FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 258

JONDI INC. v. HELLENIC LINES LIMITED

SPECIAL DOCKET NO. 259

UDDO & TAORMINA CORP. v. HELLENIC LINES LIMITED

SPECIAL DOCKET NO. 260

M. DE ROSA, INC. v. HELLENIC LINES LIMITED

SPECIAL DOCKET NO. 261

GIACOMO FOTI v. HELLENIC LINES LIMITED

Permission granted Hellenic Lines Limited to refund freight charges o shipments transported from Italy to the United States.

Stanley O. Sher, Coles and Goertner, for respondent. Com plainants appeared *pro se.*

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

By its applications filed August 22, 1962 and amended Fek ruary 6, 1963, respondent seeks an order of the Commission pu suant to Rule 6(b) of the Rules of Practice and Procedure, autho

[1] This decision became the decision of the Commission on February 21, 1963. (Rules 13(c and 13(h), Rules of Practice and Procedure, 46 CFR 201.224, 201.228.)

izing the voluntary payment of reparation to complainants. The amendments to the applications properly name the consignees as the complainants, rather than the shippers, because the freight in question was paid by the consignees. Complainants concur in the applications.

The applications arose out of transactions that are the same as those involved in *Uddo & Taormina Corp.* v. *Concordia Line*, 7 F.M.C. 473 (1963). Due to confusion in the filing of certain tariff changes by the steamship conference of which the respondent here and respondent in Special Docket 245 were members, the complainants in both cases, shippers of tomato paste and peeled tomatoes, were charged freight at the rate of $26.50 per kiloton rather than $18.00, which the parties had contracted for. The carrier seeks authority to refund the excess. The circumstances need not be repeated in detail here, nor the reasons for granting the relief sought, because they are the same as those set forth in the decision in Special Docket No. 245.

The quantity shipped by each complainant, the freight at the higher and lower rates, and the excess which respondent seeks to refund, are as follows:

Special Docket Number	Complainant (abbreviated)	Quantity (Metric Tons)	Freight Charged	Freight at lower rate	Excess
No. 258	Jondi	10.250	$ 271.62	$ 184.50	$ 87.12
No. 259	Uddo	248.640	6,588.96	4,475.52	2,113.44
No. 260	De Rosa	47.000	1,245.50	846.00	399.50
No. 261	Foti	36.800	975.20	662.40	312.80

The shipments were all made and the freight was collected during March and April, 1962. No discrimination will result from granting the requested relief because there were no shippers of tomato products on respondent's vessels during the period in question other than complainants.

An order will be entered authorizing and directing the payment of reparation to the complainants in the amounts shown in the last column of the above table opposite their respective names.

775-794 O-65-35

FEDERAL MARITIME COMMISSION

ORDER

SPECIAL DOCKET NO. 258
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NOTICE OF EFFECTIVE DATE OF DECISION
AND ORDER AUTHORIZING REPAYMENT

No exceptions having been filed to the Initial Decision of the Examiner, and the Commission having determined not to review same, notice is hereby given in accordance with Rule 13(d) of the Commission's Rules of Practice and Procedure, that the Initial Decision became the decision of the Commission on February 21, 1963.

It is ordered, That the application of Hellenic Lines Limited to repay certain overcharges be, and it is hereby, granted.

By order of the Commission, February 21, 1963.

(Signed) THOMAS LISI
Secretary

(SEAL)

FEDERAL MARITIME COMMISSION

No. 903

PACIFIC COAST/PUERTO RICO GENERAL INCREASE IN RATES

Decided February 21, 1963

Tariff rates between Pacific Coast ports and Puerto Rico as increased by 15 percent found to be just, reasonable, and lawful.

Sterling F. Stoudenmire, Jr., and *Richard W. Kurrus* for respondents.

George Bunn for Commonwealth of Puerto Rico, and *R. A. Morin* for Fibreboard Paper Products Corporation, interveners.

Wm. Jarrel Smith, Jr., as Hearing Counsel.

Arnold J. Roth, Hearing Examiner

REPORT OF THE COMMISSION

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

BY THE COMMISSION:

By order of April 19, 1960, the Federal Maritime Board (Board) instituted this investigation to determine the lawfulness of a 15 percent increase in the rates of the Pacific Coast/Puerto Rico Conference,[1] and of Isbrandtsen Company, Inc., on traffic moving from United States Pacific Coast ports to ports in Puerto Rico. The operation of the tariff was suspended by the Board for the four months' statutory period until August 18, 1960. By supplemental order of April 28, 1960, the respondents were authorized to publish, on one day's notice, an increase of 10 percent, upon

[1] Conference members include Bay Cities Transportation Company, Pan Atlantic Steamship Corporation, Pope and Talbot, Inc., and Waterman Steamship Corporation (Puerto Rican Division), of whom only Waterman provides eastbound service from the Pacific Coast to Puerto Rico.

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

their undertaking to keep account of the revenue received by reason of such increased rates, and to make refund of any increased freight charges in excess of those found to be just and reasonable.

The Conference and Isbrandtsen thereafter filed new tariffs to reinstate the 15 percent increase, effective June 16 and June 23, 1960, respectively, which were suspended until October 14 and October 21, 1960. The 15 percent increase became effective on all lines on November 1, 1960.

The Commonwealth of Puerto Rico (the Commonwealth) and Fibreboard Paper Products Corporation (Fibreboard) intervened.

After hearing the Examiner issued an initial decision in which he found that the increased rates on roofing and paint have not been shown to be just and reasonable, and that the rates on these commodities under investigation should be canceled, without prejudice to the establishment of an increase of 5 percent in the rates on paint; that the respondents should be required to account for, and repay to the shippers, in accordance with the Board's order of April 28, 1960, the amounts received by them by reason of these increased rates to the extent indicated above; and that in all other respects the rates under investigation have been shown to be just and reasonable.

Following exception to the Examiner's decision, oral argument was held.

Waterman and Isbrandtsen are the only common carriers by water presently operating in the Pacific Coast to Puerto Rico trade. In the years prior to 1960, Waterman served this trade with vessels inbound from the Far East in its Atlantic and Gulf of Mexico/Far East Service. In February of 1960, Waterman substituted a single vessel shuttle service between West Coast United States ports and Puerto Rico offering 8 sailings annually. This is the service to be offered by Waterman for the foreseeable future.

Isbrandtsen operates over this trade route using inbound vessels of its eastbound Round-the-World service which sail fortnightly from San Francisco and Stockton, California, to Puerto Rican ports. Isbrandtsen intends to continue serving this route in the same manner with 24-26 sailings annually.

Since the last general rate increase in this trade of 7.5 percent, effective August 1957, the operating expenses of both carriers have increased substantially. For example, stevedoring and long-

shore rates have increased 22 percent at Pacific Coast ports and 29.3 percent at Puerto Rican ports, crew wages are up 20.5 percent, terminal and service charges at San Francisco and Los Angeles have increased 25 and 23 percent, respectively, and total vessel operating costs are higher by 15.9 percent since December 1956.

Table I below shows the tonnage[2] carried in the trade by the respondents herein during prior years, and cargo carryings projected by respondents for the full years 1960 and 1961. Table II sets forth separately the rice tonnages carried or projected for the same periods. Both tables include, in the cargo attributed to Waterman, the tonnage handled during 1956, 1957, and 1958 by Pan-Atlantic Steamship Corporatioin, an affiliate of Waterman. The totals reflect all cargo moving in the trade except for a short period beginning late in 1957, when another carrier entered the trade for a few sailings.

TABLE I.—*West Coast-Puerto Rico Cargo*

					Projected	
	1956	1957	1958	1959	1960	1961
Isbrandtsen ----	120,383	131,171	132,873	145,423	116,669	85,200
Waterman -----	110,869	90,341	59,214	85,324	75,600	67.200
Totals -------	231,252	221,512	192,087	230,747	192,269	152,400

TABLE II.—*Rice—California to Puerto Rico*

					Projected	
	1956	1957	1958	1959	1960	1961
Isbrandtsen ---	71,467	72,179	86,001	93,955	62,297	42,600
Waterman ----	23,750	25,154	17,676	24,517	17,248	11,648
Totals ------	95,217	97,333	103,677	118,472	79,545	54.248

Bearing in mind that the total carryings shown in 1957 and 1958 reflect traffic diverted to another carrier as indicated above, Table I shows a relatively stable movement in total tonnage up to 1960, and Table II reflects a gradual increase in rice tonnage through the same period. As will be noted, a substantial decline in traffic for 1960 and 1961 is projected by both carriers. This is due principally to an irretrievable loss beginning in March 1960 of rice tonnage, through diversion by the principal shipper, who controls about 65 percent of the total movement, to contract carriage in bulk of semi-finished rice in the SS *Marine Rice Queen*,

[2] Tonnages are given in short tons of 2,000 pounds, except where otherwise indicated.

a Liberty vessel specially converted for such service. In this trade rice has been the most important commodity, accounting in 1959 for about 65 percent of Isbrandtsen's cargo and 29 percent of Waterman's cargo.

Isbrandtsen's projected tonnage of rice for 1961 is based upon a proposal by it, pending at the time of the hearing, to convert certain holds in its vessels for bulk rice carriage, in order to provide competitive service for the remaining rice shippers to whom the service of the SS *Marine Rice Queen* is unavailable. Isbrandtsen had on file with the Board proposed bulk rice rates, which were suspended, and have since been canceled. That proposal has been supplanted by a tariff which became effective April 14, 1961,[3] naming a rate of $20.75 per ton on rice in bulk, in special containers.

Waterman's projection for the same year is based upon its expectation that it would continue to carry about 1,300 tons of rice in bags per voyage. To date the Conference has proposed no rate competitive with the new Isbrandtsen rate applicable on bulk rice in containers. Since the existing Conference rate on bagged rice is $1.54 per 100 pounds, or $30.80 per ton, it is assumed that the great bulk, if not all, of the rice available to the respondents will be carried by Isbrandtsen. On one of its latest voyages shown of record, Waterman carried only 70 tons of rice.

The Examiner on the basis of the above evidence of record found that the rice tonnage available to the respondents in 1961 and future years would not exceed about 43,000 or about one-third of the total movement. We agree.

On cargo other than rice, Waterman's projection for 1961 is based mainly upon its experience in the first 8 months of 1960, giving effect to the fewer sailings contemplated in the shuttle service, and is not challenged by the parties. Isbrandtsen for 1961 projected a decline of about 1,600 tons of dried beans, and about 4,400 tons of canned goods, the two commodities other than rice which make up the bulk of the movement, and a decline of about 4,800 tons in carryings of all other commodities, or a total decline of about 10,800 tons. The Examiner found that this decline in tonnage is not supported by the testimony of record, and that it is reasonable to assume, as contended by the Commonwealth and Hearing Counsel, that the cargo available other than rice

[3] See Item No. 1675, fifteenth revised page No. 52, of Isbrandtsen's United States Pacific West Coast to Puerto Rico Tariff No. 2, F.M.B.-F No. 2, of which official notice is taken pursuant to Rule 13(g) of the Board's Rules of Practice and Procedure, 46 CFR § 201.227.

will be substantially equal to that shown for 1959 and the projected year 1960. We agree that the Examiner's projection of 152,400 tons as the total carryings by respondents for 1961 is reasonable.

Except in the case of Waterman's recently inaugurated shuttle service, the West Coast-Puerto Rico services of the respondents are and have been operated on a joint basis with other services. This requires allocation of the joint service expenses, and of the assets devoted to the joint services, so as to ascertain as nearly as possible the proper apportionment of expenses and assets between the regulated and non-regulated trades.

Waterman allocated vessel operating expenses by determining a per diem cost of the vessel operating expenses on the joint service voyages, and applying such per diem cost to the number of days required for the Pacific Coast-Puerto Rico voyages; port and cargo expenses, Panama Canal tolls, and other non-vessel expenses were applied directly, after elimination of intercompany profits on Puerto Rico port operations; vessel depreciation was allocated on a per diem basis as was done in the case of vessel operating expenses; and overhead expenses were allocated on the basis of the proportion that West Coast-Puerto Rican revenues bore to total revenues from all operations of Waterman, or a revenue prorate.[4] On Waterman's shuttle service voyages, past and projected, vessel and other costs were generally assigned directly, except overhead costs which were allocated as above. As vessel assets, Waterman claims the value of one vessel of its fleet which was operating in the West Coast-Puerto Rico service on a shuttle basis on April 30, 1960, the date as of which the parties have agreed by stipulation that the assets should be valued for the purposes of this proceeding as the approximate date on which the increased rates here involved were proposed. The remaining fixed assets claimed by Waterman were allocated on the basis of tonnage prorates, or the proportion that West Coast-Puerto Rican tonnage bore to total tonnage for which such facilities were used. Working capital was computed on the basis of an amount approximately equal to one round voyage expense of each vessel in the service. No party to the proceeding objected to the allocation methods utilized by Waterman, and they are found to be reasonable for the purposes of this proceeding.

[4] The Examiner properly excluded interest on vessel and other mortgages as operating expenses. see *Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges*, 7 F.M.C. 87 (1962).

Isbrandtsen allocated vessel operating expenses, depreciation, overhead expenses, and vessel values and other claimed asset values on the basis of a revenue prorate; agency fees and commissions were directly assigned; and port and cargo expenses and Panama Canal tolls were allocated on the basis of tonnage prorates. Working capital was computed by Isbrandtsen on the basis of one-twelfth of annual vessel expenses, and allocated by means of the revenue prorate. The Examiner allocated vessel operating expenses, depreciation, overhead, vessel and other asset values on a modified revenue prorate. His method involved the elimination of cargo expenses, which the record discloses are higher in United States and Puerto Rican ports than in other ports served by Isbrandtsen, from both total revenues and West Coast-Puerto Rican revenues of Isbrandtsen, and the determination of the revenue prorate from the remaining figures.

We agree that on this record the Examiner in using the modified revenue prorate formula adopted the most reasonable and accurate of all of the methods that were proposed or considered. The use of this proration formula results in an apportionment of Isbrandtsen's expenses in a realistic manner, by evaluating this operation as part of the Round-the-World service; yet it eliminates disproportionate cargo handling expenses which distort the gross revenue proration advocated by Isbrandtsen.

We reject the Commonwealth's proposal that only Isbrandtsen's out-of-pocket expenses should be used to determine net income. The Puerto Rican service is an integral part of this Round-the-World operation and not simply a "by-product" as contended by the Commonwealth. Actually shippers on each leg of the voyage could make the same argument. Each segment of this service should bear its proportionate share of the overall expenses of the carrier.

The Comonwealth contends that expenses should be allocated on the basis of use units if the added cost or out-of-pocket method of determining Isbrandtsen costs is rejected. Under the use unit method, the voyage expenses on the Isbrandtsen West Coast-Puerto Rico leg would be allocated out of total Round-the-World voyage expenses on the basis of days, and then expenses on that voyage leg be allocated on the basis of Puerto Rico's tonnage to total tonnage.

This method fails to take into consideration Isbrandtsen's cost in re-positioning vessels on the North Atlantic after calls at Puerto

Rico, since it counts only the days consumed in the voyage from the West Coast to Puerto Rico. Some part of this re-positioning expense is allocable to the Pacific Coast-Puerto Rico service. Further, as pointed out by the Examiner, the proposed method produced results drastically at odds with cost per revenue ton figure based on a ton-mile formula used in prior cases. Because of the volume of computations required, the time element involved resulting in prohibitive costs, the ton-mile formula in the case of Isbrandtsen's Round-the-World service was not used. However, the ton-mile formula computed on one voyage, resulted in vessel operating expense per revenue ton in excess of that resulting from the use of the modified revenue prorate used herein.

The Commonwealth excepts to the Examiner's failure to make a realistic appraisal of the probable salvage value upon retirement of Isbrandtsen's vessels, and to disallow for rate purpose any future depreciation charges. It contends that Isbrandtsen has already depreciated its vessels below the value Isbrandtsen will receive for them at the end of their useful service lives.

This record discloses the fluctuations which occur in the market price of vessels and the difficulties in determining market value as of a specific past date. It is impossible to forecast, even in the relatively near future, the probable disposal value of vessels at the end of their depreciation cycle. The residual values utilized by the respondents accord with the conventional long-standing practice of vessel owners and, in our opinion, are the most equitable and reasonable certain standards on which to rely in this proceeding. *Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, supra.*

Table III below shows the operating results of the respondents for 1959 and the projected year 1961, computed on the basis of the allocation methods adopted. The revenues for Isbrandtsen include for each year $50,000 of passenger revenues, since no attempt was made by Isbrandtsen to allocate out any expenses attributable to passengers carried by Isbrandtsen on its Round-the-World voyages. The Commonwealth proposes a restatement of the revenues of Isbrandtsen for the projected year 1961 to include amounts attributable to the additional cargoes of dried beans, canned goods, and other cargo which as found above Isbrandtsen may reasonably be expected to carry in 1961. The Examiner held that this added revenue would be largely offset by the revenues claimed by Waterman on rice, and therefore the results shown in Table III can be

accepted as a reasonable projection of the rates here under suspension. We agree. Isbrandtsen is not the dominant carrier in the trade, and the issues herein will be determined on the basis of the combined operations of both carriers in the trade. (See discussion set forth hereinafter.)

Projected expenses for both carriers are based upon experience in the first half of 1960, adjusted to allow for known increases in costs which will occur in 1961, and Isbrandtsen's expenses are further adjusted to reflect cost savings which were expected at the time of the hearing because of the then planned carriage of rice in bulk. Revenues for 1961 shown in the table include the rate increases.

TABLE III.—*1959 and Projected 1961 Operating Results of Respondents Operating Results of Pacific Coast-Puerto Rican Trade.*

	1959			1961 Projected		
	Isbrandtsen	Waterman	Totals	Isbrandtsen	Waterman	Totals
Revenues	$4,222,862	$2,857,390	$7,080,252	$2,490,680	$2,708,934	$5,199,614
Operating Expenses	3,844,379	2,726,905	6,571,284	2,120,355	2,578,201	4,698,556
Depreciation	219,757	75,778	295,535	98,501	44,868	143,369
Overhead	190,737	227,758	418,495	141,089	180,930	322,019
Net income or (loss) before income tax	(32,011)	(173,051)	(205,062)	130,735	(95,065)	35,670

For the first half of 1960, based on actual revenues—which reflect for the latter part of the period the initial impact of the losses in rice traffic detailed above—adjusted downward to remove the results of the initial 10 percent increase in rates, and with expenses allocated on the same bases as in Table III above, the operations of Isbrandtsen reflect a loss of $184,705, and those of Waterman a loss of $116,629, or a combined loss of $301,334.

In Table IV below are shown the assets claimed by the respondents, valued at depreciated book values as of April 30, 1960, allocated in the case of Waterman on the basis indicated above, and allocated in the case of Isbrandtsen on the basis of the modified revenue prorate explained heretofore, calculated from operating results of Isbrandtsen during the first six months of 1960. The amount of working capital assigned to Isbrandtsen reflects one-twelfth of projected vessel operating costs in the Round-the-World service allocated to the West Coast-Puerto Rican service on the modified revenue prorate basis. Isbrandtsen claims only an allo-

cated portion of its land-based facilities in New York, and does not claim any terminal properties. Waterman claims allocated portions of its headquarters facilities, and the terminal in Puerto Rico and associated terminal equipment. There is no dispute among the parties as to the propriety of the inclusion in the rate bases of the respondents of any of these items.

TABLE IV.—*Rate Bases of the Respondents at Net Book Values as of April 30, 1961*

	Isbrandtsen	Waterman	Totals
Vessels	$679,445	$ 338,323	$1,017,768
Other properties	23,420	412,997	436,417
Working capital	166,910	333,536	500,446
Totals	$869,775	$1,084,856	$1,954,631

The Commonwealth contends that Isbrandtsen is the dominant carrier in the trade, and that the justness and reasonableness of the increased rates should be determined on the basis of Isbrandtsen's operating results. On the record before us it does not appear that Isbrandtsen can properly be classified as the dominant carrier. The two carriers conduct entirely different operations and do not serve the same areas. With only Isbrandtsen and Waterman operating in the trade a 60-40 ratio of cargo lifted by the two carriers is not such a sufficient differential as to justify the application of the dominant carrier theory. Even if the projected operating results of the respondents were adjusted as suggested by the Commonwealth to reflect the increased carrying of cargo other than rice by Isbrandtsen, the projected revenues of Isbrandtsen for 1961 would not exceed those of Waterman by an amount sufficient to justify the adoption of the dominant carrier theory. On this record we hold that neither the strongest nor the weakest line controls rate determinations, and our findings will be based on conditions confronted by respondents as a group. *Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, supra.*

We have recently held that the fair-return-on-fair-value standard is proper in determining rates in the domestic offshore trade, and that the prudent investment standard would be used to determine the fair value of property. *Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, supra.* We find nothing in this record which warrants departure from our holdings in that proceeding.

Table IV above shows a combined rate base of respondents of $1,954,631. Table III above shows combined income before taxes of $35,670. This will produce a rate of return of 1.82 percent. Such rate of return can in no sense be deemed excessive.

As noted heretofore the Examiner held that the increased rates on roofing and paint commodities "were, are, and will be unjust and unreasonable, without prejudice to the imposition of an increase of 5 percent on the rates on paint." The Examiner's reasons for this conclusion were that the increased rates would result in an almost complete cessation of traffic movement, are more than the traffic can bear and respondents did not prove the existing rates were non-compensatory. Isbrandtsen and Waterman except to this conclusion on the ground that in a general rate proceeding carriers are not required to sustain the burden of proving the reasonableness and justness of the rate on every item and every commodity in their tariffs.

Isbrandtsen argues further that the Commission is without authority to reduce a rate primarily to protect an industry from competition. We have held that a shipper's or a commodity's competitive position is not a basis for establishing rates nor a reason for treating them differently from other general cargo commodities, and that where shippers fail to show that a commodity subsidizes other traffic or bears more than its fair share of carriers' expenses, a justification for exemption from a general rate increase has not been established. *Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates*, 7 F.M.C. 260 (1962).

Interveners have only shown the effect of the higher rates on themselves and not on the carrier respondents whose revenues and costs are in issue. The reasons for the Examiner's conclusions are insufficient and his holding as to rates on paint and roofing are reversed. The increased rates on these commodities likewise are found just and reasonable.

We find and conclude that the rates here under investigation are just and reasonable.

An appropriate order will be entered.

ORDER

FEDERAL MARITIME COMMISSION

DOCKET NO. 903

PACIFIC COAST/PUERTO RICO GENERAL INCREASE IN RATES

Full investigation of the matters and things involved in this proceeding having been had, and the commission on February 21, 1963, having made and entered a report of record 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, reasonable and lawful;

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

By the Commission, February 21, 1963.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

NOS. 924 AND 925

UNAPPROVED SECTION 15 AGREEMENTS—GULF/UNITED KINGDOM CONFERENCE AND GULF/FRENCH ATLANTIC HAMBURG RANGE FREIGHT CONFERENCE

Decided February 26, 1963

Respondent conference members found not to have been acting pursuant to an unfiled and unapproved agreement, in violation of section 15 of the Shipping Act, 1916, in failing to file tariffs showing certain rates as "open minimum," but such failure was a violation of Commission General Order 83.

John W. Douglas, Walter Carroll and *Edward S. Bagley,* for respondents.

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

Gus O. Basham, Hearing Examiner.

REPORT OF THE COMMISSION

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

BY THE COMMISSION:

These investigations were instituted on the Commission's own motion to determine whether respondents, members of two steamship conferences, during the period January 1, 1955 through November 25, 1960, violated the provisions of their approved conference agreement and carried out prior to approval under section 15 of the Shipping Act, 1916 any agreement or modification of

any agreement requiring section 15 approval.[1] In Docket 924, the investigation was concerned with the actions of the Gulf/United Kingdom Conference (FMC Agreement No. 161)[2] regarding its rates on cotton linters and lumber. Docket 925 investigated the actions of the Gulf/French Atlantic Hamburg Range Freight Conference (FMC Agreement No. 140)[3] regarding its rates on cotton linters and cotton seed hull shavings pulp. The cases were consolidated for hearing and decision following prehearing conference. These conferences, as well as three others, had the same chairman and were served by the same staff of conference clerical and administrative personnel.

The basic agreements as approved pursuant to section 15, authorize the conference members to agree upon and fix rates and charges binding upon the membership in the trades covered by the two agreements. These rates and charges must be published in tariffs filed with the Commission in accordance with Commission orders and the agreements themselves. Both agreements contained a provision as follows:

The rate on any commodity may be declared "OPEN" and subsequently "Closed" in the same manner as hereinafter provided for the establishment of rates on such commodity. When rates are declared "OPEN" the commodity on which the rates have been declared "OPEN" and the extent, if any, to which the Conference relinquishes control over the booking and transportation thereof will be shown at the time in Conference Tariffs.

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[1] Section 15 of the Shipping Act, 1916, as in effect during the period under investigation, provided in relevant part: "That every common carrier by water * * * shall file immediately with the [Commission] a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier * * *, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; * * * controlling, regulating, preventing, or destroying competition; * * * or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

* * * * *

"All agreements, modifications, or cancellations * * * shall be lawful only when and as long as approved by the [Commission], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation."

[2] During the period under investigation, the membership of the Gulf/United Kingdom Conference was as follows: Bloomfield Steamship Company (joined April of 1958), Cunard Steam-Ship Company, Ltd., Holland America Line, Lykes Bros. Steamship Co., Inc., States Marine Corporation, Harrison Line, and Waterman Steamship Corp. (joined July 1957).

[3] During the period under investigation the membership of the Gulf/French Atlantic Hamburg Range Freight Conference consisted of: Compagnie Generale Transatlantique (French Line), Holland America Line, Swedish American Line, Armement Deppe S.A., Bloomfield Steamship Company, Hamburg America Line, Lykes Bros. Steamship Co., Inc., North German Lloyd Line, Ozean/Stinnes Lines, Ropner Line (withdrew June 6, 1956), States Marine Corporation, Waterman Steamship Corporation, Wilhelmsen Line, and Polish Ocean Lines (admitted July 10, 1958, withdrew July 1, 1960).

The tariffs and minutes filed with the Commission by the Gulf/United Kingdom Conference indicated that the rate on cotton linters was declared "open" some time prior to January 1, 1955. From then until July 23, 1960, the conference's official tariff as well as the minutes of its meetings filed with the Commission showed the rates as "open." On July 23, 1960, the tariff on file with the Commission was amended to show the rate as "open" but with minimum rates to the various ports (sometimes referred to herein as "open minima" rates). In addition, the tariffs and minutes filed by this conference showed the rate on lumber as "open" on July 14, 1958 and "closed" on May 23, 1960.

