less detail:

1. The normal trading area of the Port of San Diego extends through the greater portion of Southern California, Arizona, New Mexico, and west Texas, plus areas of nearby states, and includes Baja California, Mexico. Two railroads and 70 locally-based trucking lines, among others, serve San Diego with daily freight schedules. The City and County of San Diego have enjoyed a substantial growth in population and general economic activity. From 1950 to 1960, San Diego County's population increased over 85 percent, to 1,033,011, and its manufacturing plants went from 419 to 735, with the greatest number of employees working in the aircraft, missile, and shipbuilding industries. New marine terminal facilities of the Port of San Diego completed in and since 1954, include 9 berths for ships, 3 transit sheds, and other facilities, and more facilities are under construction.

2. No ocean common carrier offers regularly scheduled and publicized service between San Diego and Hawaii, but some services have been and are offered on inducement. States Steamship Company is authorized to provide 13 inbound and 13 outbound calls annually at Hawaii in connection with its subsidized operations on Trade Route No. 29 between ports in California and ports

[1] Sec. 16 First of the Shipping Act, 1916 (46 U.S.C. 815), declares it to be unlawful for a common carrier by water "to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

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in the Far East. It has in the past advertised calls subject to inducement at San Diego for outbound service to Hawaii, and more recently, within the last year or so, appears to have provided some very limited San Diego-Hawaii service in both directions. Military and civilian shippers at times have utilized the San Diego-Hawaii service of this carrier when available.

3. Beginning in 1954, Matson published rates from Hawaii inbound to San Diego on inducement. From May 1954, through February 1960, it made 35 inbound calls and 6 outbound calls at San Diego. On the outbound calls Matson loaded military rather than commercial cargo. In the Matson tariff, San Diego has been since 1954, and is now, listed as a port of call only when vessels are scheduled for direct calls and discharging. Outbound service generally was not offered, except in special circumstances, because Matson's inbound vessels in a number of instances were scheduled, after unloading at San Diego, to proceed up the Pacific Coast and go on the lumber and bulk cargo berths. The delayed arrival of these vessels in Hawaii, after going on the lumber and bulk berths, did not make them suitable for the handling of cargo outbound from San Diego to Hawaii. Also there was a lack of pressure from consignees in Hawaii to load outbound cargo at San Diego. Matsons' inbound service to San Diego was based generally on the volume of canned pineapple offered. It was irregular, with vessel arrivals at San Diego ranging from 13 to 99 days apart and averaging about 60 days apart.

4. A number of shipper witnesses, both military and civilian, were produced to show the amount of Hawaiian cargo which would be available at San Diego if direct common carrier service were maintained. A monthly or twice-monthly service between San Diego and Hawaii was indicated as necessary to meet the needs of shippers in San Diego and adjacent areas. Generally, these shippers deem the use of Matson's existing service between Hawaii and Los Angeles to be unsatisfactory because of the added cost of overland transportation to and from Los Angeles, which service at San Diego would eliminate. Some shippers said the overland transportation cost to Los Angeles had priced them out of the Hawaiian market.

5. If regular service were available out of San Diego to Hawaii, the average monthly outbound total of commercial shipments, exclusive of household goods, should be about 700 tons. Inbound commercial tonnage should average about 360 tons monthly, prin-

cipally canned pineapple products. Some Hawaiian pineapple now comes to San Diego via the port of Los Angeles. Other pineapple is imported from Formosa and Mexico, but with a regular Hawaii-San Diego service, eliminating the overland costs from Los Angeles, this probably would be supplanted by pineapple brought in from Hawaii.

6. Military passenger traffic from San Diego to Hawaii has increased. The first three months of 1961 equalled about 90 percent of the entire year 1959, and about 50 percent of the entire year 1960. The increased movement of passengers naturally resulted in the increased movement of personal effects and automobiles. Several shippers desire a regular San Diego-Hawaii service in order to participate in the movement of military household goods. They say they cannot absorb the overland transportation costs from San Diego to Los Angeles Harbor. The lack of a regular commercial service has been a factor in causing the Government to move military household goods by MSTS or Naval fleet vessels instead of commercially.

7. Some military tonnage generated at San Diego and destined to Hawaii, which was suitable for handling by ocean common carriers, has been shipped via Naval fleet and Military Sea Transportation Service (MSTS) vessels because of the unavailability of common carrier service at San Diego, and because of the military's reluctance to incur the expense of overland transportation to Los Angeles for shipment by water in common carrier vessels to Hawaii. MSTS has offered military cargo out of San Diego to Matson, and on occasion has been refused service. At times MSTS has routed San Diego military cargoes through the port of Los Angeles because of the lack of commercial service out of San Diego and the unavailability of its own or Naval fleet vessels. MSTS has often moved commercial-type military cargo on MSTS passenger vessels. It foresees about 400 to 500 measurement tons a month of military-generated cargo at San Diego which would be available for commercial carriers.

8. During the fiscal year 1958-59, military cargo between San Diego and Hawaii totaled 11,312 tons, of which commercial vessels carried 14 percent, MSTS vessels 14 percent, and fleet bottoms 72 percent. In the fiscal year 1959-60, the total was 28,163 tons, of which commercial vessels carried 13.5 percent, MSTS vessels 30.5 percent, and fleet bottoms 56 percent. The Naval Supply Depot at San Diego was redesignated as the Naval Supply Center

in 1959, and along with the redesignation its tonnage substantially increased. A regularly scheduled common carrier service of at least one sailing a month in each direction between San Diego and Hawaii would be of benefit to MSTS and the military shipper services in the San Diego area. During the 1958-59 and 1959-60 fiscal years at Los Angeles/Long Beach Harbor, 100 percent of all military cargo for Hawaii was handled on commercial vessels. Of the 49,400 tons for fiscal 1958-59, Matson carried 42,032 tons, and of the 29,709 tons for fiscal 1959-60, Matson carried 28,660 tons.

9. In the shipping business movements of cargo in both directions are usually necessary to provide the economies of a profitable operation. Matson's San Diego service in the past has been mostly a one-way operation, and admittedly irregular, because in its judgment the tonnage to justify regular two-way service simply was not there. Matson submitted an analysis of its costs on its 35 inbound and 6 outbound San Diego calls from 1954 through 1960. This took into account so-called "added vessel costs", *i.e.*, those which were incurred because of the added time required to sail the extra distance to San Diego from Hawaii as compared to Los Angeles (San Diego is 50 nautical miles further from Hawaii), plus the time in port at San Diego and the estimated time required to sail the 95 nautical miles from San Diego to Los Angeles. Exclusive of any allowances for general and administrative expenses and return on investment, Matson's analysis for its total of 41 calls at San Diego shows a net-to-vessel total loss of $87,402. Net losses are shown on all but 8 of these 41 calls. On its last four calls, made in 1960, including two inbound and two outbound, Matson shows a loss on the first voyage of about $1,966, and net-to-vessel revenues on each of the last three voyages, respectively, of $2,408, $2,192, and $2,605, for a net-to-vessel total revenue for 1960 calls at San Diego of $5,239.

10. If Matson were to provide a service at San Diego for the Hawaiian trade, this would have to be either a direct service (a straight turn-around) between San Diego and Hawaii—which San Dego says it is not at this time seeking—or a triangular service with calls at San Diego in connection with the Los Angeles-Hawaii operation—which San Diego does seek and insists is justified by the San Diego tonnage. According to Matson, either service would necessitate adding a vessel to its fleet. It is not entirely clear that this would be necessary for the triangular

service, although the San Diego calls inevitably would lengthen the vessel turnaround time and present other problems due to the fact that Matson now has an extensive containerized-cargo operation. The two vessels it regularly employs on the Los Angeles-Hawaii route are equipped to carry containers on deck. They operate on an approximate 21-day turnaround, with departures from Los Angeles every 10½ or 11 days. Matson deems this frequency necessary and appears to have taken measures within the past year or so to insure maintaining it. According to Matson, calls at San Diego would require stretching the Los Angeles turnaround from 21 to 28 days, *i.e.*, sailing from Hawaii to Los Angeles, thence to San Diego to discharge and load cargo, thence to Los Angeles and back to Hawaii. While San Diego sailing and port time would not in themselves consume an extra seven days, Matson says there would be additional delay due to problems concerning the sequence of loading general cargo and container cargo. Only a few consignees at San Diego receive consignments in sufficient and regular volume to utilize containers. No source of container traffic inbound to San Diego from Hawaii other than pineapple has been developed. If a container service were provided at San Diego, there would be added investments necessary for containers and related equipment which would have to be justified by the container cargo to and from San Diego.

11. Matson puts the cost of operating the C-3 type of vessel which it uses in the Los Angeles-Hawaii trade at about $1,360,000 annually, exclusive of administrative and general expenses and provision for return on investment. Matson's present average net-to-vessel revenue on the Southern California cargo mix, eliminating liquid cargo in both directions, is $10 per ton. According to Matson, 136,000 tons of cargo per year moving between San Diego and Hawaii would be required merely to pay for the cost of operating an additional vessel, and more cargo would have to be obtained to meet administrative and general expenses and provide for some return on investment. The tonnage to support an additional vessel must be all new traffic, not now moving via Matson through the Port of Los Angeles or any other port.

12. The population of the Los Angeles/Long Beach metropolitan area in 1960 was 6,742,692. Historically, Los Angeles has been the principal Southern California port so far as Hawaiian traffic is concerned, and Matson has been providing a regular service there since 1926. During the seven-year period 1954-1960,

Matson carried an average of more than 750,000 tons of cargo annually in the Los Angeles-Hawaii trade. Although complainant believes, taking into account both military and commercial traffic, that there now are available adequate tonnages to support a regular two-way San Diego-Hawaii ocean service, this record indicates that San Diego if regularly served on a monthly, or semimonthly basis would generate only about 22,000 tons of cargo annually to and from Hawaii. Assuming the record does not disclose San Diego's entire potential in this respect, there is nothing to suggest that the maximum tonnage that could be anticipated would approach the annual figure which Matson deems necessary to support a regular San Diego service (finding 11 above).

DISCUSSION AND CONCLUSIONS

A progressive and rapidly growing area, San Diego understandably would like to enhance its stature as a Pacific Coast port by offering regular ocean carrier service to and from Hawaii. Unless, however, some carrier shares San Diego's belief that its growth, facilities, cargo potential, and shipper needs are sufficient to justify such a service, San Diego's aspiration cannot be realized. There is no way by which Matson or any other carrier can be required to provide the service. While we have authority to regulate an established common carrier service, this should not be confused with the power to require that common carrier service be inaugurated, which we do not possess.

Moreover, our authority under section 16 First of the Shipping Act[2] relative to the proposed discontinuance of an established service is at best restricted. Thus, assuming Matson's limited and irregular 1954-1960 San Diego operation could be classed as an established service, on which the trade had come to rely, any exercise of our authority under section 16 First relative to Matson's discontinuance of the operation would have to be tempered by the fact that we lack the power to prevent indefinitely a common carrier by water from abandoning service. *McCormick S.S. Co.* v. *United States*, 16 F.Supp. 45 (N.D.Calif., 1936, three-judge); *Gulf-Puerto Rico Rates*, etc., 2 U.S.M.C. 410 (1940). See also *Lucking* v. *Detroit & Cleveland Nav. Co.*, 265 U.S. 346 (1924).[3]

[2] Quoted, *supra*, in footnote 1.

[3] CF. *Westbound Intercoastal Rates to Vancouver*, 1 U.S.M.C. 770 (1938); *Sun-Maid Raisin Growers Assn.* v. *Blue Star Line*, 2 U.S.M.C. 31, 38 (1939); *Intercoastal Cancellations and Restrictions*, 2 U.S.M.C. 897 (1940).

As these cases make clear, there is a marked difference between our authority over the discontinuance of service by water carriers, and the authority of other agencies, such as the Interstate Commerce Commission, over carriers who hold certificates of public convenience and necessity and must secure permission to abandon service.

It is unnecessary to attempt here to define the action we might properly take under section 16 First where an established service is sought to be discontinued, because we are satisfied, in any event, that neither undue or unreasonable preference to Los Angeles, nor undue or unreasonable prejudice to San Diego, has been shown as a result of Matson's withdrawal in early 1960 from the service it was providing to San Diego. In taking this step Matson was motivated by its judgment regarding the economics of the situation, not by any intent to prefer Los Angeles or prejudice San Diego. In Matson's opinion, there was a lack of San Diego-Hawaii tonnage to support even a limited regular service, and certainly the evidence in this record does not warrant our adopting the opposite view.

Accepting for purposes of discussion the 22,000 tons of cargo which this record indicates might be anticipated as the annual San Diego-Hawaii traffic, this is but a fraction of the Los Angeles-Hawaii tonnage and the fact remains that it could not be transported by Matson except at a sacrifice to its established service at Los Angeles. A triangler service would be the only feasible method of providing regular calls at San Diego by Matson but this would necessitate extra steaming and port time, delays in cargo handling because of Matson's containerized operation, and less frequent departures both from Los Angeles, which now handles annually over half a million tons of westbound Hawaiian traffic, and from Hawaii. That such calls to San Diego would also result in material operating losses for Matson, seems adequately borne out by its past experience in serving the port (finding 9).

Complainant contends that Matson's past San Diego service was inefficient and uneconomical because largely one-way and irregularly offered. It is true that a two-way service is usually the most economic, that trade often follows or expands with the availability of services, and that Matson has made no special effort to develop the San Diego trade. From these premises, however, it does not follow that Matson has unduly prejudiced San Diego. As the evidence shows, there were good reasons for the primarily inbound

service Matson provided (finding 3), and little in the way of ton nage to justify the attendant time and expense of furnishing out bound service. It should not be overlooked, moreover, that a significant portion—perhaps as much as 50 percent—of the San Diego cargo potential reflected by this record is not new Hawaiian traffic, but simply traffic now moving through the Port of Los Angeles which would be diverted therefrom to San Diego.

On the record here, Matson cannot fairly be charged with indif ference toward the needs of San Diego, nor complacency in the matter of stimulating sources of added Hawaiian tonnage. Nor does the fact that Matson is by far the dominant carrier in the trade suggest to us that it is any the less interested in seeking or promoting new tonnage susceptible of economic transportation The contrary, it seems to us, should be true. Beyond this, we share the hope, expressed by the Examiner, that San Diego will continue to receive Matson's attention as an area that could pos sibly develop enough tonnage to make a regular service feasible.

Undue preference and prejudice under section 16 First of the Act must be established by clear and convincing proof. Further similarity of transportation conditions is a necessary element of undue preference and prejudice. *Intercoastal Cancellations and Restrictions*, 2 U.S.M.C. 397 (1940). The conditions need not be identical but should at least be comparable. So far as concerns Hawaiian cargo, there is no similarity but a great disparity be tween transportation conditions at the ports alleged in this case to be prejudiced and preferred, San Diego and Los Angeles. Dis cussion of additional points or authorities having a bearing on the application of section 16 First is therefore unnecessary.

We conclude that this record fails to show that respondent Mat son has given undue or unreasonable preference or advantage to Los Angeles, or that it has subjected complainant San Diego to undue or unreasonable prejudice or disadvantage, in violation of section 16 First. The complaint accordingly will be dismissed.

ORDER

FEDERAL MARITIME COMMISSION

No. 909

HARBOR COMMISSION, CITY OF SAN DIEGO, CALIFORNIA

v.

MATSON NAVIGATION COMPANY

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

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

By the Commission, September 25, 1962

(Sgd.) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 954 (Sub. 2)

Investigation of Increased Rates on Sugar, Refined or Turbinated, in Bags in the Atlantic/Gulf Puerto Rico Trade

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Decided September 25, 1962.

Proposed increased rates on sugar, refined or turbinated, in bags, from San Juan, Ponce, and Mayaguez, P.R., to New York, N. Y., Philadelphia, Pa., and Baltimore, Md., found just and reasonable. Order of suspension vacated, and proceeding discontinued.

Mark P. Schlefer and *T. S. Perlman* for respondent.

John Mason, Gerald A. Malia, and *Robert J. Nicol* for Puerto Rican American Sugar Refinery, Inc., and Olavarria & Co., Inc.; *John Mason* and *Gerald A. Malia* for Association of Sugar Producers of Puerto Rico, Western Sugar Refining Company, and Central Roig Refining Company; and *William D. Rogers* and *John T. Rigby* for Commonwealth of Puerto Rico, interveners.

Donald J. Brunner 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:

By fifth revised page No. 27 to its Homeward Freight Tariff No. 1, FMB-F No. 2, filed with the Commission to become effective December 18, 1961, respondent, A. H. Bull Steamship Co., (hereinafter "Bull") proposed to increase its rate on sugar, refined or turbinated, in bags (refined sugar), from Puerto Rican ports to

the North Atlantic ports of New York, N. Y., Philadelphia, Pa., and Baltimore, Md., from 59 cents per 100 pounds to 75 cents per 100 pounds.[1] Upon protest, the Commission by its first supplemental order[2] of December 14, 1961, instituted this investigation pursuant to the Shipping Act, 1916 (the 1916 Act), 46 U.S.C. 801 *et seq.*, and the Intercoastal Shipping Act, 1933 (the 1933 Act), 46 U.S.C. 843 *et seq.*, and suspended the operation of the schedule to and including April 17, 1962.

Puerto Rican American Sugar Refinery, Inc., Western Sugar Refining Company, and Central Roig Refining Company, sugar refiners located in Puerto Rico whose refined sugar moves to North Atlantic ports in the United States through the ports of Ponce, Mayaguez, and San Juan, P.R.; Olavarria & Co., Inc., a distributor of sugar in the United States which purchases the output of Puerto Rican American Sugar Refinery, Inc.; the Association of Sugar Producers of Puerto Rico; and the Commonwealth of Puerto Rico intervened in opposition to the proposed increased rate.

On January 22, 1962, following hearing, proposed findings and conclusions, oral argument thereon was held before the Examiner. Subsequent thereto, the sugar interests filed a motion for further hearing to receive evidence concerning a substantial change in the character of the service to be offered by the respondent. The motion was granted and further hearing was held on March 5, 1962, with oral argument before the Examiner immediately thereafter.

By fifth supplemental order served March 5, 1962, upon Bull's application, the Commission granted special permission for Bull to file tariff amendments on one day's notice to eliminate its service at the ports of Ponce and Mayaguez, and to cancel on 30 days' notice the existing rate of 59 cents on refined sugar. However, Bull has not yet filed a tariff change cancelling its 59 cent rate, but has ceased serving Ponce and Mayaguez.

The Examiner in an initial decision served March 12, 1962, found the proposed increased rates on sugar to be just and rea-

[1] Also involved were trailer- and van-load rates of $273.77, minimum 40,000 pounds, and $123, minimum 20,000 pounds, which would be increased to $300 and $135, respectively, but the record indicates that no traffic moves under these rates.

[2] By original order of December 7, 1961, and second supplemental order of January 8, 1962, increased rates on the same commodity filed by the United States Atlantic & Gulf-Puerto Rico Conference, Richard Kinsella, agent, and by Sea-Land Service, Inc., Puerto Rican Division, were brought under investigation and suspended. Upon special permission granted by the Commission, these rate increases were subsequently cancelled, and the investigation as to them was discontinued by third and fourth supplemental orders of January 22 and February 7, 1962, respectively.

sonable. Exceptions were filed by the sugar interests and oral argument was held on April 6, 1962.

The intervening Puerto Rican refiners are the only producers of refined sugar shipping to the North Atlantic. They are each affiliated, or under common ownership, with producers of raw sugar, and purchase their raw sugar from such affiliates as well as from some other producers. More than 60 percent of their total production of refined sugar has been shipped to the mainland and sold in competition with the products of mainland refineries. The remainder is sold in the local Puerto Rican market. Their price of raw sugar is governed by the price offered by mainland refiners, less the cost of transportation. Total sugar imported into the United States from Puerto Rico (including refined sugar) is limited by a quota established by Congress although that quota has not always been fully met.

Prior to 1956, raw sugar moved in bags to the mainland on berth terms, at rates of one cent per 100 pounds below the rates on refined sugar. In that year, raw sugar began to move in bulk at substantially lower transportation costs and many benefits were realized by the raw sugar producers. In 1957 and 1958 Bull and other carriers in the Puerto Rican trade increased their rates by some 29 percent, which adversely affected the competitive position of the Puerto Rican refiners in the mainland market. Puerto Rican refined sugar has traditionally been sold on the mainland at prices 20 to 70 cents per 100 pounds below the list prices of mainland refiners, partly because the mainland product can be purchased in bulk or liquid form, and partly because of user preference for the mainland brands.

These factors have placed the Puerto Rican refiners in a progressively tightening cost-price squeeze. They have had to absorb in full the 1957 and 1958 rate increases, which amounted to 11 cents per 100 pounds over the rates effective in 1954, and would now absorb the proposed increase of 16 cents per 100 pounds. They claim inability to absorb any portion of the presently proposed increase, and fear that they will be forced entirely out of the mainland market and, since the Puerto Rican market cannot use their entire output, production would have to be curtailed. This would adversely affect their labor force which in 1960 numbered 786 persons sharing a payroll of about $1 million. The economy of Puerto Rico, which in 1960 was marked with an

unemployment rate of 11.5 percent of the total labor force, would likewise be adversely affected.

At the time of the first hearing, respondent operated six vessels in the Puerto Rican trade (4 were C–2 type, 2 were fully automated containerships put into service during the latter half of 1961). Two C–2 vessels operated on a two-week turn-around from New York, offering weekly service at San Juan, Ponce, and Mayaguez. The other two C–2 vessels operated on a two-week turn-around from Baltimore and Philadelphia, serving the same Puerto Rican ports weekly. The containerships operated out of New York on a 10-day turn-around, serving San Juan only.

On February 10, 1962, Bull drastically curtailed its service by removing all but two of the C–2 vessels from the trade. With these two vessels operating on a two-week turn-around, weekly service is now offered between Baltimore, Philadelphia, New York, and San Juan. The first voyage under this new service was not completed until about February 26, 1962, and the financial results thereof were not available during the hearing.

Bull was the principal carrier of refined sugar moving from Puerto Rico to the North Atlantic ports. Loadings at three Puerto Rican ports in 1960 and the first 11 months of 1961 were 98,093 and 65,373 gross tons, respectively. In 1960, refined sugar comprised about 10 percent of the total cargo handled by Bull, and about 30 percent of total northbound cargo handled by all carriers in the Puerto Rican trade.

In the first 6 months of 1961, on total revenues of $9,219,548, Bull claims a direct loss of $551,557 from vessel operations, before assignment of overhead and depreciation expenses. These results are attributed by Bull to severe overtonnage in the trade, loss of cargo to competitive carriers (particularly in those categories of cargo on which the higher rates are applicable), and the maintenance of allegedly unremunerative promotional rates in aid of the Puerto Rican economy. Bull's vessel space utilization in 1960 service was only 41 percent of capacity and 50.9 percent in the first six months of 1961. Bull contends that the existing refined sugar rate, which returns $13.22 per gross ton, is noncompensatory, and that the per-ton revenue of $16.80 at the proposed 75 cents rate will fail to meet all costs properly assignable. Recognizing that too drastic an increase in the refined sugar rate would destroy the ability of the Puerto Rican sugar refiners to compete with mainland refineries, Bull states that it is willing

to compromise the rate level, and claims that the proposed 75 cents rate is therefore just and reasonable. Bull attributes more than $500,000 of its past annual losses solely to the carriage of refined sugar.

DISCUSSION AND CONCLUSIONS

The intervening sugar interests filed 25 exceptions to the Examiner's Initial Decision. These numerous exceptions reduce themselves to essentially the following contentions of error: (1) the Examiner erred when he accepted Bull's evidence of the costs of loading and discharging sugar instead of the figures submitted by intervenors and did not properly consider the "value of service" element in determining the reasonableness of this rate; (2) the Examiner erred in certain cost allocations; (3) the carrier failed to sustain its burden of proving that the proposed rate was just and reasonable; and (4) the Examiner failed to specifically indicate that the Puerto Rican trade was unbalanced with more traffic southbound than moving north.

For cargo handling expense the Examiner used actual loading and discharging costs adjusted for known increases; other costs of operations were allocated by him on the basis of the ratio of sugar tonnage converted to cubic measurement (45 cu.ft./ton) to total revenue tons also converted to cubic measurement. Because of the reduction in service the Examiner assumed that the carrier would achieve a higher vessel utilization which he estimated would be 50% at most. From these calculations he concluded the proposed rate was just and reasonable.[3]

Intervenors except to the Examiner's assignment of overtime applicable to the handling of refined sugar. Intervenors contend that the Examiner should have used the average overtime rate applicable to all cargo loaded rather than overtime only as it was applied to sugar. They also contend that Bull's reduction of vessels in use in this trade will result in a higher vessel utilization than was found by the Examiner; *i.e.*, 80% instead of 50%. For purposes of discussion, we have developed a cost per ton for refined sugar based upon the costs shown in the record adjusted to reflect an 80% vessel utilization and the average rate 9.1% for overtime for all cargo. These calculations are set forth in Table I, *infra*.

[3] Since the issuance of the initial decision, Bull withdrew from the Puerto Rican trade.

TABLE I

Loading	
1961 Costs not including overtime	$282,629
Overtime at overall rate of 9.1%	25,719
	$308,348
Tons of sugar loaded	65,375
Cost per ton—loading	$ 4.72
Increase in stevedoring costs (4.7%)	.22
Projected Cost per ton—loading	$ 4.94
Discharging	
1961 Costs not including overtime	$306,499
Overtime at overall rate of 9.1%	27,891
	$334,390
Tons of sugar discharged	61,793
Cost per ton	$ 5.41
Increase in stevedoring costs (2.9%)	.16
Projected Cost per ton discharging	$ 5.57
Total cost per ton loading and discharging	10.51
Vessel Expense	
80% vessel utilization rate of 9.5¢ per cubic foot (45 cubic feet = 1 ton)—per ton expense	4.28
Total Cost of loading and discharging and vessel expense (excluding wharfage, dockage, other port expense, other cargo expenses, overhead and depreciation	14.79

The total cost of $14.79 per ton shown in Table I which was computed on a basis most favorable to intervenor's position exceeds the revenue per ton at the 59¢ rate which is only $13.22. The rate increase in question would give the carrier a return of $16.80 per ton; $2.01 more than the cost figure reached in Table I. It is quite clear that any fair allocation of depreciation and overhead woud consume all or a major part of the remaining $2.01. The record shows that allocating these two items on a ratio of refined sugar total cargo carried on a measurement basis available both north and southbound would result in an overhead expense of $1.73 per ton and depreciation expense of $.66 per ton. Thus the addition of only overhead and depreciation would produce a $17.18 cost per ton.

Intervenors may quarrel to some extent with overhead and depreciation allocations yet we do not see where it can be validly contended that the remaining $2.01 will fully cover the carrier's overhead, depreciation and other expenses that were not included

in the calculation in Table I, let alone result in any sort of profit to this carrier.

Intervenors have objected to the Examiner's cost allocation formula which was based upon a ratio of the cubic measurement of sugar to total cargo carried. They claim he erred by not requiring respondent to submit a breakdown of actual cost figures for every operating expense and not taking into account the factor of broken stowage. We do not think their objections are well taken in either instance. The Examiner in his calculations treated sugar equally with other cargo excluding broken stowage throughout his calculations. While broken stowage conceivably could be a factor in some cases, it is a variable one that depends upon many things including the nature of the cargo, weather conditions to be encountered, the type of containers used, the type of vessel involved and the hold in which a commodity is stowed. As a practical matter, broken stowage will vary with the skill of ship's officers, the carrier's shoreside personnel and the stevedore and longshoremen loading a vessel. We think the Examiner correctly excluded broken stowage in making his calculations since by its variable nature it would not have resulted in a more accurate ratio. Broken stowage is also of relatively little importance when vessels are not being fully utilized which is the case in this trade. It was not, in our opinion, unreasonable or inaccurate for the Examiner to adopt an allocation formula for operating expenses, particuliarly when a major part of his overall calculations was based upon direct costs.

The record contains conflicting evidence as to the proper stowage factor to be used in determining the cubic measurement per gross ton of sugar, and the Examiner, after reviewing the problem, concluded that a stowage factor of 45 cu. ft. per gross ton was proper and in accordance with a recognized authority on the subject, *Modern Ship Stowage*,[4] a standard reference manual that was developed by the United States Department of Commerce. The proper stowage factor was much in dispute in the proceedings before the Examiner and the parties even went so far as to actually measure bags of sugar during the hearing. The stowage factors submitted as evidence varied from 43 cu. ft. to 56 cu. ft. per gross ton and from all this conflicting evidence we can only conclude that the Examiner quite reasonably adopted a figure that

[4] *Modern Ship Stowage*, U. S. Department of Commerce, Bureau of Foreign Commerce, 1942.

fell within the limits of the evidence presented and was in conformity with an established reference manual.

While we acknowledge the obvious fact that there is and will continue to be a substantial reduction in the service offered by Bull, the calculations made in these proceedings were on a unit basis, cost per single ton, for the same type of vessel, a C-2 freighter, that Bull says it will be using in this trade. This we believe should cure any major infirmities that might result from a reduction in service. In addition we have evaluated the rate using the greater vessel utilization recommended by intervenors. It should also be noted that the major portion of the costs of transporting this sugar is attributable to loading and discharging for which the carrier submitted actual costs. Intervenors attack the validity of the actual costs for loading and discharging which respondent submitted and the use of the carrier's operating results for the first half of 1961 in forecasting future costs. They claim these figures are not representative or probative for various reasons; changes in loading ports, difficulties encountered by the carrier in New York as the result of damage to terminal facilities and other similar contentions. They demand a degree of specificity that is impossible. As the Examiner stated, cost finding is not an exact science and if we were to adopt the stringent approach advocated by these intervenors a carrier would rarely, if ever, be able to sustain its burden of proof nor would we be able to evaluate the great majority of proposed rates for future use. We agree with the Examiner that all that is required is that the results obtained represent a reasonably close approximation of the assignable costs. In our opinion this has been achieved and the respondent has sustained its burden of proving the cost of service even in light of its reduction in operations. The intervenors contend that since this trade is heavily unbalanced in favor of the southbound traffic the rate should be based upon essentially an added traffic theory for the carrier's vessels would be sailing light northbound because of this imbalance. In substance, one of the intervenor's major contentions is that only out of pocket costs are really pertinent and the value of this service to Puerto Rico and the Puerto Rican sugar refining industry is the primary consideration. While the carrier has indicated a willingness to compromise, it has decided that the rate on this commodity must reflect cargo handling costs and a proper allocation of vessel operating expense with some contribution towards overhead and depreciation and other expenses of operation. Generally, this is

a decision within the province of the carrier's managerial discretion.

In our opinion the Examiner correctly rejected intervenors' added traffic theory and did not err by failing to make a specific finding that there was an imbalance in this trade. Whether traffic is heavier moving north or south, if a shipper does not pay his full share of the expenses incurred in the carriage of his goods including overhead and depreciation, then the deficiency must be spread among other shippers or absorbed by the carrier. This is simply an economic fact of life and applies equally to each leg of a vessel's itinerary and whether a trade is balanced or not. The Examiner rejected intervenors' related argument that value of service should be given prime consideration in evaluating this rate because of the competitive predicament in which the Puerto Rican sugar refiners fiind themselves and the effects of this rate upon Puerto Rico and the refinery workers and we feel he was correct in doing so.

Value of service falls within the realm of public interest and under certain conditions may be the determining factor in resolving the question of the reasonableness of a rate. However, the consideration and effect that must or should be given to the public interest is limited by the Due Process Clause of the 5th Amendment to our Constitution. At one time the Supreme Court expressed the view that under the 5th Amendment public interest could not be invoked to require a carrier to transport a commodity at less than cost or for merely nominal compensation and that the devotion of the carrier's property to public use is qualified by the carrier's right to a reasonable reward, *Northern Pacific RR Co.* v. *North Dakota,* 236 U.S. 585 (1915).

This view was to some extent modified or explained in *Baltimore and Ohio Railroad Co.* v. *United States,* 345 U. S. 146 (1953) wherein the Supreme Court ruled that so long as carriers' rates as a whole afforded them just compensation for their overall services to the public the Due Process Clause should not be construed as a bar to fixing noncompensatory rates for carrying some commodities when the public interest is served. On this basis carriers on occasion have been required to charge a rate for a particular service that is not fully compensatory, but only when the carrier is making an overall profit. See *Pan American World Airways* v. *Civil Aeronautics Board,* 256 F. 2d 711 (D.C. Cir. 1958) *cert. denied* 358 U.S. 836 (1958). Quite clearly the carrier's financial position limits the effect that may be accorded the public interest.

It seems to us that the value of a service to a particular segment of the public is also outweighted by the general public's interest in the carrier's continued existence of a sound economic footing and its ability to serve all shippers at reasonable rates. In this regard it is unnecessary to determine the solvency of Bull for even if it were making a profit on its over-all operations we do not see where it could be sound regulatory policy or in the public interest to require Bull or any other carrier to sustain substantial losses on a large segment of the cargo it carries. Such a practice would simply result in either disproportionately high rates on other cargo or a substantial weakening of the carrier's economic position or both. Even if we were to discount to some extent Bull's claim of losses due to the carriage of this sugar at the 59¢ rate, the record clearly indicates that this rate is not compensatory and that the carrier has sustained substantial losses carrying the refined sugar at this rate. As for the new rate which we have been considering it is not fully compensatory and in our opinion the carrier, although willing to compromise to some extent, has properly exercised its managerial discretion in determining how far it can economically go in its efforts to accomodate the shippers of refined sugar and yet maintain a sound financial position. We recognize and of course are sympathetic to this apparently distressed sugar industry, but we cannot lawfully nor rationally favor its interests over those of an equally distressed carrier subject to our regulation.

In view of our previous discussion it is unnecessary to make findings relative to the Puerto Rican refining industry's inability to absorb an increase in rates or their production costs and revenue from sales. Intervenors made further contentions of error relating to wharfage, brokerage and bill of lading charges. These items were not included in computing Table I and specific findings as to the applicability and actual amounts charged for these expenses are unnecessary in view of the undeniably small return Bull would receive from the 75¢ rate over and above costs of cargo handling and vessel operating expense. We must also reject, as did the Examiner, evidence of stevedoring costs of a contract carrier which intervenors claim is pertinent. Not only is contract carriage quite a different matter, but we have actual

cargo handling costs available. Any remaining contentions of error not specifically discussed herein we have found irrelevant, redundant or not persuasive.

Based upon the foregoing we find and conclude that the rate increase here under investigation is just and reasonable.

An order discontinuing this proceeding will be entered.

ORDER

FEDERAL MARITIME COMMISSION

No. 954 (SUB. 2)

INVESTIGATION OF INCREASED RATES ON SUGAR, REFINED OR TURBINATED IN BAGS IN THE ATLANTIC/GULF PUERTO RICO TRADE.

Full investigation of the matters and things involved in this proceeding have been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof, and having found that the proposed rate under investigation is just and reasonable:

It is ordered, That this proceeding be, and it hereby is, discontinued. By the Commission, September 25, 1962.

(Sgd.) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 987

J. M. ALTIERI

v.

THE PUERTO RICO PORTS AUTHORITY

Decided October 18, 1962.

Terminal operators' withholding of refund of overpayment on demurrage charges did not violate the Shipping Act, 1916. Not shown to have created a competitive disadvantage nor to consitute a shipping "practice", as distinguished from an isolated incident involving ordinary business activity.

J. M. Altieri, complainant, appeared on his own behalf.

John T. Rigby; Arnold, Fortas and Porter for respondent.

INITIAL DECISION OF E. ROBERT SEAVER, EXAMINER[1]

This matter was submitted without oral hearing, under Rule 11 procedure. The essential facts are not in dispute.

On September 28, 1961, complainant imported a shipment of 151 cartons of footwear into Puerto Rico from the United States mainland. (The fact that the footwear was shipped in domestic commerce does not appear in complainant's statement of the facts, but it appears to be admitted in the respondent's statement. In any event, the examiner will take notice that the vessel *S.S. Beatrice* sailed from New York on the voyage on which the footwear was alleged to have been shipped). On November 6, 1961

[1] In the absence 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 Rules 13(d) and 13(h) of the Commission's Rules of Practice and Procedure.

complainant paid to respondent, a public body that operates a marine terminal at San Juan, Puerto Rico, the sum of $54.18 for demurrage on the shipment. Respondent had erroneously notified complainant over the telephone that that was the amount of the charge. On December 4, 1961, respondent sent an invoice to complainant which stated the correct amount of the demurrage as $14.01. For these reasons, an overpayment of $40.17 had been made.

Respondent refused and still refuses to refund the amount of the overpayment to complainant. Instead, respondent credited the amount of the overpayment to an indebtedness in the amount of $167.58 which respondent contends complainant owes to respondent by virtue of the following transaction.

On November 24, 1961, respondent sent to complainant an invoice in the amount of $167.58 covering demurrage charges on an import shipment of bicycles. Respondent contends that the shipment was that of complainant and that complainant is therefore indebted to respondent for the demurrage. Respondent applied the overpayment on the demurrage charge on the footwear shipment against this later $167.58 demurrage charge on the bicycle shipment.

Complainant denies that it is indebted to respondent for the $167.58 demurrage charge on the bicycles, and alleges that the import shipment that gave rise to that charge was the shipment of U. S. and Overseas Products, Ltd. He states that the latter concern made a partial payment of $35.70 on the demurrage charge on February 26, 1962, and that this sum was accepted by respondent. Respondent does not deny the acceptance of that sum from U. S. and Overseas Products, Ltd.

Complainant contends that respondent's refusal to refund the overpayment of $40.17 violates the Shipping Act of 1916 in the following three respects, and he seeks reparation and an order requiring respondent to "cease and desist from the aforesaid violations - - - and to establish and put in force and apply in future such other charges as the Commission may determine to be lawful - - - ":

1. Respondent's action was unreasonably preferential, prejudicial, and disadvantageous in violation of section 16.[1]

2. It was unjustly discriminatory or prejudicial in violation of section 17.[1]

3. It was unjust and unreasonable in violation of section 18.[1]

[1] See Appendix.

Respondent contends, as to the first charge, that complainant has not established the necessary competitive disadvantage to prove a preference under section 16. That is, he has not proved a disparity between the treatment accorded him and that accorded other importers. They cite *Asgrow Export Corp. v. Hellenic Lines, Ltd.,* 5 F.M.B. 597 (1959) and other cases decided by the Commission's predecessor agencies. The principle is well established, and respondent is correct in its contention that there is no showing of competitive disadvantage. A violation of section 16 has not been shown.

Respondent correctly contends that section 18 applies only to carriers and not to terminal operators. For this reason, respondent can not be found to have violated that section.

As to the remaining contention of complainant - - - that respondent's action was unjustly discriminatory or prejudicial in violation of section 17 - - - respondent argues that section 17 applies solely to any "common carrier by water in foreign commerce", and that since the "Puerto Rico Ports Authority does not fall within this classification - - - complainant's allegation that respondent has violated section 17 is without merit." It is not clear whether respondent means that this section does not apply because respondent is not a common carrier or because the shipment in question was not in foreign commerce. In either case respondent is incorrect.

By its terms, the second paragraph of section 17 applies to "other persons subject to this act." This includes persons providing terminal facilities, according to the definition of the phrase "other persons subject to this act" in section 1. See *California v. United States,* 320 U.S. 577 (1944). This paragraph does apply to domestic commerce insofar as terminal operators are concerned. *Services, Charges and Practices, etc.,* 2 USMC 143 (1939). The question is whether section 17 is applicable to the circumstances involved in this case.

The complainant appears *pro se.* The complaint and statement of facts filed herein are not as complete and precise as might be desired. Taken in their best light, as they should be where, as here, respondent has not filed a counter-statement of facts; complainant's pleadings and sworn statement amount to an allegation that the conduct of respondent constitutes an unjust and unreasonable practice under section 17. If so, that is, if it is the type of conduct covered by section 17, complainant is entitled to relief.

The unjust and unreasonable practices condemned by section 17 are those, in the words of the statute, "relating to or connected with the receiving, handling, storing, or delivering of property." The practices that are intended to fall within the coverage of this section are shipping practices. It is these practices and only these that were assigned to the special expertise of the Agency. Thus, it might be an unreasonable practice for respondent negligently to stow bricks on a high shelf so that they repeatedly fell on the heads of complainant and others. The injured persons would undoubtedly have causes of action against respondent in a court of law, but is could not be seriously contended that this practice would constitute a violation of section 17 even though it is unjust and involves the storing of property. It has been held, to give another example, that claims for loss of or damage to cargo or for damages due to failure to follow routing instructions do not fall within the Act. *Pilgrim Furniture Co., Inc. v. American-Hawaiian Steamship Co.*, 2 U.S.M.C. 517 (1941).

On the other hand, the shipping agencies have taken cognizance under section 17 of such practices as the unfair charging of demurrage, *Atlantic Syrup Refining Co. v. Luckenbach Steamship Co.*, 2 U.S.M.C. 521 (1941); *Sigfried Olsen v. War Shipping Administration et al.*, 3 F.M.B. 254 (1950); and the refusal, by a carrier that was claiming both dead freight and detention damage. to deliver, the cargo, *Hecht, Levis and Kahn, Inc., et al. v. Isbrandtsen Co., Inc.*, 3 F.M.B. 798 (1950)

Complainant's case is, undeniably, an appealing one because respondent has unilaterally effected an offset of monies admittedly owing to complainant against a disputed claim of respondent against complainant. As a general rule, the courts have found such action to be unlawful. *Four-G Corp. v. Ruta,* 131 Atl. (2nd) 566 (N.J. Super. 1957); *Hamilton v. Wilcox,* 140 Atl. 201 (Me. Sup. 1928); Williston on Contracts, Revised ed., Vol. 3, Secs. 887E and 887F (1936); 70 C.J.S., "Payment", Sec. 32, page 242-3, (1951). The categorical statement of respondent's counsel that respondent had a right to withhold the refund and offset it against the other claim is without foundation. This unlawful act of respondent, if it is one, may provide the basis for an action in court; but it is not necessarily a violation of section 17.

Does the action of respondent fall within that class of activities, described above, that are cognizable under section 17 or does it fall within the category, also described above, that is outside the

purview of that section? While the question is not entirely free from all uncertainty, a full and detailed consideration of all the aspects of the case leads to the conclusion that the circumstances here do not warrant relief under section 17.

By the time the respondent refused to refund the money, the purely shipping aspects of the transaction had been completed. A dispute as to liability for demurrage or as to the amount of it; or even a persistent and continuing shuffling of the accounts of importers might fall within section 17. But there is no dispute here as to the propriety of the imposition of the charge or the amount of it ($14.01). The dispute is over the question whether respondent must refund an overpayment. The issues incident to this question would be exactly the same if the overpayment were on the purchase price of groceries. They are not so peculiar to shipping matters that they require or warrant the intervention of the Commission. A court can handle all aspects of these issues. This is not to say, of course, that court and agency action are always mutually exclusive.

If the action of respondent were one of a series of such occurrences, a *practice* might be spelled out that would invoke the coverage of section 17. *Hecht, Levis and Kahn, Inc., et al. v. Isbrandtsen Co., Inc.,* 3 F.M.B. 798 (1950). However, the action of respondent is an isolated or "one shot" occurrence. Complainant has alleged and proved only the one instance of such conduct. It can not be found to be a "practice", within the meaning of the last paragraph of section 17.

Complainant's papers filed in this proceeding allege other violations of the shipping statutes by way of conclusions. No facts are stated to support them in the affidavit submitted under Rule 11. They therefore have not been established.

For the foregoing reasons an order should be entered dismissing the complaint.

APPENDIX

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

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

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

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

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

SEC. 17. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

SEC. 18. That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample,

and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the board and keep open to public inspection, in the form and manner and within the time prescribed by the board, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the board and after ten days' public notice in the form and manner prescribed by the board, stating the increased proposed to be made; but the board for good cause shown may waive such notice.

Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carriers is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

FEDERAL MARITIME COMMISSION

No. 901

GENERAL INCREASES IN RATES—PACIFIC-ATLANTIC/GUAM TRADE

Decided October 23, 1962.

General increases in rates between United States and Guam, Mariana Islands, Midway Island, Wake Island, Ebeye (Kwajalein Atoll), and Eniwetok, for the carriage of commercial cargo, including cement, found to be lawful and just and reasonable.

Mark P. Schlefer and *J. L. Truscott*, for respondent, Pacific Far East Line, Inc.

Warner W. Gardner, Peter N. Teige and *George D. Wick, Jr.* for respondent, American President Lines, Ltd.

Eugene L. Stewart and *O. Taft Nelson* for the Government of Guam, and Guam Associates, interveners.

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

Malcolm D. Miller, Max M. Misener, and *William R. Pierce* for the General Services Administration, intervener.

William Jarrel Smith, Jr., 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*

BY THE COMMISSION:

This proceeding is an investigation into the lawfulness of two rate increases proposed by Pacific Far East Lines (PFEL) and American President Lines (APL) for the carriage of freight be-

tween the United States and Guam and several surrounding islands.

The tariffs under investigation are PFEL Guam Tariff No. 2 (F.M.B.-F. No. 2), APL Pacific-Guam Tariff No. 5 (F.M.B.-F. No. 9), and APL Atlantic-Guam Tariff No. 3 (F.M.B.-F. No. 8), which published a general increase of about 10 percent in rates between ports in the United States and Guam and which, after suspension, became effective on April 30, 1960, and PFEL Tariff No. 3 (F.M.B.-F. No. 3), APL Pacific-Guam Tariff No. 6 (F.M.B.-F. No. 11), and APL Atlantic-Guam Tariff No. 4 (F.M.B.-F. No. 10), which published a general increase of 20 percent in rates between ports in the United States and Guam and which, after suspension, became effective on January 27, 1961.

The Government of Guam, Guam Associates, the Harbor Commission of the City of San Diego and the General Services Administration intervened.

Following hearings the Examiner in an initial decision found the increases of 10% and 20% to be just and reasonable.

Exceptions were filed and oral argument held.

Respondents APL and PFEL are the only common carriers providing service between the United States and Guam and the only United States flag service between Guam and foreign countries.

During the first six months of 1960 PFEL transported approximately 87 percent of the revenue tons of non-military freight shipped from all ports in the United States to Guam, and 96 percent of such traffic from West Coast ports to Guam. In view of PFEL's dominant position in the trade, the Examiner concluded that the lawfulness of the general increases under investigation should be determined in the light of traffic, operations, revenues and net profits or losses of PFEL in the trade. We agree.

Prior to June 30, 1960, PFEL utilized three AP-3 ships and two chartered C-3 ships in the Guam trade. Two sailings a month were made from California, and one call each month was made in the Pacific Northwest and at Honolulu.

On outbound voyages, as required, the AP-3 ships would continue on to Japan, Formosa, and the Philippines, and return via Guam. The C-3 ships would continue on to Japan and return directly to the West Coast. On June 30, 1960, PFEL discontinued its charter of the C-3 ships and replaced them with three C-2 ships chartered from a wholly-owned subsidiary. Sailings to

Guam were increased to three each month. Calls in the Pacific Northwest and at Honolulu were continued at one each month and service beyond Guam was substantially as described above.

PFEL's operations include both subsidized and unsubsidized voyages, and the unsubsidized voyages are further divided into domestic operations to and from Guam and foreign operations. It is therefore necessary to separate such operations in order to determine PFEL's financial experience solely in the Guam trade. Since the unsubsidized operations are conducted with assigned ships, and separate voyage accounts are kept covering such operations, ship operating expenses and depreciation incurred relative to such ships will be directly apportioned to that service. The income and expense of other shipping operations will be divided between the subsidized and unsubsidized services in the ratio of terminated voyage expenses of the unsubsidized operations to terminated voyage expenses of all voyages terminating in the accounting period. The same ratio will be used to apportion overhead expenses (less agency fees, commissions, and brokerage earned), and depreciation expense, other than ships. Overhead expenses should be allocated on the basis of voyage expense. They should follow the expense to which they relate. *Pacific Coast/Hawaii and Atlantic Gulf/Hawaii General Increases in Rates*, 7 F.M.C. 260 (1962).

In the same manner overhead expenses in the domestic operation, sometimes called the "domestic leg," will be distributed between commercial and military cargo. Other expenses in the domestic operation, except the items which can be directly assigned by weight or cost, will be distributed on the basis of a ton-mile revenue prorate; that is, the relation that the number of ton-miles of commercial cargo (including cement) carried bears to the total ton-miles of cargo carried in the domestic trade.

The freight carried in the Guam trade falls into three categories; namely, commercial, military household goods, and military freight. The commercial cargo may be broken down into two categories—general commodities and cement in bulk. Hearing Counsel and interveners contend that revenues from military household goods, military freight, and bulk cement, and expenses assignable to the carriage of such traffic, should be excluded in determining the lawfulness of the rates under investigation.

Military freight and military household goods are carried for the United States Government at special contract rates. Neither

the private commercial shippers nor the people of Guam should pay any part of PFEL's expense for such service or for any return on the property PFEL devoted to such carriage. Accordingly, such service will be excluded in determining the reasonableness of rates under consideration.

PFEL's tariffs contain a rate for the carriage of cement in bulk, which rate is available to all commercial shippers. The fact that it is carried in bulk and for only one shipper is not controlling in this proceeding. The controlling fact is that it is common carriage subject to the tariff rates and available to any private shipper. While the record shows that PFEL did not charge the proper tariff rate during 1959 and part of 1960, this does not warrant our excluding it from our considerations in this proceeding. An investigation into the lawfulness of rates is not the proper proceeding for an adjudication of alleged violations of law. We find that the transportation of bulk cement is a part of the service covered by the rates under investigation and the revenues and expenses therefrom will be considered in testing the reasonableness of the proposed rates.

The Examiner in his initial decision projected a net profit, after Federal income tax, of $134,480 for the year 1960. In arriving at that profit, the Examiner allocated expenses between commercial cargo, military household goods, and military cargo in the manner set forth above. He found that military household goods and military cargo accounted for 47 percent of the revenue tons carried in the Guam service in the first six months of 1960.

The following table sets forth the Examiner's projection of PFEL's net profit of $134,480 for the year 1960:

Revenue	$5,990,534
Voyage Expense	4,905,584
	1,084,950
Other Shipping Operations Net	30,740
	1,054,210
Administrative and General Expenses	602,876
Depreciation	171,168
	774,044
Profit before Income Tax	280,166
Federal Income Tax	145,686
Net Profit	$ 134,480

Guam argues that the Examiner erred (1) in adjusting PFEL's projected voyage expenses to reflect the substitution of three

C-2's for two C-3's by giving effect to increased operating expenses twice, and (2) in failing to exclude rentals paid for whaleback pallets, and (3) in failing to reduce the expense of other shipping operations by savings resulting from the reduction of the number of vans and containers under lease.

The Examiner eliminated charter hire on a ton-mile prorate applicable to commercial cargo and substituted operating expense for the three C-2 ships after allocation, and added estimated increases in expenses primarily for wages and fuel. The method adopted by the Examiner was correct and does not result in giving effect to increased operating expenses twice.

With regard to the whaleback pallets, and the reduction of vans and containers under lease, the evidence shows that PFEL reduced its net expenses of other shipping operations by $58,000 for the year 1960, which it claims includes an estimate of the savings resulting from reductions in the number of leased vans, containers, and whaleback pallets. The Examiner found net expenses of other shipping operations for year 1960 to be $30,740. The evidence of record supports the Examiner's finding. The exceptions are disallowed.

We agree that the record supports the Examiner's projections of expenses except as to administrative and general expenses. We find $570,290 to be the just and reasonable amount to be allocated to the carriage of commercial cargo for administrative and general expense in the Guam service. Such amount reflects the deletion of the legal expenses in connection with PFEL's subsidized operations, and reflects savings resulting from reductions in force effected in 1959.

After such adjustment we find that PFEL's net profit after Federal income taxes for the projected year 1960 for the carriage of commercial cargo in the Guam trade under the proposed increases to be $150,121.

PFEL excepts to the Examiner's failure to find that operating ratios should be considered as a measure of the reasonableness of the rates under investigation.

On the record before us, we find that the fair return on the fair value standard should be used in determining the reasonableness of rates in the Guam trade and that the prudent investment standard should be used to arrive at the fair value of the property devoted to the Guam trade. *Atlantic-Gulf Puerto Rico General Increase in Rates and Charges,* 7 F.M.C. 87 (1962). Our reasons

775-794 O-65-29

are adequately set forth in that case and no purpose would be served by restating them here. It is therefore unnecessary to discuss transactions involving the acquisition and disposition of one of the AP's and the three chartered C-2's owned by PFEL's subsidiary and used by PFEL in the trade.

Six ships are used by PFEL in the Guam trade. Two are owned by PFEL and four as stated above by a wholly owned subsidiary. For the purposes of this proceeding all six ships will be considered as though they were owned by PFEL.