During the period in question, however, the conference members established and observed minimum rates for the commodities referred to. These minima were promptly announced to conference members by means of circulars but the circulars were not filed with the Commission. The various minima were fixed by the members in the regular course of business at conference meetings, were observed and freely quoted by the members, were available to and to some extent were published by a New Orleans daily trade journal and in the rate sheets of some forwarders, and in general were known to or readily ascertainable by any interested party, such as shippers, competing carriers, brokers and forwarders. Anyone who inquired as to what the "going" rate was at a particular moment was given the then current minimum rate, either by the conference office or by the member lines.

The tariffs and minutes of the Gulf/French Atlantic Hamburg Range Freight Conference showed the rates on cotton linters as "open" from January 1, 1955 to November 24, 1959, and the rates on cotton seed hull and shavings pulp as "open" from January 1, 1955 to May 23, 1960. However, the members regularly established and observed minimum rates which were announced by circulars to the membership, were freely quoted and available to shippers and others, as in the case of the Gulf/United Kingdom Conference commodities above, but were not filed with the Commission.

The Examiner in his initial decision found that respondents violated section 15 by agreeing upon and observing minimum rates which "were not sanctioned by", and hence were unfiled and unapproved "modifications" of, their conference agreements. Respondents excepted to this decision, Hearing Counsel replied, and thereafter we heard oral argument.

It is respondents' position that they agreed to open rates with minimums, in accordance with the provisions of their approved conference agreements; that there was no agreement to do otherwise; that the failure to file was not the result of an agreement but of an "oversight" or mistake; and that, if any violation took place, it was a violation of Commission General Order 83, requiring carriers to file complete and accurate schedules or tariffs showing their rates and charges. Hearing Counsel, in supporting the initial decision, urges that respondents removed the rates from conference jurisdiction by declaring them "open" and that minimum rates were subsequently agreed upon and observed by the members and these constituted modifications of the conference agreements which the respondents failed to file with the Commission and carried out in violation of section 15. For the reasons set forth below, we accept respondents' position and conclude that they did not violate section 15.

Discussion and Conclusions

To begin with, it is clear that respondents were authorized to do what they say they did, namely, fix "open minima" rates. The conference agreements empower the members to set their common rates and charges and Article 2 permits them to open, as well as to close, rates. No one disputes this. The language of Article 2, moreover, seems expressly to envisage instances where varying degrees of conference control may be maintained even though rates are "open." It provides that when rates have been declared open on any commodity "the extent, if any, to which the Conference relinquishes control over the booking and transportation thereof will be shown in the Conference Tariffs." Thus, the conference may open rates and relinquish complete control, or it may retain some control, such as was done here in the setting of open minima rates. We think the language of the agreements is broad enough to encompass actions of that type.

We move, then, to the more critical question as to the nature of respondents' agreement. The Examiner and Hearing Counsel view the circumstances as justifying the inference that respondents decided to open the rates on the commodities in question, removing them from conference control, and thereafter set and observed minimum rates in an unlawful manner. The foundation for this inference is the fact that respondents, over a protracted period, did not follow the proper procedures with regard to the

filing of true and complete tariffs and minutes with the Commission as required by the conference agreements and also by Commission General Order 83.[4] None of the tariffs and, with two exceptions, none of the minutes filed showed anything but that the rates during the years in question were "open." Respondents admit this but they stoutly deny that the filings reflect a decision or agreement by them simply to open rates on the commodities in question. They insist no such action was ever taken, that their decision from the outset was to open the rates *with minimums,* and that at all times pertinent to these investigations the rates on the commodities were in fact open minima. At no time, they say, did they relinquish complete control over the rates. According to respondents, the failure to indicate the minima in the minutes and tariffs filed with the Commission must have been due to mistake or oversight on the part of the conference chairman or personnel of the conference office.

We endorse fully the Examiner's condemnation of respondents' failure to comply with the filing requirements. Neglect of this sort over a long period indicates gross disregard for the responsibilities of a regulated industry. It raises doubt as to whether the Shipping Act is being complied with and could lead to loss of the protection the Act affords ocean carriers with respect to concerted activities. At the very least it evidences slipshod office management and a serious lack of proper supervision of conference employees. But we are not convinced that respondents agreed to any action not authorized by the conference agreement or, more specifically, that they agreed to relinquish their rate control over the commodities in question.

We are persuaded to this view mainly because respondents, throughout the period the erroneous filings were being made, actually were doing what they insist they had from the outset agreed to do—fixing and observing minimums on the open-rated commodities—and these minimums were not kept secret but were

[4] Title 46 CFR §§ 235.1 and 235.2 (effective Dec. 13, 1957) which succeeded a prior, similar order, General Order 128 (effective Sept. 1, 1935). General Order 83 provides in relevant part:

"235.1 Every common carrier by water in foreign commerce shall file with the [Commission] schedules showing all the rates and charges for or in connection with the transportation of property * * * from points in continental United States * * * to foreign points on its own route * * *. The schedules filed as aforesaid * * * shall contain all the rules and regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates or charges.

"235.2 [Such schedules] shall be filed as aforesaid within 30 days from the date such schedule, change, modification or cancellation becomes effective."

regularly publicized and quoted to shippers, carriers and all other interested persons, as hereinabove more fully detailed. Perhaps it is difficult to account for respondents' erroneous filings but it seems to us next to impossible to explain why they should have openly and at length pursued the mentioned course of conduct if they had any purpose or agreement either to relinquish control of the rates, or falsely to depict them as open while setting minima. Such conduct, we feel, importantly supports and lends credibility to respondents' unanimous testimony that they had no purpose or agreement of that kind.

Respondents also undertook to show that there was a considerable delay in distributing minutes of conference meetings to the members, that the members paid little or no attention to these, and that at least some of their number were ignorant or confused as to the applicable filing requirements. We suppose the latter is possible, albeit inexcusable. It is a fact, though, that the affairs and "paper work" of respondent conferences were being handled in a somewhat massive operation by a chairman and staff personnel who also were serving three other Gulf conferences. Presumably, the chairman could have shed direct light on the filing deficiencies but he passed away prior to the hearings herein.

Of course, the failure to apprise the Commission of the minimum rates where the fixing of such rates was within the authority of the members under the conference agreements, does not of itself render the action unlawful under section 15. In view of this and of what has been said above, our conclusion is that respondents did not violate that section. They clearly did, however, violate General Order 83 and its predecessor, General Order 128. This violation having ceased, there is no reason to issue an order against respondents and the proceeding is hereby discontinued.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 263

UNITED NATIONS CHILDREN'S FUND (UNICEF)

v.

(COLUMBUS LINE) HAMBURG-SUEDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT

EGGERT & AMSINCK

Application under section 6(b) for authority to repay overcharges of freight approved.

Elmer C. Maddy for applicant.

Complainant appeared, pro se, and concurred in application.

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

Respondent filed an application on December 18, 1962, under Rule 6(b) of the Commission's Rules of Practice and Procedure for authority to voluntarily pay reparation to complainant in the amount of $14,091.44, representing alleged overcharges of freight in connection with nineteen shipments of powdered milk from Milwaukee to various ports in Brazil. The shipments were delivered to the consignee between July 4 and August 1, 1962, under nineteen bills of lading dated June 15, 1962. Payment of freight in the aggregate amount of $165,186.80 was made by complainant on July 20, 1962.

The freight sought to be charged is $151,095.36. The higher charge was made because, through inadvertence occasioned by a stenographic omission, the following rule was omitted from the

[1] This decision became the decision of the Commission, on March 1, 1963.

applicable tariff (Item 27, third revised page 405, of River Plate and Brazil Conference Tariff No. 12):

"Rates herein are not subject to the Great Lakes Differential, Rule 1(A)."

Under a resolution of the Conference adopted on May 18, 1962, filed with the Commission on May 23, 1962, and its agreement with complainant UNICEF, the shipments in question were not to be subject to the Great Lakes Differential. Through the error described above, the Differential was charged to UNICEF on the nineteen shipments resulting in a total overcharge of $14,091.44.

The shipper should not suffer the consequences of the carrier's failure to effectuate the intended tariff filing. The Commission affords a place of asylum to carriers who, because of an inadvertent misstep through the maze of tariff procedures, charged the wrong rate. It authorizes correction of the overcharge or undercharge in appropriate cases, relieving the carrier of the risk of violating the Shipping Act, 1916, if the correction were made without Commission approval. *Martini and Rossi S.p.a. et al.* v. *Lykes Bros. Steamship Co. Inc.*, 7 F.M.C. 453 (1962). In the *Martini and Rossi* case, as in this case, the carrier charged an excessive rate because of an inadvertence in filing the applicable tariff, and the Commission authorized the refund of the excess.

The granting of the requested relief will not result in discrimination, favoring complainant over other shippers, for there were no shipments of the same or similar commodities of others which moved via respondent's vessels during the approximate period of time that complainant's shipments moved. The application is found to comply with the requirements of Rule 6(b) and the form of application prescribed by Appendix II (5) of the Rules.

Accordingly, an order should be entered authorizing and directing respondent to pay reparation to the complainant in the amount of $14,091.44. Interest will not be included because the concurrence of complainant in the application to repay the above amount is deemed to be a waiver of interest. If repayment is not made promptly, complainant will have an adequate remedy for collection of interest from the date of the order herein.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 263

UNITED NATIONS CHILDREN'S FUND (UNICEF)

v.

(COLUMBUS LINE) HAMBURG-SUEDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT EGGERT & AMSINCK

NOTICE OF EFFECTIVE DATE OF DECISION AND ORDER AUTHORIZING REPAYMENT

No exceptions having been filed to the Intitial Decision of the Examiner, and the Commission having determined not to review same, notice is hereby given in accordance with Rule 13(d) of the Commission's Rules of Practice and Procedure, that the Initial Decision became the decision of the Commission on March 1, 1963.

It is ordered, That the application of Columbus Line to repay certain overcharges be, and it is hereby, granted.

By the Commission, March 1, 1963.

(Signed) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 864

INTERNATIONAL LATEX CORPORATION

v.

BULL INSULAR LINE, INC.

Rates charged on shipments of clothing from San Juan, Puerto Rico, to Baltimore, Maryland, found inapplicable. Reparation awarded.

Samuel W. Earnshaw for complainant.

John Cunningham for respondent.

INITIAL DECISION OF A. L. JORDAN, EXAMINER [1]

This proceeding originated by complaint filed with the Federal Maritime Board [2] on June 12, 1959, alleging, in substance, (1) that respondent is a common carrier by water subject to the Commission's jurisdiction under the provisions of the Shipping Act, 1916, and Intercoastal Shipping Act, 1933, (2) that during the period from June 15, 1957, to and including June 16, 1958, respondent transported numerous shipments of "clothing" for complainant from San Juan, Puerto Rico, to United States ports, (3) that respondent billed complainant in the amount of $36,-664.37 which complainant paid and bore, (4) that the said shipments consisted of "clothing", but were erroneously rated and billed as shipments of "Vinyl Film Products" and were therefore overcharged in the amount of $8,288.09, contrary to the provisions of respondent's applicable Tariff, United States Atlantic and Gulf-Puerto Rico Tariff, Homeward Freight Tariff No. 7, and contrary to the provisions of the Shipping Acts. The complainant

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[1] This decision became the decision of the Commission on March 12, 1963. (Rules 13(d) and 13(h) Rules of Practice and Procedure, 46 CFR Sec. 201.224, 201.228).

[2] Predecessor of the Federal Maritime Commission.

also alleges that, in addition to said overcharges, the rates applied on the shipments involved were, on January 9, 1957 and January 15, 1958 respectively, subjected to general increases of 15 percent and 12 percent on the respective dates, and that said general increases were unjustified and resulted in unjust and unreasonable rates and charges for the services performed, in violation of Sections 16 and 18 of the Shipping Act, 1916, and of the Intercoastal Shipping Act, 1933. The complaint further alleges that by reason of the violations referred to, complainant has been injured in the amount of $8,288.09 plus the general percentage increases as included in its freight payments of $36,664.37. Reparation with interest is requested.

On August 25, 1959, respondent filed a motion to dismiss the complaint on the ground that it was presented under the Intercoastal Shipping Act, 1933, and that reparation awards are authorized only in connection with proceedings under Section 22 of the Shipping Act, 1916. By order dated October 1, 1959, the Board found that the complaint had been properly filed pursuant to Section 22 of the Shipping Act, 1916, and denied the motion to dismiss.

On April 25, 1962, respondent filed an answer to the complaint denying all violations alleged in the complaint, and alleged by way of specific defense that the complaint was not filed with the Board until July 20, 1959, and insofar as it pertains to any cause of action which accrued more than two years prior thereto, the complaint must be dismissed for want of jurisdiction. In this connection, as before stated, the complaint was filed with the Board on June 12, 1959.

Hearing was held by Examiner Arnold J. Roth, deceased, on June 29, 1962. The shipments involved consisted of "clothing" (baby pants). The tariff rate of 34 cents per cubic foot for "clothing, dry goods", should have been applied on the shipments from June 15, 1957 to December 30, 1957, inclusive, and 38 cents per cubic foot should have been applied on the shipments from January 20, 1958, to June 16, 1958, inclusive. Instead, the tariff "film, vinyl, products" rates of 44 cents and 49 cents respectively, per cubic foot, were applied for the periods stated.

Within the period involved, June 15, 1957 and June 16, 1958, forty-five shipments of "clothing" were made, transported by respondent for complainant from Puerto Rico to Baltimore, Maryland. Each shipment shows invoice number and date, name of

vessel and voyage number, cubic feet, rate and amount charged, corrected charge, difference between rate charged and applicable rate, and date the charge was paid by complainant. The overcharges as described resulted in violation of Section 2 of the Intercoastal Shipping Act, 1933, as amended. Complainant paid and bore all of said overcharges between June 24, 1957 and June 23, 1958 inclusive, and was thereby injured in the amount of $8,288.09, representing the difference between the rates applied and those that should have been applied.

Near the end of the hearing, counsel for respondent stated on the record that respondent was satisfied from the evidence in the proceeding that the product shipped was in fact baby pants and that respondent was willing to make refund of overcharges on the basis shown to be applicable in the tariff pages of record.

Counsel for complainant withdrew the allegations in the complaint concerning the rate increases in view of the Board's decision in *Atlantic—Gulf/Puerto Rico General Rate Increases*, 6 F.M.B. 14 (1960), approving said increases. Further, on the basis of respondent's willingness to refund the overcharges, complainant was willing to waive interest, and to withdraw the complaint.

The record was closed on the basis that the complaint, as amended, would be satisfied; and that upon satisfaction thereof, a request would be sent to the Commission indicating the form in which satisfaction was made, and a request that the complaint be withdrawn. Obviously, jurisdiction continues with the Commission until the complaint has been satisfied.

After the hearing, in November 1962, respondent paid $2000 on the overcharges and, as indicated by letter of November 28, 1962, from complainant's Traffic Manager to the President of A. H. Bull & Company, the balance was to be paid as follows:

Second Payment	December 13, 1962	$2000.00
Third Payment	January 14, 1963	2000.00
Fourth Payment	February 13, 1963	2288.08

On January 18, 1963, counsel for complainant, by letter dated January 17, 1963, advised the Commission that no payment on the overcharges involved had been made since the November 1962 payment of $2000, although frequent demands had been made therefor. Counsel, in his said letter, requests the Commission to reactivate this proceeding, confirm the claimed overcharges and violations alleged, and order full payment of the overcharges

forthwith in conformity with the applicable tariffs and the Intercoastal Shipping Act, 1933. On January 30, 1963, the Presiding Examiner wrote a letter to respondent, referring to the settlement agreement, and schedule of payments between the parties, and advised respondent of complainant's letter of January 17, 1963. Respondent was advised that before taking action on complainant's request it would be desirable to have a statement of position from respondent, which should be furnished as soon as practicable, and in any event within ten days from date of said letter, January 30, 1963. No reply to said letter has been received.

ULTIMATE CONCLUSIONS

Upon consideration of the foregoing it is found and concluded that the rates charged were inapplicable; that the applicable rates were 34 cents and 38 cents respectively; that complainant received the shipments as described, paid and bore the charges thereon, was damaged thereby, and is entitled to reparation in the sum of $6,288.08, this being the balance due pursuant to stipulation and agreement hereinbefore referred to. An appropriate order should be entered.

FEDERAL MARITIME COMMISSION

No. 864

INTERNATIONAL LATEX CORPORATION

v.

BULL INSULAR LINE, INC.

NOTICE OF EFFECTIVE DATE OF DECISION AND REPARATION ORDER

No exceptions having been filed to the Initial Decision of the Examiner, and the Commission having determined not to review same, notice is hereby given in accordance with Rule 13(d) of the Commission's Rules of Practice and Procedure, that the Initial Decision became the decision of the Commission on March 12, 1963. The decision is hereby referred to and made a part hereof.

It is ordered, That respondent pay complainant the sum of $6,288.08. By the Commission March 12, 1963.

(Signed) THOMAS LISI
Secretary.

(SEAL)

FEDERAL MARITIME COMMISSION

No. 974

PUGET SOUND TUG & BARGE COMPANY

v.

ALASKA FREIGHT LINES, INC.

No. 984

CERTAIN TARIFF PRACTICES OF PUGET SOUND TUG & BARGE COMPANY AND ALASKA FREIGHT LINES, INC.

Decided March 26, 1963

Tariff rule of Alaska Freight Lines, Inc., which provides for a land haul to be substituted for a portion of the water transportation between certain points not now served directly by Alaska Freight's vessels, found lawful.

Mark P. Schlefer, John Cunningham, and *T. S. L. Perlman* for Puget Sound Tug & Barge Company.

Alan F. Wohlstetter for Alaska Freight Lines, Inc.

Robert B. Hood, Jr., Hearing Counsel.

A. L. Jordan, Hearing Examiner.

REPORT OF THE COMMISSION

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

BY THE COMMISSION:

This consolidated proceeding is before us following oral argument upon exceptions to the initial decision of the Examiner. Docket No. 974 is a complaint action filed by Puget Sound Tug & Barge Company (Puget Sound) alleging that it is unlawful for Alaska Freight Lines, Inc. (Alaska Freight) to substitute land

haul for a portion of the water transportation on shipments originating in California and destined for Alaska (hereinafter called "substituted service"), and that Alaska Freight's tariffs, to the extent they provide for such service, should be stricken from the Commission's files. Alaska Freight answered that the complaint fails to state a cause of action, and that Puget Sound and others have tariffs on file with the Commission providing for service substantially similar to its own. It moved for dismissal of the complaint on these and other grounds.

In denying the motion to dismiss, the Commission concluded that the questions raised by the allegations and cross allegations of the parties should be determined upon a record in which the practices of both carriers in respect of substituted service were reviewed. It therefore initiated an investigation, Docket 984, to determine the extent to which these carriers transport goods by means of land haul between ports on the West Coast and in Alaska for which they publish rates as water carriers in tariffs on file with the Commission, and the lawfulness thereof under the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933. The Commission's order made both Puget Sound and Alaska Freight respondents, and consolidated Dockets 974 and 984.[1]

In his initial decision the Examiner found lawful the substituted service provision of Alaska Freight's tariff (hereinafter described), dismissed Puget Sound's complaint and discontinued the investigation. The principal exceptions to this decision are taken by Puget Sound which contends, basically, that Alaska Freight's tariff violates section 18(a) of the Shipping Act and section 2 of the Intercoastal Shipping Act because neither section "authorizes the filing of rates for a through route combining land and water carrier service and because the tariff fails to comply with the requirement of those sections for the filing of all rates between points on the water carrier's own route." These are in essence the same arguments made to the Examiner. We agree with the findings and conclusions of the Examiner.

FACTS

1. Both Puget Sound and Alaska Freight have filed tariffs with the Commission as common carriers by tug and barge between

[1] After the hearing in the consolidated proceeding the State of Alaska petitioned to intervene and was granted leave to do so for the purpose of filing briefs and participating in oral argument if held. The State, however, did not file a brief or otherwise participate.

ports in the States of Washington and California and ports in the State of Alaska. Neither carrier provides vessel service to all of the ports listed in its tariffs. Alaska Freight generally calls at Seattle, Washington, and Anchorage, Alaska. Puget Sound generally calls only at the ports of Seattle and Oakland and at Seward, Alaska. Both carriers have substituted service rules in tariffs on file with the Commission. Basically, they provide that when the carrier does not make a vessel call at a port designated in the tariff, it may arrange for shipment by land carrier between such port and the port at which the vessel call will be made.

2. At one time Alaska Freight made direct barge calls to the San Francisco Bay area, but stopped in the fall of 1959 due to the then poor financial condition of the company. From then until September 1961 it handled no cargo to or from the San Francisco Bay area. Its tariff since 1958 has provided for transportation in part by land vehicle and in part by barge. Its substituted service rule as currently stated in its tariff (FMC-F No. 1, Fourth Revised Page No. 20) is as follows:

Item No. 105: The transportation to be furnished by the Company will consist in part of highway transportation by motor vehicle and in part of water transportation by unmanned barge, without motive power, to be towed by a towing vessel. Carrier may at carrier's option substitute self-propelled vessel for barges on water portion and at carrier's option may substitute rail for truck on land portion, or any combination thereof.

3. Since September 1961 Alaska Freight has booked cargo from Oakland to Alaska, and has handled an average of about 80 tons of such cargo per week. Cargo it handles from the San Francisco Bay area is moved by rail or truck to Seattle and thence by Alaska Freight barges to Alaska. These rail and motor carriers are certificated by the Interstate Commerce Commission, and Alaska Freight pays them their published tariff rates. After deducting the cost to Alaska Freight for motor or rail transportation from Oakland to Seattle, Alaska Freight receives less for the carriage of cargo which it books in Oakland than it does for the carriage of cargo, which it books in Seattle, both moving to the same Alaska destination.

4. A typical Alaska Freight shipment under its substituted service rule is as follows: A shipment of 72,100 pounds of groceries destined for Anchorage originated at Oakland, California. It was received on behalf of Alaska Freight at a trucking terminal in Oakland and was then loaded onto rail cars and moved by rail to Seattle where it was placed aboard Alaska Freight's barge

Alaska Freight then transported it to Anchorage. Alaska Freight was billed and it paid the rail freight charges at 73 cents per hundred pounds. In turn it assessed and collected freight charges at its tariff rate of $2.88 per hundred pounds for groceries from Oakland to Anchorage. If the shipment had originated in Seattle, the water rate from Seattle to Anchorage would have been $2.75 per hundred pounds.

5. Alaska Freight has the equipment to provide vessel calls in California but lacks the freight to justify same. It estimates that movements of about 800 tons would be necessary in order to make barge calls feasible. If sufficient cargo were now offered in California, Alaska Freight would make direct calls by barge and consider cancelling the substituted service rule in its tariff. Thus, it bases use of the rule upon economic considerations.

6. Since 1960 Puget Sound has regularly operated vessels to and from Oakland every two weeks. In addition, as cargo offerings have warranted, it has operated vessels to Long Beach and Stockton. To cover those occasions when vessel service was not warranted by the quantity of cargo available, it included in its tariffs provisions for land haul from Long Beach and Stockton to Oakland. Its tariffs also provided for land haul to Oakland from Los Angeles, San Francisco, Crockett and Sacramento. These substituted service rules were as follows:

Puget Sound Tariff FMC-F No. 2, Second Revised Page No. 27 —*Item No. 100:*

(g) Rates between Group 3 and points in Alaska named herein apply in connection with Willig Freight Lines between Group 3 points (See Note) and carrier's terminal at Oakland, California, when not handled to or from Group 3 points by Puget Sound-Alaska Van Lines.

Puget Sound Tariff FMC-F No. 3, Original Page No. 5—*Item No. 110:*

(g) Rates from Crockett, Sacramento, San Francisco and Stockton, California, named herein apply in connection with Willig Freight Lines and Bay Cities Transportation Company when not handled from these points by Puget Sound-Alaska Van Lines.

(h) Rates from Long Beach and Los Angeles Harbor, California, named herein apply in connection with Willig Freight Lines when not handled from these points by Puget Sound-Alaska Van Lines.

7. Under its substituted service rule in Tariff FMC-F No. 2, Puget Sound accepted cargo in the Los Angeles area at the terminal of Willig Freight Lines located at Vernon, California, and had Willig truck it to Oakland for loading aboard Puget Sound's

barge. Puget Sound paid Willig the latter's I.C.C. tariff rate for this service. The cargo moved on a through bill of lading issued by Puget Sound from Willig's terminal at Vernon to its destination in Alaska. Puget Sound has paid Willig 50 cents per hundred pounds (which is the motor carrier's freight, all-kinds rate) for the movement from Southern California to Oakland. However, the difference between Puget Sound's rate from Southern California to Alaska and its rate from Oakland to Alaska has been more or less than 50 cents, depending upon competitive factors such as particular commodity rail rates from Southern California to Seattle.

8. Under its substituted service rule in Tariff FMC-F No. 3, Puget Sound held itself out to truck shipments from Crockett, Sacramento, San Francisco and Stockton to Oakland, as well as from the Los Angeles and Long Beach area to Oakland. The substituted service was performed in the same way as described above in connection with Puget Sound's Tariff FMC-F No. 2.

9. Both Alaska Freight and Puget Sound, as before stated, issue through bills of lading covering the cargo they move by substituted service and thus assume responsibility for the cargo from the time they receive it at point of origin until they deliver it at destination. The cargo so moving on a single occasion may be that of more than one shipper. Alaska Freight, for instance, in its substituted service from Oakland sometimes has several shipments by several suppliers going to several consignees, which it consolidates and moves to Seattle in one rail car on several bills of lading.

10. Under the terms of their substituted service rules, both Alaska Freight and Puget Sound substitute trucks for water service on all shipments tendered to them at Tacoma, Washington, for Alaska delivery. The shipments move on through bills of lading, with the water carriers providing or paying for (at motor carrier tariff rates) the trucking service from Tacoma to Seattle. The shippers pay the water carriers the applicable freight rates set forth in the latters' tariffs. Both water carriers publish identical rates for transportation from Tacoma and from Seattle to Alaska destinations.