In addition to ships other items properly included in the rate base of a domestic water carrier are the values of other floating equipment devoted in whole or in part to the service, other assets and working capital. The principal item claimed by PFEL in the category of other floating equipment is the barge *Adak Isle*. This barge was purchased by PFEL in 1956, and used until late 1958 to speed the unloading of cement from ships used in the Guam service. In 1958 the superstructure and all gear, such as pumping equipment used to unload cement, were removed, and the barge has not been used since. In view of the present condition of the *Adak Isle*, there is no apparent use which can be made of it by PFEL in the Guam service. The barge cannot be considered as property used or useful in providing service to shippers, and therefore will not be included as a part of the rate base.

PFEL claims that a house located in Guam, which is owned by a PFEL subsidiary, Pacific Micronesian Lines, and occupied by PFEL's representative, should be included in the rate base. Such house is being used in the regulated trade, since PFEL's local representative aids in the administration of that trade, and its depreciated value properly allocated will be included in the rate base for this reason. A second house located on Guam, which is owned by PFEL and leased to a shipper, is not used and useful in the trade, but is for the benefit of others, and its value will be excluded.

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 and allocating as between commercial cargo, including bulk cement and military cargo on the basis of the relation of the voyage expenses (63 percent to commercial and 37 percent to military), we find the fair and reasonable allowance for working capital to be $1,118,524.

Since working capital is the fund from which voyage expenses are paid, such expenses are the most accurate measure of the employment in working capital.

No allowance will be included in the rate base for "claims pending" or "other deferred charges and prepaid expenses". Working capital based on average voyage expense itself provides for these items.

On the basis of the foregoing, we find the fair value of the property devoted to the carriage of commercial cargo in the Guam trade to be as follows:

Ships	$1,137,274
Other Property	79,542
Working Capital	1,118,524
	$2,335,340

The projected net annual profit of $150,121 is approximately 6.42 percent of the rate base.

PFEL contends that a rate of return of 12.5 percent of its weighted average cost of capital would be lawful. Guam argues that PFEL should be limited to a rate of return equal to 6 percent of its invested capital.

We need not in this proceeding determine what the maximum rate of return is in this trade. A rate of return of 6.4 percent on property valued on the basis of the prudent investment standard is not unreasonable.

Exceptions not discussed here, nor reflected in our findings, have been considered and are denied as unsupported by reliable and probative evidence or are irrelevant to this decision.

It is found and concluded that PFEL's Tariff Nos. 2 and 3 applicable to general commodities and to cement in bulk transported between United States Pacific ports and ports in Guam, Mariana Islands, Midway Island and Wake Island, under investigation herein, are lawful, just and reasonable.

It is further found and concluded that APL's Pacific-Guam Tariff No. 5 and No. 6, APL's Atlantic-Guam Tariff Nos. 3 and 4 applicable to general commodities transported between United States Atlantic and United States Pacific and Hawaiian ports and ports in Guam, Mariana Islands, Midway Island, Wake Island, Ebeye (Kwajalein Atoll) and Eniwetok Atoll under investigation herein are lawful, just and reasonable.

An order discontinuing this investigation shall be entered as to both respondents.

ORDER

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

No. 901

GENERAL INCREASES IN RATES—PACIFIC-ATLANTIC/GUAM TRADE

Full investigation of the matters and things involved in this proceeding having been had, and the Commission on October 23, 1962, having made and entered of record a report stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof, and having found that the proposed rates, charges, tariffs, and regulations herein under investigation are just and reasonable and lawful;

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

By the Commission, October 23, 1962.

(Sgd) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 854

SWIFT & COMPANY AND SWIFT AND COMPANY PACKERS

v.

GULF AND SOUTH ATLANTIC HAVANA STEAMSHIP CONFERENCE, ET AL.

DISMISSAL OF COMPLAINT

On August 23, 1962, complainants filed a stipulation advising that the parties have entered into a settlement of this controversy and all related matters; that complainants accordingly desire to withdraw the complaint herein, and request that the Commission enter an order dismissing the complaint with prejudice; and that upon dismissal of the complaint, the conference and its members shall pay to Swift the sum of $13,335.90, representing the amount of damages. Therefore,

It is ordered, That the complainant herein is hereby dismissed with prejudice to its renewal and the proceeding is discontinued.
By the Commission, October 29, 1962.

(Sgd.) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 946

GRACE LINE, INC.

v.

SKIPS A/S VIKING LINE ET AL.

No. 950

SKIPS A/S VIKING LINE

v.

GRACE LINE, INC.

No. 953

SECTION 19, MERCHANT MARINE ACT, 1920, INVESTIGATION OF PRACTICES OF VIKING LINE

Decided November 13, 1962.

Neither Grace Line, Inc. nor Skips A/S Viking Line is shown upon the record in these cases to have violated section 14, 15, 16, or 18 of the Shipping Act, 1916.

Conditions unfavorable to shipping do not now exist in this trade area within the meaning of section 19 of the Merchant Marine Act, 1920, and no rules will be issued.

The complaints in Dockets No. 946 and No. 950 are dismissed, and Docket No. 953 is discontinued.

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:

These three proceedings have been consolidated. They involve carrier competition (and a resulting rate war) in the United States, North Atlantic-Venezuela trade (Venezuelan trade).

In No. 946, by complaint filed May 24, 1961, as later amended, the complainant, Grace Line, Inc. (Grace) alleges that the respondents in this proceeding, Skips A/S Viking Line (Viking) and certain individuals, firms, and companies[1] associated in one way or another with Viking, have since early January 1959, carried on a joint service in the Venezuelan trade under the name of Viking Line pursuant to an unfiled and unapproved Section 15 agreement; that this service was provided at rates lower by fixed percentages or by specific amounts than the established rates of the U. S. Atlantic and Gulf-Venezuela and Netherlands Antilles Conference (Conference); that Viking's rates were set without consideration by Viking of the usual rate-making factors; and that the service pursuant to said unfiled agreement was and is detrimental to the commerce of the United States, in violation of Section 15 of the Shipping Act, 1916 (the 1916 Act); and that the competition of Viking caused the Conference to receive numerous requests from shippers to protect them: that to meet this competition the Conference named certain emergency rates and opened other rates; that the Viking competition precluded Grace and the Conference from establishing and maintaining rates on a remunerative basis, and subjected Grace and "other members or associate member of the Conference,"[2] to irreparable injury; that Grace lost revenue of approximately $1,025,000 in 1960, and that this lost revenue was a major factor in its substantial cash loss in 1960 in the Venezuela trade. Grace prays that the Commission direct respondents to pay it as reparation for the injury caused by violations of the 1916 Act, the sum of $1,025,000 for 1960, and such further sums as may be determined to be proper. An amendment to the complaint alleges continuing damages.

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[1] C. T. Gogstad & Co., Jens Henriksen, O. N. Henriksen, Thor Eckert & Co., Inc., Risor Shipping Co. Skips A/S Imica, and D/S A/S Laly.

[2] By "associate member" Grace means Cia. Anonima Venezolana de Navegacion (CAVN). In fact, CAVN participated in many conference activities and privileges as hereinafter appears more fully, but whether CAVN had any true membership status is unclear.

Grace further alleges that the rates charged by Viking are unremunerative; that its service is operated at a loss; that Viking pays to freight forwarders excessive brokerage fees not fairly related to the value of services performed, all for the purpose of preventing and destroying competition among carriers in the Venezuelan trade; that the actions of Viking justify the issuance of a rule under Section 19, Merchant Marine Act, 1920 (the 1920 Act), and that Viking's activities subject the traffic in the Venezuelan trade, shippers and receivers thereof, and localities to undue and unreasonable prejudice and disadvantage, and are unjustly discriminatory and unfair between carriers, shippers, exporters, importers, and ports, in violation of sections 14 and 16 of the 1916 Act.

Other than Grace, no member, nor "associate member" of the Conference (including CAVN) intervened or testified in these proceedings. No shipper, receiver, exporter, importer, nor port intervened or testified. Grace has not in any way supported or followed up its contentions of violations by Viking of sections 14 and 16 of the 1916 Act. There is no evidence of the use by Viking of deferred rebates, fighting ships, retaliation against shippers, unfair contracts, undue preference, or other means of violation by Viking of sections 14 and 16 of the 1916 Act, and accordingly these allegations are not further considered herein.

An allegation by Grace of violation by Viking of section 18(b) (5) of the 1916 Act, was made at the hearing, as a trial amendment to the complaint in No. 946. This section, recently enacted, provides that, "The Commission shall disapprove any rate or charge *filed by a common carrier by water in the foreign commerce of the United States* or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States." (Emphasis supplied.) Section 18(b) (1) of the same Act provides in part that from and after ninety days following its enactment common carriers by water in foreign commerce and conferences of such carriers shall file with the Commission tariffs showing their rates and charges to and from United States ports and foreign ports. Since this section was enacted on October 3, 1961, it did not require filing of the rates contemplated by section 18(b) (5) until January 2, 1962. The taking of evidence herein was concluded in November 1961, and consequently the record does not include any rates required to be filed by Viking under section 18(b) (1). There being no such rates of Viking of record, there can be no

finding of unlawfulness under that section, of Viking rates, and the section 18(b)(5) allegation will not be further discussed.

In No. 950, by complaint filed June 27, 1961, complainant, Viking, alleges that respondent, Grace, threatened to retaliate against Viking unless Viking should abandon its rate policies and practices; that Grace proposed to the Conference a drastic reduction in rates either by reducing or opening them for the purpose of driving Viking out of the Venezuelan trade; that when the requisite number of other members of the Conference refused to concur in Grace's proposal, Grace indicated it would withdraw from the Conference, and did tender its resignation; that the Conference then agreed to the Grace proposal, and Grace withdrew its tendered resignation; that certain Conference rates were reduced and certain rates were opened; that those rates were on the principal commodities carried by Viking; that Grace reduced its rates on such commodities to the point at which, as Grace knew and intended, Viking could not profitably carry cargo in the Venezuelan trade; that the rate level maintained by Grace in 1960 was well below its costs, and noncompensatory; that such actions by Grace were and are for the purpose of excluding and preventing competition from Viking, and to drive Viking out of the trade, in violation of section 14 (Second) of the 1916 Act, that such actions did subject and now subject Viking to undue and unreasonable prejudice in violation of section 16 (First) of the 1916 Act; that during 1960, Viking's revenues were reduced by the amount of at least $968,000 as a result of the unlawful acts of Grace; that during 1961, in the period to June 8, Viking's revenues were reduced similarly in the amount of at least $253,000, and that Viking's loss of revenue resulting from the unlawful acts of Grace is continuing. Viking prays that the Commission direct Grace to pay Viking reparation of $1,221,000 and such further sums as may be proper. Viking also amended its complaint to allege continuing damages. Should reparation be found justified, and due to either Viking or Grace, both agree that another hearing should be held to determine the exact amount of reparation payable.

In No. 953, by order dated July 17, 1961, of the Federal Maritime Board, an investigation was instituted pursuant to section 19 of the 1920 Act, to determine whether Viking is cutting rates differentially below Conference levels, charging non-remunerative rates, or paying excessive brokerage fees, whether need exists for issuing rules to prevent such practices, and what the substance of such rules should be.

Upon the record, six questions are presented:

(1) Shall Grace Line, Inc. (Grace) recover reparations from Skips A/S Viking Line (Viking)?

(2) Shall Viking recover reparations from Grace?

(3) Are D/S A/S Laly (Laly) and D/S A/S Imica (Imica) violating section 15 of the Shipping Act, 1916 (1916 Act), by failing to file a joint service agreement, and /or by carrying out such agreement which has not been approved by the Commission or a predecessor agency?

(4) Shall we disapprove Viking rates under section 4(b)(5) of Public Law 87-346, 87th Cong., now section 18(b)(5) of the 1916 Act?

(5) Has Grace violated section 14, Second, of the Act by using fighting ships?

(6) Should the Commission promulgate appropriate rules under section 19 of the Merchant Marine Act, 1920 (1920 Act)?

Our Examiner, by initial decision which comes before us on exceptions, answered each question in the negative, and we agree with him.

Controlling facts upon which we base our conclusions and disposition of the matter, are found as follows:[3]

(1) The Conference has a dual rate system in this trade which has been in effect since as early as January 1, 1958. Since January 1, 1959, Conference contracts have been cancellable on 60 days notice by contract holders. As estimated by the Conference's chairman at the time of the events herein, it had tied up to dual rate contracts the great majority of shippers in the trade, and these shippers controlled about 95 to 98 percent of the cargo by volume.

(2) As of November 1961, the Conference had only four members, but in early 1959, when Viking entered the trade, the Conference had eight members, not including CAVN (see footnote 2). Some of the members have operated or operate out of Atlantic ports, and in particular mainly out of North Atlantic ports, some out of Gulf of Mexico ports, of the United States, and some out

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[3] Proposed findings and conclusions not substantially embodied in this report are rejected as cumulative, irrelevant, unsupported by reliable and probative evidence, or contrary to the weight of the evidence. Cf. Chief Judge Prettyman, of the District of Columbia Circuit, in *People v. Federal Power Commission*, 296 F.2d 348, 355 (1961), as follows:

"The inundation of the material with immaterial minutiae is one of the griefs which beset the administrative process. It is well to recognize it."

of both areas. Generally, cargo out of the Gulf ports is lower-rated bulk, while out of the North Atlantic ports, and in particular out of the Port of New York, there is more higher-rated general cargo.

(3) Grace operates only out of Atlantic ports, and is the principal carrier in the trade. Its principal competitor is CAVN. Conference members operating in November 1961, from the North Atlantic ports are Royal Netherlands Steamship Company (Dutch Line) and Alcoa Steamship Company (Alcoa). The last named two lines and CAVN also operate out of Gulf ports, as does Lykes Bros., another Conference member.

(4) While CAVN is only associated (non-technically) with the Conference, it has many of the privileges of Conference members, and has exercised a virtual veto power over Conference rates. CAVN has had an understanding with the Conference members since 1950, under F.M.B. Agreement No. 7777. When the Conference approves a rate, before it is made effective, CAVN is notified, and may concur with the proposal. When CAVN has not concurred, the Conference lines have generally bowed to CAVN's wishes and canceled their proposals, except that in many instances, CAVN made alternative and compromise proposals, or the Conference did so, and these alternative rates became effective. In instances in which the Conference decided to go ahead regardless of CAVN's wishes, the Conference gave CAVN 30 days' notice. The Conference seldom if ever made rates effective contrary to CAVN's wishes.

(5) CAVN is treated as a member of the Conference for the purposes of the shippers' contracts, that is, if a Conference contract-shipper ships via CAVN, the Conference does not consider it to be a violation of the Conference's exclusive patronage contract, whereas if said shipper utilized any non-Conference line, other than CAVN, it would be considered a violation. Prior to February 1961, CAVN generally charged the non-contract rates to all shippers whether or not they were contract signers. Since February 1961, CAVN has generally charged Conference contract rates to contract shippers and non-contract rates to non-contract shippers. The Conference, itself, because of the rate war hereinafter discussed, suspended its non-contract rates from June 1960, through December 31, 1960, and during that period the Conference lines gave all shippers the contract rates. This suspension was continued until February 1961. Prior to February 1961, when CAVN

agreed to abide by the dual rate system, any shipper was free to ship by independent or non-Conference lines, and still obtain the Conference contract rate when shipping via CAVN.

(6) Prior to the rate war in 1960, which resulted in reductions in many Conference rates, there had been no general increase in Conference rates since 1955, because CAVN asked the Conference not to raise rates in the interests of the people of Venezuela. CAVN, in turn, had been told by its owner, the Venezuelan government, not to increase rates.

(7) The Venezuelan trade depends naturally upon the prosperity of that country. The activities of the oil companies and the government's policies on housing, construction and oil prices affect the volume of imports of both industrial and consumer goods. The Venezuelan trade was normal in 1955, 1956, and 1959, and enjoyed a peak or boom in 1957, which lapped over into 1958, but it suffered a major fall-off in 1960, which continued into the late spring of 1961, and since then the volume in the trade has firmed up again. The fall-off in trade in 1960 was about 18 to 20 percent in weight. Much of the fall-off was caused by a lack of cargo moving to the oil companies, which had restricted their operations considerably. Price control by the Venezuelan government hampered oil exported in competition with lower-priced Russian and Arabian oils. The Venezuelan government has from time to time taken actions, such as the exoneration of certain cargo from import duties, to encourage shippers to use CAVN. The government also has provided for the payment of collect freight in Venezuelan money.

(8) Several lines have entered and quit the Conference from time to time. Generally, since January 1959, they left the Conference because of intense competition between all carriers, including the rate war in the trade in 1960, and because of Venezuelan government actions which tended to reduce their share in the volume of cargo and to increase their costs. Torm Lines came into the Conference in August 1958, operated out of Atlantic ports, and left the Conference about October 1960. The Peninsula and Occidental Steamship Company (P. & O.), which also had been operating out of Atlantic ports in 1958, and since, left the Conference on or before May 31, 1961. It now operates sporadically as a non-Conference liner. Belgo-Swedish Lines, operating out of Gulf ports, joined the Conference in February 1959, having been in the trade before that time, and left the Conference

in February 1960, resuming operations as a non-Conference line. Insco Lines left the Conference in or about May or June 1960.

(9) Another carrier left the trade for different reasons. North Atlantic & Gulf Steamship Company (Norgulf) began operations in about October 1954, with a weekly service out of the ports of New York and Baltimore, and a fortnightly service out of the port of Philadelphia, to the principal ports in Venezuela, LaGuaira, Maracaibo, and Puerto Cabello. At one time it also operated a fortnightly service out of the Gulf. Norgulf operated in various areas, including the Venezuelan trade, with a fleet which at times included sixty ships. Its service to Venezuela was profitable, but this was at a time when there was a great demand for ships. Unfortunately for Norgulf, it made a poor estimate of the ship-charter market, suffered financially, went bankrupt, and after operating for a time under a trustee, lost key personnel, including its Venezuelan agent. Norgulf left the Venezuelan trade about July 1, 1958, having made 22 sailings in the trade that year.

(10) While operating in the Venezuelan trade, Norgulf chartered three C1-MAV1 type vessels which now are chartered by Viking, and which now are known as the LAGO VIKING, the LEIF VIKING, and the BENNY VIKING. At the time Norgulf went bankrupt it was chartering these vessels at $32,500 each per month on charters fixed two years ahead. These C1-MAV1 vessels are well suited to the Caribbean service because they have considerable deadweight compared with their cubic capacity, making them efficient northbound bulk carriers. The first two of these vessels were in Norgulf's Venezuelan trade on a permanent basis, and the BENNY was an in-and-outer in that trade.

(11) Some of Viking's New York agent's officers were formerly employed by Norgulf, but otherwise the ownership and management of Viking is entirely new, having no connection with the ownership or management of Norgulf. In the matter of setting rates, the Norwegian management of Viking relied heavily, if not almost entirely, on Viking's New York agent. Viking's entrance into the trade provided to the ships' owners a use for these three ships at a time when the demand for such ships was poor. In fact, at the time, no other profitable employment for these ships was available to their owners.

(12) Viking entered the Venezuelan trade in January 1959, operating out of North Atlantic ports, with these three C1-MAV1 type vessels, offering a fortnightly service as a common carrier

independent of the Conference, charging rates generally lower by 10 percent than the rates of the Conference, and paying brokerage to freight forwarders generally of 2.5%, but in some instances, 5% to 10%, instead of the Conference rate of 1.25 percent. Usually when a non-conference line enters a trade it resorts to higher rates of brokerage, as well as to lower freight rates. Thus, Viking was following custom in its rate and brokerage practices.

(13) From time to time there had been a number of non-Conference operators out of the Gulf ports to ports in Venezuela, but the Conference generally had coped with them, or was not substantially affected by them. However, (except for CAVN, which cooperated with the Conference) there had been no serious attempt to operate a regular liner non-Conference service out of the United States North Atlantic ports to Venezuela. Viking upset this pattern, in that it not only offered a regular fortnightly liner service, but also had good Venezuelan port coverage, carried a large range of general commodities, and offered some refrigerated space along with general cargo space in the same vessels.

(14) The officers of the New York firm which became the agent of Viking, felt, in contrast to the relatively low-paying cargo out of the Gulf, that the higher-rated cargo out of the North Altantic ports, particularly the port of New York, even with rates 10 percent below the Conference's rates, would support the operation of a successful non-Conference line. Of course, even from the North Atlantic ports, all lines need to supplement the so-called "cream" type of the cargo with lower-rated heavier-loading types of cargo, in order to have sufficient revenues, and where C1-MAV1's are used, also to obtain needed weight.

(15) Viking's vessels are relatively slow at about 10.5 knots, compared to the vessels of Grace at about 16 knots and 21 knots, and to the vessels of other Conference lines and of CAVN at about 13.5 knots. Viking offered fewer sailings, one every two weeks, compared to the sailings of the Conference lines and CAVN as a whole, about 18 every two weeks in 1959, when Viking entered the trade. At that time Grace had 3 weekly sailings, CAVN, 2, Dutch Line, 2, Alcoa, 1, and Torm Lines, 1. Since Viking's ships were slower, since its service was less frequent, and since it did not offer container service, or a service with the transportation of cargo on pallets in the vessels, Viking and its New York agent felt that it had nothing to sell but a cut-rate service.

(16) In 1959, the Conference, and Grace in particular, became sufficiently concerned with Viking's competition to publish about 15 so-called emergency rates. These were rates reduced below regular rates, and scheduled to expire on a definite date, at which time the old rates would again become effective.

(17) In the meantime and on later occasions, overtures were made by Grace and by Conference officials to Viking as to the possibility of its joining the Conference, but it declined unless it would be guaranteed a percentage of the tonnage, or unless it could charge lower rates than other members, as a class "B" member, which latter possibility had been suggested in the Office of Regulations of the Federal Maritime Board. The Conference would not consider guaranteed cargo-percentage, or anything but regular membership and Conference rates for Viking.

(18) Besides Viking, there have been and are other non-Conference operators in the Venezuelan trade. Such carriers have included Dovar Line, American Defense Line, American Caribbean Line, Caribbean-Hamburg Line, Three Bays Line, and Wallenius. Wallenius carried automobiles at very low rates, and autos are one of the largest-volume cargoes moving to Venezuela. Viking had little effect on the rates on autos in this trade. These carriers' services have been sporadic, were in small ships, have covered a limited number of ports and fewer commodities or have been limited to particular shippers. Some of these independents have provided service only incidentally to their service at government missile sites in the Caribbean area. Nevertheless, Viking takes the position that were it not in the trade actively as a non-Conference carrier, some other line, such as Dovar, would be more actively competing in Viking's place. At times Viking has had primarily to meet the competition of another independent, rather than the competition of the Conference Lines.

(19) The airlines have competed in the trade, taking cargo such as television sets, and refrigerators. Overall, however, airline competition was minimal. The principal competition, however, has been between the Conference lines and Viking, and intra-Conference competition between member lines themselves, including competition between Conference members and CAVN.

(20) While Grace believed Viking was the cause of the worst troubles in the trade, this opinion was far from unanimous among Conference members, as indicated by the fact that no other mem-

ber joined in Grace's complaint, or intervened herein. At a meeting of Conference principals in June 1960, the Dutch Line felt that the inability of the Conference lines to move effectively against contract-violating shippers was the factor which had unsettled the Conference rate structure. CAVN at that meeting took the position that the Conference's real problem was "open rates," and not Viking competition. Alcoa was opposed to open rates.

(21) For the entire time Viking had operated in the Venezuelan trade, as an overall average, Viking carried no more than about five or six percent of the cargo by volume, although for a short time in the latter part of 1959, it carried about eight percent. Grace carried about 35 percent of the cargo in the trade in 1959, and about 33 percent in 1960.

(22) By January 1960, Grace was genuinely disturbed about the competition of Viking. One of its non-policy-making officials, a highly-regarded freight solicitor and assistant vice-president, in 1959 and 1960, stated to an officer of the New York agent of Viking that Grace was prepared to lose a couple of million dollars to get rid of Viking because Viking was in Grace's hair. Viking's captains told Viking's Norwegian manager that Grace was threatening to retaliate against Viking. The same report also came to Viking's New York agent from its Venezuelan agent. Grace felt that Viking was the first rate-cutter and, thus, the beginner in the rate war of 1960. Grace felt that it had to respond to Viking's rate-level with rate-cuts, in order to retain the loyalty of its shippers, and to keep them competitive with shippers using Viking.

(23) On January 8, 1960, Grace moved the Conference to open rates on nineteen commodities carried by Viking. The motion was passed subject to the concurrence of CAVN, and it was provided that another meeting would be held if CAVN did not concur. CAVN refused to concur. Grace moved at a meeting on January 14, 1960, that the open rates be made effective by giving the required 30-day notice to CAVN. There was no second to Grace's motion. By letter dated January 15, 1960, Grace tendered its resignation from the Conference, effective in 30 days.

(24) A Conference principals' meeting was held on February 10, 1960, at which time Grace withdrew its resignation. At a meeting on February 18, 1960, certain emergency rates on 22 commodities were agreed upon. These rates were later concurred in by CAVN. At a meeting on February 23, 1960, rates were

declared open on more than 30 commodities. The rates were opened effective March 7, to expire April 30, 1960. One rumor in the trade was that the rates were opened for about sixty days because the Conference expected Viking to be out of business in that length of time.

(25) Additional rates were opened from time to time with the concurrence of CAVN, and the expiration dates of open rates were extended. Generally rates were opened on all commodities which Viking carried. The open rates were continued in effect through 1960, and part of 1961, during which year, rates were individually and by groups gradually restored to normal. Some rates were closed in the fall of 1960. The rate war began about February 1960, and substantially ended about February 1961.

(26) The Conference decided to close rates despite the opposition of Grace. Some members apparently felt that intra-Conference competition was having worse effect on their financial conditions than Viking's competition. Certain members even feared that they would be forced to quit the trade. When the rate war ended, Viking was, as it still is, in the trade as an independent. As the Conference raised its rates back to or toward normal, Viking also raised its rates, but still maintained rate-levels below those of Conference's.

(27) When Conference rates[4] were opened, it was the policy of Grace not merely to meet Viking's rate, or go $1 or $2 under Viking's rate, but to go down immediately to the minimum rate which Grace considered it could charge. Thus when rates were opened, Grace's rates were not decreased by stages, but generally in one big cut.