11. On March 26, 1962, shortly before the hearing herein, Puget Sound published and filed various revised tariff pages eliminating the provision for overland transportation and restricting the application of its tariff to service on direct vessel calls, except at

Tacoma. These revised tariff pages became effective April 26, 1962.[2]

DISCUSSION AND CONCLUSION

Puget Sound having discontinued its tariff provisions for substituted service, the only issue before us here is whether Alaska Freight Lines, a common carrier by water subject to the Commission's jurisdiction, may lawfully maintain its substituted service, *i.e.*, the substitution of land haul for the Oakland-Seattle portion of its Oakland-Alaska service. The issue reduces itself to the single question of whether the carrier's tariffs quoting rates for such substituted service may be lawfully filed under section 2 of the Intercoastal Shipping Act, 1933. The filing requirements of section 2 are broader and more stringent than those of section 18(a) of the Shipping Act, also cited in our order of investigation, consequently if section 2 does not prohibit the service no other provision of the Shipping Act or the Intercoastal Act would appear to do so.[3]

Section 2 of the Intercoastal Act provides in part:

> That every common carrier shall file with the Federal Maritime Board [now the Commission] and keep open to public inspection schedules showing all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route; and, if a through route has been established, all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route and points on the route of any other carrier by water.

Puget Sound contends that because the Oakland-Seattle portion of Alaska Freight's service is performed by land carrier, the rates filed therefor are not rates "for or in connection with transportation between points on its own route," and are thus unlawful under section 2. For the most part decisions of the Interstate Commerce Commission (ICC) regarding substituted service under the Interstate Commerce Act constitute the authority relied upon.

Neither we nor our predecessors have had occasion to construe the quoted language of section 2 in connection with a substituted

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[2] Second Revised Page 26 and Third Revised Page 27 to its Local Freight Tariff No. 2, FMC-F No. 2, and First Revised page 25 to its Container Tariff No. 8, FMC-F No. 8.

[3] The order of investigation cites in addition to section 2 of the Intercoastal Act, and section 18(a) of the Shipping Act, sections 3 and 4 of the Intercoastal Act. However, the purpose of the investigation was to determine the lawfulness of the substituted service, not the reasonableness of the level of the rates and charges involved therein, and sections 3 and 4 of the Intercoastal Act are therefore not relevant to any issue in this case.

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service, and the legislative history of the Act is silent on tl specific problem here raised. We have, however, had recent occ sion to state that the primary purpose of section 2 is to achie equality and uniformity in the treatment of shippers. *Matsc Navigation Company—Container Freight Tariffs*, 7 F.M.C. 4{ (1963). The language of the section say nothing abo the types of service permissible under its requirements. Whi the section assumes that the rates filed will be rates for the co mon carriage of goods by water between points on the carrier route, it does not expressly prohibit the filing of rates whi include a substituted mode of carriage over a portion of tl route. For the reasons herein stated, we will not infer such prohibition.

A brief review of the history of substituted service under tl Interstate Commerce Act reveals that the ICC allows the servi under certain principles which appear to be of general applicabi ity to interstate carriers subject to its jurisdiction. While tl substitution of one mode of transportation for anoth is not a new practice,[4] the first formal proceeding in which tl ICC considered the problems presented by substituted servi appears to have been *Substituted Freight Service*, 232 I.C.C. 6{ (1939), a proceeding apparently prompted by the enactment Part II of the Interstate Commerce Act providing for the regul tion of motor carriers. The primary considerations in that ca seem to have been with the impact of the certificate and tari filing requirements imposed upon the substitute carrier by tl various provisions of the Interstate Commerce Act and with i suring full disclosure of the details of the service both to the IC and to the shipping public. The decision also made it clear th a substituted service should not be used for the total transport tion, and that an all-motor tariff must be filed where no actu rail or water haul was performed.

In the succeeding years, the ICC authorized various forms substituted service.[5] In addition to requiring that the substitu carrier be certified for his mode of transportation, *Pacific Mot Trucking Co., Extension—Oregon*, 77 M.C.C. 605 (1958), the IC

[4] For example, the ICC traces various forms of so-called "piggy-back" service backward more than a century. See *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 94-1 (1954).

[5] *Substituted Service on Livestock, Chicago, B. & O. R. Co.*, 304 I.C.C. 433 (1958), substi tion of truck for rail on carload movements; *General Commodities Between Chicago and N York*, 306 I.C.C. 243 (1959), substitution of rail for truck; *Puget Sound Truck Lines, In Extension-Substitute Service*, 66 M.C.C. 357 (1956), truck for water.

has required that the booking carrier should cleary state the names of the substitute carriers and the points between which they may be used. *Substituted Freight Service, supra; Truck Trailers on Flatcars,* 297 I.C.C. 395 (1955), affirmed on reconsideration, 298 I.C.C. 533 (1956). The ICC takes the position that where substituted service is permitted, shippers must nevertheless be accorded the option of nonsubstituted service if they desire. *Grain Flour from Twin Cities to Chicago,* 313 I.C.C. 558 (1961). Shippers, however, have not appeared concerned with the availability of such an option. They have generally participated in substituted service proceedings merely to favor and support the proposed service. *Substituted Service on Livestock,* 304 I.C.C. 43 (1958); *Puget Sound Truck Lines, Inc., Extension-Substitute Service,* 66 M.C.C. 357 (1956).

The service offered by Alaska Freight is basically the same as those approved by the ICC except that the shipper is given no option to select nonsubstituted service. In the view of Puget Sound, the lack of such an option renders defective the rates in question. In the *Substituted Freight Service* case, *supra,* the ICC found that:

> The substitution of one form of transportation for another at the carrier's option, where the shipper otherwise directs, would constitute a breach of the contract of carriage in contravention of section 20(11) of part I and section 219 of part II; . . . (232 I.C.C. at page 691)

The sections of the Interstate Commerce Act relied on in this decision set forth detailed provisions governing the issuance of bills of lading by rail and motor carriers. No comparable provisions are found in either the Shipping Act or the Intercoastal Act, indicating that the ICC's rationale is not relevant here. Further, we would agree that substitution "where the shipper otherwise directs" would probably breach the contract of carriage. In the case at hand, such a situation cannot arise for the tariff of Alaska Freight informs the shipper that substituted service may be provided and if the shipper books his cargo with the carrier it seems to us the contract is necessarily subject to that condition. In any case, we cannot find a contract breach in Alaska Freight's mere failure to offer the shipper the right to select all-water service from Oakland to Alaska.

There are further cited to us by Puget Sound some half a dozen decisions of the Interstate Commerce Commission interpreting the language "points on its own route" in section 6(1) of the Interstate Commerce Act which are said to be controlling

here.[6] They were not cited to the Examiner, and thus not considered in the initial decision. Section 6(1) of the Interstate Commerce Act requires carriers by railroad to file schedules showing all the rates, fares, and charges for "transportation between different points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established." The cases cited involve various attempts by one rail carrier to publish and file rates from points on its own line to points on the line of another rail carrier without the booking carrier securing the concurrence of the latter. In each instance the ICC found that, without the concurrence of the second carrier, the tariff filed could not properly be designated a joint tariff, and the rates were not joint rates for a through route. No problem of joint rates is presented here and the cases are inapplicable. In connection with all of the foregoing cases, it should be noted that the ICC regulates several modes of transportation and is necessarily concerned with delineating the proper sphere of each for purposes of certification, licensing and operation. There are no certification or licensing requirements imposed upon water carriers subject to our jurisdiction, and there can be no question here of operation outside the scope of any such authority. To the extent the ICC decisions are governed by the necessity of prescribing the proper relationship between two carriers subject to the Interstate Commerce Act they are of little value to us and cannot be taken as binding precedent when this Commission adjudicates the rights and responsibilities of water carriers subject to the Shipping Act and Intercoastal Act.

The decision of our predecessor in *Intercoastal Investigation 1935*, 1 U.S.S.B. 400 (1935), also a case not called to the attention of the Examiner, is likewise urged by Puget Sound as precluding the lawful filing of Alaska Freight's rates. The portion of the Intercoastal case relied upon dealt with an improper attempt by several water carriers to establish certain joint intercoastal rates. Again, the problem in the case at hand is not one of joint rates.

The point is made that the Federal Maritime Board ruled on July 2, 1959, in a matter pertaining to Consolidated Freightways,

[6] *New York, N.H. & H.R. Co. v. Platt*, 7 I.C.C. 323 (1897); *Enterprise Transportation Co. v. Pennsylvania R.R. Co.*, 12 I.C.C. 326 (1907); *Coal Rates on the Stony Fork Branch*, 26 I.C.C. 168 (1913); *Chicago, M. & St. P. Ry. Co. v. Great Northern Ry. Co.*, 49 I.C.C. 302 (1918); *Brick Rates from Danville*, 63 I.C.C. 277 (1921); *Drayage and Unloading at Jefferson City, Mo.*, 206 I.C.C. 436 (1935); *Southern Class Rate Investigation*, 100 I.C.C. 513 (1925).

Inc., that it lacked jurisdiction of a motor carrier's joint motor-water-motor commodity rates between Honolulu, Hawaii and interior points in the United States, and the ruling is said to be controlling here. The Examiner correctly stated that as a motor carrier Consolidated Freightways was not subject to the Board's jurisdiction whereas here the filing is by a water carrier subject to the Commission's jurisdiction.

Finally, Puget Sound appears to be contending that Alaska Freight's rates are unlawful because they "fail to afford publicity, inflexibility, or unalterability to AFL's charges (*i.e.*, share of revenue) for the only transportation actually performed by it—the barge transportation between Seattle and Alaska." In addition, it is suggested that Alaska Freight partially absorbs the transportation cost, resulting in an illegal rebate to shippers. The word "charges" as used in section 2 of the Intercoastal Act can hardly be equated with the carrier's share of revenue. This would ignore the plain meaning of the remainder of the statutory language. Further, there is no evidence in the record of any rebate to shippers, nor explanation as to how any rebate is accomplished. The available evidence indicates that shippers similarly situated receive uniform treatment under Alaska Freight's rule. Nor is there in this case any issue as to discrimination.

We noted at the outset that the requirements of section 2 are designed primarily to achieve uniformity and equality in the treatment of shippers. Publication as called for in the section enables the shipper to determine what the carrier is charging him for the transportation offered and that the charges are to his competitors. *Matson Navigation Company-Container Freight Tariffs, supra.* Alaska Freight's tariff meets these requirements. However, the tariff as presently on file does not specify by name the carrier or carriers performing the substituted portion of the service nor the points between which they may be used, and we shall require that it be amended to correct these deficiencies.

Alaska Freight has shown that it previously served Oakland by vessel (barge); that it discontinued the service in the fall of 1959 because of the company's poor financial condition at that time; that it resumed booking cargo at Oakland for Alaska in the fall of 1961; and that, while this cargo has been and is inadequate to justify direct vessel service at Oakland, Alaska Freight hopes to generate enough tonnage to permit the resumption of

direct service. We think this suffices to establish that Alaska Freight has a route between Oakland and Alaska destinations within the language "between points on its own route" in section 2 of the Intercoastal Act.

Moreover, the route remains essentially that of a water carrier even though for economic reasons a portion of it is presently being served by land haul which the water carrier employs. It appears to provide a valuable service to Oakland shippers. We will not destroy the service by reading into the quoted language of section 2 what is in our opinion an unwarranted prohibition. That language was adopted in connection with the imposition of a tariff filing requirement and is, we think, mainly descriptive. We therefore conclude that the substituted service rule contained in Alaska Freight's tariff, FMC-F No. 1, Fourth Revised Page No. 20, Item No. 105, is lawfully on file with the Commission under the provisions of the Intercoastal Act as well as the Shipping Act, 1916, subject of course to the changes to be made therein, as hereinbefore mentioned.

Cargo booked at Tacoma, a port city some 30 miles south of Seattle, is hauled overland to Seattle by both Puget Sound and Alaska Freight. Puget Sound has not cancelled its substituted service tariff provision in this respect. The Examiner found, as urged by Puget Sound, that the motor haul from Tacoma to Seattle is a bona fide pick-up and delivery service within the Seattle terminal area.[7] We think it unnecessary to so find inasmuch as the substituted service thus provided by both carriers seems well within the views we have expressed in validating Alaska Freight's Oakland service.

During the course of this proceeding, Hearing Counsel as well as Alaska Freight (which advanced it as an alternative) have declared that substituted service in the Alaska trade should be made the subject of a full-scale inquiry, with participation by all carriers having provisions for such service in their tariffs. We recognize that the use of substituted service may give rise to a number of problems, some of them possibly unique, but it is not clear, at least at present, that an investigation of the type suggested should be conducted. Nor has it seemed to us that resolution of the questions raised concerning Alaska Freight's substituted service between Oakland and Seattle should be deferred,

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[7] The Examiner cited *North Carolina Line—Rates to and from Charleston, S. C.*, 2 U.S.M.C. 83, 87-88 (1939); *American Trucking Ass'ns v. United States*, 17 F. Supp. 655, 657 (1936).

consequently we have examined and disposed of them in the manner above indicated. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified. An order will be entered dismissing the complaint in Docket 974 and discontinuing the investigation in Docket 984.

FEDERAL MARITIME COMMISSION

No. 974

PUGET SOUND TUG & BARGE COMPANY

v.

ALASKA FREIGHT LINES, INC.

No. 984

CERTAIN TARIFF PRACTICES OF PUGET SOUND TUG & BARGE COMPANY AND ALASKA FREIGHT LINES, INC.

DISMISSAL OF COMPLAINT (NO. 974) AND DISCONTINUANCE OF PROCEEDING (NO. 984)

This consolidated proceeding having been duly heard and submitted, and the 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 Alaska Freight Lines, Inc., shall, within 30 days from the date of service of this order, amend its Tariff, FMC-F No. 1 to include in any provision authorizing the substitution of motor or rail haul for a portion of the water transportation, the name of the carrier or carriers which may be substituted for the vessels or barges of Alaska Freight and the points on its route between which such substituted carrier or carriers may be used;

It is further ordered, That the complaint in No. 974 be, and it is hereby, dismissed and the proceeding in No. 984 be, and it is hereby, discontinued.

By the Commission, March 26, 1963.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 881

General Increases in Alaskan Rates and Charges

Decided April 30, 1963

Rates, fares and charges of Alaska Steamship Company for the transportation of property by water in interstate commerce between Pacific Coast ports of the United States and ports in the State of Alaska, and also between ports within Alaska, as increased, found to be just, reasonable and lawful.

Rates, fares and charges of Puget Sound Alaska Van Lines, Inc., Alaska Northern Express, Inc., Alaska Freight Lines, Inc., and Garrison Fast Freight Division of Consolidated Freightways, Inc., for the transportation of property by water in interstate commerce between Pacific Coast ports of the United States and ports in the State of Alaska, as increased, remanded to Examiner for the taking of further evidence.

Stanley B. Long, Arthur G. Grunke, Ira L. Ewers, and *John Robert Ewers* for Alaska Steamship Company; *Alan F. Wohlstetter* and *Ernest Land* for Alaska Northern Express, Inc., and Alaska Freight Lines, Inc.; and *Mark P. Schlefer* and *Odell Kominers* for Puget Sound-Alaska Van Lines, Inc., respondents.

Malcolm D. Miller, J. H. Macomber, Jr., John Regan, and *Clarence J. Koontz* for Administrator of General Services; *Martin L. Friedman, Ralph Moody, Douglas Gregg,* and *Seymour S. Berdon* for the State of Alaska; *Calhoun Edward Jacobson* and *Richard O. Gantz* for Port of Anchorage, Alaska; *J. D. Paul* for Seattle Traffic Association; *H. E. Franklin, Jr.,* for Tacoma Chamber of Commerce; *Frank S. Clay* for Portland Freight Traffic Association; *Fred H. Tolan* for Northwest Fisheries Association, Northwest Fish Traffic Committee, and Association of Pacific Fisheries; *George W. Brooks* and *Charles Morton* for International Woodworkers of America, AFL-CIO and International Brotherhood of Pulp, Sulphite and Paper-Mill Workers, AFL-CIO; *Ed-*

ward M. Taber for Chase Brass & Copper Company, Incorporated; and *Omar O. Victor* for the United States Smelting Refining and Mining Company, Interveners.

Robert J. Blackwell, Robert B. Hood, Jr., and *Edward Schmeltzer*, Hearing Counsel.

Arnold J. Roth, Hearing Examiner.

REPORT OF THE COMMISSION

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

BY THE COMMISSION:

This is an investigation to determine the lawfulness of increased rates, fares and charges for the transportation of cargo by water in interstate commerce between Pacific Coast ports of the United States and ports in the State of Alaska, and also between ports within Alaska.

Alaska Steamship Company (Alaska Steam), filed, on December 9, 1959, to become effective January 10, 1960, revised tariff schedules setting forth increased rates and charges. The new rates and charges generally amounted to an increase of 10% over those previously filed. Coastwise Line (Coastwise), applied on December 18, 1959, for permission to file, on less than 30 days' notice, revised tariff schedules to become effective January 10, 1960, setting forth increased rates and charges. Coastwise's new rates and charges also amounted to an increase of 10%. Such permission was granted on January 4, 1960. Garrison Fast Freight Division of Consolidated Freightways, Inc. (Garrison), filed on December 28, 1959, effective January 27, 1960, revised tariff schedules setting forth increased rates and charges amounting to increases of approximately 5.3% and 7.9%.

The Federal Maritime Board (Board), our predecessor, upon its own initiative, and upon a hearing concerning the lawfulness of such rates, charges, rules, regulations and practices, named Alaska Steamship Company, Coastwise, and Garrison respondents therein.

Alaska Northern Express, Inc. (Alaska Northern) filed revised tariff schedules on February 1, 1960, effective March 2, 1960, and on March 1, 1960, was made a respondent in the investigation.

Puget Sound Alaska Van Lines, Inc. (PSAVL), (Puget Sound, Tug and Barge Co.), filed on December 15, 1959, effective December 25, 1959, its first tariff schedules (Tariff No. 1, FMB-F No. 1)

covering freight rates for transportation between Pacific Coast ports on the one hand and ports and points in Alaska on the other.

No order of investigation was entered prior to the effective date of the PSAVL tariffs. PSAVL by order served May 19, 1960, was made a respondent in the investigation. PSAVL's new tariffs named rates at a level generally the same as those under investigation, and were at such levels on the date of the first order in this investigation.

Petitions to intervene were granted to the State of Alaska (Alaska), the United States of America, by the Administrator of General Services (General Services) representing the executive agencies of the Government, except the Department of Defense; United States Smelting, Refining and Mining Company; the Port of Anchorage, Alaska; International Brotherhood of Pulp, Sulphite and Paper-Mill Workers, AFL-CIO, acting jointly; Chase Brass & Copper Company, Incorporated; Tacoma Chamber of Commerce; Portland Freight Association; Seattle Traffic Association; Northwest Fisheries Association; Northwest Fish Traffic Committee; and the Association of Pacific Fisheries.

At the time of the prehearing conference before an Examiner on March 2, 1960, it was announced by the presiding Examiner, on the basis of correspondence with him, that Coastwise would not participate because it had recently withdrawn its services from the trade. After prehearing conference, Alaska Northern acquired the stock of Alaska Freight Lines, Inc. (Alaska Freight), which thereafter adopted Alaska Northern's tariff schedules and assumed Alaska Northern's position as a respondent in the investigation. Hereinafter, the term "Freight Lines" will be used to designate the operations of these carriers. Garrison did not participate in the proceedings.

After hearing, Examiner Roth issued an initial decision in which he found that:

1. The increased rates of Alaska Steam, Coastwise, Garrison, and Freight Lines, named in tariff schedules specified in the orders entered herein, have not been shown to be just and reasonable for the future. An order should be entered requiring cancellation of the tariff schedules naming the increased rates under investigation, and discontinuing the proceeding as to these respondents.

2. The increased rates as specified are not shown to have been unjust, unreasonable, or otherwise unlawful during the pendency

of this proceeding. The provisions of the orders instituting this investigation that respondents shall keep account of all freight moneys received by reason of the increased rates, and make refund of any increased charges in excess of those determined to be just, reasonable, and otherwise lawful, should be vacated and set aside as unjustified on the record.

3. The rates of Van Lines are unjust and unreasonable for the future to the extent that they exceed the rates maintained by Alaska Steam on January 9, 1960, but are not shown to have been unjust, unreasonable, or otherwise unlawful for the past. An order should be entered requiring this respondent to cease and desist from continued maintenance of the rates found unlawful for the future.

4. Individual rates of the respondents, to the extent assailed, have not been shown to have been or to be unjust, unreasonable, or otherwise unlawful, except as specified above.

Oral Argument was held upon exceptions to the initial decision of the Examiner.

Alaska, which achieved statehood on January 3, 1959, occupies a vast area of 586,400 square miles, and is sparsely populated. Total population in 1960, including military personnel stationed in Alaska and their dependents, was about 225,000, most of whom, except in the Fairbanks area, are concentrated in the coastal areas. Anchorage, the largest city, has a population of about 44,-200, with about 40,300 additional living within 30 miles. Fairbanks is about half the size of Anchorage, and the remaining cities range downward in size from Ketchikan and Juneau, the capital, with populations of about 11,000 and 10,000, respectively. Generally, the various coastal areas are not connected by highway or rail, and the State is therefore largely dependent upon transportation by water or air. The Alaskan coastline is about 26,000 miles long, and service to the widely scattered small population centers located along this coastline is thus difficult and expensive.

Prior proceedings have referred to the difficulties and hazards inherent in providing water transportation service in the Alaskan trade.[1] There is an exceptionally large number of small ports to be served. In 1959, for example, Alaska Steam's vessels made 736 calls at 64 different ports. However, only about 13 of the ports

[1] See *Alaskan Rate Investigation*, 1 U.S.S.B. 1 (1919); *Alaskan Rates*, 2 U.S.M.C. 558 (1941); *Alaskan Rate Investigation No. 2*, 3 U.S.M.C. 43 (1948); *General Increases in Alaskan Rates and Charges*, 5 F.M.B. 486 (1958).

are served regularly the year round, the remainder being served only during the summer months or during the salmon season. Cargo movement in the trade is highly seasonal, and severely unbalanced. Of the total cargo handled by Alaska Steam in 1958 and 1959, only 23.7 percent moved southbound, and Freight Lines estimates that its southbound cargo is only about 14 percent of northbound cargo. In the same years, 74 percent and 72 percent, respectively, of the cargo of Alaska Steam moved in the period April-October, inclusive, with the peak movements occuring in the months of June, July, August, and September. At the small ports, berthing accommodations are poor, making operations costly. There are navigational hazards because of ice, wind, fog, shoals, and strong tides in narrow passages, but there is no indication in the record of recent casualties due to these causes, and in any event the navigational risks are diminished by the use of modern navigational aids such as radar which have been added to the vessels and claimed as assets devoted to the trade, and the risks are covered by insurance the cost of which is charged to the trade. It is contended that perhaps the most serious problem of the regulated carriers in the trade arises from the fact that any carrier may enter or leave the trade at will, giving rise to so-called "hit-and-run" competition, and from the fact that in the case of large blocks of cargo moving to particular areas, shippers tend to resort to the use of tug and barge operators under contract. More than 130 carriers have, at one time or another, been engaged in the trade and have subsequently failed or withdrawn, as in the case of Coastwise as indicated above.

Alaska Steam is the only carrier serving all areas of Alaska, and together with its predecessors Alaska Steam has provided such service continuously for 65 years. It is the only respondent which presented comprehensive evidence in support of its rates under investigation. It operates a fleet of 14 vessels, consisting of 7 owned Liberty type vessels, 2 of which were acquired in 1959, 4 owned C1-MAV-1 type vessels, and 3 C1-MAV-1 vessels chartered from the Maritime Administration, the latter of which are utilized principally during the peak season, and remain under charter in an off-hire status when laid up during the off season, Alaska Steam being responsible for all lay-up and maintenance expenses. A fourth C1-MAV-1 vessel, previously chartered by Alaska Steam, was unused and in lay-up status from September 18, 1958, to November 19, 1959, and was returned to the Maritime

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

SPECIFIC RATES

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

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

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

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

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

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

Garrison is a non-vessel-owning common carrier [2] in the Alaskan trade. The cargo handled by it is entirely containerized, in cargo vans owned by Arctic Terminals, Inc., and the water service between Seattle and Alaska is provided by Alaska Steam pursuant to Agreement No. 8173, as amended, approved by the Board under section 15 of the Shipping Act, 1916, 46 U.S.C. 814. The rates of Garrison, concurred in by Alaska Steam, apply between Seattle and ports and interior points in the rail belt of Alaska, and include pickup and delivery. Interior transportation in Alaska is provided by motor vehicle or by the Alaska Railroad. Little evidence was presented concerning the operations of Garrison, and no evidence in justification of its rates under investigation was presented. Revenues of Garrison amounting to $15,227,056 received during the period January 1, 1957, through March 1960 were distributed under a division arrangement, with $4,838,755 or 31.78 percent going to Alaska Steam, $333,765 or 2.19 percent to Terminal Company, $2,075,297 or 13.63 percent to the Alaska Railroad, $2,090,782 or 13.73 percent to Arctic Terminals, Inc., $5,676,-911 or 37.28 percent to Garrison, and the remainder to Valdez Dock Co. and to Garrison to cover cargo insurance. The amount to Arctic Terminals, Inc., apparently covers the rental of containers and associated equipment, and does not appear on the records of any respondent as an expense. In 1958 and 1959, Alaska Steam received $1,258,854 and $2,027,280, respectively, as its share of Garrison revenues from northbound and southbound military and commercial cargo. Effective January 10, 1960, the divisions to Alaska Steam were substantially increased, the increases ranging from 16 percent on fresh meats to 45 percent on numerous categories of general dry cargo.

Freight Lines provides a twice-weekly barge and van service between Seattle and Alaskan ports in the rail belt area. One weekly sailing calls at Anchorage except that in the winter when the Anchorage port is inaccessible the call is made at Seward. The other weekly sailing calls the year around at Valdez. In addition, a new service was inaugurated between Portland, Oregon, and Anchorage, and one sailing was held in this service prior to the hearing, utilizing chartered space on a barge otherwise operating in private carriage. Regular monthly service will be offered at Portland if the operation is financially and operationally successful. Freight Lines made no direct showing in justification

[2] See *Common Carriers by Water—Status of Express Companies, Truck Lines and Other Non-Vessel Carriers*, 6 F.M.B. 245 (1961)

of its rates under investigation. However, witnesses and operating data were made available to Hearing Counsel, through whose presentation the evidence of record was submitted. As in the case of Garrison, the rates of Freight Lines apply between continental ports and ports at interior points in the Alaskan rail belt area, and include pickup and delivery. Transportation within Alaska is provided generally by motor vehicle, except that when Alaska highways are closed to truck movement piggy-back service of the Alaska Railroad is utilized. Freight Lines is presently owned principally by persons engaged in construction or other businesses in Alaska, who utilize that carrier for their shipments whenever feasible.

PSAVL provides a weekly barge and van service between Seattle and Seward, and twice-monthly sailings between San Francisco and Seward, with calls at Whittier for military cargo as required. It is a wholly-owned subsidiary of Puget Sound Tug and Barge Company, a contract carrier in the Alaskan trade and a common carrier in the intercoastal trade between California and Pacific Northwest ports, which in turn is jointly owned by Drummond Lighterage Company and Cary Davis Tug and Barge Company. PSAVL did not participate voluntarily in the proceeding, and the evidence of record concerning its operations was secured by means of a *subpena duces tecum* issued by the presiding Examiner. Between April 1958 and January 1960 Puget Sound Tug and Barge Company, as contract carrier, provided transportation for the cargoes of Coastwise Line originated in California and destined to Alaska, which were transshipped at Seattle, presumably in lieu of the interchange arrangement between Coastwise Line and Alaska Steam discussed in *General Increases in Alaska Rates and Charges, supra,* at pages 488-9.

The last prior general rate increase in the Alaska trade, of 15 percent, became effective in full in April 1958, and was found just and reasonable by the Federal Maritime Board in *General Increases in Alaska Rates and Charges, supra.* The respondents do not rely upon any particular cost increases occurring since that time in justification of the increased rates here involved. Alaska Steam shows that longshore wages have increased 11.5 percent at Pacific Coast ports and 6.1 percent at Alaskan ports. On the other hand, costs for standard bunker fuel oil decreased from $3.25 per barrel in June 1957 to $2.40 in March 1959 and to $2.375 in December 1959; and costs for P.S. 300 fuel oil decreased from $3.05 per barrel to $2.9925, in December, 1959.

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Table I below shows the total cargo [3] carried by Alaska Steam in the Alaskan trade in the years 1955-1959, and that projected by it for 1960, and the number of vessel voyages completed or projected during the same period.

TABLE I.—*Cargo and Voyages of Alaska Steam*

	1955	1956	1957	1958	1959	Projected 1960
Cargo	514,301	532,214	481,411	482,202	461,000	472,392
Voyages	173	169	161	163	176	184

Table II below shows a breakdown of the 1958 and 1959 cargo carryings of Alaska Steam by direction and by type of cargo.

TABLE II.—*Cargo of Alaska Steam by Direction*

	Northbound		Intermediate		Southbound	
	1958	1959	1958	1959	1958	1959
Commercial	264,108	278,090	6,933	3,889	114,215	76,875
Military	74,562	79,780	—	—	15,663	14,268
Mail	5,739	6,997	13	9	969	1,092
Totals	344,409	364,867	6,946	3,898	130,847	92,235

Table III below shows the latest information of record concerning the northbound and southbound carryings of Alaska Steam during the first 7 months of 1960, as compared with the same period in 1959. The Garrison cargo listed reflects the commercial cargo handled by that carrier and transported by water by Alaska Steam under the arrangement referred to above, and also the cargo handled in the same fashion by Garrison for agencies of the Department of Defense under military tender rates. The final hearing session in the proceeding was concluded on December 6, 1960.

In the periods shown in Table III, interport Alaskan cargo was relatively stable but insignificant, being 2,280 tons in 1959 and 2,-087 tons in 1960. Total tonnage handled in the first 7 months was 232,832 tons in 1959, and 258,898 tons in 1960, reflecting a 11.1 percent increase in 1960 over 1959, as compared with the 2.5 percent increase for the full year 1960 projected by Alaska Steam as shown in Table I.

[3] In this report, cargo tonnage is shown in payable tons, i.e., tons as freighted on a weight or measurement ton basis.

TABLE III.—*Alaska Steam Tonnage First 7 Months of 1959 and 1960*

	NORTHBOUND		SOUTHBOUND	
	1959	1960	1959	1960
Commercial	140,501	153,507	17,011	19,359
Garrison	28,789	30,426	1,795	1,367
Military	32,542	35,801	5,778	11,017
Mail	3,630	4,548	506	786
Totals	205,462	224,282	25,090	32,529

DISCUSSION

The Examiner rejected Alaska Steam's cargo projection of 472,392 tons for the year 1960, concluding that Alaska Steam carryings would amount to 511,000 tons or some 38,600 tons more than projected by it. Alaska Steam excepted to the Examiner's conclusions.

In rejecting Alaska Steam's projection the Examiner pointed out that Tables II and III indicate an increasing trend in Alaska Steam's northbound carryings, and that during the first 7 months of 1960 Alaska Steam's total cargo increased by 29,153 tons over the same period in 1959, or about 2.5 times the amount of increase predicted by Alaska Steam for the entire year. The Examiner found that the tonnages of commercial and military cargo for the first 7 months of 1960 exceeded those of the same period in 1959 by 12.6% and then projected this rate of increase over the full year and arrived at a total of 519,086 tons, or 46,694 tons more than projected by Alaska Steam, and 59,086 tons more than carried by Alaska Steam in 1959. However, taking into consideration certain factors, and allowing for competition, the Examiner projected Alaska Steam's 1960 tonnage at about 511,000 tons or 38,600 tons more than the increase projected by Alaska Steam. While the Examiner may have been correct in his projection for the year 1960 certain facts in the record show that 1960 was to be a better than average year for cargo carryings in the Alaskan trade. These factors are:

1. A prediction was made that there would be an exceptionally large salmon pack in Bristol Bay based on evidence then available as of August 1, 1960; at the time of the hearing there was evidence that in southeastern Alaska the salmon run in 1960 was the lowest since records had been kept, but in other areas averages were well up including Bristol Bay where a large increase was shown—an increase of 17,967 revenue tons as of July 27, 1960; and,

2. A large movement of MSTS cargo during the summer and fall of 1960 after the Navy withdrew three ships from service in the Alaskan trade. In the Bristol Bay area, if the salmon pack was as large as it appeared it might be in July, 1960, it could be surmised that the added local income would create a demand for merchandise to be shipped northbound, which would also increase 1960 carryings.

The above would create a temporary increase for 1960 which we do not believe represents a steady level of carryings for the future.

In Docket No. 828 it was shown that Alaska Steam's revenue tons carried fluctuated, but declined generally from 690,626 revenue tons in 1949, with the exception of a peak year in 1951 resulting from the Korean War. The first year shown in this record was 1955 when 514,301 tons were carried. In 1958, 482,202 tons were carried and in 1959, 461,000 tons were carried. For 1960 respondent projected 472,392 tons. The evidence in the record points to the fact that while the population and economy of Alaska might be increasing somewhat, participation by Alaska Steam in Commerce is not. A variety of inhibiting factors was shown in the record:

1. Competition by water carriers with different forms of transportation, i.e., barge transportation is increasing.

2. M.S.T.S. cargo would decrease as a result of decreased military activity.

3. The Fairbanks area was actively trying to divert parcel mail deliveries to trucks causing a probable loss of this cargo in the future.

4. The use of highway motor carriers would increase.

5. Construction material carryings in connection with the defense early warning system line had been completed.

6. There has been some direct importation into the Anchorage area from foreign countries of steel pipe, and building materials; and,

7. No industrial expansion was foreseen in Ketchikan.

8. Generally, conditions in the trade are changing and it is not possible to see clearly any expanding factors as far as Alaska Steam's service is concerned, although some off-setting factors in favor of respondent were shown.

However, certain off-setting factors are present:

1. Service has been improved by Alaska Steam through the addition of voyages which, however, have increased expenses with no corresponding increase in cargo;

2. Alaska Steam has started some container service which promises economies in operations.

Thus, on the basis of the entire record before us we find that the projection of Alaska Steam of 472,392 tons more closely approximates the reasonably expectable level of future carryings than does the Examiner's projection, restricted as it was to the single better than average year 1960. Accordingly, we will base our determinations on cargo carryings by Alaska Steam of 472,392 tons.

Table IV below shows the result of its operation in the Alaskan trade claimed by Alaska Steam for the years 1958 and 1959, and the constructed results for 1960.

TABLE IV.—*Operating Results Claimed by Alaska Steam*

	1958	1959	1960 Constructed
Revenues	$15,718,157	$16,185,665	$17,673,521
Expenses	14,848,824	15,992,656	17,140,098
Net before Income Tax	869,333	193,009	533,423
Estimated Income Tax	452,053	100,365	277,380
Net after Tax	$ 417,280	$ 92,644	$ 256,043

The revenues projected for the year 1960 include actual revenues for the first 5 months of the year, estimated revenues based upon the cargo projection for the last 7 months of the year, and $1,253,533 attributable to the rate increase here involved as applied to commercial cargo, which became effective on January 10, 1960. Expenses for that year are based upon actual expenses for the first 5 months, actual expenses for the last 7 months of 1959 adjusted to include expenses of $557,107 for 6 additional voyages required during the last 7 months of 1960 to bring the total voyages up to the 184 projected for the year and also adjusted to reflect for the last 7 months of 1960 increased costs of $304,071 due to crew and stevedoring wage increases not reflected in the 1959 figures, and constructive increases added to reflect for the full year 1960 wage and other cost increases occurring or expected to occur during the year.

The Examiner at the outset disallowed interest on vessel mortgages in the amounts of $31,582 in 1958 and $33,070 in 1959 and no exception was taken to this action, with which we agree.

The Examiner disallowed as operating expense, deposits in the Skinner Trust of $39,620 in 1958 and $10,500 in 1959. The Trust was shown to be a depositary of charitable donations by the affiliated companies in the Skinner holding company system, and recipients of donations therefrom are all recognized objects of charitable contributions. Since charitable donations have been recognized as justified if for the public good, as these are, we will recognize expenses for charity as eligible expenses chargeable to the shipping public and allowable for rate-making purposes. The Examiner's exclusion of expenses for contributions is reversed.

The Examiner allowed expenses for unfunded liability portions of payments into the Skinner Pension Fund Reserve, amortizable over a period of ten years. Payments by Alaska Steam for such costs were $94,784 in 1958 and $70,900 in 1959. Pension payments are in the nature of wages and constitute a present benefit to employees; and, the use of a ten-year period of amortization for computation of unfunded liability, being allowed for tax purposes, seems to us to be a reasonable exercise of management's discretion. The exception to the allowance of this expense is rejected.

The Examiner allowed certain inactive vessel expenses, incurred because of the need to lay-up some ships during the winter months when activity in the Alaskan service is diminished, or of the need to take ships out of Alaska service, for other reasons, and also made pro rata allocations of inactive vessel expense to charter service in recognition of the fact that the ships were chartered to others, when not used in Alaska service. The Examiner reduced expenses by disallowing $3,312 in 1958 and $8,479 in 1959.

We do not agree that charter service should bear part of inactive vessel expenses and the Examiner's reduction of vessel lay-up expense on this account is reversed. We recognize that by chartering its vessels as charters became available during the off season, Alaska Steam has thereby reduced the inactive vessel expense which would otherwise have accrued. To further reduce the remaining inactive vessel expense by an allocation to the charter operations does not appear to us to be either appropriate nor in accordance with sound accounting practice.

The Examiner allowed inactive vessel expenses for the *Palisana* from September 18, 1958 to December 31, 1958 in the amount of $7,359, but disallowed such expenses from January 1, 1959 to November 19, 1959 in the amount of $24,313 because in 1959 the

ship was not used or useful in the Alaskan trade. In March 1959 two ships the *Nenana* and *Talkeetna* were purchased to supplant the *Palisana*. The lay-up expense, however, is a non-recurring one and its inclusion in predicting Alaska Steam's results under the increased rates would unduly distort such results.

Certain other pre-inaugural expenses for the same two newly acquired ships were incurred in early 1959 in the amount of $117,-477 for expenses required to fit them for the Alaskan service. The Examiner disallowed pre-inaugural expenses on the ground that they were capital costs rather than expenses. Alaska Steam, however, distinguished between its capital costs of $24,325 and the balance which was described as for maintenance and repair work. There was no evidence to show the work was not maintenance and repair. The Examiner simply relied on the fact that work was done before the ships were put in service as a basis for classifying the expenses as capital costs. It is not proper to convert maintenance and repair work into capital improvements, just because the work was done before putting the ships into service and for the purpose of making them suitable for Alaskan service. More evidence than the timing and purpose of the work was needed, but not supplied, by those urging the contrary. The exceptions to the Examiner's exclusion of this amount is sustained.

The Examiner also allowed inactive vessel expenses for the *Coastal Monarch* of $8,736 in 1958 and $23,195 in 1959. The winter layup in 1958 is a normal incident of the trade and the inactive status of the ship in 1959 was caused by declines in cargo handled, and we agree that the allowance of expenses was proper.

Exception was taken to the Examiner's allowance of an expense of $20,000 to replenish the reserve for redelivery expenses which had been depleted by about $18,400 to defray redelivery expenses for the *Palisana*. Since the redelivery expense would be allowable, there is no abuse of discretion in first using reserve funds and then later restoring funds to the reserve which were used for this purpose. The exception to the Examiner's action is rejected.

Depreciation expense was claimed on the basis of a 20-year life for all ships in Alaska Steam's fleet except the *Nenana* and the *Talkeetna* to which a 25-year life was assigned. We agree with the Examiner that the vessels owned by Alaska Steam have been extensively modified to fit them for the Alaskan trade, and ac-

cordingly are not ordinarily adaptable for use in other trades without reconversion. They are United States Maritime Commission-built ships, which are durable according to the testimony of Alaska Steam's expert witness on ship valuation and vessel reproduction costs, and which with proper maintenance will sail for as much as 30 years. Alaska Steam provides for regular maintenance and repair of its vessels, the cost of which is charged to the Alaskan trade. Despite the fact that most of the vessels were built in 1944, and are nearing the end of a 20-year life, the record is devoid of any indication that vessel replacement is contemplated by Alaska Steam in the foreseeable future. Since 1951, capitalized improvements costing $876,974 have been added to the vessels, many of them required for the containerized service, and a number of these were made in 1958 and 1959 which would, on the basis of a 20-year vessel life, be depreciated over short periods ranging from 36 to 60 months. Alaska Steam has assigned to the vessels salvage values which appear to represent minimum scrap values, and in some instances no salvage values whatever, an indication that it intends to utilize its vessels for the fullest term possible. In the case of the *Nenana* and *Talkeetna,* Alaska Steam is already taking depreciation on a 25-year life, and the record discloses no reason why similar depreciation practices should not be followed with respect to the remainder of the fleet.

Depreciation accounting is a system of accounting which aims to distribute the cost or other basic value of tangible capital assets, less salvage, over the estimated useful life of the unit in a systematic and rational manner. The predictions of estimated use life of the assets must meet the controlling test of experience, otherwise the amounts charged to operating expenses for depreciation are excessive, and to that extent users of the regulated service are required to provide, in effect, capital contributions, rather than amounts representing the consumption of capital on a cost basis. It is clear on this record that the minimum vessel life reasonably attributable to the fleet of Alaska Steam is 25 years. Accordingly, the adjustments to Alaska Steam's depreciation charges contended for by the State of Alaska as stated above are necessary. Allocation of a portion of depreciation expenses to offshore charter services is proper as a part of the cost of such services.

In 1958 Alaska Steam, as a carrier in the Alaskan trade, participated in a joint venture to provide transportation service for the Department of Defense between points in California and Washington and certain isolated points in Alaska, for the purpose of supplying defense installations. The transportation services necessary included a combination of land, water, and barge services which could not have been supplied by any one of the joint venturers individually. Alaska Steam credited to the Alaskan trade for that year revenues equal to the normal tariff charges on the items handled by it, but failed to credit to the trade $138,036 of additional profits earned under the joint venture.

Profits from the unregulated non-common carrier service in a joint venture contract operations are not a recurring item in Alaska SS Co.'s operation. While some days are devoted each year to this so-called off-shore service, principally in connection with the Department of Defense shipments, the periods each year are quite variable and the amount of revenue unpredictable. Inclusion of such amounts as are profits or losses would distort common carrier tariff income in the revenue projections by such unrelated operations in non-common carrier services; hence the $130,000 figure used by the Examiner will not be included in our revenue projections, nor credited to respondent's revenues. The exception to the Examiner's inclusion of such profits is sustained.

The Examiner excluded from 1958 and 1959 revenue experience, used in his projection for 1960, amounts received by Alaska Steam from insurers representing amounts due in excess of actual expenses incurred in repairing the *Coastal Monarch* from fire damage. The exclusion was proper since this too is a non-recurring item, the inclusion of which would distort results designed to project as near normal a year as possible for rate purposes.

The Examiner in line with our decision in *Atlantic & Gulf-Puerto Rico General Rate Increase*, 7 F.M.C. 87 (1962), credited to the regulated trade profits realized from terminal and management operations performed by affiliates of Alaska Steam. The exception to this action is rejected.

With regard to profits of affiliates we have established the principle of protecting the shipping public "from the siphoning-off of revenues by affiliates of the regulated carrier." *Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates,*

7 F.M.C. 260 (1962). This principle exists without regard to the claimed reasonableness of the charges, because the usual buyer-seller conflict does not operate freely where closely related companies deal with each other. Gains to one side of the buyer-seller equation are necessarily reflected in losses to the other before a contract is closed in the usual negotiation. Concessions of interest between the parties are necessary here and there in reaching a contract, but where the parties are subject to common control or one dominates the other by effective control through legal affiliation the negotiation is distorted so as to require unnecessary concessions by one side to the other. The resulting price serves as a poor measure of value for use as a factor in deciding on the reasonableness or justness of rates. The contract in question with Alaska Terminal is a perfect example of such distorted bargaining and of the reason for the principle. Alaska Steam, reasonably assured of its cost from approved rates, has made generous concessions to Alaska Terminal by negotiating a "cost-plus" contract. Charges are not fixed, but are based on costs, and the contract contains escalation clauses which cause an assured profit at shippers' expense regardless of changes in costs to Alaska Terminal. Any profit goes to the Skinner Corp., which effectively controls both the bargaining parties. The leases of office space and wharf and other property from Arctic Terminals and Ketchikan Wharf Co., also affiliates of Alaska Steam, are subject to similar infirmities. The ascertainable profits of $107,211 after taxes derived by Alaska Steam's affiliate under the Skinner Corporation holding company, Alaska Terminal and Ketchikan, will be added to revenues by a credit to Alaska Steam's net profit after taxes.

As a result of the foregoing we have found the estimates of Alaska Steam as to its 1960 revenues based on projected cargo carryings at the proposed new rates are reliable and probative. After making no additions to revenues for joint venture profits and disregarding the Examiner's additional traffic projections as not supported by the record, the amount of such estimated revenue is found to be $17,673,521.

Revenue	$17,673,521
Voyage Expense	14,507,060
Net	3,166,461
Administrative and General Expense	1,648,465
Depreciation	363,644
Inactive Vessel Expense	402,684
Total	2,414,793
Net Income before Federal Income Tax	751,668
Federal Income Tax	385,367
Net Income after Income Tax	366,301
Profits of Related Companies	107,211
Net Income	$ 473,512

Alaska Steam claims $21,130,417 as a rate base as of December 31, 1959, the approximate date upon which the rate increases here involved became effective, consisting of $8,991,862 for owned and chartered vessels valued at the average of net book value and reproduction cost depreciated; $1,020,693 as the fair value of other owned property and equipment having a net book value of $306,827; $1,072,893 representing the net book value of container vans and associated equipment owned by the Alaska Railroad used in the service of Alaska Steam, and one-half of the net book value of similar equipment owned by Arctic Terminals, Inc.; $508,059 as the fair value of terminal equipment owned by Terminal Company of which the net book value is $106,193; $5,410,117 as the fair value of the pier and equipment owned by the Port of Seattle and leased by Terminal Company, having a net value on the books of the Port of Seattle of $2,544,783; $3,331,226 as working capital computed on the basis recognized by the United States Maritime Commission in *Alaskan Rates*, 2 U.S.M.C. 558, 566-7, 639, 644-6; and $795,567 as going concern value representing 10 percent of the claimed value of owned assets.

In *Atlantic & Gulf-Puerto Rico General Increases in Rates and Charges*, 7 F.M.C. 87 (1962), we held, with respect to common carriers by water in interstate commerce as defined in the first section of the Act, operating between the United States and Puerto Rico, (a) that the cost of property "used but not owned by the carriers should not be included in the rate base," (b) that we would "utilize the prudent investment standard to determine the fair value of property being devoted to the service of the public in the domestic offshore trades", and (c) that working capital

should be an amount approximately equal to one round average voyage expense of each ship in the service. The facts here regarding the Alaska trade are so similar to those in the Puerto Rico trade as to justify following these principles and applying them to Alaska Steam. Both trades involve regularly scheduled steamship service from the mainland of the United States to nearby areas served by unsubsidized ships of U. S. registry engaged in ocean transportation. The Alaska service is more seasonal, requires some irregular service to many ports in outlying areas of Alaska, and is more hazardous in many respects than Puerto Rico service, but respondent's long experience in the trade has enabled it to provide a relatively stabilized service with an established nucleus of owned property devoted to the trade. Its many years of experience have enabled Alaska Steam to adjust its rates and insurance coverages to the risks involved. The differences are not sufficient to justify different treatment of the valuation of the rate base property. The Hawaii trade is also similar, and we have applied such a test to carriers in that trade too. *Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates,* 7 F.M.C. 260 (1962). The respondent has a substantial investment in assets which it owns and which are used and useful in providing service to the shipping public and on which respondent is entitled to earn a just reasonable return. Only owned property will be considered for inclusion in the rate base and the claimed "going concern" value will be excluded. Expenses in the form of rent or charter hire of ships are allowable charges to shippers for non-owned property but shippers should not, in addition, pay for a return on such property where no investment is at stake. Going concern value is value built up by developmental outlays charged to operating expenses and paid for by previous shippers over the developmental years. To grant seasoned companies such as respondent a right to continue earning a return on going concern value as though it were an existing investment is an unfair form of double charging against shippers. The working capital rule of the *Puerto Rico* case is equally applicable. We have established as the measure of what a regulated carrier is entitled to for working capital in the rate base an amount equal to one round average voyage expense of each ship in the service. Such a measure has been found to provide adequate amounts to meet the need which arises from the time lag between payment by carriers of expenses and receipt of payment for services in respect of which the services are incurred. In a

regulated business such as respondents where rate increases can lag behind cost increases, or where existing rates must provide for temporarily unprofitable operations, the need to provide a substantial reserve exists. Other factors affecting this generalized measure of judgment are the rate of working capital turnover, the seasonality of the business, which here is extreme, and the credit terms on which service is rendered. Accounts receivable of respondent in 1959 were over half its current assets. It is noted that Alaska Steam had a December 31, 1959 working capital consisting of an excess of current assets over current liabilities of $1,578,106. The amount of working capital needed for these purposes cannot be determined with exactitude, but in our judgment the one round average voyage expense rule has proven satisfactory and is adopted for this respondent. Such a rule produces $902,004.

Depreciation as noted above will be accrued after December 31, 1957 on the basis of a 25-year life for Alaska Steam's entire fleet.

After reflecting the foregoing revisions in Alaska Steam's figures, we find the following as regards respondent's rate base as of December 31, 1959.

Vessels—Original Cost Plus Betterments	$6,270,762
Less Accumulated Depreciation	2,455,183
Net	3,815,579
Other Shipping Property and Equipment	306,827
Terminal Property Owned by:	
Alaska Terminal & Stevedoring Co.	140,283
The Ketchikan Wharf Co.	58,138
Working Capital	902,004
Total Rate Base	$5,222,831

Just and reasonable rates should provide enough out of revenues from the regulated service to meet all allowable expenses of providing service, including the cost of acquiring or retaining the capital needed to provide service. We have recognized that regulated carriers should be permitted, through charges to shippers, to meet all actual legitimate costs of rendering service in the regulated trade and consistency seems to require that in allowing a respondent rates sufficient to cover its total recognized costs, the costs of capital or earnings required to retain capital in the business or to reward owner-managers should be one of these. An actual cost measure should be used as far as possible throughout the rate-fixing process, including the cost of capital. Under this

method the level of earnings needed to pay interest on respondent's notes and to pay dividends adequate to give stockholders a return comparable with other investments having a comparable risk should be allowable. One test of fairness of the rate of return is its ability to accomplish this capital attracting or capital retaining function.

The record on this subject contains only the testimony of two witnesses on behalf of respondents and the documents they relied upon which were admitted as exhibits. These show their testimony that a rate of return within the range of 15 to 20 percent was necessary on the amount of equity capital required and employed to perform the Alaska service. In their opinion the capital attracting function would be performed, in the light of the risks of the Alaskan trade and business conditions in transportation to Alaska, if such a return were achieved by investors.

Respondent's securities evidencing its investment in ships are not sold in the market for securities; accordingly, there is no evidence of any market place valuation of the required dividend returns on such investment. Expert testimony had to be taken as the next best available guide.

Comparisons with a public stock offering of Lykes in 1958 and Pacific Far East Lines in 1955 showed, with regard to Lykes, a cost of 20.89% and a rate of return on net tangible assets of 9.26% and, with regard to PFEL, a cost of 26.60% and a rate of return on net tangible assets in 1958 of 5.06% and over a period from 1954 to 1958 an average of 14.76%. The method of valuing net tangible assets was not shown. Some infirmities in respondent's method of arriving at this data was shown and the evidence in this record on the rate of return is admittedly meagre, but, it is acceptable. Intervenors did not produce any opposing witnesses or evidence or testimony for our consideration. We conclude on this record that rates which produce a return of 9.07% are not unjust or unreasonable.

Alaska Steam excepts to the Examiner's failure to use an operating ratio test of lawfulness of the rates. The operating ratio test of justness and reasonableness of rates is not applicable where, as here, the regulated carrier has a substantial investment in property used and useful in providing service. The test has been uniformly rejected in such cases. *General Increase in Alaskan Rates, supra; Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, supra.* This method is some-

times used when it is impracticable to determine investment values or where the regulated carrier has no capital investment in transportation property, but this is not a factor in regard to Alaska Steam.

The Examiner was correct in refusing to consider the operating ratio as a measure of the justness and reasonableness of Alaska Steam's rates.