(28) The Conference rate effective on and after December 14, 1955, on agricultural implements, was $27. It was opened March 7, 1960, and Grace made its rate $12 on that date. Viking's rate prior to the rate war was $24, except for one shipment at $20.25 early in 1960. On household washing machines, the normal Conference rate of $20 was opened with a minimum of $15 effective February 22, 1960, which was the rate Grace made effective on that date. The Conference opened the rate without any minimum effective March 7, 1960, and Grace's rate on that date became $11. Viking's rate prior to the rate war was $18. On toys, with a value of less than $350 a freight ton, Viking normally charged $31.50

[4] Rates herein are stated per ton, weight or measurement.

and the Conference charged $35. During August 1960, both Viking and Grace charged $13.50. Grace intended to go as low as Viking's break-even point in setting its rates, but even such low rates were met, and Grace went to even lower rates. On individual rates, both Grace and Viking undoubtedly reached non-compensatory levels.

(29) When the rate war ended, although many rates went up to normal, others while raised, did not rise to their previous levels. Commitments to shippers kept some rates from returning all the way up to their normal levels. Viking's policy during the rate war was to cut its rates, so long as it obtained enough revenue to cover loading, discharging and commissions, plus "something for the ship", such as $1 or $2 a ton.

(30) Viking had its ships under time charters at $18,000 each per month on six-month renewal bases, or about $600 per day. The ships' owners, rather than Viking, had to pay operating expenses, including crews' wages, food, maintenance and repairs, etc. Bunkers, however, were a cost of the charterer. Operating expenses of a C1-MAV1 were about $17,000 a month. The charter rate was adjusted downward slightly for operations in 1959, and downward substantially for 1960, so that technically Viking broke about even instead of operating at a loss in those years. In actuality, both the Viking and the Grace operations in the Venezuelan trade in 1960 lost very substantially. For the first six months of 1961, Viking's operating results considerably improved.

(31) The losses of Viking which were absorbed by the owners of its ships, were in part absorbed by the Norwegian government. The Norwegian income tax rate of at least one of the owning companies was 65 percent and losses of Viking in the Venezuela trade were offset against the profits of other ventures of that company. Similarly, Grace Line's losses may be said to have been absorbed by the United States Government to some extent.

(32) Grace is a subsidiary of W. R. Grace & Co., which said in its annual report for 1960, that "five adverse factors" resulted in Grace's operating at a loss in 1960, for the first year since 1932. These five factors were stated to be the world-wide surplus of cargo shipping capacity, the downturn in trade with Venezuela, losses in Grace's Great Lakes service, Grace's inability to inaugurate its container-ship service in 1960, and inclusion of the high cost of certain South-American government-owned or sup-

ported lines in the determination of the amount of Grace's operating subsidy. No mention was made in this report of competition with Viking Line as a loss factor.

(33) The rate war lasted throughout 1960, in which year there was also a major fall-off in trade with Venezuela. The rate war ended gradually in 1961, and Grace's, the Conference's and Viking's rates gradually increased in 1961. In November 1961, the trade was still improving, but the Conference with fewer members, had a total of only about 12 sailings every two weeks compared to 18 prior to the rate war in 1960.

(34) In its first year of operation, 1959, Viking charged compensatory rates. In 1960, both Viking and Grace charged less than compensatory rates, at least on some commodities. Viking carried refrigerators, washing machines, and household stoves in large quantities, and on this type of cargo Viking was receiving substantial revenues and profits. Such cargo was obtained strictly on a rate basis.

(35) Viking's rates were made generally below the Conference's rates on both the high and low-rated commodities. Where the Conference had low rates, Viking cut as little as possible. Sometimes a cut of $0.25 or $0.50 was all that was needed to attract the cargo. On the higher-rated cargo, Viking generally cut the rates 10 percent, but went even lower where it felt a larger cut was necessary to attract the cargo, and it could still make a profit. The 10 percent cut was in the tradition of other independent lines. Rates cut more than 10 percent were usually on the high side, and in the range of $40, $50, $60, or $70.

(36) Viking's rates did not always go as low as the Conference's rates. For example, Viking refused to go below $15 on New York State beans, but a Conference line carried them at about $13.50 during the open rate period.

(37) As an independent, Viking did not maintain a tariff of its rates open to the public, although it was obliged within 30 days after one of its ships sailed to file the rates on cargo transported by that ship with the Commission.[5] In the meantime another Viking ship could have sailed with cargo booked at lower or higher rates. Thus, the Conference lines might wait as much as 30 days to ascertain Viking's rates from its filings with the Commission, and of course, it took additional time for member lines

[5] *Section 19 Investigation 1935*, 1 U.S.S.B.B. 470, 502 (1935).

to agree on new rates, make them effective, and book cargo. Viking to some extent was able to keep the Conference lines in the dark as to its rates. Its rates could be ascertained to an extent from sources other than tariffs, such as phone calls to Viking. The record as to availability of information from this source is uncertain, one witness saying a telephone call would get the rates, and another witness saying that only known friendly voices would receive rate information. Of course, carrier's rates as quoted to a shipper are often passed on by the shipper to a competing carrier, at times accurately. Venezuelan custom manifests available to competitors would also show Viking's rates.

(38) Viking's cargo comes largely from freight forwarders, and as much as 85 percent of its shipments are made by freight forwarders or list the names of forwarders on the shipping documents. On about 87.5 percent of its shipments, Viking paid 2.5 percent brokerage (the customary rate for "independents") to the freight forwarder. During the period of record, Viking paid brokerage in excess of 2.5 percent on about 100 shipments out of over 4,000 shipments. On a few occasions no brokerage at all was paid. Viking's agent had discretionary authority to exceed the rate of 2.5 percent in paying brokerage. Brokerage of five percent and ten percent was paid at times. The record is convincing that in most instances it was Viking's lower freight rates which attracted the cargo, but that in some instances the cargo was secured by the payment of 5 or 10 percent brokerage. Viking's 2.5 percent brokerage policy was the same as that of other non-Conference lines.

(39) Viking payments to freight forwarders compensated them for the preparation of complicated analyses of manufacturer's lists of articles shipped, with stowage factors and other documents, which Viking's agent did not have the information and facilities to prepare, but were primarily made as payment to the forwarders for bringing the cargo to Viking. Viking's brokerage policy was in part compelled by the competition of Dovar Line or by an unnamed Conference line, not Grace. One line was cited to Viking's agents many times, as competing both rate-wise and brokerage-wise, until it left the Conference in 1960 or early 1961.

(40) Except as to Grace and Viking, the record contains nothing specific about the operating results of carriers in the Venezuela trade, but several Conference lines lost money in 1960. Those carriers generally opposed opening of the rates, and gen-

erally supported closing of the rates after they had been opened because of their losses.

DISCUSSION AND CONCLUSIONS

The foregoing facts support and require denial of reparation and requested rules.

Neither Viking nor Grace can show that the applicable statute (section 22 of the 1916 Act) makes the losses they have sustained legally or equitably recoverable.

Section 22 (under which both Grace and Viking necessarily complain) makes recoverable as reparation, *only* damages *caused by a violation of the 1916 Act.* The complaints and argument of both parties recognize and demonstrate that this is true. Each, as complainant, alleges and seeks to prove violation of the Act (with resulting injury) by the other. As respondent, each denies and disproves the other's allegations just described.

While Grace, in its complaint in No. 946, alleged violations of sections 14 and 16 of the 1916 Act by Viking, the allegations are wholly without evidentiary support, and have not been asserted by brief or argument.

It is shown on pages 3 and 4 of this report that no Viking rate here involved is subject to the provisions of section 18(b)(5) of the 1916 Act, and this disposes of Grace's allegation and contention based upon that section.

From the carefully drawn and detailed counts of the Grace complaint we extract one remaining allegation, which is that the 1916 Act (specifically, section 15) has been and is now being violated.

In effect, Grace's allegations and arguments as to violation of section 15 are (1) that the owners of Viking by agreeing to create Viking as an operator in the Venezuelan trade, entered into an agreement which section 15 requires to be filed immediately with the Commission, and that inasmuch as that agreement has not been filed (as it has not), Viking's owners have violated section 15 by failing to comply with its filing provisions, and (2) that Viking's operations in the Venezuelan trade constitute carrying out by Viking's owners, of an unapproved section 15 agreement,[6] also a violation of section 15.

[6] Common usage has established the term "section 15 agreement" as meaning an agreement subject to the provisions of section 15 of the 1916 Act.

The critical question is whether the agreement to create Viking is, in view of Viking's intended operations in the Venezuelan trade, a section 15 agreement. If so, section 15 is violated, although this would not necessarily mean that Grace should recover reparations. In our opinion, the agreement is not a section 15 agreement, and section 15 has not been violated by failure to file the agreement, or by Viking's operations.

To be subject to the provisions of section 15 an agreement must be an agreement of a common carrier by water or other person subject to the 1916 Act with another such carrier or person "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 agreement between Laly and Imica to create Viking as a berth operator in the Venezuela trade may well be considered to provide for a cooperative working arrangement between them. Assuming, *arguendo*, that it does so, the agreement nevertheless is not subject to section 15 unless it is between a common carrier or other person subject to the 1916 Act and another such person or carrier. As Laly and Imica are not carrying on the business of forwarding or furnishing wharfage, warehouse, or other terminal facilities in connection with a common carrier by water, and were not when they entered into the agreement, neither is or was when the agreement was made an "other person subject to the (1916) Act" (Section 1). Grace contends however that, although when the agreement was made neither Laly nor Imica was a common carrier by water (and this we find as fact), *both* became such carriers the instant Viking began operating; that the agreement thus became an agreement between common carriers; and (as it has been neither filed nor approved) Viking's operations constitute carrying out an unapproved section 15 agreement between Laly and Imica *by Laly and Imica.* The argument's ingenuity exceeds its merit. It is, in effect, that as Viking is operating as a common carrier by water, *so are Viking's owners,* Laly and Imica. The argument proves too much. If it be correct,

it means that all individual incorporators of a steamship line have always been and are violators of section 15 of the 1916 Act. This was never the legislative intent, nor is it the legislation's effect. Section 15 was enacted to subject anticompetitive agreements between those engaged in specified maritime enterprises to the scrutiny of a regulatory agency, and to authorize that agency under stated conditions to exempt such agreements from the operation of the antitrust laws, and this it does. This agreement is not between parties specified by section 15. Therefore section 15 does not require that it be filed with and approved by the Commission nor can the Commission, by approval, exempt it from the operation of the antitrust laws. Although, as we have indicated, there is a measure of logic in arguing that because Viking, the *whole*, is engaged in common carriage by water, so are Laly and Imica as Viking's *parts*, sufficient answer is given by our conclusion that this does *not* make Laly and Imica common carriers by water *within the meaning of section 15 of the Act*. Indeed, what Judge Byers said in *The Southern Cross*, 24 F. Supp. 91, 93 (D.C. E.D. N.Y., 1938) is directly applicable to Grace's argument:

> If logic were an end in itself, the argument * * * would at least be plausible. But when logic and common sense are approaching head-on, it is not the latter which must give way.

Inasmuch as all section 15 cases cited by Grace involve agreements between common carriers or other persons subject to the 1916 Act, they are inapplicable here.

Upon the basis of what has been said we conclude that neither Viking nor any Viking interest was obligated to file or forbidden to carry out the agreement under consideration. We now turn to Viking's charge that Grace has violated section 14, Second of the 1916 Act by operating fighting ships.

Section 14, Second forbids any common carrier by water to operate a "fighting ship" and defines the term. The statute states that a "fighting ship" is "a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade."

Viking contends that Grace used its vessels to destroy Viking's competition by driving Viking out of the Venezuelan trade, and therefore each Grace sailing was the operation of a fighting ship. The argument though specious, is not new. Viking recognizes that it was advanced and overruled in *Seas Shipping Co.* v. *American*

South African Line, 1 U.S.S.B. 568 (1936); contends that *Seas* was incorrectly decided, and asks us to hold to the contrary. Due regard to the intention of Congress in enacting section 14, Second prevents.

The Alexander Committee which after its far-reaching and painstaking investigation secured the passage of the 1916 Act, recognized that operating fighting ships on the one hand, and cutting rates for cargo carried on vessels regularly employed on the other, are *two different* methods of competitive operation.

In its report the Committee pointed out the testimony of witnesses that in the Atlantic-Gulf Trade steamship conferences could then crush independents "by putting in steamers to fight the competition" which is to say, the operation of fighting ships, "*or* by having their regular boats cut rates to an unremunerative basis" (Vol. 4, p. 394) (emphasis added.) The Committee's recommendation, which Congress followed by enacting section 14, Second was intended to and does prohibit putting in steamers to fight the competition, but was not intended to and does not prohibit the cutting of rates on "regular boats", even to an unremunerative level. This conclusion is strengthened by the fact that the evidence about "fighting ships" before the Committee all related to ships specially put on to fight competitors, and in no instance to cutting rates on vessels regularly operating on the route.

Grace having put in no steamers to fight Vikings' competition has not operated fighting ships. Nothing in this record indicates that Grace has increased sailings, changed sailing dates, or in any way changed its normal operating pattern.

Viking has failed to support its charge that Grace's rate-cutting subjected Viking to unreasonable prejudice and disadvantage in violation of section 16 of the 1916 Act by appropriate evidence or convincing argument. Grace's cut rates, if not met by rates as low or lower, were effective equally to take cargo away from all other operators—not just Viking. The Examiner's finding that Grace did not violate section 16 as charged is not challenged by exception or by oral argument.

We turn now to the sole remaining issue—if, under section 19 of the 1920 Act, we should issue rules with respect to the payment of brokerage or "systematically undercutting" conference rates. It is wholly unnecessary to discuss the merits or demerits of any proposed rule, because no rule can issue unless and until we find that conditions unfavorable to shipping exist in this trade, and

we conclude upon the whole record that such conditions do not now exist. As stated in the initial decision, this trade is now relatively stable, and the carriers' prospects are improving. It is well for us to point out, however, that payment of excessive brokerage in our opinion is a pernicious practice, inimical to the best interest of shipping in our foreign trade and oppressive to the shipper who must eventually bear the cost. Hence, the Federal Maritime Commission will review this matter on an industry-wide scale. We are by no means sure that payment of excessive brokerage is made only by non-conference lines.

Further, we do not consider systematically undercutting a competitor's rates a desirable or even valid method of ratemaking. Advertising by a carrier that its rates are so fixed is provocative of retaliation and rate war, with resulting instability detrimental to our foreign commerce.

Our ultimate conclusions are:

(1) That neither Grace nor Viking has violated any provision of the 1916 Act, and therefore neither is entitled to recover reparations from the other.

(2) Conditions unfavorable to shipping do not now exist in the Venezuela trade and therefore no rules to meet such conditions will be issued.

(3) The complaints in Docket Nos. 946 and 950 should be dismissed and Docket No. 953 should be discontinued.

An appropriate order will be issued.

FEDERAL MARITIME COMMISSION

No. 946

GRACE LINE, INC.

v.

SKIPS A/S VIKING LINE ET AL.

No. 950

SKIPS A/S VIKING LINE

v.

GRACE LINE, INC.

No. 953

SECTION 19, MERCHANT MARINE ACT, 1920, INVESTIGATION OF PRACTICES OF VIKING LINE

The Commission on this day having entered its report containing its findings and conclusions herein, which report is made a part hereof:

It is ordered:

(1) That Dockets No. 946 and 950 be, and they hereby are dismissed; and

(2) That Docket No. 953 be, and it hereby is, discontinued

By the Commission, November 13, 1962.

(Sgd.) Thomas Lisi
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 244

MARTINI & ROSSI S.P.A. ET AL.

v.

LYKES BROS. STEAMSHIP CO. INC.

Decided November 13, 1962.

Permission granted Lykes Bros. Steamship Co. to waive collection of undercharges on shipments transported from Italy to the United States.

Walter Caroll and *Edward S. Bagley*, for respondent.

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 application made by Lykes Bros. Steamship Co., Inc. (Lykes) pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure,[1] for permission to waive collection of undercharges due on certain shipments transported from Italy to the United States on the SS. *James Lykes* in February 1962.[2]

[1] Rule 6(b) provides:

Carriers or other persons subject to the shipping acts may file applications for the voluntary payment of reparation or for permission to waive collection of undercharges, even though no complaint has been filed pursuant to rule 5(b). All such applications shall be made in accordance with the form prescribed in Appendix II(5) herein, shall describe in detail the transaction out of which the claim for reparation arose, and shall be filed within the 2-year statutory period referred to in rule 5(c). Such applications will be considered the equivalent of a complaint and answer thereto admitting the facts complained of. If allowed, an order for payment will be issued by the Commission.

[2] The shippers and commodities involved are Martini & Rossi S.p.A., vermouth; Fiat, S.p.A., automobiles; Eternit S.p.A., asbestos pipe; Riccardo Giusti & Figli, wine; S.p.A. Lucchese Olii & Vini, olive oil; Serchi Stefani, wine; Calzaturificio Orbio di C. Capobianco, shoes.

By section 18(b) of the Shipping Act, 1916, effective January 2, 1962, water carriers in the foreign commerce of the United States were for the first time required by statute to file with the Commission tariffs showing all their rates and charges, and were prohibited from collecting or receiving other than the rate or charge so filed for the transportation of property, or service connected therewith.[3] During the month of January 1962, the carrier Lykes had on file with the Commission its Special Rate Circular No. 2 containing rates for commodities such as those here involved. This Circular had an expiration date of January 31, 1962, after which the higher rates published in Lykes' Westbound Mediterranean (excluding Spain) U. S. South Atlantic & Gulf Ports Freight Tariff No. 1, also on file with the Commission (hereinafter "Westbound Mediterranean Tariff"), would apply absent an extension of the Circular. Lykes intended to extend the lower rates but due in part to oversight and in part to misunderstanding of the newly enacted tariff requirements, as aforesaid, its Genoa, Italy office (the issuing office for the tariff) failed to make the necessary filing with the Commission.

Lykes' employees continued to solicit cargo on the basis of the lower rates, apparently in ignorance of the fact that Circular No. 2 had expired. On discovering the situation Lykes filed Special Rate Circular No. 3, effective February 20, 1962, reinstating the lower rates but in the interim the shipments here in question had been booked, transported and paid for on the basis of the lower rates. These were not the rates legally applicable to the shipments, since Lykes' Westbound Mediterranean Tariff went into effect, albeit inadvertently, on February 1, 1962, and was in force until February 20, 1962. Having received less than the lawful rates, Lykes is in violation of the new statutory requirement. It is also obligated to collect the undercharges from the shippers concerned.

The Examiner in his initial decision concluded that the Commission was without power to grant Lykes a waiver of the duty to collect the undercharges because, as to the foreign commerce, the Commission lacks the authority "to determine, prescribe, or

[3] Public Law 87-346 (75 Stat. 762, 764-5). Prior to this enactment individual water carriers engaged in the foreign commerce of the United States were not required to file rates in inbound trades except in the East Coast of South America to the Pacific Coast of the United States trade. Conferences pursuant to their agreements filed schedules of inbound rates after they became effective. In the outbound trades, the requirement by administrative regulation was that the rates be filed within 30 days after becoming effective. P. L. 87-346 also provides that no rate increase can be effective until 30 days after its filing, unless the Commission authorizes a shorter period, but a decrease may be made effective upon filing.

order enforced a just and reasonable maximum rate." The theory here is that, were it so empowered, the Commission might find unjust or unreasonable the Westbound Mediterranean Tariff rates and in lieu thereof prescribe the lower rates of the Special Circular as just and reasonable maximums, but lacking such power the Commission may do nothing. Lykes took exception to the Examiner's conclusion and we also disagree with it.

In our opinion, the issue is not one as to the level of rates. Nor is the power to prescribe a substitute rate for one appearing in a tariff a prerequisite to the granting of relief in cases of bona fide rate mistake or inadvertence under Rule 6(b). We so indicated in our most recent case under the rule, *Y. Higa Enterprises, Ltd.* v. *Pacific Far East Line*, 7 F.M.C. 62 (1962). That case arose in the domestic off-shore trade where we have full rate authority and could have exercised it but did not. We thus avoided any suggestion that our power to afford relief was restricted to situations where we could do so by prescribing a rate. In *Higa* we merely described as an "unjust and unreasonable practice" the carrier's neglect in filing a tariff change embodying a rate that the parties, acting in good faith, had agreed would apply. We stated that an innocent shipper should not be made to bear the consequences of the carrier's failure, and thereupon granted the requested waiver.

The instant case presents essentially the same kind of situation. The carrier's failure to continue in effect the rates it had been charging and which it actually quoted during the relevant period, was the result of oversight and misunderstanding as to a statutory provision that had been in force approximately one month. The record contains no hint that the parties concerned were not acting in complete good faith. The fact that the commerce involved is foreign is not significant, in the view we take of our right to afford relief under Rule 6(b).

The paramount question in cases of this type is whether granting the requested relief will result in discrimination. This is because the primary purpose of the new tariff filing provisions of the Shipping Act, 1916, as with similar provisions on which it was based, is to prevent discrimination. If this purpose will not be defeated we think we are unquestionably clothed with discretion to permit corrective action under the rule. We have the responsibility for administering that Act and also the Intercoastal Shipping Act, 1933, and are empowered among other

things to see that equity and justice are done in the matter of reparations.[4]

Every precaution will be taken to insure that discrimination does not result from the approval of applications under Rule 6(b). To that end the requirements of the rule must be fully complied with and the Examiners should freely utilize their authority to obtain any additional information deemed necessary. Where the facts show that there will be no discrimination, and that the case is one of bona fide rate mistake or inadvertence, it seems to us clear that we may exercise our discretion to remedy the situation. Our action, however, cannot excuse parties from any statutory penalties to which they may be subject.

The record in this case shows that granting the relief sought will not result in discrimination and that such grant, as in the *Higa* case, *supra,* will relieve innocent shippers from the consequences of the carrier's failure to effectuate an intended tariff filing. For these and other reasons above mentioned, the waiver will be granted.

[4] See *Flota Mercante Grancolombiana, et al.* v. *FMC and USA,* 302 F. 2d 887 (D.C. Cir. 1962).

ORDER

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 244

MARTINI & ROSSI S.P.A. ET AL.

v.

LYKES BROS. STEAMSHIP CO., INC.

WHEREAS, the Commission has this day made and entered a report stating its findings and conclusion herein, which report is made a part hereof by reference:

It is ordered, That the application of Lykes Bros. Steamship Co., Inc., to waive collection of certain undercharges be, and it is hereby, granted.

By the Commission, November 13, 1962.

(Sgd.) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 999

AMERICAN GREAT LAKES—MEDITERRANEAN EASTBOUND FREIGHT CONFERENCE—SURCHARGE ON SHIPMENTS FROM BUFFALO, NEW YORK

Decided November 20, 1962.

Surcharge of 10% imposed by Conference on all cargo moving from Buffalo to Mediterranenan Ports found to be unjustly discriminatory and ordered set aside.

James O. Moore, Jr., *Frank G. Raichle*, and *Ralph H. Halpern* for petitioner, Nelson A. Rockefeller, Governor of the State of New York.

Burton H. White for respondents.

Harold B. Ehrlich for Niagara Frontier Port Authority, *Edward Brick* and *W. G. Gilbert* for Buffalo Area Chamber of Commerce, *Arthur W. Todd* for Port Control of the City of Cleveland, Council of Lake Erie Ports, Great Lakes Ports Traffic Committee, and *Frank Catanzarite* for the Buffalo Corn Exchange, intervenors.

Donald J. Brunner, 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:

On May 30, 1962, acting pursuant to Section 16, First,[1] of the Shipping Act, the Governor of the State of New York (petitioner) filed with the Commission a protest and petition wherein it was alleged that on April 13, 1962, the American Great Lakes—Mediterranean Eastbound Freight Conference (respondents)[2] amended its freight Tariff No. 4, as follows:

> SURCHARGE ON SHIPMENTS FROM BUFFALO, NEW YORK—Effective June 1, 1962, 10% surcharge is established on all rates and charges on shipments from Buffalo, New York.[3]

The petition further alleges that the surcharge is unjustly discriminatory, in violation of Section 17 of the Shipping Act; and that it unjustly discriminates against the State of New York and creates an undue and unreasonable prejudice against the port and a preference to other Great Lakes ports in violation of Section 16.

On the basis of this petition and pursuant to Section 16, First, the Commission issued an order on June 5, 1962, requiring respondents to show cause why the surcharge should not be set aside.

Respondents filed an answer to the petition wherein it was alleged that the surcharge is justified because of extraordinary high terminal costs incurred by respondents at Buffalo and the serious delays at that port, which costs and delays, it is alleged, greatly exceed those at other Great Lakes ports.

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[1] Section 16, First, was amended by P.L. 87-346, October 3, 1961, by the addition of the following provision:

Provided, That within thirty days after enactment of this Act, or within thirty days after the effective date or the filing with the Commission, whichever is later, of any conference freight rate, rule, or regulation in the foreign commerce of the United States, the Governor of any State, Commonwealth, or possession of the United States may file a protest with the Commission upon the ground that the rate, rule, or regulation unjustly discriminates against that State, Commonwealth, or possession of the United States, in which case the Commission shall issue an order to the conference to show cause why the rate, rule, or regulation should not be set aside. Within one hundred and eighty days from the date of the issuance of such order, the Commission shall determine whether or not such rate, rule, or regulation is unjustly discriminatory and issue a final order either dismissing the protest, or setting aside the rate, rule, or regulation.

[2] Respondents are the Conference and its member lines. The Conference is organized under Federal Maritime Commission Agreement No. 8250 and consists of the following steamship lines: American Export Lines, Inc., Concordia Line—Great Lakes Service, Fabre Line, Hellenic Lines, Limited, Mediterranean Star Line, Montship-Capo Great Lakes Service, Nedlloyd Line, Niagara Line, Orient Mid-East Great Lakes Service, Watts Watts Line Great Lakes Service, Zim Israel Navigation Company, Ltd.

[3] The 10% surcharge is imposed on all commodities moving on respondents' vessels from Buffalo to ports in the Mediterranean. No similar surcharge applies to other Great Lakes ports. There is nothing in the record to indicate that any of the other carriers serving Buffalo have imposed a similar surcharge.

775-794 O-65-31

The Niagara Frontier Port Authority, the Buffalo Area Chamber of Commerce, the Corn Exchange of Buffalo, the Port Control of the City of Cleveland, the Council of Lake Erie Ports, and the Great Lakes Ports Traffic Committee intervened in this proceeding.

Following hearings, the Examiner found the surcharge to be unjustly discriminatory and recommended that it be ordered set aside. Exceptions were filed and oral argument held.