The Examiner referred to our precedents affirming the principle that the dominant carrier in a non-contiguous domestic trade will be taken as the rate-making line, citing decisions, and concluded that such a principle "was promulgated for use in this trade." Our past decisions were not rules promulgated for use in this trade, but were based on the facts of those proceedings. The facts in this case show that the rate-making carrier test is not applicable. Alaska Freight provides barge service twice weekly between Seattle and Tacoma, Washington and Anchorage or Seward, Alaska, and offers voyages from San Francisco. Statistics and data concerning Alaska Freight's rates, schedules and tonnages are in the record, but there is no detailed information concerning its rate base, revenues, expenses and returns. Alaska Freight took the position that the proper level of rates in the Alaska trade is determinable from an examination of the operations of Alaska Steam.

Garrison operates no ships and the record contains no property valuation or other evidence of its rate base, revenues, expenses and return, nor did Garrison file any briefs herein.

PSAVL makes one departure each Saturday from Seattle to Seward, using three specially built barges for van containers. PSAVL provides no service to the rest of Alaska. Alaska Steam provides service by self-propelled ships carrying miscellaneous cargo. In the first six months of 1960 Alaska Steam carried 86,240 revenue tons of Seward area cargo and all the PSAVL, Coastwise and Alaska Freight respondents carried 73,633 revenue tons. PSAVL carried 26,067 revenue tons; Coastwise, 9,381 revenue tons; and Alaska Freight, 38,185 revenue tons. The latter carrier respondents do not serve other areas of Alaska. The difference in services offered by these carriers and the lack of any dominance in the amount of tonnages carried in the areas where they are competitive justify the exclusion of any rate making carrier theory.

The exception by PSAVL that the rate making carrier theory is inapplicable is sustained.

The record herein is insufficient for us to reach any conclusions as to the justness and reasonableness of the rates of Garrison, or Alaska Freight, or PSAVL. A determination as to the rates of these respondents must be made since our conclusions are that the rates of Alaska Steam do not control the rates for the different service of Garrison, Alaska Freight or PSAVL.

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

The proceedings as to respondent Alaska Steam shall be dismissed.

No conclusions are reached as regards to the rates of Coastwise in view of the fact that it ceased to operate before the hearing was closed and the proceedings will be discontinued as regards Coastwise.

The exceptions of the General Services Administration (1) that the initial decision improperly raises the question of the authority of the Commission to order reparation in a proceeding instituted on its own motion is disposed of by our ultimate conclusion approving Alaska Steam's rates and eliminating the need for reparation.

We conclude:

(1) That the increased rates of Alaska Steam subject to this proceeding are just, reasonable, and lawful since their effective date and during the pendency of this proceeding; and

(2) That there is insufficient evidence to make any findings on the justness, reasonableness and lawfulness of the rates of Garrison, Alaska Freight and PSAVL.

An order will be entered.

FEDERAL MARITIME COMMISSION

No. 881

GENERAL INCREASES IN ALASKAN RATES AND CHARGES

Full investigation of the matters and things involved in this proceeding having been had, and the Commission on April 30, 1963, 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 (1) that the proposed rates, charges, tariffs, and regulations of respondent, Alaska Steamship Company, herein under investigation, are just, reasonable and lawful; (2) that the proposed rates, charges, tariffs, and regulations of respondents, Puget Sound Alaska Van Lines, Inc., Garrison Fast Freight Division of Consolidated Freightways, Inc., and Alaska Freight Lines, Inc., should be subject to further investigation; and (3) that Coastwise Line has withdrawn its services from the Alaskan trade;

It is ordered, That this proceeding be and it is hereby, discontinued as to respondents, Alaska Steamship Company and Coastwise Line, and remanded to an Examiner for further investigation with respect to rates of respondents, Puget Sound Alaska Van Lines, Inc., Garrison Fast Freight Division of Consolidated Freightways, Inc., and Alaska Freight Lines, Inc.

By the Commission, April 30, 1963.

(Signed) THOMAS LISI
Secretary

775-794 O-65-39

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 262

LUTCHER, S. A.

v.

(COLUMBUS LINE) HAMBURG-SUEDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT EGGERT & AMSINCK

Permission granted to respondent to waive collection of undercharges of freight on certain shipments of Lutcher, S. A. from New York to Santos, Brazil.

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

This is an application under Rule 6(b) of the Commission's Rules of Practice and Procedure, filed December 18, 1962, for permission to waive collection of undercharges of freight on the following shipments of paper pulp machinery from New York to Santos, Brazil in January, February, and March 1962.

Bill of Lading Number	Freight Computed At Regular Tariff Rate	Freight Charged At Project Rate	Undercharge
55	$ 851.60	$ 599.40	$ 252.20
64	12,339.09	9,050.45	3,288.64
45	1,918.58	1,774.38	144.20

On the shipments covered by B/L Nos. 55 and 64, the higher rate under the regular tariff of the River Plate and Brazil Conference on file with the Commission was charged initially and paid to respondent, the carrier, for the account of Lutcher, S. A., the consignee. The excess of that tariff rate over the project rate was later refunded to Lutcher by respondent. In the case of the

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[1] This decision became the decision of the Commission on May 7, 1963. See Rules 13(d) and 13(h), Rules of Practice and Procedure, (46 C.F.R. 201.224 and 201.228).

shipment under B/L No. 45, the lower, project rate was charged initially.

The member lines of the River Plate and Brazil Conference, acting jointly through the Conference, offer special rates to shippers of various kinds of machinery to be used in the construction of industrial projects by the shippers, such cargoes being noncommercial in the sense that they are not for resale by the shipper prior to the proprietary use for which the machinery is intended. In keeping with this practice, the Conference chairman negotiated with representatives of Lutcher, S. A., beginning June 1, 1961, and, prior to the time of the shipments in question, advised them that they would be charged the project rate on the shipments involved here.

On January 2, 1962, a new statute came into force that for the first time required water carriers in the foreign commerce of the United States to file with the Commission tariffs showing all their rates and charges. (Section 18(b), Shipping Act, 1916, as amended.) In the confusion incident to the Conference getting its various tariff schedules on file under the then new statute, they failed to file the page of the tariff covering paper pulp machinery until shortly after the dates of the shipments in question. The tariff (Correction No. 354, Original Page No. 534, River Plate and Brazil Conference Tariff No. 12) was filed on April 24, 1962.

The statute prevents the charging of rates not on file at the time of the shipment. Technically, then, respondent probably violated the statute. I say "probably" because an argument might be made that the charging of the project rate might have been justified under Page No. 505 of Tariff No. 12 covering project rates on power plant machinery to Santos, or even Page No. 507 covering pulp paper machinery to Buenos Aires (being in the same rate range with Santos). Viewing the situation in its worst light the shipments in question fell between the other tariffs, that were then in effect, through mere oversight. In such circumstances, the Commission alleviates the burden that would fall upon an innocent shipper, if the higher tariff rate were charged, by granting permission to repay an excess freight charge or waive collection of an undercharge due to such oversight. *Y. Higa Enterprises, Ltd.* v. *Pacific Far East Line*, 7 F.M.C. 62 (1962). This waiver does not absolve the carrier from its violation of the Shipping Act. *Martini and Rossi* v. *Lykes Bros. Steamship Co., Inc.*, 7 F.M.C. 453 (1962). It merely shields the carrier from a

charge of having violated the Act by failure to collect the undercharge.

There is no question that the parties acted in good faith. Mr. Edward F. Hawkins, Senior Tariff Examiner on the Commission's staff, testified that this Conference is one of the most meticulous in following the tariff filing requirements. No discrimination will result as between Lutcher and other shippers if the application is granted, because there were no other shippers of similar equipment on applicant's vessels during the period in question. The shippers to nearby ports received the benefit of project rates, so the granting of the relief requested will actually tend to eliminate a possible discrimination, rather than cause one.

An order will be entered granting the application, as amended.

SPECIAL DOCKET NO. 262

LUTCHER, S. A. v. (COLUMBUS LINE) HAMBURG-SUEDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT EGGERT & AMSINCK

NOTICE OF EFFECTIVE DATE OF DECISION AND ORDER AUTHORIZING WAIVER OF UNDERCHARGES

No exceptions having been filed to the Initial Decision of the Examiner, and the Commission having determined not to review same, notice is hereby given in accordance with Rule 13(d) of the Commission's Rules of Practice and Procedure, that the Initial Decision became the decision of the Commission on May 7, 1963.

It is ordered, That the application of Columbus Line to waive certain undercharges be, and it is hereby, granted.

By the Commission, May 7, 1963.

(Signed) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 1065

ALEUTIAN MARINE TRANSPORT COMPANY, INC. — RATES FROM, TO, AND BETWEEN SEATTLE, WASHINGTON AND PORTS IN ALASKA

Rates from, to, and between Seattle, Washington and Alaska ports found to be just and reasonable. Order should be entered discontinuing the proceeding.

Niels Peter Thomsen, President of Aleutian Martin Transport Company, Inc., for respondent.

Harold L. Witsaman and *Robert J. Blackwell*, Hearing Counsel.

INITIAL DECISION OF A. L. JORDAN, EXAMINER[1]

On August 2, 1962, the Commission ordered an investigation, under the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, into and concerning the lawfulness of the rates, fares, charges, rules, classifications, regulations, and practices contained in respondent's tariff schedule naming freight rates from, to, and between Seattle, Washington and Alaska ports designated as FMC-F No. 4 effective February 16, 1962.

Notice of investigation and hearing was published in the FEDERAL REGISTER of August 16, 1962. Hearing was held December 10, 1962, at Seattle, Washington. No one intervened in the proceeding. The State of Alaska filed an informal protest by letter but did not participate in the hearing. On motion of Hearing Counsel, not objected to by respondent, the record in FMC Docket No. 990, *Alaska Livestock & Trading Co., Inc.* v. *Aleutian Marine*

[1] This decision became the decision of the Commission on May 7, 1963. (Rules 13(d) and 13(h) Rules of Practice and Procedure, 46 C.F.R. 201.224, 201.228).

'ransport Company, Inc., 7 F.M.C. 387 (1962), was incorporated nto the record of this proceeding.

?espondent's Service

Respondent operates as a common carrier between Seattle Vashington, Seward, and Kodiak Island and Alaska Peninsula ,nd Aleutian Island ports, and locally between ports on Alaska 'eninsula, Kodiak Island and Aleutian Islands. This service, ince July 1, 1961, has been performed by use of one wooden hull 'essel, the *M. V. Expansion* of 544 gross tons, 278 net tons or .0,000 cubic feet. It has reefer capacity of approximately 230 neasurement tons. The vessel can also accommodate 12 passen;ers. The passenger operation is limited primarily to the sumner months. The general cargo operation is conducted year ιround on a regular schedule with a 26-day turnaround. In addi;ion to its freight and passenger operations respondent maintains ι store on the *Expansion* selling merchandise at the various ɔorts along the Aleutian Chain. Prior to use of the present *Exɔansion* respondent had operated for seven years another *Exɔansion*, about half the size of the present one, directly between Seward and the Aleutian Islands, not serving Seattle.

Respondent's general cargo operations are substantially unbalınced. Outbound from Seattle the *Expansion* carries all types ɔf general cargo and some Government cargo. Inbound there is ittle cargo available; most of it, during the summer months, be.ng carried by Alaska Steamship Company (Alaska Steam). Re;pondent has attempted to attract frozen crab and other frozen ;eafood products as back-haul cargo with limited success, but ıas averaged only about five tons of dry cargo per voyage southɔound.

Respondent operates under a mail contract with the Post Office Department in accordance with 39 U.S.C. 487(a) which authorizes the Postmaster General to enter into a contract for the carriage of mail between Seward and the Aleutians and which provides that the contractor shall "furnish and use in the service a safe seaworthy boat of sufficient size to provide adequate space for mail, passengers, and freight". Respondent carries mail between Seward, Kodiak Island, and the Aleutian Islands, Alaska. The current contract provides for an annual payment to respondent in the amount of $190,000, and expires on June 30, 1963. Carriage of the mail under the contract, while obviously essential to the area served, is not so extensive that the mail itself would phys-

ically constitute a substantial tonnage per voyage, the average per voyage for the past two years being a little more than three tons.

Table No. 1 below shows the amount of cargo carried by respondent during the calendar years of 1961 and 1962, in tons.

TABLE No. 1

		1961	1962
Seattle to Alaska and	general cargo	520	1640
Aleutian Islands	cold storage	108	175
Between Alaskan ports	general cargo	628	400
Aleutian Islands and	mail	42	34
Alaska to Seattle	general cargo	20	60
	cold storage	350	982
Totals		1668	3291

The rate increase

A comparison of the present tariff with the one it superseded shows that the commodity rate increases involved in this proceeding are between 10 and 13.6 percent, depending on the number of items compared, and including corresponding increases in the N.O.S. rates. As to the latter only a few items were changed. As to these, respondent does not generally carry an appreciable amount and the shift was primarily to simplify the tariff rather than to increase the rates.

Respondent based its rate increases on the inclusion of marine insurance coverage. Under its former rates the shipper purchased the marine insurance. Inclusion of the cost of such insurance now in the ocean freight results in lower overall charges to the shipping public because the shipper cannot acquire the insurance as cheaply as the carrier.

R. F. Dreitzler & Company (Dreitzler) which specializes in marine insurance and acts as the marine insurance broker for respondent explained that, because there are inadequate insurance facilities in Alaska, Alaskans allow shippers in Seattle to purchase cargo insurance and they in turn pass the charges on. Previously the available insurance coverage was not all-risk insurance although many Alaskans may not have understood this. There also exists the misconception on the part of Alaskans that when shipments are made there is an all-risk assumption by the carrier. According to Dreitzler, Alaska Steam, the principal carrier in the Alaska trade, recently adopted an all-risk assumption bill of lading which affected respondent directly, because Alaska Steam had all-risk coverage under its bills of lading, i.e. all-risk

cargo insurance provided by the carrier and included as a part of the freight charges, but shippers utilizing respondent's vessel had to purchase insurance separately. Further, shippers patronizing both Alaska Steam and respondent also found that they had to pay a higher insurance premium on shipments via respondent's vessel than formerly because the volume of cargo that respondent's underwriters would be insuring had been diminished by the cargo moving under the Alaska Steam all-risk bill of lading and the insurance rates increase as the volume of cargo underwritten decreases.

Shippers also faced the problem that when they utilized respondent's vessel, they could not obtain all-risk insurance on cargo carried aboard a wooden hull vessel.

Dreitzler discussed these problems with respondent and various underwriters and successfully negotiated an all-risk cargo insurance policy which covered cargo carried by respondent at a premium approximately 50 percent of what it would cost the individual Alaskan shipper even though the all-risk policy was considerably broader in coverage. The initial annual premium of $22,000 for this all-risk policy was computed on the basis of the value of the estimated tonnage that would be carried in that period. At present the carrier pays a premium of $5.25 for each ton shipped.

Dreitzler informed respondent that, on the basis of projected tonnage, it would have to raise its freight rates 12-13 percent to meet the added cost of the premium on this insurance. This increase would also cover losses under a deductible feature of the policy, i.e. $1000 per voyage. Respondent did not desire to increase its rates by more than 10 percent. However, according to Dreitzler's calculations a 10 percent increase would just about cover the premium, but would not be sufficient to offset losses under the deductible. Rates in some cases were increased more than 10 percent. Without calculating the exact tonnage moved and revenues developed as a result of the increase, a fair inference may be drawn that the actual rate increases approximate that recommended by Dreitzler to cover respondent's insurance premiums and the losses under the deductible.

In 1962 respondent adopted a marine cargo insurance policy which provides shippers with all-risk cargo insurance under the bill of lading. The freight rate increases involved in this proceeding were instituted to cover the added cost of this insurance and

the revenue developed from these increases corresponds within reasonable limits to the premium for this insurance plus losses that may reasonably be anticipated under the deductible provision of the policy. This new insurance program provides shippers with greater insurance coverage than they can obtain individually at a substantially lower cost. Therefore the benefits accruing to shippers are unquestionable; they receive greater insurance protection for substantially less money.

Reduction in wool rate

Although this proceeding primarily involves a general rate increase respondent has reduced its rate on wool since the proceeding was instituted. There are only two shippers of wool from the Aleutian Islands to Seattle via respondent's vessel. They each ship about 100 bags of wool a year, or a total for both shippers of approximately 40 short tons. Last summer respondent discussed the wool rate with one of the two shippers and it was agreed that the rate would be reduced about 50 percent if carried on deck under a canopy. This rate does not appear to be fully compensatory, but it covers out of pocket costs, including insurance coverage, with some contribution towards respondent's other expenses. Considering the value of the service to the wool shippers in the remote area involved, the infrequent shipments of wool, and the fact that respondent is making an over-all profit as later shown, the reduced rate on wool is not unreasonably low. *Investigation of Increased Rates on Sugar, Refined or Turbinated in Bags in the Atlantic/Gulf Puerto Rico Trade* 7 F.M.C. 404 (1962).

Rates and services of other carriers

Alaska Steam calls at three or four of the major ports served by respondent, during the summer months. Kimbrel Launch Transportation Company operates the *Western Pioneer* from Seattle to practically all the ports served by respondent. Neither carrier provides year round service comparable to that offered by respondent. Respondent is also the only water carrier carrying mail to the Aleutian Islands.

Alaska Steam's rates are lower in many instances than respondent's rates, but the two carriers are considerably different in size and operate different types and number of vessels and their operations in general are completely dissimilar. While the record furnishes little information about the operation and rates of other

carriers in this trade, none is sufficiently similar to those of respondent to make a valid comparison of rates.

Respondent's future operations

Respondent believes its mail contract which expires June 30, 1963, will not be renewed, and that the mail will go by air carrier instead of water carrier. In this case respondent plans to discontinue its common carrier operations and convert the *Expansion* into a fishing vessel and use it in the crabbing and fishing industry in Alaska. If the mail contract is renewed, respondent nevertheless plans on going into the crab business in Alaska so as to create its own back-haul from Alaska to Seattle. Moreover, if the mail contract is renewed, respondent plans using a smaller vessel, the former South-East Alaska Mailboat *Fairbanks* under charter, in the mail service. This vessel is 59 feet long, has cargo carrying capacity of 40 tons, can carry 6 passengers, and is operated by a crew of two men. Respondent proposes, if awarded a mail contract, to operate the *Expansion* between Seattle and the Aleutian Islands as heretofore for a minimum of eight trips per year, and at least on a bi-monthly schedule during the winter months. Regular monthly sailings would be made from Seattle from May through September. The *Fairbanks* would make the other four trips of the Seward to Nikolski route whenever there is insufficient freight to justify the sailing of the *Expansion* from Seattle, and in cases of emergency should the *Expansion* be delayed in her schedule due to weather, necessary ship repairs or annual dry-docking.

Financial Results

The present *Expansion* was built in 1946. Respondent purchased it from the State of Alaska in March or April 1961 for $61,121.11 less towing engine sold for $1,600.00; or

Hull	$ 30,560.56
Engine	28,960.55
Outfitting and Improvements	153,047.77
Total	$212,568.88

Outfitting and improvements were necessary for the vessel to pass Coast Guard inspection. The hull as outfitted and improved may be depreciated on a 10-year basis, and the engine may be depreciated on a 5-year basis.

Respondent's fiscal year ends on September 30th. In its statement of earnings respondent shows income and expenses for fis-

cal 1961 and 1962 in summary (details in Exhibits 5 and 6) as follows in Table No. 2.

TABLE No. 2.—*Statement of Earnings*

1961		Income		1962
$238,711.58		Mail contract		$198,643.23
23,708.50		Passengers		40,654.49
40,252.22		Freight		164,612.40
1,653.36		Wharfage & Hauling		8,558.01
10,422.44	41,689.77	Barter sales	31,659.05	12,378.79
	31,267.33	Less Cost of sales	19,271.26	
$314,748.10		*Total Income*		$424,855.92
271,815.86		*Operating Expenses*		409,793.60
42,932.24				15,062.32
39,941.18		*General & Administrative Expenses*		43,394.36
2,991.06		*Operating Profit (loss)*		(28,332.04)
		Other Income		
468.76		Interest income		0
1,279.98		Gain on sale of bonds and equipment		0
199.15		Miscellaneous		1,067.37
0		Gain on sale of boat		20,531.13
4,938.95				(6,733.54)
		Other Charges		
5,107.53		Interest expense		12,826.41
1,199.45		Expense of idle equipment, including depreciation of $580.00 for 1961, and $1,019.45 for 1962		1,297.05
(1,368.03)		*Net Earnings (loss)*		(20,857.00)

Respondent has inappropriately included in operating expenses for 1962 an item in the amount of $85,998.57 for depreciation of vessel and amortization of outfitting costs of the present *Expansion* over the 2-year life of the present mail contract. The appropriate amount for this item is $24,152.78. That is, $3,056.00 for the vessel hull on a 10-year life basis, $15,304.78 for outfitting on a 10-year basis, and $5,792.00 for engine on a 5-year basis. The difference, therefore, in the amount applied by respondent and the appropriate amount is $61,845.79. This results in a write-off of $61,845.79 in 1962 and is directly related to the net loss shown by respondent for that year.

Respondent, however, was not in a loss position on September 30, 1962, as shown in Table No. 2. This loss, as before stated re-

sulted from an extremely accelerated write-off of the outfitting costs of the present *Expansion.* While it may seem logical to respondent to depreciate these costs over the two-year life of the mail contract, these expenses, as before stated, were necessary to outfit the vessel and to meet Coast Guard inspection requirements which are not restricted to vessels carrying mail. An accurate and reasonable write-off of these costs would correspond to the life of the hull which is depreciated realistically at ten years. A reasonable life of the engine for depreciation allowance is five years.

Respondent also inappropriately lists a nonrecurring gain on the sale of a capital asset as part of its earnings for the year ended September 30, 1962. This was the gain on the prior *Expansion* and amounted to $20,531.13.

Under "other charges" in 1962, respondent inappropriately includes an item of "interest expense" in the amount of $12,826.41. *Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges,* 7 F.M.C. 87, 113 (1962). Also under "other charges" in 1962, respondent inappropriately includes expense of idle equipment, including depreciation thereon, in the amount of $1,297.05.

Adjusting respondent's statement of earnings for 1962 to reflect the findings above, excluding, because not explained, an item under "other income" noted as "miscellaneous" in the amount of $1,067.37, respondent's operations in 1962 resulted in a gross profit of $33,513.75 instead of the losses claimed by respondent in Table No. 2.

The following table, No. 3, reflects the accurate financial results of respondent's 1962 operations.

TABLE NO. 3.—*Income Statement Year Ended September 30, 1962*

Revenue	$424,855.92	
Operating Expense	322,416.33	
Depreciation	25,531.48	
	347,947.81	
Administrative and General Expense	43,394.36	
	391,342.17	
Gross Profit	33,513.75	
Less: Federal Income Tax	11,927.00	(1)
Net Profit	21,586.75	
Rate Base	234,514.44	(2)
Rate of Return	9.20%	

(1) $33,513.75 @ 52% = $17,427 less 5,500 = 11,927.00

(2) see Table No. 4 below

Table No. 4 shows respondent's rate base in accordance with the prudent investment standard adopted by the Commission in *Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, supra.*

TABLE No. 4.—*Rate Base September 30, 1962*

Vessel—Original Cost plus Betterments	$212,568.88	(a)
Less: Accumulated Depreciation	12,076.50	
Net	200,492.38	
Other Equipment Devoted to Trade	4,606.76	
Working Capital	29,415.30	(b)
Total Rate Base	234,514.44	

(a) see page 7.

(b) Average Voyage Expenses.

While operating revenues increased during fiscal 1962 to $424,-855.92 from $314,748.10 for the same period in fiscal 1961, wages and other operating expenses also increased substantially. An added expense for 1962 was the insurance premium for the recently instituted all-risk cargo insurance.

No separation or allocation is made of mail cargo revenues and expenses, for the mail tonnage moved is not in proportion to the amount paid under the mail contract. The statute authorizing the mail contract contemplates more than mail service to be furnished under the contract and in effect is a subsidy which helps to provide over-all common carrier service to the area involved. It is obvious that but for the revenue respondent derives from the mail contract the service here involved could not be profitably maintained.

Based upon the calculations shown in Tables 3 and 4 respondent's rate of return for fiscal 1962, after taxes, was 9.20 percent. It is found that such rate of return is not excessive.

ULTIMATE CONCLUSION

Upon consideration of the foregoing it is found and concluded that respondent's rates here under investigation from, to, and between Seattle, Washington and Alaska ports are just and reasonable. An order should be entered discontinuing the proceeding.

FEDERAL MARITIME COMMISSION

No. 1065

ALEUTIAN MARINE TRANSPORT COMPANY, INC. — RATES FROM, TO, AND BETWEEN SEATTLE, WASHINGTON AND PORTS IN ALASKA

NOTICE OF EFFECTIVE DATE OF DECISION AND ORDER DISCONTINUING INVESTIGATION

No exceptions having been filed to the Initial Decision of the Examiner, and the Commission having determined not to review same, notice is hereby given in accordance with Rule 13(d) of the Commission's Rules of Practice and Procedure, that the Initial Decision became the decision of the Commission on May 7, 1963.

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

By the Commission, May 7, 1963.

(Signed) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 265

LYKES BROS. STEAMSHIP CO., INC. APPLICATION FOR AUTHORITY TO REFUND IN PART FREIGHT CHARGES COLLECTED ON SHIPMENT VIA SS HARRY CULBREATH FROM DURBAN, SOUTH AFRICA, TO HOUSTON, TEXAS

Decided June 4, 1963

Application of Lykes Bros. Steamship Co. to refund certain overcharges pursuant to Rule 6(b) granted.

Terriberry, Rault, Carroll, Yancey & Farrell for applicant.

Charles E. Morgan, Hearing Examiner

REPORT OF THE COMMISSION

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

BY THE COMMISSION:

Lykes Bros. Steamship Co., Inc. (Lykes) filed an application pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure for permission to make a partial refund of freight on a small shipment of water fosfatefedders from Durban, South Africa, to Houston, Texas, in October 1962.

The shipment consisted of five cartons, weighing 500 pounds and measuring 60 cubic feet (or 1.5 measurement tons). At the time there was no specific rate on water fosfatefeeders (or on agricultural implements) in Lykes' tariff covering the South Africa/Gulf Trade, and accordingly freight at the cargo N.O.S. rate of $66.00 per ton weight or measurement was collected from

the shipper, Aero Marine, Ltd. (Aero). The total collected was $99.00.