Buffalo is one of the nation's largest flour milling centers. Much of the flour produced there is exported to Mediterranean ports on vessels operated by respondents. Most of this flour is shipped in the name of private relief agencies, such as CARE, as part of the Government foreign relief program, and the United States ultimately pays the freight. The Conference lines also transport machinery, rags and general cargo, in relatively small quantities, out of Buffalo; and they transport flour as well as many other commodities from other ports on the Great Lakes.

The Port of Buffalo is in competition with other ports on the Great Lakes, particularly those that are also on Lake Erie. Some of the flour milling companies that have mills at Buffalo also have mills at other ports on the Great Lakes and elsewhere. The existence of the surcharge will cause other ports to be designated as the port of export for relief flour. The surcharge imposed by respondents has caused a decline in shipments of flour and other commodities from this port.

The rate on relief flour is $28.50 per long ton, which is lower than the rate on flour for private shipment. These rates apply equally from all United States ports on the Great Lakes to the Mediterranean.

The shipping season on the Great Lakes extends from about April 15 to about December 1. For several months prior to the 1962 season, the respondents were concerned over what they considered to be inordinately high terminal costs and time consumed at Buffalo for loading bagged flour, as compared to the costs for these services and the efficiency at the other Great Lakes ports, with which Buffalo competes. Early in 1962, the Conference exchanged letters with the Port Authority at Buffalo on this subject and held meetings with the main stevedore concern there. On April 6, 1962, the Conference decided to impose the surcharge of 10%, which was based on what the Conference considered to be about the differential between terminal costs on relief flour at Buffalo and those costs at other Great Lakes ports. The 10% surcharge became effective June 1, 1962.

DISCUSSION AND CONCLUSION

Petitioners have established that (1) Buffalo competes with other Great Lakes ports for the transportation of flour to the Mediterranean; that (2) Buffalo, as one of the biggest flour milling centers in the United States, is a natural port for the transportation of flour to overseas markets; and that (3) since the imposition of the surcharge at the Port of Buffalo, the shipment of flour from that port has greatly declined. We conclude from these facts that the imposition of the 10% surcharge by respondents is the proximate cause of the decline in flour shipments from Buffalo, and that its continuance will cause irreparable harm to the port and to the State of New York. Therefore, unless the surcharge by the Conference is justified, it must be set aside.

The only justification advanced by the Conference for the surcharge is that, in the opinion of the Conference members, terminal costs (including costs of delay) for loading cargo, principally flour, are higher at Buffalo than at competitive ports on the Great Lakes.

On this point the Examiner found that the over-all cost of loading (terminal charges plus a cost factor representing hourly productivity) at Buffalo exceeds the "average" at the other ports by at least 10%, and possibly a little more. He also found that terminal charges at some of the other ports are not substantially lower than those at Buffalo, nor is loading accomplished at some of the other ports with significantly greater speed than it is at Buffalo.

We cannot agree that the record establishes the "average" with the exactness required in a proceeding such as this. It does not indicate that the elements comprising the average were the same at all ports. It does show that different services are provided at some of the ports as compared to others. At some, the services include unloading railroad cars, storing, checking, and the like. At others, the rate merely covers loading cargo into the ship.

In addition, there is an almost total lack of documentary evidence in the record which would support the average claimed by respondents to be applicable. Most, if not all, of the supporting evidence was within the possession of respondents. Many of the stevedoring arrangements at ports other than Buffalo were oral. These and the data relating to operating costs at the various ports were accessible only to respondents. Requests for the production of documents were only partially complied with by respon-

dents, and then only at the end of the hearings when their accuracy could not be tested.

In our view, the record merely shows that the terminal costs are somewhat higher and the stevedore efficiency somewhat lower at Buffalo than at some other Great Lakes ports. And, as the Examiner found, it also shows that terminal charges and loading time at some of these other ports are not significantly different from those at Buffalo. The evidence relating to commodities other than flour was meager, and it does not establish that the terminal costs at Buffalo on these items differ at all from those at the other ports. In short, the record fails to support respondents' action in singling out Buffalo for the imposition of a surcharge, and it has therefore not been justified.

There are also other elements which should be considered in determining whether a rate differential at a particular port may be upheld, such as volume of traffic, competition, distance, advantages of location, character of traffic, frequency of service, and others. *Port Differential Investigation*, 1 USSB 61, 69 (1925). The Conference made no attempt to present evidence on any element except terminal costs.

The justification for a surcharge must be demonstrated by a record that is considerably more complete and solid than the one before us. We conclude that the surcharge constitutes an unjust discrimination against the Port of Buffalo and the State of New York, in violation of Section 16, First. This is also the conclusion the Examiner reached.

Respondents take the position that the State of New York is not discriminated against by the 10% surcharge at Buffalo. The record, on the other hand, shows clearly that the State of New York has, in addition to the interest any State would have in one of its major ports, a pecuniary interest in the Port of Buffalo. The State has advanced money to the port for the development of its terminal facilities, and for operating the port. The Niagara Frontier Port Authority, which operates and owns the major facilities at Buffalo, is an agency of the State of New York whose members are appointed by the Governor and whose operations are financed by State funds. It follows that the discrimination in question constitutes a discrimination against the State as well as the Port of Buffalo.

An order setting aside the surcharge will be entered.

ORDER

FEDERAL MARITIME COMMISSION

No. 999

IN THE MATTER OF AMERICAN GREAT LAKES MEDITERRANEAN EASTBOUND FREIGHT CONFERENCE—SURCHARGE ON SHIPMENTS FROM BUFFALO, NEW YORK

This proceeding having been initiated by an Order to Show Cause issued by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a Report containing conclusions and decision thereon, which Report is hereby referred to and made a part hereof;

It is ordered, That the 10 percent surcharge imposed at the Port of Buffalo by respondent American Great Lakes—Mediterranean Eastbound Freight Conference be, and it is hereby, set aside; and

It is further ordered, That the respondent publish, issue and file with the commission immediately an appropriate amendment to its tariff indicating that the surcharge is no longer in effect; and

It is further ordered, That the respondent cease and desist from enforcing the surcharge in any manner whatsoever.

By the Commission, November 20, 1962

(Signed) Thomas Lisi
Secretary

FEDERAL MARITIME COMMISSION

No. 905

UNITED STATES LINES AND GONDRAND BROTHERS

VIOLATION OF SECTION 16

Decided December 19, 1962.

Gondrand Brothers found to have knowingly and wilfully obtained fror United States Lines Company transportation of logs by water fror North Atlantic Range ports to the ports of Antwerp and Rotterdam a less than the rates or charges which would otherwise have been appli cable during the period 1954 through 1959, in violation of section 1 of the Shipping Act, 1916.

United States Lines Company found to have allowed Gondrand Brothers t obtain transportation of logs by water from North Atlantic Range port to the ports of Antwerp and Rotterdam at less than the regular rates o charges established and enforced on the line of such carrier during th period 1954 through 1959, in violation of section 16 Second of the Ship ping Act, 1916.

Elmer C. Maddy and *Ronald A. Capone* for respondent Unite(States Lines Co.

Howard A. Levy and *Robert J. Blackwell,* Hearing Counsel.

Arnold J. Roth, Hearing Examiner.

REPORT OF THE COMMISSION

THOS. E. STAKEM, *Chairman*; JOHN HARLLEE, *Vice Chairman* JOHN S. PATTERSON, *Commissioner*; JAMES V. DAY, *Commis sioner*; ASHTON C. BARRETT, *Commissioner,* did not participate ir this case.

BY THE COMMISSION:

This proceeding was instituted by the Federal Maritime Boarc (Board) to determine whether Gondrand Brothers (Gondrand) of Zurich, Switzerland and United States Lines Company (US Lines, also sometimes herein called "respondent") violated sectior 16 of the Shipping Act, 1916, in connection with the shipment of

certain logs during the period 1954 through 1959, from North Atlantic Range ports of the United States to the ports of Antwerp, Belgium and Amsterdam and Rotterdam, Holland.

Gondrand is a corporation or association organized under the laws of Switzerland. It entered no appearance in the proceeding although it had actual notice thereof. The Board's initial order of investigation was served by registered mail upon Gondrand's agent in the United States, Intra-Mar Shipping Corp., New York, N. Y. Intra-Mar acknowledged receipt of the order and advised that while it was the agent of Gondrand for some purposes, it was not an agent for service of process, and suggested that the Board contact Gondrand direct in Switzerland. Copies of subsequent notices, orders and other documents issued in the proceeding were forwarded to Gondrand in Switzerland but most were returned by Gondrand with statements that it was not authorized under Swiss law to accept such documents submitted directly to its offices. A representative of Gondrand attended the prehearing conference as an observer. Gondrand's election not to participate in no way impaired the jurisdiction of the Board and this Commission to carry out this investigation and to make and enter findings, conclusions and such order as the circumstances warranted. The parties and conduct involved were clearly subject to the Shipping Act, 1916 and, as stated, Gondrand had actual notice.

Hearing was held before an Examiner, briefs were filed by US Lines and Hearing Counsel, and an initial decision was rendered in which respondents Gondrand and US Lines were found to have violated section 16 of the Shipping Act, 1916. Exceptions to the initial decision were filed by US Lines and a reply thereto was filed by Hearing Counsel, following which we heard oral argument.

We agree with the Examiner that section 16 was violated. We also adopt as our own the facts which he found, as follows:

FINDINGS

US Lines is a common carrier by water subject to the Act, operating in the trade from North Atlantic ports of the United States to Antwerp and Rotterdam, among others. As such, it is and at all times here involved was a member of the North Atlantic Continental Freight Conference (the conference), which was organized and operates under Agreement No. 4490, as amended, approved by the Commission or its predecessors pursuant to section 15 of the Act, 46 U.S.C. 814. At all times here involved, US Lines

so far as is here pertinent participated in the conference freight tariffs, and did not publish or maintain any different tariffs.

Gondrand is an agent in Switzerland for US Lines, with responsibility to book cargo for US Lines vessels both east and westbound, to solicit freight, and to perform various other functions for US Lines in Switzerland including the collection of freight monies. For these services, Gondrand is paid a commission based on the gross freight booked by it or through its facilities on cargoes shipped between Switzerland and the United States. Gondrand also operates as a freight forwarder in Europe, and as such it performs services for various consignees including, in many instances, arranging for inland transportation of the goods of such consignees after delivery by the vessel at the port of discharge in Europe, as well as for the ocean transportation. Gondrand's activities with respect to these goods are, however, confined to those of a forwarder, and it does not buy, sell, or use them itself. US Lines was at all times aware of this dual status of Gondrand.

Some time prior to December 1954, Gondrand and an official of US Lines entered into an arrangement covering the eastbound movement of logs, whereby US Lines would make payments to Gondrand so that the ultimate rate assessed on shipments of logs handled by Gondrand would approximate the rates concurrently maintained by competitive nonconference carriers, in order to enable US Lines to obtain, against nonconference carrier competition, a portion of the log movement. In 1955, the existence of this arrangement came to the attention of other officials of US Lines, and instructions were given that the arrangement be discontinued as a possible violation of the conference agreement, but it nevertheless continued until 1959. The ultimate rates assessed under this arrangement did not appear in any tariff participated in by US Lines, nor was a report of these rates made by US Lines to the Board as required by the outstanding order in *Section 19 Investigation, 1935*, 1 U.S.S.B.B. 470 (1935).

The record discloses 59 shipments which were transported on vessels of US Lines under the above arrangement. The earliest of these moved under bill of lading No. 100, dated December 27, 1954, on Voyage 51 of the *American Attorney* which sailed from New York on December 28, 1954, and the latest under bill of lading No. 22 dated March 5, 1959, on Voyage 51 of the *American Guide* which sailed from New York on the same date. The ship-

ments were variously described in the bills of lading as maple logs, birdseye maple logs, peeled maple logs, hardwood logs, and hardwood logs (maple). Except for one shipment in 1956 which was loaded in Norfolk, all were loaded in New York, and they were discharged in Antwerp and Rotterdam, although a number of the Rotterdam shipments were consigned to Amsterdam. Freight charges in each instance were billed to and paid by Gondrand. On 11 of the shipments, Gondrand appeared as sole consignee in the bills of lading. On the remainder, Gondrand appeared as consignee, with an ultimate consignee shown in the body of the bill, or Gondrand was listed as a party to be notified of the arrival of the shipment, or Gondrand did not appear on the bill of lading at all.

The mechanics of the arrangement may be illustrated by a shipment of 71 peeled maple logs, weight 74,860 pounds, loaded at New York on Voyage 8 of the *American Archer* under bill of lading No. 43, sailing date February 6, 1959. Freight charges were entered on the bill of lading at the conference rate of $1.20 per 100 pounds, totaling $898.32, a freight bill in the same amount was tendered to Gondrand under date of February 25, 1959, and paid by it. The bill of lading indicates that the consignee was Transportmij Traffic NV., Rotterdam, with arrival notice to be addressed to Gondrand. Under date of March 31, 1959, a specification was prepared by Gondrand listing this and other shipments handled during the first quarter of 1959, claiming refund on this shipment of $37.43 based upon a rate of $1.15 per 100 pounds. By letter of May 26, 1959, addressed to the Paris, France, office of US Lines, Gondrand submitted copies of the specification, together with paid freight bills, and requested remittance of $534.58 on the shipments handled in the first quarter of 1959, including that mentioned above. Under date of June 24, 1959, the manifest records of US Lines were corrected to reflect the claim made by Gondrand, and a check in the amount of $534.58 was transmitted by US Lines to Gondrand on July 13, 1959. By letter of July 24, 1959, Gondrand acknowledged receipt of this check. The remainder of the 59 shipments were handled in similar manner, with freight bills issued to Gondrand in the first instance and paid by it at the applicable conference rates, and later remittance of amounts to Gondrand to adjust the freight charges to reflect lower nonconference rates. By letter of May 9, 1960, addressed to the London, England, office of US Lines, Gondrand transmitted to US Lines a check in the amount of $12,591.19, covering all refunds

previously received by Gondrand under the above arrangement during the years 1956-1959. This letter reads:

In line with our discussion at Zurich last week, we have talked the matter over here and we realise that the only way this false situation can be corrected, is for us to refund to you the full amount of US $12,591.19.

It is most regrettable that this action is necessary, but we fully realise the situation you have been placed in.

The record indicates that no shipments of logs between the ports here involved were handled by US Lines for any shippers other than those for whom Gondrand was acting. In addition to payments made to Gondrand under the above arrangement, Gondrand also received its regular commissions on the shipments as agent of US Lines.

DISCUSSION AND CONCLUSION

US Lines took exception to the Examiner's findings of fact, as above set forth, and submitted instead its own "Statement of Facts." However, this specifies neither the findings excepted to nor the findings US Lines thinks the Examiner should have made, and it fails to comply with our Rule 13(h) which requires that exceptions "indicate with particularity alleged errors" in the initial decision. Moreover, the findings proposed by US Lines, to the extent they relate to facts, were actually made by the Examiner albeit in slightly different language. The evidence of record fully supports the findings made by the Examiner.

Section 16 of the Shipping Act, 1916, so far as pertinent, provides:

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

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

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

The Examiner concluded that the arrangement between Gondrand and US Lines was entered into knowingly and wilfully,

and was effectuated by means of false billing, in violation of section 16. In its exceptions US Lines reiterates the contentions made in its brief to the Examiner. It argues that the net amount paid by Gondrand, after the refund had been made in each instance, was the regular rate then established and enforced by US Lines. It points to the requirement of filing rates in the export trade within 30 days after they become effective, which prevailed at the times involved herein,[1] and claims that since the rates on file could be changed under this policy without prior notice to the Board, the filed rates were, in effect, supplanted every time US Lines carried logs for Gondrand.

A necessary corollary of this reasoning would seem to be that US Lines filed the rate which it gave Gondrand in each instance. But this was not done. We take official notice of the fact that never during the lengthy period in question did US Lines file with the Board its actual rate to Gondrand. During all that time only US Lines conference rate for logs was on file. Surely it is not consistent for a carrier thus to publish and maintain one rate *ad infinitum*, and yet contend that its regular rate was something else. Nothing in the Board's decision in *Filing of Freight Rates in the Foreign Commerce, etc.*, 6 F.M.B. 396 (1961) or other cases cited by respondent, supports the view that a carrier's regular rate is whatever figure it chooses on the spot to give the shipper but which it never files as required. Under this theory, ignoring as it does the rate actually published and any need to perfect changes therein, the principle of a "regular" rate all but vanishes and a violation of section 16 could seldom be shown. Such a position is untenable.

United States Lines was bound by its conference agreement to observe the rates in the conference tariff. These were the only rates filed and published by it or on its behalf. The rates so reported and published were its regular or established rates which it was bound to charge and shippers were bound to pay. *Prince Line, Ltd.* v. *American Paper Exports, Inc.*, 45 F. 2d 242, aff'd 55 F. 2d 1053 (CA 2, 1932); *Compania Anonima Venezolana de*

[1] By Public Law 87-346, approved October 3, 1961, section 18 of the Shipping Act, 1916 was amended to require that every common carrier by water in foreign commerce file with the Commission and keep open to public inspection tariffs showing all its rates and charges for transportation, and that no different rate or charge should be collected or received by such carrier. The prior requirement for filing rates or changes within 30 days is contained in General Order 83 (46 C.F.R. Parts 235 and 535).

Navegacion v. *A. J. Perez Export Co., et al.*, 303 F. 2d 692 (CA 5 1962).[2]

United States Lines offered testimony to the effect that i carried no shipments of logs during the period in question othe than those for Gondrand. It therefore argues that "all shippers' were treated equally and hence no discrimination existed and n violation of section 16 Second can be found. We think it unlikel that over a period of four and one-half years there were no othe shippers of logs in the relevant trade who were not in one way o another prejudiced by the fact that US Lines allowed onl Gondrand to obtain transportation at a rate lower than the one i made available to the shipping public generally. But we need no pursue the matter for violation of section 16 Second clearly is no made contingent upon a showing of instances of such discrimina tion. The command of the section is absolute that a carrier shal not by false means or by other unfair or unjust means directly o indirectly allow a person to obtain transportation at less than th regular rate. The policy underlying this command is the same a that underlying the recent Shipping Act amendment which pro hibits a carrier's deviation from its tariff as filed with the Com mission. (Fn. 1, *infra.*)

In the course of its argument, respondent takes the positio that its transactions with Gondrand were "above board" withi the meaning of these words as used in the opinion in the *Princ Line* case, *supra*. There the court said, in reference to section 16 Second (55 F. 2d, at 1055):

> The law did not forbid all concessions to a shipper; apparently it assume that if these were above board, and known or ascertainable by competitors the resulting jealousies and pressure upon the carrier would be correctiv enough. But it did forbid the carrier to grant such favors, when accompanie by any concealment, and its command in that event was as absolute as though it had been unconditional.

It is true, as respondent says, that no deception was practice on Gondrand, since Gondrand was a party to the rebating. But this hardly creates an above-board atmosphere for the arrange ment. The shipments were billed and paid for in the first instance at the regular rates of US Lines, undoubtedly to conceal the arrangement. For a time the fact that Gondrand was receiving a lower rate was not known even among all the US Lines' officials

[2] *Ambler* v. *Bloedel Donovan Lumber Mills*, 68 F. 2d 268 (CA 9, 1933), cited by respondent, is quite a different case in that there the court found, *inter alia*, no effective rate for the transportation of lumber higher than the one which had been agreed upon after negotiation between carrier and shipper.

who apparently should have been aware of it, and certainly it was not known to or ascertainable by the shipping public. It was precisely the sort of unlawful arrangement the court referred to in the above *Prince Line* quotation. In that case the agreement between shipper and carrier covered the transportation of parcels of "paper" the contents of which were undisclosed by the shipper and hence unclassified for rate purposes, although the carrier's tariff specified various classes of paper and rates therefor. In holding that the carrier violated section 16 Second, the court described the arrangement, in language equally appropriate here, as follows (at 1055):

This was an 'unfair device or means,' for it destroyed that equality of treatment between shippers, which it was the primary purpose of the section, and for that matter of the whole statute, to maintain.

Two additional points made by US Lines should be noticed. It says that the word "person" in section 16 Second means "shipper" including "consignee," that there is no proof that Gondrand was either of these, and consequently that US Lines could not have violated the section by allowing Gondrand to obtain transportation at the lower rate. This claim is made notwithstanding that Gondrand is actually named as consignee in the documents covering about a fourth of the shipments. It is clear, moreover, that 16 Second cannot be construed as respondent contends because if it is section 16 becomes an absurdity.

The first paragraph of section 16 forbids "any shipper, consignor, consignee, forwarder, broker, or other person" from obtaining transportation at less than the applicable rate. There is a parallel proscription in section 16 Second against carriers allowing "any person" to obtain such transportation but this would be operative under respondent's construction only where a shipper or consignee was involved. Further, although carriers could not directly allow rate concessions to shippers or consignees, they could under respondent's construction favor forwarders, brokers or others, and through them could also favor shippers and consignees. We are satisfied, as was the Examiner, that the words "any person" as used in section 16 Second are fully as broad as the words "shipper, consignor, consignee, forwarder, broker, or

other person" used in the section's first paragraph, and that they plainly encompass Gondrand.[3]

Finally, US Lines asserts that any possibility of violation" was eliminated when Gondrand in May 1960 repaid to it the rebates it had paid Gondrand over the years 1956 through 1959. Respondent does not undertake to explain this novel theory. Suffice it to say that repayment of a portion of the sums Gondrand illegally received from US Lines does not cure the illegality and has no bearing on that matter.

The Examiner describes the arrangement here as "false billing" which it perhaps was in view of the submission and payment in the first instance of bills of lading and freight bills that both parties, by reason of their prior agreement, knew did not reflect the rates Gondrand was ultimately to be charged. Unquestionably the arrangement constituted an "unjust or unfair device or means" prohibited by section 16 and we think it preferable in the circumstances to rest our decision on that ground.

Our conclusions are:

(1) That respondent Gondrand Brothers knowingly and wilfully obtained from United States Lines Company transportation of logs by water from North Atlantic Range ports to the ports of Antwerp and Rotterdam at less than the rates or charges which would otherwise have been applicable during the period December 27, 1954 through March 5, 1959, in violation of section 16 of the Act; and

(2) That respondent United States Lines Company allowed Gondrand Brothers to obtain transportation of logs by water from North Atlantic Range ports to the ports of Antwerp and Rotterdam at less than the regular rates or charges established and enforced on the line of such carrier during the period December 27, 1954 through March 5, 1959, in violation of section 16 Second of the Act.

Since the unlawful arrangement has been terminated, there is no occassion for us to issue an order against the respondents and the proceeding is discontinued.

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[3] Respondent disputes comparison of 16 Second and the first paragraph on the ground that the latter was not added to section 16 until 1936 (49 Stat. 1518), some 20 years after 16 Second was enacted. Without the comparison, the fact remains that 16 Second uses the broad and unqualified language "any person." Furthermore, it is clear that in enacting the first paragraph Congress sought parity. Section 16 Second penalized carriers for allowing any person to obtain unlawful rates, and the first paragraph was designed similarly to penalize any person who obtained or attempted to obtain such rates.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 245

UDDO & TAORMINA CORP., COMPLAINANT,

v.

CONCORDIA LINE (JOINT SERVICE OF DAMPSKIBSAKTIESELSKABET ALASKA, AKTIESELSKABET ATLAS, DAMPSKIBSAKTIESELSKABET IDAHO, SKIPSAKSJESELSKAPET HILDA KNUDSEN, AND SKIPSAKSJESELSKAPET SAMUEL BAKKE), RESPONDENT.

SPECIAL DOCKET NO. 246

DOMESTIC EDIBLE OIL CO. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 247

A. SARGENTI & CO., INC. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 248

KRASDALE FOODS INC. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 249

JOSEPH L. SCLAFANI INC. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 250

D. & A. SCLAFANI v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 251

CAPITOL FOODS v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 252

RINALDI BROS. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 253

PACKER BROS. INC. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 254

C. DANIELE & CO., INC. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 255
LUIGI CASO V. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 256
VITELLI-ELVEA CO. INC. V. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 257
MARINO BROS. V. CONCORDIA LINE, ETC.

Decided January 2, 1963

Permission granted Concordia Line (Joint Service, etc.) to refund freight charges and to waive collection of undercharges on shipments transported from Italy to the United States.

Thomas K. Roche and *Sanford C. Miller*, for Respondent.
E. Robert Seaver, Hearing Examiner.

REPORT OF THE COMMISSION

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

BY THE COMMISSION:

These are applications by respondent, concurred in by complainants, for an order of the Commission pursuant to Rule 6(b) of the Rules of Practice and Procedure, authorizing the voluntary payment of reparation to some of the complainants and waiver of the collection of undercharges as to others. The applications arise from respondent's transportation for complainants, in March 1962, of certain peeled tomato products (tomato sauce or pulp and peeled tomatoes) from Naples, Italy, to New York.

On February 15, 1962 the member lines of the West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference, which include respondent, voted to reduce the freight rate on peeled tomato products from $26.50 per 1000 kilos to $18.00. On February 16, 1962 the Conference notified the Commission of this reduction by cable. Representatives of the Commission advised the Conference that the filing of the rate change could not

* Commissioner Barrett took no part in the hearing or decision of this case

be accomplished by cablegram. Proposed filing tariff rules require that tariffs and amendments thereto be filed with the Commission in a prescribed manner and form, 26 F. R. 12294. Thereafter a tariff revision (First Revised Page No. 14) was prepared and filed effective February 23, 1962, setting forth the reduction in the tomato rate to $18.00.

In the interim, respondent had advised complainants and other shippers that the rate on tomato products was to be reduced to $18.00 effective February 16, 1962, and complainants' tomato products were in good faith booked on that basis. However, in view of the Commission's rejection of the cable filing, respondent charged, and in all but three instances collected from complainants, freight based upon the $26.50 rate. The quantity shipped by each complainant, the freight at the higher and lower rates, and the excess that respondent seeks to refund or to waive are set forth in the following table:

Spec. Docket Number	Complainant (Abbreviated)	Quantity		Freight Charged or Billed	Freight at $18.00	Excess
245	Uddo & Taormina	146.	W.	$3,869.00	$2,628.00	$1,241.00
246	Domestic, etc.	10.8	W.	286.20	194.40	91.80
247	A. Sargenti	12.	W.	318.00	216.00	102.00
248	Krasdale Foods	12.	W.	318.00	216.00	102.00
249	Joseph L. Sclafani	27.85	W.	764.52	501.30	263.22
250	D. & A. Sclafani	7.35	W.	194.77	132.30	62.47
251	Capitol Foods	15.	W.	397.50	270.00	127.50
252	Rinaldi Bros.	10.4	W.	275.60	187.20	88.40
253	Packer Bros.	15.	W.	397.50	270.00	127.50
254	C. Daniele & Co.	9.18	W.	243.27	165.24[1]	78.03
255	Luigi Caso	15.	W.	397.50	270.00[1]	127.50
256	Vitelli-Elvea	57.7	W.	1,529.05	1,038.60[1]	490.45
257	Marino Bros.	15.845	W.	419.89	285.21	134.68

In an initial decision the Examiner found that an order should be issued authorizing the voluntary payment of reparation in Dockets 245 to 253, inclusive, and 257, and the granting of application to waive collection of undercharges in 254, 255 and 256. We agree.

Common carriers by water in the foreign commerce of the United States are required by section 18(b) of the Shipping Act, 1916, to file with the Commission tariffs showing all their rates

[1] In Special Dockets 254, 255, and 256 freight was paid at the lower rate. The application in these three proceedings is for authority to waive collection of the underpayment. In the other cases, the freight was paid at the higher rate.

775-794 O-65-32

and charges for transportation between United States ports and foreign ports. The statute prohibits charging more or less than the rates specified in the tariffs so filed. This requirement for filing was new at the time of the transactions involved in these proceedings, section 18(b) having become effective on January 2, 1962.

The parties do not question the refusal of the Commission to accept the cablegram notice of the change in the freight rate. They urge that the Commission should authorize the relief requested based on the $18.00 rate in order to meet the good faith intentions and expectations of all concerned. They allege that the circumstances here are substantially similar to those in *Y. Higa Enterprises, Ltd.* v. *Pacific Far East Line*, 7 F.M.C. 62 (1962), wherein the Commission waived the collection of certain undercharges. There, Pacific Far East Line had inadvertently failed to file a tariff change which the parties in good faith had agreed would apply, and we held that an innocent shipper should not be made to bear the consequences of the carrier's failure to file the change.

More recently, in *Martini and Rossi S.p.A., et al.* v. *Lykes Bros. Steamship Co.*, 7 F.M.C. 453 (1962), we granted similar relief. In that case, Lykes inadvertently permitted its Special Rate Circular on file with the Commission to expire, bringing into force the higher rates published in its regular tariff. But it continued to solicit cargo based on the lower rates, and did in fact reinstate those rates when it discovered that the Special Circular had expired. In authorizing Lykes to waive collection of the undercharges, we cited the newness of the filing requirements of section 18(b) of the Shipping Act and the carrier's apparent good faith mistake as a result thereof.

The relief sought by the instant applications is in line with our action in the *Higa* and *Martini and Rossi* cases. It should be granted in order to apply the rate that all the parties believed to be in force at the time they contracted for the shipment of the tomato products. The conference attempted to file the reduced rate by cable and, until informed by the Commission that this filing was unacceptable, it was not unreasonable for respondent to book cargo at the reduced rate believed to be the lawful one. The shippers are innocent and no discrimination will result in granting the requested relief. Respondent seeks to provide the same relief

to all shippers of tomato products on its vessels during the time in question.

An order will be entered authorizing and directing the payment of reparation to the respective complainants in Special Dockets 245 to 253, inclusive, and 257 in the amounts shown in the last column of the foregoing table, and granting the application to waive collection of undercharges in Special Dockets 254, 255, and 256.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 245

UDDO & TAORMINA CORP., COMPLAINANT,

v.

CONCORDIA LINE (JOINT SERVICE OF DAMPSKIBSAKTIESELSKABET ALASKA, AKTIESELSKABET ATLAS, DAMPSKIBSAKTIESELSKABET IDAHO, SKIPSAKSJESELSKAPET HILDA KNUDSEN, AND SKIPSAKSJESELSKAPET SAMUEL BAKKE), RESPONDENT.

SPECIAL DOCKET NO. 246

DOMESTIC EDIBLE OIL CO. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 247

A. SARGENTI & CO., INC. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 248

KRASDALE FOODS INC. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 249

JOSEPH L. SCLAFANI INC. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 250

D. & A. SCLAFANI v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 251

CAPITOL FOODS v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 252

RINALDI BROS. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 253

PACKER BROS. INC. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 254

C. DANIELE & CO., INC. v. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 255
LUIGI CASO V. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 256
VITELLI-ELVEA CO. V. CONCORDIA LINE, ETC.

SPECIAL DOCKET NO. 257
MARINO BROS. V. CONCORDIA LINE, ETC.

ORDER

WHEREAS, the Commission has this day made and entered a report stating its findings and conclusion herein, which report is made a part hereof by reference,

It is ordered, That the application of Concordia Line to waive collection of certain underchanges and to refund certain freight charges be, and it is hereby, granted.

By the Commission, January 2, 1963.

(Sgd) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 912

Matson Navigation Company—Container Freight Tariffs

Decided January 21, 1963

Tariff of Matson Navigation Company applicable to containerized cargo from California to Honolulu, Hawaii, and publishing single-factor rates which include pickup service in port terminal areas, ocean haul, and delivery at container freight station or container freight yard, is lawful in its present form and not contrary to the provisions of Section 2 of the Intercoastal Shipping Act, 1933.

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

R. Y. Schureman for Western Motor Tariff Bureau, Inc.

A. P. Davis, Jr., and *C. H. Fritze* for Carnation Company.

John MacDonald Smith for Pacific Motor Trucking Company.

Bruce R. Geernaert for Merchant Express of California and Walkup Drayage and Warehouse Company.

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

Richard S. Harsh and *Robert J. Blackwell* as Hearing Counsel.

C. W. Robinson, Hearing Examiner.

Report of the Commission

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

By the Commission:

This proceeding was instituted to determine the lawfulness under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, of two tariffs filed with the Commission by Matson Navigation Company (Matson). The tariffs, designated Westbound Con-

* Commissioner Day took no part in the hearing or decision of this case.

tainer Freight Tariff No. 14 and Eastbound Container Freight Tariff No. 15, prescribe the rates, charges, regulations and practices governing the transportation of cargo in containers between United States Pacific Coast ports and Honolulu, Hawaii.

The Western Motor Tariff Bureau (Bureau) on behalf of its members, except Pacific Motor Trucking Company, Pacific Intermountain Express and Navajo Freight Lines, formally protested the tariffs.[1] Petitions to intervene were filed by Pacific Motor Trucking Company, Merchants Express of California, Walkup Drayage and Warehouse Company, the Harbor Commission of San Diego and Carnation Company. Hearings were held and an initial decision was issued.

Tariff 14[2] (the westbound tariff) differs from the usual ocean carrier tariff in that it combines in a single factor rate a charge for picking up goods at the shipper's premises, the rate for the water transportation (the so-called line-haul) and a charge for delivery to a designated off-dock point in Honolulu. Matson's operations as presently conducted under Tariff 14 are the culmination of a series of studies to find ways of reducing the costs of handling general cargo between dock and vessel. These costs represented over one-half of the total costs of Matson's West Coast-Hawaii service. Containerization of cargo was selected in principle, and further studies were made to develop a suitable container. Matson, under the provisions of Tariff No. 11, inaugurated a container service in the latter part of 1958.

Tariff 14 contains single factor rates on a large selection of containerized cargo from the ports of San Francisco, Stockton, and Los Angeles to Honolulu. The tariff defines and designates "port areas" for each of the ports of San Francisco, Stockton and Los Angeles. The San Francisco port area is slightly smaller than the San Francisco-East Bay cartage zone established by the California Public Utilities Commission in its Decision No. 50,872, Case No. 5,235, issued December 14, 1954; it is also smaller than the San Francisco commercial zone determined in accordance with the ruling of the Interstate Commerce Commission in *Commercial*

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[1] Under the provisions of Rules 3(a) and 5(h) of the Commission's Rules of Practice and Procedure the Bureau became a party to the proceedings by virtue of its protest.

[2] At the prehearing conference the parties agreed that the lawfulness of Tariff 15 (the eastbound tariff) would not separately be placed in issue but that evidence relating to it could be introduced for the purpose of exploring the lawfulness of Tariff 14. No pickup service is provided under Tariff 15, and the rates therein apply to transportation beginning at Matson's container freight yard and apply only to the ocean line haul. No charge for pickup and delivery service is included in this rate.

Zones and Terminal Areas, 46 M.C.C. 665 (1946). The Stockton port area is the same as the Stockton commercial zone which was also determined by the Interstate Commerce Commission in the *Commercial Zones and Terminal Areas* case, *supra.* The Los Angeles port area is the same as the commercial zone of Los Angeles defined by the Interstate Commerce Commission in *Los Angeles, Calif., Commercial Zone,* 3 M.C.C. 248 (1937).

Each of the designated port areas is broken down into "pickup zones," and the applicable tariff rate is determined by the zone in which the cargo originates. "Container freight yards" have been established within each of the port areas. The container freight yard is located in the dock area and is used for the receiving, marshalling and storing of fully loaded and empty containers. In addition to the container freight yard, Matson has established within each port area a "container freight station" where less than full container loads are consolidated with other shipments into full container loads.

The pickup service provided under Tariff 14 is performed within each of the port areas by an exclusive drayage agent selected by Matson on the basis of sealed bids. Each agent is certificated as a common carrier by motor vehicle by the Interstate Commerce Commission. The drayage agents provide the motive power for Matson's container equipment which, at the time of hearing before the Examiner consisted of 1800 dry cargo containers, 270 refrigerated containers, 655 tandem-axle and 195 single-axle semi-trailer chassis. In addition to providing the motive power for the container equipment, the drayage agent receives the cargo, issues Matson's dock receipt and performs other services incidental to the receipt of container cargo.

Under Tariff 14 the pickup service includes transporting the empty container to the shipper's place of business, loading the goods into the container and, in the case of full container loads, transporting the fully loaded container to the container freight yard where it awaits loading on the ship. This service is performed by the agent under the general supervision of Matson. Where a shipper offers less than a full container load, the drayage agent may pick up the shipment using his own equipment and take it to the container freight station where the shipment is consolidated with others until a full container load is obtained. After such consolidation, the fully loaded containers are transported to the container freight yard and then loaded aboard ship.

The use by Matson of a single drayage agent in each of the designated port areas results in maximum utilization of containers and chasss, a reduced number of container and chassis pools which must be maintained, and a reduction in the number of one-way hauls by draymen. Flexibility of operation, and the substitution of containers in the event of cancellation of bookings are also facilitated by the use of exclusive agents. As of January 1, 1961, Matson's investment in its container service totaled $10,-235,000, and its total firm lease obligations for containers and chassis were $7,558,757.

Under the provisions of Tariff No. 14 shippers located within the port area pickup limits may elect to bring their shipments to the container freight station as an alternative to the use of the pickup service offered by Matson. If the shipper elects not to use Matson's pickup service, he receives an allowance of 5 cents per 100 pounds under Rule 23 of the tariff. Under Rule 42 of the tariff cargo situated outside the designated port area pickup limits may be loaded into containers and moved to the container freight station at the shipper's expense. The rate is then 11 cents per 100 pounds less than the within area pickup rate. Shippers outside the port area pickup limits may also bring their shipments to the container freight station. Under these circumstances, Rule 42 provides for a rate which is 5 cents less than the port area pickup rate.

Service at Honolulu terminates with delivery of the cargo to the consignee at a centrally located container freight station. However, consignees may take delivery of the containers themselves at a container yard adjacent to the waterfront and haul them to their premises for unloading and receive an allowance of 5 cents per 100 lbs.

In his initial decision the Examiner disposed of the matters under investigation on the basis of a single issue which he framed as follows:

> The principle issue is whether this Commission has jurisdiction over pickup service and off-dock container freight station service in defined port areas.

The Examiner concluded "that Matson's Tariff No. 14, naming single-factor rates for containerized cargo, is not subject to the jurisdiction of the Federal Maritime Commission and should be stricken from the Commission's files." Exceptions to the initial

decision were filed by Matson and Carnation Company.[3] Hearing Counsel and the Bureau filed replies to the exceptions of Matson only.

Matson's specific exceptions to the initial decision fall into two general areas, those which may for the sake of convenience be termed procedural and those which are substantive. Under the first, Matson urges that we remand the proceeding to the Examiner because of his failure to comply with section 8(b) of the Administrative Procedure Act. In this regard Matson contends that the decision is ambiguous and subject to at least two different interpretations; and that the Examiner failed to provide a sufficient statement of the reasons or basis for his findings and conclusions as required by section 8(b) of the Administrative Procedure Act. Matson contends that it is not clear from the initial decision whether Matson may under no circumstances offer a "motor pickup service and off-dock container freight station service" or merely that the "form" of Tariff 14 is inadequate because it provides for a "single factor rate rather than stating separate rates for the various aspects of the service." Hearing Counsel, on the other hand, urges that the decision is legally sufficient and clearly states that Tariff 14 is defective under section 2 of the Intercoastal Act because it contains single-factor rates which include charges for a pickup and delivery service not subject to the jurisdiction of the Commission.

While the decision may, as Matson contends, be subject to two interpretations, we do not agree that the decision should be remanded solely for the purpose of clarification particularly in view of the fact that we disagree with the conclusions reached therein. We think Hearing Counsel is correct in his interpretation of the decision; for if section 2 of the Intercoastal Act does not preclude the quotation of single factor rates including pickup and delivery charges we are aware of no other provision of the applicable statutes which would do so.

Section 2 of the Intercoastal Act provides in relevant part:

The schedules filed [with the Commission] . . . shall plainly show the places between which passengers and/or freight will be carried, and shall contain the classification of freight and of passenger accommodations in force and shall also state separately each terminal or other charge, privilege, or facility granted or allowed, and any rules or regulations which in anywise change

[3] The exceptions of Carnation are directed to the question of whether specific rates in Tariff 14 constitute increases, and deal with somewhat different problems than those posed by the exceptions of Matson. Consequently, we shall deal with the exceptions of Carnation separately after disposing of the other issues presented.

affect, or determine the aggregate of such aforesaid rates, fares, or charges, or the value of the service rendered. . . .

Hearing Counsel construes this section as requiring the separate statement in Tariff 14 of that portion of the single factor rate which represents the charge for the pickup and delivery service offered by Matson. The argument of Hearing Counsel runs basically as follows: The language of section 2 of the Intercoastal Act is almost identical to that of section 6(1) of the Interstate Commerce Act and this similarity was intended by Congress. Early in its history the Interstate Commerce Commission construed the provisions of section 6(1) of the Interstate Commerce Act to require that all charges for services not subject to the jurisdiction of the Interstate Commerce Commission must be stated separately from charges for services which are subject to its jurisdiction. This construction is valid for section 2 of the Intercoastal Act, because of its similarity with section 6(1). Jurisdiction over the operations of motor carriers is vested in the Interstate Commerce Commission by Part II of the Interstate Commerce Act, and section 33 of the Shipping Act [4] precludes the exercise by the Commission of any concurrent jurisdiction over motor carriers. Thus, according to Hearing Counsel, section 2 requires the separation of the charge for pickup and delivery, a service not subject to Commission jurisdiction, from the line haul rate, a service subject to Commission jurisdiction, before Tariff 14 can be accepted by the Commission. It is the contention of Matson that the Commission has jurisdiction over the pickup and delivery service offered in Tariff 14, and that Tariff 14 is lawful in its present form.

Two decisions of the Interstate Commerce Commission are cited to us as establishing the proposition urged by Hearing Counsel, *Cosmopolitan Shipping Co.* v. *Hamburg American Packet Co.*, 13 ICC 266 (1908) and *Tariffs Embracing Motor-Truck or Wagon Transfer Service*, 91 ICC 538 (1924).

The *Cosmopolitan* case involved through rates established by a rail carrier subject to the jurisdiction of the Interstate Commerce Commission and an ocean carrier not at that time subject to regulation by any government agency. The Interstate Commerce

[4] Section 33 provides: "That this Act shall not be construed to affect the power or jurisdiction of the Interstate Commerce Commission, nor to confer upon the [Federal Maritime Commission] concurrent power or jurisdiction over any matter within the power or jurisdiction of [the Interstate Commerce Commission]; nor shall this Act be construed to apply to intrastate commerce.

Commission found that if two rail lines or a rail line and a water line subject to the Interstate Commerce Commission's jurisdiction united in a through rate, the law presumed "that no public need exists for the public presentation of any other than the total rate." Such a joint rate could only be changed in accordance with the procedure fixed by law and after public notice of 30 days. However, regarding joint rates established between a rail carrier subject to the Interstate Commerce Act and an ocean carrier not subject thereto, the Commission pointed out that the rail line might charge the joint rate of its tariff, yet by legally altering from day to day its division of such rate, give to the unregulated carrier the means of inducing traffic by granting rebates or preferential rates. The Interstate Commerce Commission, at page 280 of its report, summed up the principal reason underlying its construction of section 6(1):

> The Commission, not having been given control over the ocean carriers cannot compel observance of the law by such carriers, *and if they so choose they may alter their rates at such times as they please or for such patrons as they please.* Therefore the line must be drawn precisely between those carriers whose rates and practices this Commission can control and those which it cannot control; and upon this line of reasoning it has been the consistent ruling of the Commission that 'joint rates' cannot be made between carriers subject to the act and those not subject to the act. . . . (Emphasis supplied.)

The clear rationale for this distinction between jurisdiction and no jurisdiction was the ability of the carrier not subject to the jurisdiction of the Interstate Commerce Commission to circumvent the design and purpose of the Interstate Commerce Act. As we shall point out later, this situation no longer exists.

In the *Motor-Truck or Wagon Transfer* case the Interstate Commerce Commission decided that it had jurisdiction over motor carrier pickup and delivery within a rail carrier's terminal area but it did not have jurisdiction over line-haul transportation by motor vehicle. The decision was prior to the passage of the Motor Carrier Act of 1935 which vested such jurisdiction over motor carriers in the Interstate Commerce Commission. Applying the principle of the *Cosmopolitan* decision, the Interstate Commerce Commission allowed the quotation of single-factor rates which included terminal area pickup and delivery by motor-vehicle, but required that charges for what in fact constituted line-haul carriage by motor vehicle be stated separately from the rail line-haul rates. Again the rationale of the *Cosmopolitan* case was the basis of the distinction drawn between jurisdiction and no jurisdiction.

We think it important to note that in both of these cases the Interstate Commerce Commission was dealing with a carrier which was not only without the the Interstate Commerce Commission's jurisdiction but which at the time in question was not subject to the jurisdiction of any governmental agency.[5] Thus, the unregulated carrier could freely grant special rates and preferences without being in violation of any Federal regulatory statute designed to protect the shipping public. In short, the unregulated carrier was free to circumvent the design and purpose of the Interstate Commerce Act with impunity.

Such is not the case presented here. Matson's drayage agents are common carriers by motor vehicle subject to the Interstate Commerce Act and are certificated by the Interstate Commerce Commission under that Act. *Western Motor Tariff Bureau, Inc.* v. *Matson Navigation Company,* No. MC-C 3000, decided June 11, 1962. Their rates may be established and changed only in accordance with the procedures fixed by the Interstate Commerce Act and they are subject to all the applicable provisions forbidding rebates, discriminations, preferences or prejudices. Today common carriers by motor vehicle are subject to government regulation in their dealings as motor carriers with the shipping public and with other carriers. Thus, the conditions which prompted the Interstate Commerce Commission to so construe section 6(1) of the Interstate Commerce Act do not exist today and should not in our opinion dictate our construction of section 2 of the Intercoastal Act. When the reason for the rule ceases to exist so should the rule.

It is not jurisdiction which requires the separate statement of rates and charges but uniformity in the treatment of shippers. Prior to the enactment of the Intercoastal Act, water carriers subject to the Shipping Act were required to file and keep open to public inspection only their maximum rates, fares and charges and the carrier was only prohibited from charging a *greater* compensation for his service than the rates, fares and charges filed in compliance with the Shipping Act. Under these requirements, the carrier in many instances filed and publicly posted an unrealistically high maximum rate, and then charged similarly

[5] The same is true of the two cases cited by Hearing Counsel as standing for court approval of the Interstate Commerce Commission's construction of section 6(1), *News Syndicate Co.* v. *N. Y. Cent. R.R.*, 275 U.S. 179 (1927) and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.* 283 U.S. 654 (1931). The *News Syndicate* case involved a U.S. rail carrier and a Canadian rail carrier while the *Lewis-Simas-Jones* case involved a U.S. rail carrier and a Mexican rail carrier.

situated shippers differing rates for the same service. Shippers were unduly hampered in their attempts to determine whether their competitors were granted preferential rates because of the difficulties involved in ascertaining the actual rate charged.[6] One of the major difficulties stemmed from the manner in which carriers published their rules and regulations providing for various absorptions and allowances. Typical of the rules then current were those considered by the United States Shipping Board in *Intercoastal Rates of Nelson S.S. Co.*, 1 U.S.S.B. 326 (1934).[7] In its decision in the *Nelson* case, rendered the year following the passage of the Intercoastal Act, the Shipping Board found that the vast majority of the tariffs filed with the Board were not in compliance with section 2 because they failed to state "the rates, charges, rules, and regulations in such a manner as to enable the consignor or consignee to see for himself the exact price of transportation." For example, all of the tariffs in question contained instances of "port equalization," [8] but none specified the actual amount of the equalization and it was necessary for the shipper to examine the tariffs of rail carriers in order to determine the actual cost of transportation to him. Concerning such rules the Shipping Board said:

> To hold that a shipper must look beyond the tariffs of the carrier offering him a service to ascertain the rate would be to put the shipper under an onerous obligation not imposed upon him by law. The inclusion of any provision in a tariff which makes the amount of the charge dependent upon the measure of a rate published in tariffs of some other carrier . . . cannot too strongly be condemned. (1 U.S.S.B. at 339)

Another type of rule condemned by the Board provided for the absorption of certain railroad unloading costs. Thus, one tariff, typical of all, contained a rule providing:

> When railroads do not unload or absorb the cost of unloading, Nelson Steamship Company will absorb the cost of such car unloading, when the cargo is loaded into Nelson Steamship Company vessels.

[6] See Sen. Rept. No. 651, 72d Cong., 1st Sess. (1932) and House Rept. No. 2006, 72d Cong. 2d Sess. (1932) on S. 4491 which became the Intercoastal Shipping Act, also Hearings before the Subcommittee of the Senate Committee on Commerce, 72d Cong., 1st Sess., and Hearings before the House Committee on the Merchant Marine and Fisheries, 72d Cong., 1st Sess.

[7] While the initial proceeding was concerned only with the tariff of Nelson Steamship Company, all carriers engaged in intercoastal transportation were subsequently made respondents, and three dockets Nos. 139, 144 and 148 were consolidated and considered together. In addition, the record in Docket No. 126, a general investigation of intercoastal transportation, a case which at that time had been heard but not decided was stipulated into the record.

[8] Generally, the term as used in the tariffs meant "the difference between the cost of transportation from the point of origin of the cargo to the port at which it is loaded into [the carrier's vessel] and the cost of transportation on the same cargo from the same point of origin to the port taking the lowest rail rate at which such cargo could be loaded into an Intercoastal vessel."

The Board found that this rule failed to meet the requirements of section 2 because:

> Such rules and others contained in the suspended schedules, not necessary to detail, which do not disclose the cost of the service or the specific amount to be absorbed, clearly open the gate to rebates, undue preferences and prejudices prohibited by law. (1 U.S.S.B. at 340.)[9]

We think it clear from the above that section 2 was never intended to require the separate statement of each and every terminal charge which is a component of the final rate for the service offered. To the contrary, the purpose of the "state separately" language of section 2 was to make the carrier, once it had fixed its rate or charge for the service offered, specify individually anything else which would effect a change in the ultimate rate to be paid by the shipper. Thus, if a tariff contains a description of the complete service offered and the total rate charged for that service, section 2 requires only that the carrier specify and state separately any additional charges imposed by the carrier, and all absorptions or allowances granted or allowed by it, which would increase or reduce the total rate for the transportation offered.

In Tariff 14 Matson first states the complete service offered and the rate charged for the service. The tariff then provides an option under which the shipper may elect to use only a portion of the entire service offered. If the shipper so elects, the tariff states in specific amounts the "allowances" granted. None of the evils sought to be corrected by section 2 appear in Tariff 14. The shipper is able, from an examination of the tariff, to determine what the exact price of the transportation is to him and to his competitor as well. This is all that is required by that provision of section 2 here under consideration and we therefore find and conclude that Tariff 14 meets those requirements of section 2.

It is contended that the cents-per-cwt "allowance" granted by Matson to shippers who elect not to use the pickup and delivery service as provided in Tariff 14, is unlawful because a carrier subject to our jurisdiction may neither grant an allowance for nor absorb any part of the cost of any service the performance of which is not a duty imposed upon that carrier by law, and which is in fact performed by a carrier not subject to our jurisdiction. While we have already rejected the jurisdictional distinction, it seems to us there is a basic misunderstanding as to the nature of

[9] See also *Intercoastal Investigation, 1935*, 1 U.S.S.B. 400 (1935), where the Shipping Board condemned rules which cast absorptions of certain loading costs in minima but did not specify the precise amount to be absorbed in all cases.

the allowances granted by Matson as they appear in the record before us. Under Tariff 14, Matson offers a containerized service which includes a pickup and delivery service. The charge for this service is included in the rate quoted by Matson in the Tariff. If Matson may lawfully include such charge, as we think it may, it would seem clear that it can and should omit the charge when the service is not performed. A shipper choosing not to use the pickup and delivery service provided by Matson thus receives a reduction from the quoted rate, specified in cents per cwt., which Matson chooses to cast in the form of an allowance. He therefore pays less than the shipper using the full service offered by Matson. Each however pays for the service he receives, and each is able to readily ascertain not only the charges he must pay but also those of his competitor. On the record before us we find Matson's so-called "allowance" valid under section 2 of the Intercoastal Act.

It is argued that "common carriers by water" are precluded from performing a pickup and delivery service and that the motor carriers must be found "other persons" subject to the Shipping Act before they can perform such a service. In effect this would restrict common carriers by water solely to the performance of "transportation by water . . . on the high seas," whatever that term may properly include. But such is not the intent or the meaning of the clear language of the Act. In section 1 the Act defines "other persons" subject to its provisions as those who are not included in the term "common carrier by water," and who engage in forwarding or the furnishing of wharfage, dock, warehouse or other facilities. The phrase "not included in the term common carrier by water" was not intended to preclude common carriers from engaging in the other activities but simply to bring within the ambit of the statute those persons who do engage therein. Thus when a terminal operator performs one of the specified services he becomes an "other person" while the common carrier performing the same service does not become an "other person" but remains a common carrier. We think it clear that the Shipping Act does not preclude a common carrier by water performing services other than "transportation by water . . . on the high seas", but contemplates and authorizes the performance by such carriers of so-called incidental services.