Aero had made a previous shipment of water fosfatefeeders in March 1962, and was charged at the rate of $28.00 per ton, which was the rate listed in the applicable tariff covering the Gulf/South Africa (or outward) trade. Lykes' inward tariff at the time provided in effect for this same rate. It stated that the outward rate would be applied whenever a particular item was not shown, as was true of water fosfatefeeders. However, subsequent to March 1962, Lykes was advised by the Commission to file rates for the inward trade separate from those for the outward trade. The inward rates were filed but, because movements of fosfatefeeders and other agricultural implements were rare in the inward trade, these items were not listed. This omission led to the $99.00 N.O.S. rate being charged Aero, as aforesaid.

Lykes contends only $42.00 should have been charged, based on the $28.00 rate, and seeks permission to refund the $57.00 difference.

The application was denied by the Examiner on the grounds (1) that "applicant has not met its burden of proof . . . requiring that it show that the applicable tariff rate as charged was unlawful", and (2) that the application is technically defective under Rule 6(b), because the shipper failed to file a concurrence to the application.

We disagree with the Examiner and will grant the application for the partial refund. Aero's concurrence was filed May 23, 1963, after the Examiner's decision, and we can see no objection to accepting it despite the tardiness in complying with the requirement of Rule 6(b).

Turning to the merits of the application, Lykes states that except for its inadvertent omission in failing to cover agricultural implements when the separate inward rates were filed, it would have filed the same $28.00 rate that had theretofore existed. Since Aero had recently paid the $28.00 rate, it calculated the freight for the shipment in question on that basis. Whether or not this was a justified assumption, the shipper had no reason to expect freight to be charged at a rate more than 130 percent greater than it had recently paid to move the same item. Failure to file the proper rate was due solely to the error of the carrier, and under the circumstances we do not think the burden of this should fall on the shipper. No other shipment of fosfatefeeders was made

during the relevant period (except for Aero's shipment in March 1962) and the granting of this application therefore will not result in any discrimination.

Contrary to the Examiner's theory of the case, the fact that the rate charged is not shown to be unjust, unreasonable or otherwise unlawful is not determinative of an application under Rule 6(b). *Martini & Rossi* v. *Lykes Steamship Co., Inc.,* 7 F.M.C. 453 (1962). As in that case, the relief sought here will relieve an innocent shipper of the consequences of the carrier's failure to file a proper rate.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 265

LYKES BROS. STEAMSHIP CO., INC. APPLICATION FOR AUTHORITY TO REFUND IN PART FREIGHT CHARGES COLLECTED ON SHIPMENT VIA SS HARRY CULBREATH FROM DURBAN, SOUTH AFRICA, TO HOUSTON, TEXAS

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. Accordingly,

It is ordered, That the application of Lykes Bros. Steamship Co., Inc., to refund certain overcharges is hereby granted.

By the Commission, June 4, 1963.

(Signed) THOMAS LISI
Secretary

FEDERAL MARITIME COMMISSION

No. 884

UNAPPROVED SECTION 15 AGREEMENTS—JAPAN, KOREA, OKINAWA TRADE

DENIAL OF MOTION TO STRIKE STATEMENT OF HEARING COUNSEL

The Examiner has certified to the Commission his denial of a motion by respondent Maersk Line to strike a part of a "Statement of Issues and Contentions" submitted by Hearing Counsel during the course of these proceedings. It is the contention of Maersk, joined in by the other respondents, that the Statement of Issues and Contentions (the Statement) unduly broadens the issues in this proceeding as to Maersk Line. In certifying his ruling, the Examiner states the following questions are presented:

(1) Are Hearing Counsel precluded from subsequently raising issues not specifically raised by them at a prehearing conference, where all such issues are within the scope of the Commission's order of hearing and investigation?

(2) In this particular case, has the manner and circumstances in which Hearing Counsel have raised issues not specifically raised at the prehearing conference deprived Respondent of due process and a fair hearing?

The Statement in question consists of a list of contentions as to the activity of respondents during the period under investigation, and assertions that the activity constitutes certain violations of the Act. An Appendix to the Statement relates each exhibit in the proceeding to one or more of the contentions made in the Statement. The Statement was not required by any rule of procedure of the Commission, directed by the Examiner, nor was it requested by the respondents. In Hearing Counsel's words:

> The purpose of this statement is [among other things] * * * to apprise Respondents of the issues and contentions which Hearing Counsel shall argue on brief in order that Respondents may have fair opportunity to prepare and conduct their rebuttal case.

The gravamen of Maersk's motion is that the present statement "broadens the investigation or the issues as compared with contentions

made by Hearing Counsel at the Prehearing Conference," and to that extent respondents argue that the Statement should be stricken. By his prehearing statements, Hearing Counsel attempted clarification of the specific areas he would explore under the Order of Investigation instituting this proceeding. We have had occasion to comment on such statements in the recent past. In Docket 882, *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159 (1962), the respondents made frequent demands for particularization of the "charges" against them, and in response to these demands, the Examiner required Hearing Counsel (then Public Counsel) to furnish on two separate occasions detailed statements of the "charges" or "violations" which Hearing Counsel initended to urge. Concerning these statements we said:

> It is apparent that in demanding the aforesaid statements from Public Counsel respondents were seeking to have him in effect modify the issues of fact and law stated in the Board's orders of investigation, whereas only the Board could have done so. Public Counsel neither initiated nor was responsible for the contents of the orders and he could not amend them. If respondents believed them lacking in any respect, their recourses were solely to the Board. 7 F.M.C. 159, at 166.

The Order of Investigation defines the scope of this proceeding and respondents are charged with notice of all issues within its scope. Any statements by Hearing Counsel regarding the issues in a proceeding of this kind are at best tentative assertions of the matters he intends to assert and prove. The issues and contentions raised by Hearing Counsel in the present statement, to whatever extent they depart from his prehearing statements, are clearly within the scope of the Order of Investigation initiating this proceeding, and if respondents believed the Order of Investigation defective they should have petitioned the Commission for its modification.

It is important to note that respondents have not put on their rebuttal case, indeed they even deferred cross-examination of Hearing Counsel's witnesses until the completion of his case. Coming as it did before respondents are called upon to present their side of the issues, we are unable to view Hearing Counsel's Statement as anything but an unexpected windfall to respondents. However, this is but another example of the confusion and misunderstanding which seems always to be the result of these statements and we remain of the view that they should be discontinued. See *Unapproved Section 15 Agreements—South African Trade*, *supra*, at 167.

If, as respondents contend, they now need additional time for the preparation of their defense, they should seek such additional time reasonable in the circumstances from the Examiner. We think it clear that respondents have in no way been prejudiced by the Statement, much less denied due process.

In view of the foregoing we answer both of the questions presented in the negative. The ruling of the Examiner is affirmed and respondents' motions are denied.

By the Commission, March 14, 1963.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 264

LYKES BROS. STEAMSHIP CO., INC.—APPLICATION FOR AUTHORITY TO REFUND IN PART FREIGHT CHARGES COLLECTED ON SHIPMENT BY THE SS CHARLOTTE LYKES FROM HOUSTON, TEXAS TO LE HAVRE, FRANCE

Permission granted Lykes Bros. Steamship Co., Inc. to refund freight charges on certain NATO shipments.

Walter Carroll of New Orleans for Applicant.

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

Lykes Bros. Steamship Co., Inc. (Lykes) applied on January 11, 1963 for an order authorizing the voluntary payment of reparation to A. G. Valcke and Co. as agent for NATO Maintenance, Services, and Supply Agency, NATO Supply Center Chateauroux, France (hereinafter referred to as Shipper). The application was amended on March 22, 1963 so as to supply additional data required by the Examiner. The Shipper concurs in the application. Applicant seeks to refund $2,982.20 to the Shipper, representing the excess freight charges on a shipment of combat vehicle repair parts from Houston, Texas to LeHavre, France on May 18, 1962, covered by a bill of lading dated May 18, 1962.

Until the shipment in question was made, equipment of the type involved here had not moved in this trade that was destined for the Bordeaux/Dunkirk range. It had been shipped, theretofore, to the Antwerp/Hamburg range. For this reason, the controlling tariff (Gulf/French Atlantic Hamburg Range Freight Conference Tariff No. 9) omitted, by inadvertence, a commodity rate on such equipment. The tariff contained an item for such equipment destined for the Antwerp/Hamburg range naming a rate of $33. per ton, W or M (40 cu. ft.). On July 18, 1962, the rate was extended to the Bordeaux/Dunkirk range, after the discrepancy came to the attention of the conference.

In the absence of a commodity rate, Lykes was constrained, under Section 18(b) of the Shipping Act, 1916, to charge the general cargo

[1] This decision became the decision of the Commission on April 23, 1963, and an order was issued granting the application.

NOS rate of $1.75 per cu. ft., which brought the freight to $5,642. on the 3224 cu. ft. shipped, despite Lykes desire and its prior intent to charge the freight based on the $33. per ton (40 cu. ft.), rate. The latter rate would have brought the freight on the shipment to $2,659.80. Lykes seeks authority to refund the difference. Due to oversight and inadvertence in not having included the aforesaid commodity rate in the applicable tariff, Shipper was charged a rate greatly in excess of that which has been charged on prior shipments to nearby ports, and which it had a right to expect on this shipment.

In similar circumstances, the Commission has held that an innocent shipper should not be made to bear the consequences of a carrier's inadvertent failure to file the tariff that was intended to apply. *Y. Higa Enterprises, Ltd.* v. *Pacific Far East Line*, 7 F.M.C. 62 (1962). In that case and other recent cases, applications under Rule 6(b), such as the one in this proceeding, have been granted by the Commission, thus relieving the carrier of the risk of violating the Shipping Act, 1916, by making the refund without Commission approval.

No discrimination will result from granting the application because there were no other shippers of similar equipment on applicant's vessels, similarly situated, during the period in question.

An order will be entered granting the application.

(Signed) E. ROBERT SEAVER,
Presiding Examiner.

March 29, 1963

FEDERAL MARITIME COMMISSION

No. 977

PUGET SOUND TUG AND BARGE COMPANY

v.

FOSS LAUNCH AND TUG CO.,

WAGNER TUG BOAT COMPANY,

T. F. KOLLMAR, INC., D/B/A NORTHLAND FREIGHT LINES

Decided June 18, 1963

Tandem tow of Foss barge containing contract carrier cargo with Northland barge containing common carrier cargo does not violate principle that disfavors carrier acting as both common and contract carrier on the same voyage.

Wagner tariff rate on cement and asphalt based on high volume found to be prima facie discriminatory and preferential.

Respondents' rates not found to be unreasonably low.

Mark P. Schlefer and *T. S. L. Perlman* for complainant.

Stanley Sher for Foss Launch and Tug Co. and Wagner Tug Boat Company, respondents.

T. F. Kollmar, as president of T. F. Kollmar, Inc., respondent.

George N. Hayes, Attorney General, State of Alaska, for the State of Alaska, intervener.

E. Robert Seaver, Hearing Examiner.

REPORT

BY THE COMMISSION (Thos. E. Stakem, *Chairman*; Ashton C. Barrett, *Vice Chairman*; John Harllee, John S. Patterson, and James V. Day, *Commissioners*):

This proceeding arises out of a complaint filed by Puget Sound Tug and Barge Company (Puget Sound) charging that certain agreements between respondents and certain of the rates charged thereun-

der for the transportation of cargo by respondents in the Alaska trade are violative of the shipping statutes. The State of Alaska and the Port of Anchorage intervened in support of respondents.

This is the fourth of a series of proceedings before the Commission all of which involved the same parties and their operations in the Alaska trade. Before dealing with the issues raised in the complaint filed by Puget Sound in this proceeding, we shall briefly set forth the full chronology of events leading to its institution, including some discussion of our decisions in the three prior related cases. This is necessary because, in addition to placing the present complaint in its proper perspective, certain of the issues presented in this case have been rendered moot by our prior decisions.

Respondent Foss Launch & Tug Co. (Foss) has been engaged in the Alaska trade as a private or contract carrier since 1930 using tugs and barges which it either owns or operates as a bareboat charterer. Foss does not own any cargo containers, vans or boxes which are used extensively in the trade for the carriage of general cargo but which are not required by Foss in its contract carrier operations. Foss, as a contract carrier, does not have a tariff on file with the Commission.

T. F. Kollmar, Inc., doing business as Northland Freight Lines (Northland) is a non-vessel owning common carrier by water, and began operations in the Alaska trade as such in 1960 pursuant to an arrangement with Foss which is described in detail below. Northland has on file with the Commission a tariff naming class and commodity rates between Seattle and Anchorage. Northland owns a number of vans used as cargo containers in its common carrier operations.

Respondent Wagner Tug Boat Company has been a wholly-owned subsidiary of Foss since 1939, but its operations in the Alaska trade as a common carrier by water did not begin until early in 1960 when it filed its first tariff with the Commission. This tariff was replaced by a more detailed tariff in August, 1961. Wagner has no full-time personnel, offices or terminal facilities separate from those of Foss. It owns one ocean-going tug and one non-ocean-going tug and as necessary uses Foss equipment in its service under contracts, the terms of which are substantially similar to those of the arrangements between Foss and Northland described *infra*.

Complainant Puget Sound entered the Alaskan trade as a common carrier early in 1960 under a tariff filed late in 1959. Its common carrier operations are conducted in the name of one of its divisions, Puget Sound Alaska Van Lines. Puget Sound, like respondents, provides its service with tugs and barges which it either owns or bareboat charters. It offers mainly a container service and provides weekly sailings to Seward the year around. Puget Sound also operates as a contract carrier in the trade. It does not, however, carry contract

cargo in the same barge or on the same tow with the cargo it transports as a common carrier. Since its entrance in the trade Puget Sound has been concerned with the competition offered by Foss through a series of arrangements or agreements between Foss, Northland and ultimately Wagner. The alleged unlawfulness of these arrangements, beginning with those between Foss and Northland in 1959 and culminating in Agreement 8492 between Foss, Northland and Wagner, approved by the Commission in February of this year, has been the basis of the various complaints filed by Puget Sound.

The first agreements were between Foss and Northland and were entered into in 1959 and 1960. Some of these agreements were written and at least one appeared to be oral. Under the terms of the agreements between Northland and Foss, each covering a single sailing, Foss agreed to transport cargo solicited and booked by Northland in Northland's capacity as a non-vessel owning common carrier, while Northland was given exclusive use of the barges necessary to transport the cargo. Foss provided the towing vessel and the master and crew thereof and gross revenues were divided approximately 50 percent to each party.

Shortly after entering the trade, Puget Sound filed the first in its series of complaints, Docket 904 *Puget Sound Tug and Barge Co.* v. *Foss Launch & Tug Co. et al.* The complaint charged that the arrangements between Foss and Northland were within the purview of section 15 of the Shipping Act, 1916, and that Commission approval of the arrangements was required before they could be effectuated.

While Docket 904 was pending, Foss brought Wagner into the trade as a common carirer by water and with this Puget Sound filed its second complaint, Docket 914, *Puget Sound Tug and Barge Co.* v. *Foss Launch & Tug Co. et al.* The complaint was intended to bring into the proceedings Wagner, now a participant in the allegedly unlawful arrangements between Foss and Northland. The two proceedings were consolidated and by its decision issued January 8, 1962, 7 F.M.C. 43, the Commission found that Foss was a common carrier by water with respect to cargo carried under its agreements with Northland and that the agreements were subject to section 15.

While Dockets 904 and 914 were pending Northland, Wagner and Foss (a party as Wagner's parent corporation) filed Agreement 8492 seeking Commission approval under section 15. The agreement provided that Northland would solicit and book cargo and issue its own bills of lading, and that Wagner would accomplish the physical transportation of the cargo by tug and barge. The agreement applied only to "such cargo as Northland tenders to Wagner", and there was no obligation on Northland's part to supply any minimum tonnage. Wagner was not obligated to furnish any minimum space or schedule

of sailings for Northland cargo, its obligation being limited to furnishing "such barge or barges" as were actually being employed in its common carrier service. Certain charges were apportioned between the parties and gross revenue was to be divided according to division sheets which were to be furnished the Commission. The division then anticipated was 50 percent to each party. Puget Sound protested approval of the agreement, and the Commission instituted an investigation to determine whether the agreement should be approved, modified or disapproved, Docket 976, *Agreement 8492 Between T. F. Kollmar, Inc., d/b/a Northland Freight Lines and Wagner Tug Boat Company in the Alaska Trade*, 7 F.M.C. 511 (1963). The issues in Docket 976, as set forth in the order of investigation were only those relevant to the approvability of the agreement. The reasonableness of respondents' rates was not an issue in that proceeding, and Puget Sound's complaint in this proceeding was an attempt to raise that issue. Puget Sound filed simultaneously with its complaint a motion to consolidate this proceeding with Docket 976. The motion was denied.

In our decision in Docket 976 we approved Agreement 8492. In reaching that decision we disposed of a contention that the agreement was unapprovable because under its terms contract carrier cargo and common carrier cargo might be carried on the same barge or in the same tow. Such a mixture of contract and common cargo it was contended was unlawful *per se*. We said at 7 F.M.C. 519:

> We are unwilling, from our review of the cases * * * to accept [the] 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.

This issue of the so-called dual capacity operation was considered by the Examiner to have been raised, albeit inferentially, in the present proceeding. We now turn to a consideration of Puget Sound's complaint in this proceeding.

As we read the complaint it primarily concerns itself with charges that the rates in Wagner's Local Freight Tariff No. 2, F.M.C.-F. No. 2 and Northland's Local Freight Tariff No. 1, F.M.C.-F. No. 1, are unjust, unreasonable, and otherwise unlawful in that:

> (a) Said rates are noncompensatory in that they have failed and will fail to produce revenues sufficient to meet the expenses incurred in performing respondents' common carrier service, and therefore are unreasonably low and destructively competitive with complainant's service;
>
> (b) Wagner's Tariff No. 2 names rates on asphalt in bulk and on cement in bulk based on minimum weights so high as not to be available to more than one shipper of each such commodity while the same tariff names rates on asphalt

and cement based on minimum weights geared to the requirements of the other shippers thereof;

(c) The structure of the aforesaid rates and the arrangement between the parties affords them an assured bottom cargo which enables them to, and they thereby do, engage in destructive competition with complainant;

(d) The maintenance of two or more tariffs naming rates for the same service between the same ports constitutes failure plainly to show the rates, charges, classifications, rules and regulations in force for such service and constitutes and affords opportunity for discrimination between or among shippers.

The Examiner noted that counsel for complainant tried this proceeding primarily as a rate case, but shifted emphasis on brief to the dual capacity issue raised, but not then decided, in Docket 976. The respondents took the position that because Puget Sound litigated the question of the *per se* illegality of respondents' dual capacity operations in Docket 976, they should not be permitted to relitigate the issue in this proceeding. Respondents also contended that neither the complaint nor Puget Sound's counsel at the prehearing conference raised the dual capacity issue, and it would be unfair to entertain the question here in the absence of proper notice. The Examiner, however, decided that the dual capacity issue was properly before him.

In his initial decision, issued prior to our final decision in Docket 976, the Examiner found that the tandem tow of a Foss barge containing contract carrier cargo with a Northland (Kollmar) barge containing common carrier cargo did not violate the principle that disfavors a carrier acting as both a common and a contract carrier on the same voyage; that Wagner's tariff rates on cement and asphalt based as they were on a high minimum volume were discriminatory and preferential, but that the general level of respondent's rates was not unreasonably low. In addition, the Examiner was of the opinion that any dual capacity operation by Foss and its wholly-owned subsidiary Wagner would violate the principle disfavoring dual capacity operation on the same voyage.

Exceptions were filed and oral argument was held.

Puget Sound excepted to the initial decision "insofar as it holds lawful respondents' practice of combining Foss contract carrier cargo with Foss-Northland common-carrier cargo in the same tow on the same voyage." Respondents originally excepted to those portions of the initial decision wherein the Examiner expressed his opinion concerning the lawfulness of any future operation combining Foss contract cargo with common carrier cargo of Wagner, its wholly-owned subsidiary. Respondents excepted to the Examiner's expression of his opinion on this question on the ground that the issue was not properly before him. However, they now ask that we decide both aspects of the dual capacity issue, including the lawfulness of the Foss-Northland operation.

Wagner and Foss also excepted to the Examiner's conclusion that

Wagner's bulk asphalt and bulk cement rates were discriminatory and preferential and therefore unlawful.

We shall consider the issue of Foss-Northland dual capacity operation first. The Examiner in dealing with this issue treated the question of the *per se* illegality of such an operation at some length, and without the precedent of our decision in Docket 976 reached the same conclusion we did—that the particular operation in question was not illegal *per se*. Although we agree generally with the reasoning of the Examiner in reaching his conclusion, we consider our decision in Docket 976 to be dispositive of the question and do not feel that further extended discussion on the issue is warranted or necessary.

Our decision in Docket 976 mentioned the future possibility of unlawful discriminations or preferences to shippers, under Agreement 8492 and stated that the Shipping Act affords ample means for reaching any such results actually occurring in the subsequent operations of the parties under the agreement. The Examiner has found that no substantial evidence of such results is present in this record and we concur. We conclude that operations under Agreement 8492 have not thus far resulted in any undue preferences or unjust discriminations in the parties' treatment of shippers.

We further agree with the Examiner that Foss' practice of hauling contract cargo southbound rather than returning empty after its equipment is employed to transport common carrier cargo north does not constitute an unlawful dual capacity operation.

The testimony at the hearing of Mr. Paul E. Pearson, vice president and general manager of Foss and of Wagner, prompted some concern in the mind of the Examiner that in the future the common carrier operation of Wagner might be treated as a mere adjunct of the Foss contract carrier operation. His concern led him to consider the lawfulness of such a dual capacity operation should it be undertaken. We do not consider that the question of the legality of any future dual capacity operations by Foss and Wagner was an issue properly before the Examiner for decision. Other than the speculative testimony referred to above, there was no evidence to show the manner in which such operations would be conducted; nor did the complaint as we read it challenge any proposed Foss-Wagner dual capacity operation. Under the circumstances, we do not consider it appropriate to reach any conclusion regarding the possible unlawfulness of an operation which may or may not take place in the future. Foss and Wagner are of course charged with the responsibility of conducting their operations in conformity with the shipping statutes and no warning should be necessary to make them aware of this responsibility. Therefore, on the record before us we reach no conclusions as to the unlawfulness of such future operations.

Foss and Wagner except to the Examiner's finding that Wagner's

bulk rates on cement and asphalt were preferential and discriminatory and therefore unlawful. On cement Wagner's rate is $9.25 per ton on minimum quantities of 3500 tons and on asphalt it is $16.50 per ton on minimum quantities of 1400 tons. Complainant contends that these rates are unlawful because (1) the minimum is so high that it is available to only one shipper and thereby violates section 14 Fourth as a discrimination based on volume of freight offered and violates section 16 First by giving an undue preference, and (2) the spread between the rates (46.25 cents/cwt. in lots of 3500 tons versus $2.10/ cwt. in smaller lots on cement, and 82.5 cents versus $1.45 on asphalt) is so excessive as to be an undue preference under section 16 First. There is at present only one shipper of cement in the trade, Permanente, and the Examiner decided that it was not possible on the record to conclude that there was no forseeable prospect that other cement shippers would enter the field and that it may be that the high cement rate was keeping them out. He did however, conclude "that a volume rate which is five times as much as the general rate on the same commodity is, *prima facie*, discriminatory," and that the volume rates of Wagner on asphalt and cement should be canceled. He further concluded that Foss' contract with Permanente Cement calling for the same volume rates was lawful because sections 14 and 16 do not apply to contract carriers, and we decided in Dockets 904 and 914 that the multiple towing operation considered therein did not make Foss a common carrier.

We agree with the Examiner's conclusions as to the Foss contract; and we think the Examiner was correct when he found that Wagner's rates on cement and asphalt were *prima facie* discriminatory. We do not, however, agree that the rates should be canceled on the basis of the record before us. Accordingly we will grant respondents 30 days in which to petition for a limited remand of the proceedings for the purpose of submitting evidence in justification of the rates found to be *prima facie* discriminatory.

We agree generally with the Examiner's remaining findings and conclusions concerning the general level of respondents' rates and for the reasons set forth below we think the exceptions taken to these findings and conclusions are without merit.

Complainant's allegation, concerning the noncompensatory level of respondents' rates, raises two basic considerations in the light of the evidence that was adduced by both sides. One of these involves a comparison of respondents' rates with those of the other carriers in this trade. The other involves a review of respondents' operating experience to determine whether their rates have been noncompensatory. Much accounting data and testimony was introduced on the latter question, but it will be unnecessary to discuss these in detail here (including the many disputes over accounting details) because the theory

employed by complainant in the computation of respondents' revenues and expenses is invalid for the reason that they are based on the mistaken belief that the Foss–Kollmar dual operation is illegal *per se.*

Northland made eleven voyages between Seattle and Anchorage using Foss' equipment in 1961, the year adopted by the parties to test the profitability of respondents operation. Relying on the alleged illegality of the Foss-Northland operation, complainant assumes a situation where all of the expenses of both Northland and Foss, both northbound and southbound, are charged against the voyage revenues, but the Foss revenues on contract cargo are excluded, with a minor adjustment to reflect greater speed if the contract cargo barge had not been included in the tows. Exhibits 1 to 15 and Exhibit 65, introduced by PSAVL, reflect a loss of $58,732.99 if the accounting is done on the theory advanced by complainant.

Exhibits 33 to 61 were introduced by respondents to reflect voyage profits and the cumulative profits to Foss arising out of the 1961 voyages. They establish the fact that a net profit of $46,334.91 was earned by Foss. Northland introduced Exhibit 28, a profit and loss statement (not prepared for the purpose of this proceeding) reflecting the Northland operating experience for a period covering the eleven voyages. It shows a profit of $27,327.01 before taking into account any expense for compensation for Mr. T. F. Kollmar, president, who spent most of his time managing the Northland operation and soliciting cargo during the six month operating season. This figure excludes an item for accounts receivable in the amount of $17,000 which Mr. Kollmar believed was due the company. These exhibits show that the Northland operation was profitable, although the record is somewhat uncertain as to the exact amount of profit.