It is also contended that our predecessors have "hitherto avoided the task of setting forth 'terminal areas' by regarding 'terminal facilities' as the term is employed in section 1 of the

Shipping Act, 1916, as meaning the particular terminal structures at the point where a vessel berths." No authority is cited to us for this proposition and it is supported only by assertions to the effect that departure from this "traditional approach" would create more problems than it would solve. Again at the heart of this contention is the view that some kind of usurpation of Interstate Commerce Commission jurisdiction is necessary or is the ultimate result of the acceptance of Tariff 14. It is clear that this does not follow.

Matson has undertaken to provide a more efficient and less costly service to its shippers. A part of this containerized operation is a pickup and delivery service which is physically performed by common carriers by motor vehicle who act as agents for Matson. Throughout the entire operation Matson is the principal charged with the direction of and liability for the services performed. The service is offered by Matson in its capacity as a common carrier by water and it is in this capacity that Matson is subject to the regulatory jurisdiction of this Commission. For this purpose it makes little difference whether the service is construed to be an integral part of the "transportation by water" by a common carrier by water; the furnishing of "terminal facilities" by a common carrier by water, or the establishment and observance of reasonable practices relating to "delivering property for transportation." These are services commonly considered as incidental to line haul transportation by water, and our decision herein is limited to such a service. Nothing in this report should be taken as extending our findings and conclusions as applying to other combinations of services such as two line hauls. We are not saying, nor do we mean to imply, that through their contractual relations with Matson the motor carriers operating as Matson's agents somehow remove themselves from the jurisdiction of the Interstate Commerce Commission. They remain subject to the Interstate Commerce Act and all its requirements applicable to such carrier. Nor are we attempting to exercise any concurrent jurisdiction over these motor carriers such as is precluded by section 33 of the Shipping Act. We are merely subjecting to regulation a service authorized by the provisions of the Shipping Act offered by a common carrier subject to that Act. If a portion of that service is conducted by a carrier subject to another agency's regulation and the carrier performs that service in violation of the laws administered by that agency, that is a matter for

775-794 O-65-33

the agency concerned. Practical difficulties and problems may arise but jurisdictional conflicts should not.

There is nothing novel in this approach. It is substantially similar to that taken by the Civil Aeronautics Board in *City of Philadelphia* v. *C.A.B.*, 289 F. 2d 770 (D.C. Cir. 1961). In that case a transcontinental air freight service substituted a truck service from the Newark Airport to Philadelphia (a distance of about 90 miles) in connection with its West Coast service and eliminated the feeder planes previously performing the service between Newark and Philadelphia. The substituted service was challenged on the ground, *inter alia,* that the C.A.B. had no authority to authorize the substituted service because the Interstate Commerce Commission had not exempted the truck haul under section 303(b)(7a) of the Interstate Commerce Act. At page 774 the Court cited with approval the following portion of the Civil Aeronautics Board decision:

> Philadelphia makes the subsidiary argument that the Philadelphia-Newark truck haul is subject to the jurisdiction of the Interstate Commerce Commission. Our finding goes no further than that Flying Tiger Line's proposed service will, as to it, constitute air transportation and that in rendering service through the airports proposed Flying Tiger Line will be fulfilling its obligations under its certificate. We are not asserting jurisdiction over the motor carrier as an air carrier nor are we determining the status of the truck operation under the Interstate Commerce Act. Whether the Philadelphia-Newark truck haul should be considered as incidental to air transportation within the meaning of the Interstate Commerce Act, and thereby exempt from economic regulation under that statute, is a matter for the Interstate Commerce Commission. We do not intend that our action here should influence what that decision should be. If the Commission should conclude under the standards normally applied by it that the truck operation is not exempt, the trucker must have or obtain the requisite I.C.C. authority in order for Flying Tiger Line to operate in the manner it proposes.

In deciding this case we are doing no more than did the Civil Aeronautics Board. And as we have stated, nothing in this decision is to be taken as disturbing the statutory relationship between the truckers acting as Matson's agents and the Interstate Commerce Commission. Our decision leaves to that Commission all those matters within its statutory province including matters regarding the rate contracted for by these carriers with Matson. Once the charge of the motor carrier to Matson becomes fixed it is like any other fixed cost of a water carrier and is to be considered as such in determining the reasonableness of the rate which that water carrier charged the shipping public.

In addition to the jurisdictional difficulties suggested to us, it is urged that the practical difficulties inherent in departing from the "traditional approach" to terminal areas would result in operations which are detrimental to commerce rather than beneficial. Among those suggested are the difficulty of deciding the geographical limitations of the newly broadened concept of a terminal area, the possibility of two terminal areas—one for motor carriers designated by the Interstate Commerce Commission and one for water carriers designated by this Commission. There is of course the possibility of differently designated terminal areas. We fail to see that differing designations by two agencies creates an insurmountable difficulty. The reasonableness of a terminal area of a water carrier subject to the Shipping Act is to be determined upon consideration of the nature of water transportation and the purposes and policies of that Act. We are not persuaded that a modern, more efficient and less costly innovation in water transportation is to be sacrificed because of possible future difficulties of practical application.

The question of the reasonableness of Matson's terminal areas arises. The shipping statutes do not define the term "terminal area". In the absence of definitive criteria the reasonableness of the geographical extent of a given terminal area must be decided on a case by case basis. Basically, a pickup or delivery service is a terminal area operation if it is incidental to or an integral part of the line haul service, as it is in Matson's containerized operation. Thus, the relationship between the terminal area and the line haul is significant. The coincidence of the terminal area with a homogeneous industrial or business community surrounding the port is another significant factor. Present and potential traffic patterns, commercial zones and the concentration of a carrier's shippers are still others.

Tariff 14 designates port areas (here used interchangeably with the term terminal areas) for each of the ports of San Francisco, Stockton and Los Angeles. Matson selected the precise geographical boundaries of its terminal areas on the basis *inter alia* of decisions by the Interstate Commerce Commission in the cases of Stockton and Los Angeles, and the terminal area it selected for San Francisco is smaller than the area established by the Interstate Commerce Commission and the California Public Utilities Commission. (See p.p. 480–81, *supra.*) In selecting its terminal areas consideration was given by Matson to the fact that the San Francisco port area contains 644 shippers who ship

5 tons or more per month by Matson to Hawaii; the Los Angeles port area contains 553 such shippers, and 16 are located within the port area of Stockton. In the case of Matson's service under Tariff 14 the ocean haul is 2,200 miles while the maximum distance within any port area is approximately 40 miles. In *North Carolina Line—Rates To and From Charleston, S. C.,* 2 U.S.S.B. 83 (1939) a predecessor agency approved the furnishing of pickup and delivery service within the corporate city limits of Charleston and Baltimore when that service was performed in conjunction with an ocean haul of 589 miles. After consideration of all factors we find the port areas as designated in Tariff 14 to be reasonable under the circumstances as they now exist.

As we have noted above, Carnation Company challenges the reasonableness of certain of the rates quoted in Tariff 14. Carnation contends that Matson filed Tariff 14 "under a misrepresentation as to the character of the Tariff itself." On the face of Tariff 14 it is stated, "All rates and charges named herein are reductions, except as otherwise noted." It is Carnation's position that certain of the rates published in Items 275 and 341 are not decreases, but increases, and that they are not otherwise noted as increases. Carnation contends that there has been no change in the service rendered to Carnation by Matson which would justify said increases; and it is argued that if the rates in Tariff 11 were just and reasonable the increased rates in Tariff 14 are perforce unjust and unreasonable. Reparation is claimed based on the difference between the old and new rates.

The record before us is insufficient to determine whether there has been an increase in certain rates as alleged, and, if so, whether such increase is just and reasonable. Accordingly, the parties are granted 30 days within which to petition for an order remanding this proceeding to the Examiner for the limited purpose of resolving the issues raised by Carnation. Replies to any petition filed in accordance herewith may be made within 10 days of the service of said petition. No order will be issued in this proceeding pending expiration of said 30 day period. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified.

FEDERAL MARITIME COMMISSION

No. 1062

AGREEMENT 8765 BETWEEN U.S. FLAG CARRIERS IN THE GULF/MEDITERRANEAN TRADE

Decided February 5, 1963

Agreement 8765 between conference and nonconference U. S. flag carriers in the Gulf-Mediterranean trade, covering certain agricultural commodities, found not violative of Shipping Act, 1916, and approved by the Commission pursuant to section 15 thereof.

Ronald A. Capone and *Robert Henri Binder,* for Isthmian Lines, Inc.; Kulukundis Maritime Industries, Inc.; Lykes Bros. Steamship Co., Inc.; T. J. Stevenson & Co., Inc.; Central Gulf Steamship Corporation, General Shipping & Trading Corporation and Compania Maritime Unidas, S.A.; Stockard Steamship Corporation, Atlantic Ocean Transport Corporation and Mediterranean Transport Corporation; and States Marine Lines, Inc. and Global Bulk Transport Corporation, respondents.

Sterling Stoudenmire, for Waterman Steamship Corporation, respondent.

John Hudgins and *Joseph A. Ryan, Jr.,* for the Secretary of Agriculture of the United States, intervenor.

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

John Marshall, Hearing Examiner.

REPORT OF THE COMMISSION

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

BY THE COMMISSION:

This case involves an agreement, No. 8765, signed by all of the U. S. flag carriers in the trade between the U. S. Gulf ports and

ports in the Mediterranean, under which certain nonconference carriers agree to observe the rates, rules and regulations of the Gulf-Mediterranean Ports Conference (conference) on certain agricultural commodities of which the U. S. Department of Agriculture is the primary shipper.[1] The question is whether the agreement should be approved pursuant to section 15 of the Shipping Act, 1916.

The parties to the agreement are Isthmian Lines, Inc.; Kulukundis Maritime Industries, Inc.; Waterman Steamship Corporation; Lykes Bros. Steamship Co., Inc.; T. J. Stevenson & Co., Inc.; Central Gulf Steamship Corporation, General Shipping & Trading Corporation and Compania Maritime Unidas, S.A. (three carriers operating as the Central Gulf Lines joint service); Stockard Steamship Corporation, Atlantic Ocean Transport Corporation and Mediterranean Transport Corporation (three carriers operating as the Levant Line joint service); and States Marine Lines, Inc. and Global Bulk Transport Corporation (two carriers operating as the States Marine Line joint service). By the agreement the nonconference members, Stevenson, Kulukundis and Levant, agree with Isthmian, Lykes, Waterman, Central Gulf Lines, and States Marine, members of the conference, that they, the nonmembers, will observe the rates, rules and regulations of Gulf-Mediterranean Ports Conference Tariffs Nos. 6 and 7 as they apply to cornmeal (in bags, barrels, boxes or cases); wheat (in bags); wheat flour (in bags, barrels, boxes or cases); powdered skimmed milk ("For charitable purposes only—not for resale"); shortening; and clean rice (in bags, bales or cartons). These are hereinafter sometimes referred to as "8765 commodities."

Under the terms of the conference agreement all member lines, American and foreign, participate in rate determinations on all commoditis, including those enumerated in Agreement 8765, but the foreign members accede to the judgment of the American lines in fixing rates on the 8765 commodities because substantially all these commodities are carried by American lines pursuant to the requirements of cargo preference laws and executive policies

On Jun 27, 1962 the Commission on its own motion ordered an investigation into the question whether Agreement 8765 should be

[1] The Gulf/Mediterranean Ports Conference, operating under Agreement 134, is composed of 19 members, of which 14 are foreign flag and five American. The trade covered by the conference is that from Gulf of Mexico and South Atlantic ports of the United States to ports in the Mediterranean, including Europe, North Africa, the Middle East and adjacent seas.

approved, naming as respondents the eight signatories thereto, who comprise all the U. S. flag carriers in the trade. During hearings and oral argument before the Examiner, these carriers urged approval of the agreement. Hearing Counsel and the U. S. Department of Agriculture (Agriculture), an intervenor in the case, urged disapproval. The Examiner found and concluded that the agreement should be approved. Exceptions and replies to his decision were filed, and we heard oral argument. We have concluded that the agreement should be approved.

DISCUSSION AND CONCLUSION

During the two and one-half year period January 1, 1960 through June 30, 1962, the eight U. S. flag carriers in the trade, the parties to the agreement, lifted an outbound total of approximately 2,324,000 tons, of which 684,000 tons or 29 percent consisted of 8765 commodities. Over 99.8 percent of the 8765 commodity tonnage was shipped directly by or under the sponsorship of Agriculture, at the expense of the United States Government,[3] and was subject to the cargo preference laws. These laws require at least 50 percent shipment in American flag vessels and it is the policy of Agriculture to ship almost exclusively via U. S. flag carriers. 8765 commodities together with Department of Defense (MSTS) cargo, represent nearly half of the carryings of the American flag lines in this trade. The importance of 8765 commodities is further emphasized by the fact that shipments thereof are usually large enough to provide so-called "base cargo loads" or tonnage to which MSTS or bulk cargoes can be added to make a compensatory voyage.

Wheat flour in bags comprised approximately 80 percent of the 8765 commodity tonnage during the period here in question. Wheat in bags represented a substantial part of the remainder. Since February 1957, the conference contract rate on each has been $28.50 per ton. The conference tariff makes the contract rates available to Agriculture and other Government agencies without requiring them to execute contract rate agreements.

Kulukundis first "broke" the $28.50 contract rate on June 14, 1961, when it received a booking from Agriculture for 4938 tons of wheat in bags at $26.50. On July 31, 1961 it received a like

[3] Section 416, Agricultural Act of 1948, and Public Law 480, 83rd Congress. The term "sponsorship" refers to the provision of commodities and reimbursement of shipping costs by Agriculture to approved United States nonprofit relief agencies engaged in the distribution of surplus agriculture commodities abroad.

booking of 2470 tons at $25.30. Next Stevenson broke the rate and from August 1961 through January 1962 received seven bookings of wheat flour in bags from Agriculture totaling 34,539 tons at rates ranging from $24.90 to $26.50. Levant, a conference member, thereupon withdrew from the conference and on February 6, 1962 received a booking from Agriculture of 5032 tons of wheat flour in bags at $25.50. Kulukundis also received Agriculture bookings of 7908 tons of wheat flour in bags at $25.90 on January 15, 1962, and 7901 tons at $25.50 on February 6, 1962, although this latter was later rebooked with a conference line at the conference rate of $28.50. Kulukundis is continuing to offer lower than conference rates on all 8765 commodities except wheat flour in bags. From March 25 to April 15, 1962, Levant offered lower rates on wheat flour in bags to Beirut and Port Said. Subsequent to its bookings mentioned above, Stevenson became, at least temporarily, inactive in the trade.[3]

This pattern of rate reductions by nonconference lines on substantial tonnages of the most important commodities moving in the trade, aroused the concern of the conference members. It was feared the rate-cutting would be expanded and/or lead to disintegration of the conference. One line, Levant, did withdraw, as previously noted, and others were threatening to do so. Such conditions can lead to complete deterioration of the rate structure in the trade and possibly the break-up of the conference itself. Contrary to the position of the opponents of the agreement, we think it clear on this record that a serious situation existed in the trade, and that the conference lines were justified in attempting, within the ambit of section 15 of the Act, to find a satisfactory solution with the carriers concerned.

Initially, the U. S. flag conference members sought to prevail upon the nonconference lines to join the conference, without success. Consideration was then given to an agreement which would at least stabilize rates on the 8765 commodities, and this effort succeeded. Of course, the rates on these commodities could have been thrown open permitting the conference lines to meet the nonconference competition but this would likely have led to further rate deterioration and instability, the very condition the conference was attempting to overcome. Certainly, the compromise alternative chosen by the parties was a reasonable solu-

[3] We are unable to find in this record support for the claim that Stevenson "abandoned" the trade. The indications are to the contrary. It became a party to Agreement 8765 and has urged approval thereof through participation in these proceedings.

tion under the circumstances. In our judgment, although full conference participation by the rate-cutting lines would have been more desirable, the limited agreement that was reached is not to be condemned because it does not go all the way in assuring complete stability in the trade. The conference parties to the agreement hope it will lead to full conference participation, and it may.

The Shipping Act recognizes and history has demonstrated that stability of rates is needed to assure continuity and regularity of service in the ocean commerce, which is in the public interest, the interest of the commerce of the United States, and in the interests of both carriers and shippers. Subject to continuous supervision by this Commission, the Act permits rate-fixing agreements among carriers. By their very nature, these reduce or eliminate rate competition, and there are trades where, perforce of such agreements, rate competition is nonexistent. Agreement 8765 is therefore not unique. The controversy over it seems to us to stem more from the fact that the shipper mainly affected is the U. S. Department of Agriculture, than from anything found in the Shipping Act as grounds for disapproving the agreement.

In this connection, the record shows that Agriculture effected a saving of $174,427.82 by reason of securing the aforesaid bookings at less than the $28.50 conference rate for the commodities involved. While we share the desire to conserve the taxpayer's dollar, the record indicates that the saving referred to was accomplished by undercutting a conference rate which is barely compensatory to the carriers and which is admitted by Agriculture to be reasonable. Hence, there is no question before the Commission that the carriers are employing their concerted power to charge an agency of the United States Government an unreasonable rate. Under the circumstances, the mere fact that Agriculture is the shipper mainly affected appears to us to be irrelevant to an issue properly involved in our inquiry into the approvability of the agreement under section 15.

It is contended that the agreement, by eliminating the possibility of rate competition on 8765 commodities while nonconference competition exists as to other commodities, discriminates against Agriculture vis-a-vis shippers of other commodities. This contention, even if valid, overlooks the fact that Agriculture has a number of alternatives if it decides the conference rates (now admitted by it to be reasonable) are too high. It has the legal right under the cargo preference laws to use foreign flag vessels

in any case for up to 50 percent of the cargo, and if no U. S. flag vessels are available at fair and reasonable rates it may use foreign flag vessels for all of the cargo. Or it may, as it has done in the past, ship via U. S. flag tramp vessels. These choices, in addition to Agriculture's ability to ship over alternative routes, are sufficient to insure that the rates on 8765 commodities are kept reasonable.

Furthermore, while Agriculture is the predominant shipper, it is not the sole shipper of 8765 commodities, and the agreement applies with equal effect and without discrimination to all shippers of such commodities. There can be no unjust discrimination against a shipper under the Shipping Act unless another similarly situated shipper with whom the complaining shipper competes is preferred. *Wharfage Charges and Practices at Boston*, 2 U.S.M.C. 245, 248 (1940); *The Huber Manufacturing Co. v. N. V. Stoomvaart Maatschappij "Nederland,"* 4 F.M.B. 343, 347 (1953). Here, the fact that the shippers of other than 8765 commodities are in the same position before and after the agreement cannot be said to be a preference in favor of those shippers. It is but an incidental circumstance brought about by the inability thus far to achieve complete conference participation among the regular carriers in the trade. If such participation had been achieved, Agriculture's position rate-wise would be exactly what it is under the present agreement.

What has been said above applies with equal force to the claim that the agreement causes undue or unreasonable prejudice or disadvantage to Agriculture under section 17 because "fixed non-competitive" rates on 8765 commodities prefers shippers of other commodities on which there are "variable competitive" rates. If in the future there should be actual unjust discrimination or unreasonable prejudice or disadvantage to shippers of 8765 commodities, the Act provides ample means for remedying the situation including the power it vests in us to modify or withdraw approval of any section 15 agreement theretofore approved.

Having examined Agreement 8765 under the standards laid down in section 15, our conclusion is that the record fails to support a finding that the agreement is unjustly discriminatory or unfair, detrimental to the commerce of the United States, contrary to the public interest, or otherwise violative of the Act.

Hearing Counsel objects to certain of the procedural provisions of the Agreement as being "vague." Although we do not think

the objections so urged are well taken, we do think that Article 2 of the agreement is ambiguous and must be clarified. As written, the article undertakes without qualification to bind the nonconference lines to charge the conference rates on 8765 commodities. These commodities, however, are covered by the conference's dual rate or contract system and the nonconference lines cannot use such a system without the Commission's express permission obtained in the manner and under the conditions set forth in section 14(b) of the Act. Since the parties apparently intended that the nonconference lines simply adhere to one set of rates on 8765 commodities, these being the same as the rates the conference gives its contract shippers, we shall approve the agreement with a modification making clear that the rates quoted in the tariffs of the nonconference lines for 8765 commodities are single rates and not an extension or application of the conference's dual rate system. An appropriate order will be entered.

JOHN HARLLEE, *Commissioner*, dissenting:

Certainly no present urgent necessity has been proven with relation to the agreement concerned here. Even though the necessity were apparent, I would hesitate, on this record, to approve the agreement for the following reasons:

The record, in my opinion, does not support the respondent's claim or the Commission's finding that the rate situation is such that it would probably lead to a rate war and possibly the break-up of the Gulf/Mediterranean Ports Conference. There is no evidence that there has been any extensive rate instability lately or that Stevenson, the carrier offering reduced rates most frequently, is even in the trade any more. In fact, there is evidence that the rate level is barely compensatory, from which we may infer that it would not be economically feasible for the lines to engage in drastic rate reductions for any considerable period, much less precipitate a rate war.

But even if the rate situation in the Gulf-Mediterranean trade were as grim as respondents believe it to be, I would question a rate-fixing agreement aimed solely at one shipper, namely, the Department of Agriculture.[1] Approval of this agreement will deprive Agriculture of the right to obtain rates set in accordance with the competitive forces operative in this trade, whereas shippers of other commodities will be free to "shop around."

[1] As the majority opinion points out at p. 496, "over 99.8 percent of the 8765 commodity tonnage was shipped directly by or under the sponsorship of Agriculture."

Agriculture is, by virtue of the cargo preference laws, a "captive shipper." To sacrifice the right of one shipper to competitive rates for the sake of preserving rate stability among all other shippers is a unique kind of discrimination, but it is discrimination all the same. If outside competition were removed as to all shippers (e.g., by the nonconference carriers joining the conference), then all shippers would contribute to rate stability, rather than only one shipper, as in the matter before us. In my opinion, such an agreement is "unfair as between shippers" within the meaning of section 15.

It is not enough to say that Agriculture has avenues by which it can escape the noncompetitive rates, that is, by shipping over alternate routes or by tramp and foreign flag vessels. If it is possible that Agriculture will be forced to look to means of transportation which it has in the past chosen not to utilize, then the agreement is contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916. But even if Agriculture has other devices, so have the conference members. They have the conference structure, strengthened by the dual-rate system, to use as an economic weapon to maintain rate stabilization. If rates cannot be stabilized within that structure, then we should take another hard look at the conference/dual-rate system. But we should not allow the conference members to go outside of that system to enter into "side" agreements with carriers who wish to remain outside the conference without better evidence of necessity for them.

In summary, then, the record clearly shows that Agriculture will bear the full brunt of this agreement and will thereby lose the benefit of the savings which have accrued to it in the past from the reduced rates.

I believe that this agreement is therefore "unfair as between . . . shippers . . ." and "contrary to the public interest" within the meaning of section 15. My opinion is that such an agreement cannot be approved and, under the clear mandate of section 15, must be disapproved by the Commission.

FEDERAL MARITIME COMMISSION

ORDER

No. 1062

AGREEMENT 8765, BETWEEN U.S. FLAG CARRIERS IN THE GULF-MEDITERRANEAN TRADE

This proceeding having been initiated by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a Report containing its findings and conclusion thereon, which Report is hereby referred to and made a part hereof;

It is ordered, That the first sentence of Article 2 of Agreement 8765 is hereby modified by changing the period to a comma and adding the phrase "except that the rates so quoted, charged and collected by the non-conference members shall be single rates and in no manner an extension or application of the Conference dual rate system.";

It is further ordered, That Agreement 8765, as modified by this Order, be and it is hereby, approved.

By the Commission, February 5, 1963.

(Signed) THOMAS LISI
Secretary

(SEAL)

FEDERAL MARITIME COMMISSION

No. 989

CERTAIN TARIFF PRACTICES OF SEA-LAND SERVICE, INC., PUERTO RICAN DIVISION

Decided February 5, 1963

Single-factor rates of common carrier by water from inland points in Puerto Rico to a port in United States are required to be filed with the Commission, but a separate statement in the tariff of charges for the included pickup service in Puerto Rico is not required.

C. H. Wheeler and *Warren Price, Jr.*, for Sea-Land Service, Inc., Puerto Rican Division, respondent.

John M. Kinnaird and *George F. Galland* for Consolidated Freightways Corp. of Delaware (Garrison Fast Freight Division), intervener.

L. A. Parrish, Alabama State Docks Department, intervener.

Norman D. Kline, Donald J. Brunner, and *Robert J. Blackwell,* Hearing Counsel.

Charles E. Morgan, Hearing Examiner.

REPORT OF THE COMMISSION

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

BY THE COMMISSION:

On January 3, 1963 the Commission decided on its own initiative to review the Initial Decision of the Examiner in this proceeding. The proceeding was instituted by the Commission to determine the lawfulness of the filing of certain single-factor rates on "Sugar Refined or Turbinated, in Bags" by Sea-Land Service, Inc., Puerto Rican Division (Sea-Land) as 13th Revised Page No.

34 to its Homeward Freight Tariff No. 4, FMC-F No. 2. Leave to intervene was granted to Consolidated Freightways Corporation of Delaware, Garrison Fast Freight Division (Garrison) and to the Alabama States Docks Department. With the consent of the parties, the Examiner adopted a shortened procedure in which no hearings were held but a verified statement of facts was submitted by Sea-Land. The only evidence of record in this proceeding is Sea-Land's verified statement.

FACTS

Sea-Land began its container service in the North Atlantic-Puerto Rican trade in August of 1958. Container service was instituted in an effort to reduce the cargo handling costs incurred in the traditional breakbulk service. These costs represented approximately one-half of the cost of Sea-Land's operations in the trade. Sea-Land maintains terminals at the ports of San Juan, Ponce and Mayaguez, Puerto Rico, and at Port Newark, New Jersey. At each of these ports container marshaling yards are set up for the receipt, delivery and holding of empty and laden containers.

Sea-Land presently employs three specially converted container ships in the Puerto Rican trade offering two sailings per week in each direction. Each ship can carry a total of 226 containers which are either stowed below deck in specially constructed cells or on deck where they are secured by specially designed fittings.