Considerable question arose at the hearing concerning the accounting details incident to certain of the exhibits introduced by both sides, but it is unnecessary to treat these at length. Under the theory employed by complainant, the operation of respondents would have clearly been unprofitable; but the theory is invalid. Respondents' exhibits showing the profitability of the Northland operation are not precisely detailed as to the allocation of expenses between contract and common cargo. While problems might well arise as to the proper allocation of expenses in a proceeding under the Intercoastal Shipping Act, 1933, to determine the justness and reasonableness of a given rate, this is not such a proceeding. The question presented here is whether respondents' rates are so unreasonably low as to be unprofitable. On the record before us complainant has failed to show that respondents' rates are noncompensatory. It is found that Northland's operation is profitable. There is a lack of substantial evidence as to the operating experience of Wagner.

Before making the comparison of rates, an introductory word regarding PSAVL rates is necessary. The northern terminus of the PSAVL common carrier operation is Seward, Alaska. Very little cargo remains there, as this is merely a transshipment point. The Alaska Railroad picks up the cargo there and transships it on to Anchorage and other points on the railroad. PSAVL and the railroad are party to a traffic agreement under which the railroad publishes its Tariff 63–A showing the total freight charges for the through movement of traffic from Seattle to points in Alaska. PSAVL sets forth its proportion of the interline rate on the regular tariff filed with the Commission. The Alaska Railroad interline rate (including the PSAVL portion) to Anchorage includes wharfage and delivery expense, whereas the tariff rates of Kollmar and Wagner do not, according to the uncontradicted testimony of Mr. Kollmar.

Evidence was introduced of certain rates of Pacific Western Lines from Seattle to Anchorage. The service of this carrier is similar to that of the parties to this proceeding. For purposes of comparison, examples of these rates are included in the table set out below, together with those of PSAVL/ARR, Northland, and Wagner (from PSAVL Exhibit 19, and the Northland Exhibit 32B).

Comparison of rates per 100 pounds

(Quantity shown in parentheses)

Seattle to Anchorage

Commodity	PSAVL/ ARR	Northland	Northland [1]	Wagner	P.W.L.
Anti-freeze	(30M) 3.16	(25M) 2.77	(25M) 3.05	(25M) 3.09	(50M) 2.70
Asphalt	(80M) 1.91	(80M) 1.45	(80M) 1.70	(80M) 1.45	(50M) 1.70
Cement	(40M) 2.05	(50M) 2.10	(50M) 2.31	(50M) 2.10	(40M) 1.92
Iron Articles	(24M) 2.97	(24M) 2.81	(24M) 3.09	(24M) 2.81	(30M) 2.98
Liquor	(20M) 3.47	(20M) 3.07	(20M) 3.34	(20M) 3.07	(20M) 3.06
Liquor (Malt)	(50M) 2.80	(50M) 2.20	(50M) 2.20	(50M) 2.47	(60M) 2.35
Lumber	(40M) 1.96	(40M) 1.76	(40M) 2.02	(40M) 2.10	(40M) 2.08

[1] Plus wharfage and delivery charges.

The tariff rates of Northland on all but one of these selected items average about 15 percent less than those of PSAVL/ARR. The Northland rate on cement is higher. However, when the wharfage and delivery charges are added these Northland rates are no lower, on the average, than those of PSAVL/ARR. On the basis of a comparison of rates, it cannot be said that respondents' rates are unreasonably low.

Proposed findings and exceptions not discussed or reflected by this report have been considered and found not justified.

775-794 O-65-41

FEDERAL MARITIME COMMISSION

No. 977

PUGET SOUND TUG AND BARGE COMPANY

v.

FOSS LAUNCH AND TUG CO.,

WAGNER TUG BOAT COMPANY,

T. F. KOLLMAR, INC., D/B/A NORTHLAND FREIGHT LINES

Full investigation of the matters and things involved in this proceeding having been had, and the Commission on June 18, 1963, 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 (1) that the tandem tow of Foss Launch & Tug Co. barge containing contract carrier cargo with Northland Freight Lines barge containing common carrier cargo does not violate the principle disfavoring a carrier acting as both common and contract carrier on the same voyage; (2) that respondent's rates are not unreasonably low; and (3) that Wagner Tug Boat Company's rates on cement and asphalt based on high volume are *prima facie* discriminatory, but that complainant, Puget Sound Tug and Barge Company should be allowed 30 days from the date of service of this order within which to petition for a limited remand of the proceedings for the purpose of submitting evidence in justification of said rates;

It is ordered, That this proceeding is discontinued except as to the issue of whether the rates of Wagner Tug Boat Company on asphalt and cement are discriminatory; and the complainant is hereby granted 30 days from the date of service of this order within which to petition for remand on said issue.

By the Commission, June 18, 1963.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 726

ISBRANDTSEN CO., INC.

v.

STATES MARINE CORPORATION OF DELAWARE, ET AL.

No. 732

H. KEMPNER

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 733

H. KEMPNER

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 734

GALVESTON COTTON COMPANY

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

No. 735

TEXAS COTTON INDUSTRIES

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

AMENDED ORDER AWARDING INTEREST

Pursuant to the decision of the United States Court of Appeals for the District of Columbia Circuit in *States Marine Lines Inc.* v. *Federal Maritime Commission*, 313 F. 2d 906 (1963), cert. denied 374 U.S. 831 (1963), holding that interest to complainant should be granted from November 3, 1952, paragraph 1 of the order served by the Federal Maritime Board in the above proceedings on August 9, 1961, is hereby amended to read as follows:

1. That respondent, States Marine Corporation of Delaware, is hereby notified and directed to pay unto complainant, Isbrandtsen Co. Inc., on or before July 20, 1963, $5,455.00 plus interest on such amount at the rate of 6% per annum for the period from November 3, 1952 to the date of payment, as reparation for the injury caused by respondent's violation of Section 17 of the Shipping Act, 1916.

By the Commission, June 25, 1963.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1102

Pacific Coast European Conference

Port Equalization Rule

Decided July 17, 1963

1. An evidentiary hearing is not required where no factual issue is involved. Show-cause procedure may be used for the purpose of determining the questions of law presented in such a case. Respondents' motion to dismiss denied.

2. Rule 29 of respondents' Freight Tariff No. 13 instituting a plan of port equalization found to be without sanction in respondents' conference agreement and therefore unlawful. Respondents ordered to cease and desist from putting the rule into effect or from carrying it out, and to strike it from the tariff.

3. Absent provision therefor in their basic conference agreement, respondents are not authorized to institute a plan of port equalization. Such a plan is not conventional or routine rate-making but is a new arrangement for the regulation and control of competition which must be expressly approved pursuant to section 15 of the Shipping Act, 1916.

4. The provision which Public Law 87–346 added to section 15 of the Act, authorizing an approved conference to file and effectuate, without prior Commission approval, "tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof" (75 Stat. 762, 764) limits respondents strictly to the exercise of the rate-making power conferred by their basic conference agreement and prohibits them from effectuating a tariff rule embodying their unapproved port equalization plan.

Robert L. Harmon, for respondents.

J. Richard Townsend, for Stockton Port District, intervenor.

Timothy V. A. Dillon, for Sacramento-Yolo Port District, intervenor.

Frank W. Gormley, and *Robert J. Blackwell*, Hearing Counsel.

REPORT

BY THE COMMISSION (Thos. E. Stakem, *Chairman*, John Harllee, John S. Patterson and James V. Day, *Commissioners*):

I. Facts

On February 20, 1963, the Pacific Coast European Conference filed with the Commission an amendment to its Freight Tariff No. 13, in the form of a new rule, Rule 29. This rule provides:

29. *PORT EQUALIZATION* Carriers may equalize a shipper's cost of delivering cargo to carriers' loading berths in accordance with the conditions herein set forth:

(a) Equalization is the absorption by a carrier of the difference between a shipper's cost of delivery to ship's tackle at the loading port nearest to the shipment's point of origin and the cost of delivery to ship's tackle at the loading port designated by the equalizing carrier.

(b) Equalization shall be restricted to transportation costs on shipments from points of origin in California to loading berths in either Stockton, Sacramento, or a San Francisco Bay Area port, viz. Alameda, Oakland, Richmond, or San Francisco.

(c) Equalization shall not be made between San Francisco Bay Area ports, nor between berths within any of the ports named in (b) above.

(d) The delivery costs shall be based upon the lowest available published rates.

(e) Equalization payments shall only be made upon shipper's invoices submitted to and approved by the Conference office. Invoices must be supported by copies of the covering ocean bills of lading and copies of the transportation bills showing applicable tariff authorities covering movement from shippers' points of origin.

Prior to this filing, the Commission received a letter from the Stockton Port District advising the Commission that the rule would be filed and requesting that the Commission reject the filing. The substance of this complaint was forwarded to the conference chairman for his views. He replied by requesting the name of the complainant and a full copy of the complaint. The Commission informed him that the gist of the complaint had been stated and that the name of the complainant was of little use in responding to the inquiry, and requested an anwser from the conference. No further correspondence was had.

On April 9, 1963, the Commission issued an order directing that the conference and its members lines show cause why Rule 29 should not be declared unlawful and stricken from the tariff, because the conference had failed to obtain Commission approval as required under Section 15 of the Shipping Act, 1916. The order to show cause provided for the filing of affidavits of fact and memoranda of law and oral argument. Affidavits and memoranda were to be filed by the close of business on April 30, 1963, with replies thereto due no later than May 10, 1963. Oral argument was set for May 17, 1963. Petitions to intervene were filed by the Stockton Port District (Stockton), the Sacramento-Yolo Port District, and by the Commission of Public Docks of the City of Portland, Oregon.

On April 26, 1963, respondents moved to dismiss the proceeding on the ground that "the order and the procedure therein contemplated are without a lawful, statutory basis and are, in fact, directly contrary to the minimum requirements of a fair hearing as set forth in the

Shipping Act and the Administrative Procedure Act." Replies in opposition to the motion were filed by hearing counsel and Stockton. Stockton also filed a memorandum of law, and hearing counsel filed a memorandum supporting Stockton's position on the merits.

In lieu of requesting allotment of time at oral argument, as authorized in a notice sent them by the Secretary of the Commission, respondents requested disposition of their motion to dismiss. When informed that the motion to dismiss would be argued at the same time as the merits, respondents claimed they had been given inadequate notice and did not have time in which to prepare their case. Accordingly, respondents chose to stand on their motion to dismiss and the memorandum in support thereof. Oral argument was held as scheduled on May 17, 1963, with hearing counsel and attorneys from Stockton Port District and Sacramento-Yolo participating therein. No one appeared for respondents, or the Commission of Public Docks of the City of Portland.

The issues before the Commission are (1) whether the Commission has authority to conduct a proceeding of this type pursuant to an order to show cause; and (2) whether Rule 29 of Freight Tariff No. 13 is an agreement within the scope of section 15 of the Shipping Act requiring Commission approval before it can be effectuated.

II. Authority for the Proceeding

Respondents in their motion to dismiss assert that they are entitled to an evidentiary hearing on the basis of the following language from section 15:

> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair * * *.

Respondents allege that "hearing" in this context means a "full hearing",[1] and that the Commission is denying them such a hearing. Respondents' reliance on the above portion of section 15 is misplaced and without merit.

Respondents filed Rule 29 with the Commission as a tariff amendment. They did not file it for approval under section 15, consequently there is no issue as to the approval, disapproval or modification of the rule under the section. The primary question in this proceeding is whether Rule 29 should have been submitted to the Commission for

[1] By "full hearing" respondents refer to the evidentiary hearing before an examiner provided for in sections 7 and 8 of the Administrative Procedure Act.

section 15 approval.[2] This involves no factual issue but simply an inquiry as to whether the rule is authorized by respondents' basic conference agreement and if not so authorized, whether it is a new agreement or a modification of an existing agreement which is subject to the Commission's approval under section 15. To resolve the questions of law thus presented, all that is necessary is an examination of Rule 29, the basic conference agreement, and section 15. We are not, as respondents claim, called upon to make "a finding of certain adverse effects." Indeed, to conduct an evidentiary hearing for the purpose of disposing of the questions actually at hand would be wasteful for all concerned.

Nor are respondents correct in contending that Rule 10(n) of the Commission's Rules of Practice and Procedure gives them the right to present evidence and cross-examine witnesses.[3] Rule 10(n) is not applicable to show cause proceedings. Rule 5(g) which governs such proceedings states:

> The Board may institute a proceeding against a person subject to its jurisdiction by order to show cause. The order shall be served upon all persons named therein, shall include the information specified in rule 10(c), may require the person named therein to answer, and shall require such person to appear at a specified time and place and present evidence upon the matters specified.

Rule 5(g) allows for discretion in adapting the show cause procedure to the requirements of the particular case, as has been done here. If it had been intended that Rule 10(n) be applicable to show cause

[2] The relevant portions of section 15 are as follows:

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

* * * * * * *

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof * * * agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt."

[3] Rule 10(n) provides:

Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. * * *

proceedings, a specific reference to that effect would have been included in Rule 5(g).

Respondents also cite *Trans-Pacific Freight Conference of Japan, et al.* v. *Federal Maritime Board and United States*, 302 F. 2d 875 (D.C. Cir., 1962) for the proposition that the Commission cannot declare anything "unlawful". That case involved the validity of an interim cease and desist order, which had been issued in an attempt to maintain the status quo pending the outcome of proceedings before the Commission. It did not involve any question of the Commission's authority to issue an order in the circumstances present here, where it has been determined in an appropriate proceeding that a conference proposes to exceed the scope of its approved section 15 agreement.[4]

In their supporting memorandum respondents further contend that in the case of *Sea-Land Service Inc., et al.* v. *Federal Maritime Commission and United States*, (9th Cir., No. 18377, filed January 8, 1963) the Commission took a position inconsistent with that taken here. We disagree. In Sea-Land the Commission moved for (and obtained) remand of the case because the petitioners sought to have reviewed, as a "final order" of the Commission, a letter which had been written by a staff member in response to the petitioners' informal request for advice as to whether certain proposed leases were within section 15. No hearing had been held and no reasons had been given for the determination made in the letter, and the Commission took the position that a remand was essential to permit such action before the court could properly undertake judicial review. It should be emphasized that in the Sea-Land case the informal determination was the result of the informal approach the petitioners there chose to employ. Furthermore, in the present case the respondents have been accorded opportunity for a hearing consonant with the issues to be determined.

Respondents further claim that they were not timely notified of the matters of fact and law asserted. A reading of the Commission's order is sufficient to dispel this notion; respondents were notified when they were served with a copy of the order, and they cannot possibly claim that the notice was not timely. Our rules 5(e) and 7(b), which are cited by respondents, are inapplicable in the present proceeding. They relate only to the filing of answers to complaints, and not to replies to orders to show cause. There is no provision in Rule 5(g) which specifies a time limit for replies to such orders. Likewise Rule

[4] Regarding our authority to issue a cease and desist order prohibiting the effectuation of such unapproved activity, the court said in the *Trans-Pacific* case, *supra*, footnote 8:

"In Pacific Coast European Conference, 5 F.M.B. 65 (1956), the Board asserted the authority to issue a cease and desist order prohibiting the parties from carrying out an unapproved agreement. We need not express a view as to whether such an order is within the Board's authority. But we do note that different considerations might well be involved in such a case."

10(o), cited by respondents, relates solely to a suspension proceeding under section 3 of the Intercoastal Shipping Act of 1933, and it in turn refers to Rule 5(h), not Rule 5(g). It should be noted that respondents made no application for an enlargement of time to file replies, nor did they assert why they were not able to reply to the order in the time alloted. Absent such an application or assertion, respondents' claims seem frivolous.

This same ground has been traveled with these respondents on several prior occasions. In *Pacific Coast European Conference*, 7 F.M.C. 27 (1961), we stated in language equally applicable here:

> * * * The complaint is that such a proceeding [evidentiary-type hearing] is necessary to provide proper notice and hearing, and an evidentiary record on which to base findings. Respondents also claim an order to show cause is unauthorized by the Act.
>
> This procedural argument is but a play on form and words. The order to show cause was expressly provided for by the Board's rules, it fully specified the charges against the conference and alleged that respondents' actions had prevented the Board from carrying out its statutory duties, and it was well within the powers vested in the Board by the Act.
>
> The order gave respondents notice of the issues involved and time to prepare to meet them. * * * The questions raised by the order * * * were purely legal. There was no factual issue and hence no occasion to compile an evidentiary record in a hearing. * * * the proceeding in our view quite adequately satisfied the requirements of due process. (7 F.M.C., at pp. 37–38.)

An earlier case, *Pacific Coast European Conference (Payment of Brokerage)*, 4 F.M.B. 696 (1955), arose from respondents' attempt to effectuate without Board approval a tariff rule (Rule 21) and amendment thereto containing certain provisions respecting the payment of brokerage (hereinafter more fully discussed). Respondents contended the Board could find a violation of section 15 only after a full evidentiary hearing. Rejecting this position, the Board held that such a hearing is not required where the sole questions are of law. Upon an examination of the rule, respondents' basic conference agreement, and section 15—precisely as we have done here—the Board decided as a matter of law that the rule required section 15 approval and lacking same it was unlawful (4 F.M.B., at pp. 700–703).

Respondents petitioned for reconsideration, arguing that the Board was powerless to make such a declaration absent an evidentiary hearing. The Board in a detailed review of its authority in the premises again rejected respondents' position, *Pacific Coast European Conference (Payment of Brokerage)*, 5 F.M.B. 65 (1956). The Board also stated:

> * * * It is inconceivable that Congress would have granted antitrust law immunity to agreements between carriers which might, in the absence of such immunity, offend those laws, and yet have denied the agency charged with supervision over those agreements the power to protect the public by declaring a

given agreement to be unlawful, as unapproved, and/or by requiring the carriers to cease and desist from effectuating the agreement prior to approval or after disapproval. None of these powers is specified in the Act, yet each has been vested implicitly in us as necessary to the "effective government supervision" contemplated by the Act. Section 22 of the Act, in permitting us to make such order as we deem proper, gives us that authority. * * * (5 F.M.B., at p. 68.) [5]

The Board supported the foregoing decisions by citing, *inter alia*, *Isbrandtsen Co., Inc.* v. *United States*, 211 F. 2d 51 (1954), cert. den. 347 U.S. 990 (1954) and *United States Navigation Co.* v. *Cunard Steamship Co.*, 50 F. 2d 83 (2nd Cir., 1931), aff'd 284 U.S. 474 (1932). In *Isbrandtsen* no hearing had been held but the court determined, as a matter of law, that the institution of a dual rate system without prior approval under section 15 was a violation of the Act. In the *Cunard* case the Second Circuit stated:

The Shipping Board may determine whether any agreement such as is described in the bill has actually been made, and, if it has, may order it filed and require the parties to cease from acting under it unless and until it is approved. (50 F. 2d, at p. 90.)

In affirming, the Supreme Court said:

* * * If there be a failure to file an agreement as required by section 15, the board, as in the case of other violations of the act, is fully authorized by section 22, *supra*, to afford relief upon complaint or upon its own motion. (284 U.S. at 486.)

Manifestly, therefore, it is well settled that we have the power to determine whether an agreement subject to our approval under section 15 exists and if so to take appropriate action. It is equally well settled that an evidentiary hearing is not required in making such determination where, as here, the only question is one of law.[6] Respondents motion to dismiss will be denied.

III. THE PORT EQUALIZATION RULE

We think it clear that Rule 29 is subject to section 15, and is not within the scope of respondents' basic conference agreement, Agreement No. 5200. The scope of that agreement is set out in section 1 thereof, which is the only provision relevant here and provides:

This agreement covers the establishment, regulation and maintenance of agreed rates and charges for or in connection with the transportation of all cargo in vessels owned, controlled, chartered and/or operated by the parties hereto in the trade covered by this agreement, and brokerage, tariffs and other matters directly relating thereto, members being bound to the maintenance as between themselves of uniform freight rates and practices as agreed from time to time.

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[5] A further decision in this case, rendered in 1957 upon completion of an evidentiary hearing to determine the merits of respondents' brokerage rule in light of the provisions of sections 15, 16 and 17 of the Act, is reported at 5 F.M.B. 225.

[6] See also *Producers Livestock Marketing Assn.* v. *United States*, 241 F. 2d 192 (10th Cir. 1957); *Riss & Co.* v. *United States*, 117 F. Supp. 296, 301–2, 304 (W.D. Mo. 1952), aff'd 346 U.S. 890 (1953); Davis, *Administrative Law Treatise* (1958), section 7.06.

Under this provision the parties are authorized to regulate competition among themselves by establishing uniform rates for the transportation of cargo. They are not authorized to create "new relationships which invade the areas of concerted action specified in section 15" without additional approval under that section. This was expressly held in the 1955 *Pacific Coast European Conference* case, 4 F.M.B. 696, *supra*. As before noted, in that case respondents had sought to effectuate, without Board approval, tariff Rule 21 and amendment thereto respecting brokerage. These directed that brokerage be paid only to brokers on the conference's approved list and provided for the exclusion from that list and the refusal of brokerage to any firm soliciting business for a nonconference carrier. The Board rejected respondents' contention that since their basic agreement mentioned "brokerage" they were authorized without more to put such a rule into effect. Using language equally pertinent here, the Board said:

> Surely amended Rule 21 introduces a new scheme of regulation and control of competition and provides for an exclusive working arrangement not embodied in the basic agreement. * * * the authority granted in article 1 does not extend, without additional approval, to the creation of new relationships which invade the areas of concerted action specified in section 15 in a manner other than as a pure regulation of intraconference competition. (4 F.M.B. at 702–703.)

As is shown on its face, respondents' present rule, Rule 29, institutes a port equalization plan under which they absorb part of a shipper's inland freight expense equal to the difference between the cost he would incur in delivering the shipment at the loading port nearest the shipment's point of origin in the State of California, and the cost he incurs in delivering it to respondents at a more distant port (Stockton, Sacramento and specified San Francisco Bay Area ports). Respondents thus pay a portion of the shipper's expense in order to induce his cargo to their vessels at the indicated ports.

The adoption of a plan of this kind does not constitute conventional or routine rate-making among carriers. It is a new arrangement for the regulation and control of competition. Moreover, it affects third party interests such as the ports and facilities from which traffic is drawn and it obviously is not "a pure regulation of intraconference competition". Port equalization raises questions of possible unfairness, unjust discrimination, and detriment to commerce, all matters included in the standards for adjudging the approvability of agreements under section 15, and may bring into play the requirements of sections 16 and 17 of the Act. In other cases it appears the carriers

have undertaken to comply with the Act by providing expressly for the plan in their agreements filed for section 15 approval.[7]

As far back as 1927 the Shipping Board, in *Section 15 Inquiry*, 1 U.S.S.B. 121, held that the words "every agreement" as used in section 15 (quoted in footnote 2, *infra*) require all agreements covering matters of the kind specified in the section to be filed for approval, and that only those activities which could be considered "routine" when measured by the standards of section 15 were excepted. It was indicated that "current rate changes" and other day-to-day conference transactions would be deemed "routine".[8] The *Isbrandtsen* decision, *supra*, which along with *Section 15 Inquiry* was cited by the Board in support of its decision in the *Pacific Coast European Conference* case, 4 F.M.B. 696, *supra*, held that the institution of a dual rate system was not routine activity. The court also declared that any "new scheme" for the regulation and control of competition must have section 15 approval, as follows:

> "Agreements" referred to in the Shipping Act are defined to include "understandings, conferences, and other arrangements." Clearly, a scheme of dual rates like that involved here is an "agreement" in this sense. It can hardly be classified as an interstitial sort of adjustment since it introduces an entirely new scheme of rate combination and discrimination not embodied in the basic agreement. In either case, § 15 requires that such agreements or modifications "shall be lawful only *when* and as long as *approved*" by the Board. Until such approval is obtained, the Shipping Act makes it illegal to institute the dual rate system. (211 F. 2d at 56.)

Apart from the case law, however, Congress has now erected a specific statutory barrier to the effectuation of Rule 29 in the absence of section 15 approval. Public Law 87–346, enacted in October 1961, added to section 15 of the Shipping Act a provision authorizing an approved conference to file and put into effect, without prior Commission approval, a tariff or change or amendment thereto which sets forth "rates, fares and charges and classifications, rules and regulations explanatory thereof" and which is "otherwise in accordance with law" (75 Stat. 762, 764; quoted in footnote 2, *infra*). Though worded as an "exception" to the approval requirements of section 15,

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[7] For example, see *City of Portland et al.* v. *Pacific Westbound Conference et al.*, 4 F.M.B. 664 (1955), 5 F.M.B. 118 (1956), aff'd. Sub. nom. *Pacific Far East Line* v. *United States*, 246 F. 2d 711 (D.C. Cir. 1957); *Pacific Westbound Conference Agmt. No. 7790*, 2 U.S.M.C. 775 (1946); *City of Mobile et al.* v. *Baltimore Insular Line et al.*, 2 U.S.M.C. 474 (1941).

[8] *Empire State Hwy. Transp. Assn. et al.* v. *American Export Lines et al.*, 5 F.M.B. 565 (1959) is a recent example of routine or conventional ratemaking authorized by the basic section 15 agreement. Involved there were tariffs of an association of ocean terminal operators which established rates, and certain regulations respecting their application, for the loading and unloading of vessels at piers in the port of New York area. A later tariff increasing the level of these rates and revising the rules, was held not to be a matter requiring separate section 15 approval in *Empire State Hwy. Transp. Assn. et al.* v. *Federal Maritime Board*, 291 F. 2d 336 (D.C. Cir. 1961), cert. den. 368 U.S. 931 (1961).

this language in no sense enlarges conference power. On the contrary, it is intended absent additional approval to limit conference authority, such as that contained in section 1 of respondents' basic agreement, strictly to the rate-making activity therein provided for.