The single-factor rates here in question apply only to shipments of sugar originating from Aguirre, Central Igualdad, Central San Francisco, Humacao, and Mercidita, in Puerto Rico. The rates include (1) pickup by Sea-Land at the shipper's premises, (2) the wharfage charges and handling charges, (3) ocean transportation to Port Newark and delivery there at Sea-Land's terminal. The shipper using the full container service has Sea-Land call at his premises where the cargo is loaded directly into the container. Movement over the highways of Puerto Rico is accomplished by means of specially constructed semi-trailer chassis into which the containers are locked. The containers are hauled from the shipper's premises to Sea-Land's portside terminal at Ponce, Mayaguez or San Juan, where the containers are loaded aboard the vessel by means of specially designed gantry cranes for transportation to Port Newark. The haul from shipper's premises to Sea-Land's portside terminal is accomplished by motor carriers under con-

tract to Sea-Land. The entire movement from point of origin at shipper's premises to delivery at Port Newark is under the bill of lading and responsibility of Sea-Land.

Shippers have the option under the proposed tariff of electing to make delivery of their goods to Sea-Land's terminal. In such a case, the shipper selects an independent motor carrier and pays that carrier's charges for delivery to Sea-Land. When the cargo arrives at the container marshaling yard it must be unloaded from the motor carrier's vehicle and loaded into Sea-Land's containers which are then placed aboard the vessel. If the shipper elects to make his own delivery he pays Sea-Land's published port-to-port rate. This type of movement involves extra cargo handling and checking of shipments, not required when Sea-Land's pickup service is utilized. The additional cargo handling also increases the possibility of loss or damage to cargoes, and results in costs of handling between the dock and the vessel which the container service was designed to eliminate.

When the pickup service is used, Sea-Land containers are hauled 15 miles from the inland points of Aguirre, Mercidita, and Central San Francisco to the port of Ponce, and about 5 miles from Central Igualdad to the Port of Mayaguez. The distance from Humacao to San Juan is unspecified, however, sugar originating from that point has historically been shipped through San Juan. Single factor rates have been in existence only a short time, yet more than 40% of all current shipments move under these rates.

DISCUSSION AND CONCLUSION

All parties agreed and the Examiner found that the rates for Sea-Land's service here under consideration must be filed with the Commission under Section 2 of the Intercoastal Shipping Act, 1933, which requires every common carrier by water in the offshore domestic commerce of the United States to file and keep open to public inspection schedules showing the rates, fares and charges for the transportation services offered by such carriers. We agree with the Examiner's findings and conclusions with respect to this issue. Sea-Land is a common carrier by water operating between the United States and Puerto Rico and as such is clearly subject to the requirements of Section 2. Thus, there remains only the question of the Commission's jurisdiction to

accept for filing in their present form Sea-Land's single factor rates on "Sugar Refined or Turbinated, in Bags."

There is no dispute as to whether Sea-Land's pickup service is a bona fide terminal service incidental to the line-haul transportation. However, Hearing Counsel feels that some clarification is required concerning the validity of Sea-Land's rates under that provision of section 2 which requires that each schedule of rates filed

shall also state separately each terminal or other charge, privilege, or facility, granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, or charges, or the value of the service rendered to the passenger, consignor, or consignee. . . .

It is suggested that while the Commission may properly find that single-factor rates are valid under section 2 without additional breakdown or separation of charges, clarification of the meaning of section 2 is necessary because of two prior Commission proceedings. In *Aleutian Homes, Inc.* v. *Coastwise Line, et al.* 5 F.M.B. 602 (1959), the tariff of Coastwise Line provided only a tackle-to-tackle rate, and no terminal charges were published. However, the shipper was not permitted to deliver or receive cargo at the end of ship's tackle. Coastwise assessed all terminal charges, and in at least one port it performed certain of the terminal services itself. Instead of publishing the terminal's charges in its tariff and applying them in a lawful manner, Coastwise in effect adopted the terminal's tariffs, misapplied them and collected overcharges. The tariff publishing practices of Coastwise Line were condemned because:

It is the duty of a common carrier by water to provide a place for the receipt and delivery of property. This obligation may be fulfilled by the carrier itself or through an agent. In any event, the 1933 Act requires that the charges for the services involved, regardless of who makes them, must be stated separately in the tariff of the carrier. The failure of coastwise to do this, particularly when it calculated and collected such charges, resulted in a violation of section 2 of the 1933 Act and section 18 of the 1916 Act. 5 F.M.B. 612–613. (Citation omitted.)

In *Intercoastal Investigation, 1935,* 1 U.S.S.B. 400 (1935) it was stated at page 433-434:

If in connection with intercoastal transportation a terminal or other charge is made, or a privilege or facility is granted or allowed, or a rule or regulation in anywise changes, affects or determines any part of the aggregate of the rates, fares, or charges, or the value of the service to the passenger or shipper, it must be stated separately in the tariff of the carrier regardless of

775-794 O-65-34

who makes the charge, grants, or allows the privilege or facility, or applies the rule or regulation.

It is urged that the foregoing interpretations of section 2 render Sea-Land's tariff deficient because there is no separate designation of the charges imposed for the pickup service performed by Sea-Land. We recently had occasion to consider the proper interpretation of section 2 in *Matson Navigation Company—Container Freight Tariffs,* 7 F.M.C. 480 (1963). There respondent included in a single-factor rate charges for pickup service within designated port terminal areas and delivery to an off-dock container freight station. Concerning the validity of those rates under section 2, we said, at page 489,

> We think it clear . . . that section 2 was never intended to require the separate statement of each and every terminal charge which is a component of the final rate for the service offered. To the contrary, the purpose of the "state separately" language of section 2 was to make the carrier, once it had fixed its rate or charge for the service offered, specify individually anything else which would effect a change in the ultimate rate to be paid by the shipper. Thus, if a tariff contains a description of the complete service offered and the total rate charged for that service, section 2 requires only that the carrier specify and state separately any additional charges imposed by the carrier, and all absorptions or allowances granted or allowed by it, which would increase or reduce the total rate for the transportation offered.

In the *Aleutian Homes* case, *supra,* the rate published was for transportation from tackle-to-tackle, but the actual service offered by the carrier was something more since the shipper was not permitted to deliver or receive cargo at the end of ship's tackle. Additional charges were imposed and collected by the carrier, but the shipper was not able from an examination of the tariff of the carrier to determine what these charges were. Thus, the clear purpose of section 2 was defeated because the shipper could not tell from the tariff the exact price of the transportation offered to him and to his competitors. In order to determine the proper charges the shipper had to go beyond the carrier's tariff to the terminal's tariff, and then determine whether the carrier had imposed the correct charges. Such a burden may not be imposed upon a shipper. *Intercoastal Rates of Nelson S.S. Co.,* 1 U.S.S.B. 326 (1934). We do not understand the *Aleutian Homes* case to preclude carriers from including proper terminal charges within single-factor rates. Furthermore, we understand the quoted language from the *Intercoastal* case, *supra,* as requiring the separate statement of only those terminal charges, privileges or facilities not properly identified as included within the quoted rate.

Sea-Land's tariff offers two services, one includes pickup and delivery for which a single-factor rate is quoted while the other requires delivery of the goods to Sea-Land at the container marshaling yard. For the latter a port-to-port rate is quoted. The shipper may easily determine what he is paying for and which service he may most economically employ. The primary purpose of section 2 is achieved when the shipper is able to determine from the tariff the exact price of the transportation to him as well as to his competitor. We accordingly find and conclude that Sea-Land's single-factor rates here under consideration are valid under section 2 of the Intercoastal Shipping Act, 1933.

ORDER

FEDERAL MARITIME COMMISSION

No. 989

CERTAIN TARIFF PRACTICES OF SEA-LAND SERVICE, INC., PUERTO RICAN DIVISION

This proceeding having been duly heard and submitted, and the Federal Maritime Commission, having fully considered the matter and having this date made and entered a Report containing its conclusions and decision thereon, which Report is hereby referred to and made a part hereof;

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

By the Commission, February 5, 1963.

(Signed) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 976

AGREEMENT 8492 BETWEEN T. F. KOLLMAR, INC., D/B/A NORTHLAND FREIGHT LINES, AND WAGNER TUG-BOAT COMPANY IN THE ALASKAN TRADE

Decided February 12, 1963

Agreement 8492 found not violative of the Shipping Act, 1916, and approved by the Commission pursuant to section 15 thereof.

Alan F. Wohlstetter for Wagner Tug Boat Company, Foss Launch & Tug Co., and T. F. Kollmar, Inc., d/b/a Northland Freight Lines, respondents.

Mark P. Schlefer and *T. S. L. Perlman* for Puget Sound-Alaska Van Lines, Inc. and Puget Sound Tug & Barge Co., Inc., protestants.

Calhoun E. Jacobson and *Richard O. Gantz* for port of Anchorage, Alaska, intervenor.

Robert B. Hood, Jr., Hearing Counsel.

A. L. Jordan, Hearing Examiner.

REPORT OF THE COMMISSION

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

BY THE COMMISSION:

This proceeding is concerned with an agreement, No. 8492, between a common carrier tug and barge operator, Wagner Tug Boat Company (Wagner), and a non-vessel-operating common

* Commissioner Barrett took no part in the hearing or decision of this case.

carrier, T. F. Kollmar, Inc., d/b/a Northland Freight Lines (Northland), engaged in the trade between Seattle, Washington, and Anchorage, Alaska. The question is whether the agreement should be approved pursuant to section 15 of the Shipping Act, 1916. The agreement provides that Wagner, in addition to transporting its own cargoes under its own tariff, will transport for Northland common carriage cargoes generated by Northland at Northland's tariff rates.

The agreement includes Foss Launch & Tug Co. (Foss) as a party. Wagner has been a wholly-owned subsidiary of Foss since 1939. Foss has been engaged as a contract or private carrier by tug and barge in the Alaskan trade since 1930. It does not file tariffs with this Commission. Wagner operates as a common carrier in the Alaskan trade, making calls at Anchorage in the ice-free months. It has no full-time personnel, offices or terminal facilities separate from those of Foss. Its first tariff as a common carrier in the Alaska trade covered but a single commodity, bulk cement, but in August 1961 this was replaced by the filing of a tariff of rates covering general commodities, and also bulk cement of at least 3,500 tons. This became effective in September 1961 and was applicable during the 1962 shipping season for transportation between ports in Washington and several ports in Alaska. Wagner owns one ocean-going tug and one non-ocean-going tug, and intends to charter equipment from Foss for use under Agreement 8492, and for the conduct of its own common carrier service. The equipment will be furnished by Foss with crews, stores and fuel. Wagner expects to continue its seasonal common carrier operations to Anchorage whether or not Northland cargo becomes available to it through approval of the agreement.

Northland neither owns nor operates vessels. It does own a number of vans used as cargo containers, and currently has on file with the Commission a common carrier tariff which names class and commodity rates between Seattle, Washington and Anchorage, Alaska. Under this tariff Northland provides containers or vans for the use of shippers and its tariff states that the transportation thereunder "may be by vessels owned by or chartered to carrier, or may be in participation with Wagner Tug Boat Company" (FMC-F No. 1, Rev. Page No. 5 and 3rd Rev.

Page 7).[1] Under Agreement 8492, Northland will solicit and book cargo and issue its own bills of lading, and Wagner will accomplish the physical transportation of the cargo by tug and barge. Such cargo may move on the same barge as cargo booked by Wagner under its own tariff.

Agreement 8492 applies only to "such cargo as Northland tenders to Wagner," and there is no obligation on Northland's part to supply any minimum quantity. Wagner is not obligated to furnish any minimum space or schedule of sailings for Northland cargo, its obligation being limited to "such barge or barges actually being employed" in its common carrier services. On Northland cargo moving to Alaska, Wagner assumes possession at the first place of rest on its pier at Seattle and delivers to Northland at ship's tackle at Anchorage. For cargo from Alaska, Wagner assumes possession only after storage aboard its vessel at Anchorage, and delivery to Northland is completed at the "final place of rest on the pier at Seattle." Wagner assumes loading and unloading costs at Seattle and Northland pays these costs at Anchorage. All cargo insurance is paid by Northland, and Wagner furnishes the necessary dunnage for Northland cargo. Gross revenue derived from Northland cargo will be distributed between Wagner and Northland in accordance with division sheets to be filed with the Commission, the division currently anticipated being 50% to Northland and 50% to Wagner. Either party can cancel the agreement on 90 days' notice.

Both the Northland and Wagner tariffs now on file provide that the carrier will furnish cargo containers or vans for the loading of cargo "the nature, density and dimension of which are, in the judgment of the carrier, suitable for containerization." Both tariffs make weight allowances for cargo loaded into the carrier's vans by shippers. However, Wagner presently owns no vans and does not plan to purchase any until the trade requires it, whereas Northland owns vans and has apparently made full use of them.

Under Wagner's tariff the rate and minimum tonnage for bulk cement are identical to the rate and minimum tonnage for bulk cement contained in a transportation contract Foss has with Permanente Cement Co., and the latter has agreed that its cement

[1] By a Report served January 8, 1962 in Dockets 904 and 914, which were complaint actions by Puget Sound Tug & Barge Co. against Foss, Wagner, Northland, et al., we held that Foss was a common carrier as to general cargo transported on its barges for Northland during 1960, and that Foss-Northland agreements covering such transportation are subject to section 15. Pending this decision, consideration of Agreement 8492, here in issue, was deferred.

may move either under the contract or under Wagner's common carriage tariff, at the option of Foss and Wagner. It would be possible under Agreement 8492 for two barges to be towed in tandem on a single voyage with one of the barges containing a mixture of general cargo booked in part by Wagner and in part by Northland, and the other containing cement or other contract cargo booked by Foss. However, such towing of cement and general cargo barges is considered inadvisable from an operational standpoint. Moreover, it is not the intention of the parties to the Agreement to transport contract cargo under their arrangement.

The tariffs of Wagner and Northland do not limit their operation to warmer months, nor does anything in Agreement 8492. However, the record indicates that the service which Wagner and Northland will provide under the agreement will be seasonal because ice conditions prohibit calls at Anchorage by other than special vessels during the colder months, and there is no evidence the parties intend using such special equipment. The normal shipping season at Anchorage opens in mid-April and is closed by ice to all but special vessels around the first of November, and there are occasional periods during winter when calls at Anchorage are impossible even for such vessels. The only common carrier currently serving Anchorage the year around is Alaska Freight Lines (Alaska Freight), which is also a tug and barge operator. When ice conditions are severe at Anchorage, it calls at Seward or Valdez as alternates.

Coupled with the physical difficulties of winter operation to Anchorage is the seasonal fluctuation in the cargo demands of the trade. There is a much greater demand in summer than in winter. On occasion during the summer Alaska Freight has made as many as three sailings per week, whereas in winter it sometimes offers only once a week service due to lack of cargo. A major reason for this fluctuation is the winter shutdown of the construction and oil exploration industries. This also reduces the population because the workers move south in winter.

Approval of the agreement was protested by Puget Sound Alaska Van Lines (PSAVL), a division of Puget Sound Tug & Barge Company. PSAVL began operation as a common carrier by tug and barge in the Alaskan trade in January of 1960, but its parent corporation has been a contract or private carrier in the Alaskan trade for many years. PSAVL offers one sailing a week from Seattle and one every two weeks from California (via

Seattle) to Seward, Alaska, and maintains that sailing frequency the year around. It does not serve Anchorage directly but, through an arrangement with the Alaska Railroad (U. S. Department of the Interior), does offer a through bill of lading service from Seattle to Anchorage via Seward. The total rate for cargo moving under this through billing arrangement can be found only by resort to an Alaska Railroad tariff which is not filed with this Commission nor subject to regulation by any Federal regulatory agency. Seward is also served twice weekly from Seattle by the self-propelled vessels of Alaska Steamship Company (Alaska Steam). The Port of Seward is owned by the Alaska Railroad, which has expended considerable effort developing it as a transshipment point for rail belt cargo. Substantially all the cargo moving through Seward to Anchorage moves via the Alaska Railroad.

The Port of Anchorage, a municipal department of the City of Anchorage, Alaska, intervened in support of the approval of Agreement 8492. In July 1961 it opened a new municipal terminal. Anchorage is the largest city in Alaska and serves as a distribution center for almost one-third of the State's people. However, as has been indicated, it receives little direct water transportation service and most of the freight destined for it moves by vessel to Seward and thence by the Alaska Railroad to Anchorage. Under Agreement 8492 Anchorage would receive additional direct, although seasonal, water service. Though it would prefer direct year around service, it feels the seasonal service will bring benefits to the Anchorage community not provided by the existing indirect service.

Seward is served regularly by Alaska Steam and PSAVL. But it consumes little of the goods that flow into it. The Port Director at Anchorage estimated that 70 to 80 percent of all the cargo moving to the Port of Seward is ultimately destined either for consumption in the Anchorage area or for redistribution out of Anchorage to other points in the rail belt area of Alaska. The Port of Seward has the natural advantage over Anchorage of being free from troublesome ice in winter. The barge-rail service to Anchorage via the Port of Seward, from Seattle, takes about a day less of transit time than the direct barge service to Anchorage, but this may be offset by savings resulting from all-water transportation and the elimination of extra cargo handling necessitated by transhipment at Seward.

We ordered an investigation into the approval of Agreement 8492. After hearings and the filing of briefs in which all parties except PSAVL urged approval of the agreement, the Examiner found that the agreement was not violative of the Shipping Act and should be approved. Following exceptions by PSAVL and replies thereto, we heard oral argument. We think the Examiner's decision in the case is correct.

DISCUSSION AND CONCLUSION

Although the exceptions of protestant PSAVL are quite numerous, they reduce to four general categories of objections and may be disposed of on that basis. To begin with, PSAVL states that the agreement provides for the filing of rates and consultation between the parties on the level thereof, and it argues that the Examiner erroneously failed to receive evidence on and consider the level of the rates of Wagner and Northland to be charged under the agreement. PSAVL says the arrangement may permit unreasonably high rates derived from transportation contracts held by Foss, to be used "to subsidize unreasonably low rates on Northland and Wagner general cargo."

Agreement 8492 is not a section 15 arrangement providing for uniform rates nor common rate action by the parties, and the section 15 cases of that kind which PSAVL cites are inapposite.[2] Wagner's own rates are not fixed in concert with Northland, nor are Northland's fixed in concert with Wagner, and nothing in Agreement 8492 would authorize this. The agreement does provide for Northland to consult with Wagner on amendments to Northland's tariff which affect the income Wagner will receive under the revenue division previously referred to. But this merely relates to the amounts to be charged for the combined Northland/Wagner service—a service to which Northland and Wagner each contribute a different part. Such activity differs materially from rate-fixing among competitors offering the same service, and the reasonableness of the rates to be charged under the combined service is not relevant to the equestion of approving the agreement.

Both Wagner and Northland are subject to the Intercoastal Shipping Act, 1933, which requires them to file all their tariffs and, if called upon, to justify the rate levels therein. Whether

[2] *Empire State Highway Transportation Assn.* v. *American Export Lines*, 5 F.M.B. 565 (1959); *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761 (1946); *Carloading at Southern Calif. Ports*, 3 U.S.M.C. 137 (1949).

or not the Intercoastal Act is a part of the Shipping Act, 1916, as PSAVL argues, it is clear that the provisions of the Intercoastal Act are applicable to the rates of common carriers by water in interstate commerce, like Wagner and Northland, and that the Intercoastal Act affords the proper recourse for inquiry into the reasonableness of their rates. The 1916 Act only authorizes as to the domestic trade the prescribing of a maximum reasonable rate after a finding of unreasonableness (section 18(a), 46 U.S.C. 817a), and this is inapplicable to the present proceeding. PSAVL's complaint is not as to the maximum rates that may flow from the agreement but as to the minimum rates. It concedes it would have no objection if the rates of respondents were no lower than those of the "regular carriers" in the trade, and if respondents operated a year around sailing frequency.

The failure of Wagner and Northland to operate year around is the basis of another of PSAVL's major complaints. It says the agreement should be disapproved because seasonal operation by Wagner and Northland will be detrimental to commerce and contrary to the public interest. At oral argument its counsel contended that the term "contrary to the public interest" now appearing in section 15 as amended by Public Law 87-346, may be used to require that a section 15 joint service agreement meet the prerequisites of a certificate of public convenience and necessity. Wagner and Northland, PSAVL says, did not prove a demand or necessity for their service. The detriment alleged by PSAVL stems from the possibility that Wagner and Northland will deprive PSAVL (and other "regular carriers"), also the Port of Seward and the Alaska Railroad, of summer traffic, without having to operate during winter months when cargo is scarce and operating costs are high.

PSAVL misconceives section 15. Public Law 87-346 did not write into section 15 a public convenience and necessity standard, and we have no authority of the kind suggested. Both Wagner and Northland may, as they already have, individually enter and serve the trade without establishing that their operation serves the public convenience and necessity. No approval or license for such an operation can be required by this Commission. Nor does the fact that they now propose a joint service in the same trade give us the power to veto the proposal on public convenience and necessity grounds.

In connection with the alleged infringement of the public interest and detriment to commerce standards of section 15, it is worthy of note that none of the carrier and port interests which PSAVL asserts will be adversely affected by the operation of the proposed agreement have asked us to disapprove or modify it, and the Port of Anchorage wants it approved. So far as concerns PSAVL itself, the thrust of its position is that the unfair and discriminatory character of the agreement will disappear if the Wagner/Northland combine is required to provide winter service. We are unable to follow this reasoning. Aside from our inability to impose such a requirement, the record makes plain that winter cargoes are relatively light necessitating a curtailment of service by the carriers presently in the trade. We should think these carriers would be hurt rather than helped by the additional overtonnaging that the Wagner/Northland service would bring to the winter trade.

Furthermore, the fact remains that Cook Inlet, on which Anchorage is situated, experiences ice conditions which preclude winter operation except by special vessels, and on occasion even they find it impossible. Alaska Freight, though it offers year around tug and barge service to Anchorage, is forced to make its calls at Seward or Valdez when ice conditions are severe at Anchorage. In testimony, PSAVL's president conceded that he would not operate a scheduled service to Anchorage during winter. Thus, even if it could be said that harm will flow from the Wagner/Northland operation because seasonal, this would result from conditions which are not reasonably within the control of Wagner and Northland. It seems to us the objections PSAVL urges could as validly be urged against the carriers who, because of winter ice, only seasonally serve Great Lakes ports through the St. Lawrence Seaway.

PSAVL's situation as a result of Agreement 8492 is not materially different from what it would be if a single common carrier entered the trade on a seasonal basis, as indeed Wagner appears to have done and plans to continue regardless of whether Agreement 8492 is approved. PSAVL is not, of course, entitled to be protected from competition, and we are unable to find any merit in its argument that the agreement is unfair, detrimental or contrary to the public interest under section 15. Opposed to these charges, moreover, is the interest of Alaska's largest city, Anchorage, which earnestly seeks the benefits inherent in the provision

of additional direct water service during the months of heavy traffic, as is contemplated under this agreement.

PSAVL's next argument is based on the possibility that common and contract cargo may be carried in the same barge tow. According to the record this is not likely to occur and is not contemplated by the parties to Agreement 8492. Nevertheless, it concededly could occur and some comment on the matter appears in order. We are unwilling, from our review of the cases PSAVL cites,[3] to accept its contention that the agreement must be disapproved because a mixture of common and contract carriage on one vessel (or barge tow) on the same voyage would, without more, be unlawful. We think the better approach is that such a mixture of cargoes may not be used to evade regulation and must not result in a carrier's avoidance of its common carrier obligations with respect to the fair, nonpreferential and nondiscriminatory treatment of shippers.

We have no evidence which would warrant our concluding that the parties will, or that they intend to handle contract and common carriage under Agreement 8492 in a manner which would violate the Shipping Act. We should not disapprove the agreement on the bare possibility that they could violate the Act. At the least there ought to be a substantial likelihood of such conduct. If it develops that the parties' actual operations entail rate or other practices of questionable legality, the provisions of the Shipping Act afford ample means for reaching and if necessary correcting same. As for PSAVL's allegation that Wagner's tariff already contains an unlawful minimum weight provision for cement, this has not been proved. Moreover this issue, as with others sought to be raised in this case, is relevant in the pending complaint case (Docket 977) which PSAVL's parent brought against Foss, Wagner and Northland for the specific purpose of inquiring into their rates and practices.

PSVAL's final contention is that Wagner and Northland may have a different rate on the same commodity moving on the same barge, creating undue preference or prejudice among shippers. Admittedly, such a movement is possible, since Wagner and Northland are independent common carriers and they could have different rates on the same commodity. But it does not follow that this would result in preference or prejudice to shippers. Both

[3] *Absorption or Equalization on Explosives*, 6 F.M.B. 138 (1960); *Transportation by Mendez & Co.*, 2 U.S.M.C. 717 (1944); cf. *Grace Line* v. *F.M.B.*, 280 F. 2d 790 (2d Cir. 1960); *Flota Mercante Grancolombiana, et al.* v. *F.M.C. & U. S.*, 302 F. 2d 887 (D. C. Cir., 1962).

carriers must publish their rates and file them with this Commission, thereby apprising shippers of any rate variance and permitting them to exercise their own choice of carrier. Typically, shippers will book with the carrier having the lower rate, which fact itself would tend to bring about rate parity between the carriers. It is clear, in any event, that shippers will be able to make their own informed selection.

PSAVL's subsidiary claims as to possible rebating, refusals by Wagner to book cargo, and the like, are purely speculative and not supported by logic. It seems to us that acceptance of the position urged would require the disapproval of every agreement between a common carrier and a nonvessel operating common carrier under which each carrier quotes its own rates for cargo moving on the same vessel.

Our conclusion is that Agreement 8492 is not detrimental to the commerce of the United States, contrary to the public interest, or otherwise violative of the Act, and it should be approved. We would add, as already indicated, that this approval should serve the public interest in a peculiarly positive way because the agreement envisages additional direct water service to the Port of Anchorage, and at a cost to shippers which is apparently less than the combination water-rail rate to Anchorage via the Port of Seward. An appropriate order will be entered.

FEDERAL MARITIME COMMISSION

ORDER

No. 976

AGREEMENT NO. 8492 BETWEEN T. F. KOLLMAR, INC., D/B/A NORTHLAND FREIGHT LINES, AND WAGNER TUG BOAT COMPANY IN THE ALASKA TRADE

This proceeding having been initiated by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a Report containing its findings and conclusion thereon, which Report is hereby referred to and made a part hereof;

It is ordered, That Agreement 8492 be, and it is hereby, approved.

By the Commission, February 12, 1963.
(Seal)

(Signed) Thomas Lisi
Secretary