H.R. 6775, 87th Congress, the bill that became Public Law 87–346, evolved from H.R. 4299, 87th Congress, its immediate predecessor in the legislative chain. In H.R. 4299 the exception covered "tariffs of rates, fares, and charges". The Department of Commerce and our predecessor, the Federal Maritime Board, questioned the words "tariffs of" because—

> * * * conferences may insert rules and regulations in their tariffs which have the effect of restricting competition in a manner not reasonably to be inferred from the basic agreement.[9]

Thereafter, the House Merchant Marine and Fisheries Committee redrafted H.R. 4299. Draft revision 2 thereof changed the exception to read "tariff rates, fares, charges, classifications, rules and regulations". Again the Board objected, its Chairman testifying as follows:

> We believe that this exemption is too broad. The purpose of this provision is to leave conferences free to adopt rates and to amend them from time to time without the need for formal Board approval of each rate action as a separate section 15 agreement. We agree with this purpose. The problem is that the rules and regulations inserted by conferences in their tariffs may go beyond mere rate matters, and instead set up new types of concerted activity not contemplated by the basic conference agreement. * * * To insure that the classifications, rules and regulations * * * are confined only to legitimate rate activities, we recommend the insertion * * * of the phrase "explanatory thereof" after the word "regulations".[10]

The Committee then introduced H.R. 6775 incorporating this change and others decided upon as a result of its hearings. H.R. 6775 was reported and passed the House with the exception reading "tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof". Before a subcommittee of the Senate Commerce Committee, the American Steamship Committee on Conference Studies consisting of 22 lines operating American-flag ships, requested deletion of the words "explanatory thereof" on the following grounds:

> We feel that that is much too confining. When you have a basic agreement, a basic conference agreement operating, it is intended to lay down within that conference structure, lay down the terms, conditions, rules, and regulations for competition among the members. But this confines the action of the members of the conference to be just a rate organization. There are many things which

[9] H. Rept. 498, 87th Cong., pp. 14, 19–20; Hearings on H.R. 4299 before the Special Subcommittee on Steamship Conferences, House Merchant Marine and Fisheries Committee, 87th Congress, March and April 1961, pp. 4, 8.

[10] House Hearings, *id.*, pp. 460–61.

occur from day to day, from time to time, which conference has to take action on. With this language in there it wouldn't be able to take action on anything without the Board's prior approval, except perhaps a change in the tariff rate.

There are new concepts coming into this business, such as containers, and many conferences have found it necessary to lay down the rules and regulations for competing with one another on containers.

There are lots of other things, like demurrage rules and regulations which are not really encompassed in the original agreement but which occur as time goes on.[11]

Following this testimony, the words "explanatory thereof" were deleted in a draft revision of H.R. 6775 prepared by the subcommittee. However, notwithstanding the industry objection, the words were restored when the Senate Commerce Committee reported the bill.[12] As thus restored to the restrictive version which the Board had urged and the House had approved, the exception was enacted into law. Plainly, therefore, the statute itself now expressly prohibits respondents' Rule 29 unless specific Commission approval is obtained under the standards of section 15.

Respondents have not sought, much less obtained, section 15 approval of their port equalization plan. An order is attached denying their motion to dismiss, requiring them to cease and desist from putting Rule 29 into effect, and directing them to strike Rule 29 from Freight Tariff Number 13.

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[11] Hearings on H.R. 6775 before the Merchant Marine and Fisheries Subcommittee, Senate Commerce Committee, 87th Congress, Part 2, July and August 1961, pp. 539. 544, 556.

[12] In reporting H.R. 6775, the Senate Commerce Committee stated (S. Rept. 860, 87th Cong., p. 18):

"Agreements not approved by the Commission would be unlawful. Before approval or after disapproval it would be unlawful to carry out any agreement. However, approved conference tariff rates, * * *, if otherwise lawful, may take effect without prior approval by the Commission upon compliance with the tariff filing requirements of the Shipping Act, 1916, as amended."

FEDERAL MARITIME COMMISSION

No. 1102

PACIFIC COAST EUROPEAN CONFERENCE

ORDER REGARDING PORT EQUALIZATION RULE

This proceeding having been initiated by the Federal Maritime Commission pursuant to Rule 5(g) of its Rules of Practice and Procedure, and the Commission having fully considered the matter and having this day made and entered of record a Report containing its findings and conclusions, which Report is hereby referred to and made a part hereof;

It is ordered, That the motion to dismiss the proceeding filed by Pacific Coast European Conference and its member lines (respondents) be and it hereby is denied; that respondents cease and desist from putting into effect or carrying out Rule 29 of their Freight Tariff No. 13; and that respondents forthwith strike Rule 29 from their Freight Tariff No. 13.

By the Commission, July 17, 1963.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 827 (Sub. No. 1)

Philip R. Consolo

v.

Flota Mercante Grancolombiana, S.A.

Decided September 16, 1963

On rehearing on remand complainant found injured to the extent of $106,001.00 by respondent's refusal to allocate, between August 23, 1957 and July 12, 1959, refrigerated space on respondent's ships for the carriage of bananas and reparation in such amount awarded.

Robert N. Kharasch, *William H. Lippman* and *Amy Scupi* for complainant.

Odell Kominers and *J. Alton Boyer* for respondent.

REPORT

BY THE COMMISSION (John Harllee, *Chairman*, Ashton C. Barrett, James V. Day, John S. Patterson, Thos. E. Stakem, *Commissioners*):

Pursuant to remand by the United States Court of Appeals for the District of Columbia Circuit,[1] this matter was reheard for the purpose of reconsidering the order of our predecessor, the Federal Maritime Board, directing respondent, Flota Mercante Grancolombiana, S.A. (Flota), to pay reparations to complainant, Philip R. Consolo (Consolo).

On June 22, 1959, the Board in Dockets 827, 835 and 841[2] found that Flota had violated sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916, by excluding Consolo and another qualified banana shipper (Banana Distributors) from participation in the refrigerated space on its common carrier vessels in the trade between Ecuador and the United States and allocating all such space to a single

[1] *Flota Mercante Grancolombiana, S.A., et al.* v. *F.M.C.* and *U.S.A.*, 302 F. 2d 887, 112 U.S. App. D.C. 302 (1962).

[2] *Philip R. Consolo* and *Banana Distributors, Inc.* v. *Flota Mercante Grancolombiana, S.A.*, 5 F.M.B. 633 (1959).

shipper, Panama Ecuador. On March 30, 1961, the Board in Docket 827 (Sub. No. 1) entered on behalf of Consolo the reparation order here under consideration, in the amount of $143,370.98. No interest was allowed in this award but interest at 6 percent per annum was granted on any amount not paid by Flota 60 days after the Board's order. This supplanted an Examiner's decision which had awarded Consolo $259,812.26 as reparations.

On appeal, the Court had before it two petitions by Flota, one attacking the Board's finding that it had violated the Shipping Act, the other attacking the reparation order, as well as a petition by Consolo attacking the reparation order. The Court sustained the Board's finding of violations and upheld its denial of Consolo's claims for pre-award interest, for an earlier starting date for the reparation period, and for an upward revision in the amount of space he would have been allocated if permitted to ship on Flota's vessels. However, the Court set aside the Board's reparation order and remanded it to the Commission to consider—

* * * whether, under all the circumstances, it is inequitable to force Flota to pay reparations, or at least inequitable to force it to pay those reparations calculated under the relatively harsh measure of damages utilized by the Board.

The Court prefaced this language with a discussion of Flota's argument that it would be "inequitable" to award reparations because of the following factors:

1. The then "unsettled nature of the law" as to whether a violation had occurred.

2. The possibility that Flota "in good faith believed" its situation was distinguishable from that of Grace Line, the carrier in a recent case dealing with similar issues, due to factual differences, *i.e.*, the physical characteristics of Flota's vessels and difficulties and delays in loading if more than one shipper were to use its banana space.

3. The Board's delay in deciding a petition for declaratory order sought by Flota (Docket 835).

4. Flota's "possible liability" for breach of the exclusive contract which it had signed with Panama Ecuador, one of Consolo's competitors, for what Flota may have thought "a reasonable period of time" in light of the Board's decision in a prior banana case involving Grace Line.

5. Consolo's apparent failure to utilize all of the banana space already available to him on Grace Line vessels.

The Court stated that the Board "took up most of these points individually and disposed of them briefly", and went on to say—

But the essence of Flota's argument was that the cumulative weight of all of the circumstances, and not any one circumstance, rendered it inequitable to require reparations. We are not prepared, on appeal. to go this far; but we do consider * * * that the Board failed to give adequate consideration to this issue. The Board may have erroneously believed (1) that it was required to

grant reparations once it found a violation of the Act, or (2) that all of the issues as to the reasonableness or equity of Flota's conduct were determined in the first phase of the proceeding.

DISCUSSION AND CONCLUSIONS

The Commission recognizes, and we think the Board did, that section 22 of the Shipping Act does not require the award of reparations when a violation has been found. The language of the section is that we "may" direct the payment of "full reparation" for injury caused by the violation. This is permissive, hence the mere fact that a violation of the Act has occurred does not in itself compel a grant of reparations. We believe, also, that in granting reparations the Board took account of all the circumstances. But in any case we have made our own thorough review of this matter and have concluded that Consolo is entitled to reparations, though in an amount smaller than the Board awarded. In so concluding, we have not only re-examined the record but have considered the contentions of the parties including the arguments set forth in their briefs submitted on remand, and have particularly weighed the individual and cumulative effect of the factors mentioned by the Court as they bear on the equities.

First, we discuss the "unsettled nature of the law" in May 1957, at the time Flota executed a renewal contract allocating all of its available banana space to Panama Ecuador for three years, thereby excluding Consolo (and others) from its vessels. Shortly prior to this, in April 1957, the Board in *Banana Distributors, Inc.* v. *Grace Line*, 5 F.M.B. 278, had held that Grace Line's practice of contracting all of its banana space to three shippers to the exclusion of other qualified shippers was unjustly discriminatory and unduly and unreasonably prejudicial in violation of sections 14 (Fourth) and 16 (First) of the Act. And four years earlier, in *Philip R. Consolo* v. *Grace Line, Inc.* 4 F.M.B. 293 (1953), the Board had held the same thing after a full review of the problems attendant upon the transportation of bananas and of Grace's contention that it was not subject to common carrier obligations with respect to this commodity.

Grace "satisfied" the complaint in the 1953 case but after the 1957 decision it appealed. The Board's order was reversed and remanded in 1959 by the Second Circuit Court of Appeals due to the Court's disagreement with a test—namely, that bananas "are susceptible to common carriage"—which the Board had advanced in dealing with Grace's argument that Grace was, and because of the special conditions involved in banana transportation, could only be a contract carrier of the fruit. The Court refused at that time to consider the

Board's contention that a common carrier for the public generally cannot also carry "a particular commodity on a contract basis".[3] On reconsideration pursuant to this remand, the Board eliminated any reference to the "susceptibility test" and reached the same result it had reached earlier. The Board held that Grace was a common carrier by water under the Shipping Act and could not evade the requirements of the Act as to any part of the goods it carried. On appeal the Second Circuit in 1960 affirmed this decision and the Supreme Court refused review.[4]

We must judge Flota's protestations of innocent intent in the context of the circumstances as they existed in May 1957 when it executed the three-year renewal of its exclusive contract with Panama Ecuador and it is evident from the foregoing that Flota executed that contract in contravention of two Board decisions directly in point. *In both instances the Board had held that Grace was a common carrier of bananas and had declared illegal its attempts to exclude qualified banana shippers from its vessels.* The Board had ruled, also, that forward booking arrangements for transportation of the fruit for a period not exceeding two years were reasonable provided the available space was prorated among all qualified banana shippers who desired it.[5] Of course, the courts could alter these decisions, and to that extent they did not "settle" the law. But they were authoritative pronouncements by the agency with prime responsibility in the field and we fail to see why shippers should be penalized because Flota chose to ignore them and sign a three-year exclusive contract. Moreover, while Grace appealed the Board's 1957 order, the order was not stayed and remained valid pending the outcome of the appeal which neither Flota nor anyone else knew would succeed—as it temporarily did in 1959.

Flota argues that if it accepted Consolo's demands for space it might have been faced with litigation for breaching its contract with Panama Ecuador. But a provision in that contract absolved Flota of any liability in the event the contract was declared illegal or unenforceable.

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[3] *Grace Line, Inc.* v. *Federal Maritime Board,* 263 F. 2d 709 (CA2, 1959).

[4] *Banana Distributors, Inc.* v. *Grace Line,* 5 F.M.B. 615 (1959), aff'd *Grace Line, Inc.* v. *Federal Maritime Board,* 280 F. 2d 790 (CA2, 1960), cert. denied 364 U.S. 933 (1961).

[5] Bananas are plentiful in Ecuador, and the amount of bananas a shipper can sell depends solely on the current market for the product and the amount of space he can acquire for transporting them. The fruit is, however, highly perishable and must be carried in refrigerated compartments to prevent rapid ripening. Through forward booking arrangements the shipper is able to contract for a fixed amount of carrier space for a specific period of time. Such an arrangement permits the shipper to purchase bananas with the knowledge that vessel space is available for carrying them. During the period of the forward booking contract, other shippers, not party to this arrangement, are foreclosed from any space. In the 1957 *Grace* case forward booking arrangements for a two-year period were approved but only if a reasonable proration of space was made to all qualified shippers who desired it and were prepared to meet the terms of the forward booking contract.

Although this provision might have put Flota in the position of having to defend the *Grace* decisions and assert their application to the Panama Ecuador contract, it is not unreasonable to think that one acting in good faith would choose such a course. Flota consciously chose the opposite course and we can only conclude that it did so because it preferred the advantages if its long-term, exclusive arrangement with Panama Ecuador.

In so acting, Flota violated its common carrier duty, as repeatedly declared by the Board, to carry goods for all qualified shippers. Even if Flota thought the Board would be reversed, one who acts in contravention of a statute, court or administrative ruling, in the belief that it will be declared invalid, assumes a calculated risk. If the law which he contravenes is upheld, he must face the consequences. Flota is not facing but is seeking to escape the consequences by passing the burden of its wrongdoing on to the party who bore the pecuniary brunt thereof. This does not appeal to our sense of equity.

We next deal with the possibility that Flota "in good faith believed" its situation was distinguishable from that of Grace. Flota argues that its ships were not adaptable for loading and unloading and points out that when in 1959 it did open its space to several shippers, they combined into a single corporation, the Continental Banana Company, to act as a single shipper in the stevedoring, importation and marketing of bananas. But this goes to refute Flota's argument rather than support it because it shows that means were available to solve the problem of accommodating several shippers. Instead of a good faith exploration of such means, Flota, we think, simply preferred its existing one-shipper arrangement.

It would be safe to assume that every vessel in the banana trade is not exactly the same, structurally. To rely upon their structural difference as an excuse to avoid common carrier obligations would go far toward eliminating such obligations. Thus, legal precepts based on activities of a similar carrier, a similar contract, the same commodities, and the same trade, could be overridden by claiming structural differences in the ship. Nor is a refusal to carry goods for many justified by fear that they cannot cooperate in using the available space. Whether shippers can cooperate will never be known unless they are offered space. It is the common carrier's duty to offer the space and give shippers the chance to devise cooperative means of using it. In the final analysis the possibility of cooperation is one to be assessed by the individual shippers, and not the carrier. If multiple utilization is truly impossible, we think shippers will recognize this and accept the fact that the space can only be utilized on an exclusive basis.

Regarding the question of the Board's delay in deciding Flota's petition for declaratory order, we first point out that Flota brought this petition only under threat of a formal complaint by Consolo, which complaint Consolo actually filed two weeks after the petition. Flota had already violated the Act as interpreted by the Board when it filed its petition, hence, it did not, in fact, seek the Board's assistance in governing its conduct. Its resort to the Board was under pressure of the troubles it had invited by executing a three-year renewal of its exclusive contract with Panama Ecuador, in complete disregard of everything the Board had said on the subject. Again, judging Flota's claim in proper context, we are unconvinced of its good faith.

More importantly, however, Consolo's complaint, unless satisfied, was required to be investigated and determined by the Board under section 22 of the Shipping Act, 1916, regardless of the disposition it made of Flota's petition. And in the exercise of its discretion under section 5(d) of the Administrative Procedure Act (A.P.A.), the declaratory order provision (5 U.S.C. 1004(d)), the Board not only did not have to accord Flota's petition priority of consideration, it did not have to consider the petition at all. It might well have adjudicated the matter on the basis of Consolo's complaint and the one later filed by Banana Distributors, as being the more appropriate and effective procedure for handling the issues involved. Thus, the Attorney General's Manual on the A.P.A. states at p. 60 that an agency need not issue declaratory orders—

> * * * where it appears the questions involved will be determined in a pending administrative or judicial proceeding, or where there is available some other statutory proceeding which will be more appropriate or effective under the circumstances.

See also *Western Air Lines* v. *C.A.B.*, 184 F. 2d 545 (CA 9, 1950) with respect to the wide discretion an agency has in choosing the means to dispose of the business before it.

Even standing alone, Flota's petition would have offered no promise of a speedy resolution of the controversy. Under section 5 of the A.P.A., such a petition must be determined on the record after notice and opportunity for agency hearing.[6] In filing the petition Flota conceded nothing. It took the position that its vessels were different structurally from Grace's vessels and as a practical matter they could only accommodate a single banana shipper.[7] Flota's assertion of this position, which was sharply disputed by the aggrieved shippers, led to

[6] 5 U.S.C. 1004; see also Attorney General's Manual on the A.P.A., p. 59 and Rule 10(1), FMC Rules of Practice and Procedure.

[7] Flota also contended during the course of the proceeding that it was not a common carrier of bananas, that even if it was it had not prejudiced or unjustly discriminated against shippers, and that it had not violated the Act.

a complex and lengthy hearing into the physical characteristics and utilization of its vessels so far as the banana trade was concerned. Flota made the contention notwithstanding the in-depth probing of the special conditions of banana carriage including multiple shipper problems, which had occurred in the *Grace* cases. It hoped somehow to avoid those cases. Flota had a right to attempt this but any possibility of a prompt disposition of the controversy was thereby precluded, no matter what form the adjudication took.

Clearly, there is no substance to Flota's argument that its petition should have been determined independently of the complaints filed by Consolo and Banana Distributors, or that this would have expedited resolution of the dispute. Flota suffered no prejudice through the consolidation of its petition with complaints involving the identical controversy. We think the Board was entirely reasonable in exercising its discretion in this respect.

Nor is there any support for the suggestion that there was Board delay in the actual handling of the controversy, for which Flota is being made to pay reparations. The consolidated proceeding took about two years to terminate, and Flota meanwhile continued its advantageous Panama Ecuador arrangement. Panama Ecuador itself participated in the case, arguing along with Flota that the physical limitations of the vessels foreclosed their use by more than one banana shipper.

The record of the proceeding reflects that numerous requests for postponements were made and that Flota either authored or favored most of these. If there was any disposition on its part for a prompt determination, this cannot be discerned. For example, Flota asked for and obtained delays in answering Consolo's complaint and in the time set for the first prehearing conference; it joined in putting the hearing off to a date four months after that prehearing; and it then moved for a further delay of over two months in the hearing date. The hearing thus did not begin until a year after the filing of Flota's petition and Consolo's complaint. Whatever else may be said in justification of these delays, they cannot be explained on the ground that Flota was seeking "prior action" on its petition. The delays were in no sense caused by the Board. Indeed, in rendering their decisions the Examiner and the Board acted with what may be termed unusual dispatch, considering the controversial nature and size of the record.[8]

Turning now to Flota's allegation that under the Board's decision in the *Grace* case it believed its forward booking contract with Panama

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[8] The Examiner's decision was rendered three weeks after he received the parties' briefs; the Board's six weeks after it heard the oral argument.

Ecuador was for a reasonable period of time, we find it impossible to understand how Flota could have held any such belief. The 1957 *Grace* decision authorized forward booking for not to exceed two years, whereupon Flota executed a renewal of the Panama Ecuador contract for three years. That decision also set forth the criteria for valid forward booking contracts, making it quite clear that such an arrangement must provide "a reasonable opportunity for prospective shippers to engage in the trade" and the available space must be fairly prorated among qualified shippers. The duration of the contract is not even relevant until this latter requirement has been satisfied. Flota made no attempt to prorate its available space among qualified shippers. Instead, the space was offered and contracted to one shipper on an exclusive basis and this was illegal, apart from the period of time which the contract covered.

The final point to which we were directed to give further consideration involves Flota's contention that Consolo's failure to use all of his available space on Grace Line ships should reduce the reparations assessed in his favor. In arriving at its reparations figure, however, the Board did take account of this factor, and its award reflects this consideration.

There are certain periods during the year when the market for bananas drops, importers reduce their purchases and shippers naturally reduce their shipments to reflect the declining market. This is an industry-wide condition, so that at the same time Consolo was not fully utilizing his space on Grace Line, Panama Ecuador was not filling Flota's vessels nor were other shippers in the trade making full use of their available space.

The Board's reparation award was computed as follows: For each voyage made by Flota during the reparation period (Panama Ecuador, of course, being the only banana shipper), there was figured, for the actual number of bananas carried, the price received by Panama Ecuador upon the sale of the bananas less its cost of purchasing them. From this figure was deducted shipping and handling expenses such as freight and stevedoring, to arrive at the net profit or loss for the bananas shipped on each voyage.

Not every voyage was profitable and during the slack periods referred to above, particular voyages resulted in a negative or loss figure. The Board took account of the losses by making appropriate deductions from the profits, thereby compensating for the periods when Consolo could not have used all of the space on Flota's vessels to which he was entitled. The relevant exhibits reflect the industry-wide lag in the market for bananas and show a very close correlation between the periods when Consolo was not using all of his space on Grace

vessels and the periods when Panama Ecuador's shipments on Flota occasioned a loss.

The Board found (and the Court sustained its finding) that an equitable proration of space to Consolo during the reparation period would have been 18.46% of the total. Thus, to determine Consolo's reparations because of being denied its just proration of space, 18.46% of the net profit (adjusted for losses as above described), was taken and the resulting figure was awarded by the Board as reparations.

In mitigation of the Board's award Flota also urges upon us Consolo's failure to charter vessels and his failure to use space available on the Chilean Line. These points are not tenable. We agree with Consolo that it would have been a hardship for him to charter ships in order to ply his trade, and we think it unreasonable to contend he should have done so in the circumstances. Flota does not make clear what ships were available for charter; or that Consolo could have used them; and if he could, on what terms. As to the Chilean Line, it has been shown, to our satisfaction, that Consolo did exert efforts to ship thereon and did, in fact, make several such shipments late in 1958. This arrangement was terminated by the Chilean Line, however, and not by Consolo.

There are other factors and charges which were taken into account in determining the Board's award which we have re-examined and we agree that certain adjustments should be made as urged by Flota. In light of the evidence presented, the freight rate of $34 per ton of bananas charged by Flota to Consolo in 1959, when Consolo was one of several shippers via Flota, appears to be a fairer figure for computing the reparations than the rate of $30.23 per ton Flota had charged its exclusive shipper (Panama Ecuador) for all of the banana space during the reparation period. The Board used the $30.23 rate in its computation.[9] We think Flota would not have continued this rate when faced with the situation of accommodating multiple shippers because operational costs increase when more than one shipper uses the available space. It seems to us the rate of $34 per ton actually charged by Flota when allocating space to several shippers, is more representative of the figure it would have charged had it allocated space to more than one shipper during the reparation period. It may be noted, also, that during the reparation period Consolo was one of several banana shippers using Grace's vessels and Grace charged him $36 per ton.

[9] In determining its reparation figure, the Board computed freight on the basis of $1.134 per stem of bananas, which was the rate charged by Flota to Panama Ecuador, its exclusive shipper, during the reparation period. Bananas average 75 pounds per stem, hence the freight rate per ton used by the Board was $30.23. Our use of the $34 per ton rate increases the amount attributable to freight charges and reduces the reparation figure.

Finally, while we agree with the Board that the stevedoring costs at Philadelphia rather than New York were proper, since Flota served Philadelphia and not New York, the Board inadvertently erred in not figuring an increase in stevedoring costs instituted September 25, 1958 in Philadelphia. This amounted to 9.95 cents per stem and is taken into account, along with the revised freight rate above-mentioned, in out computation of reparations.

Based upon the shipment of 1,061,286 stems of bananas on 98 voyages between August 23, 1957 and July 12, 1959 yielding a total gross profit of $2,513,236.43 (after adjustment for negative or loss figures on some voyages), and the subtraction therefrom of total freight amounting to $1,353,139.65 and stevedoring and incidental expense amounting to $585,876.87,[10] the net profit for the 98 voyages is $574,219.91, of which Consolo is entitled to 18.46% or $106,001.00.

In our opinion this constitutes the legally and mathematically correct measure of damages in this case. We agree with the Board, as apparently did the Court, that no single "equitable" argument belatedly raised by Flota justifies departing therefrom. Flota, however, has stressed the cumulative weight of its arguments as the basis for equitable relief. Flota initiated and pursued the unlawful act without good cause and without a satisfactory showing of good faith, and we have been unable, except as noted, to find any equity in its contentions whether viewed separately or together. But even if that were not so the question would arise as to how we could equitably recognize the cumulative circumstances urged by Flota.

Could we define the equities in dollars and cents? Could we say that equity dictates that a legally and mathematically correct reparation figure be reduced by some unknown and arbitrary percentage such as a third, half, or perhaps all? We think not. It is, in any event, clear to us that by this stage of this prolonged controversy Flota's position has received all possible recognition, as evidenced by the fact that the reparation figure has been successively reduced so that it is now substantially less than half the amount the Examiner awarded Consolo several years ago.

An award is hereby made and shall be paid to complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, in the amount of $106,001.00, with interest at the rate of 6% per annum on any amount unpaid after 60 days, as reparation for the injury caused by respondent's violation of sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916.

[10] This figure is obtained by adding the amount of $53,641.94 for the increase in stevedoring costs at Philadelphia between September 25, 1958 and July 12, 1959 to the $532,234.93 which the Board determined for stevedoring and incidental expense (539,115 stems times 9.95 cents equals $53,641.94).

FEDERAL MARITIME COMMISSION

No. 827 (Sub. No. 1)

Philip R. Consolo

v.

Flota Mercante Grancolombiana, S.A.

Order Directing Payment of Reparations

This proceeding having been remanded by the United States Court of Appeals for the District of Columbia Circuit (*Flota Mercante Grancolombiana, S.A., et al.* v. *F.M.C.* and *U.S.A.*, 302 F. 2d 887, 112 U.S. App. D.C. 302 (1962)), and the Commission having considered the Court's opinion and duly re-examined the entire record and the briefs of the parties submitted on remand, and having on the date hereof made and entered a Report setting forth its findings and conclusions on remand, which Report is hereby referred to and made a part hereof:

It is ordered, That respondent Flota Mercante Grancolombiana, S.A., be and it is hereby directed to pay to complainant Philip R. Consolo of 4425 North Michigan Avenue, Miami Beach, Florida, on or before 60 days from the date hereof, $106,001.00, with interest at the rate of 6% per annum on any amount unpaid after 60 days, as reparation for the injury caused by respondent's violation of sections 14 (Fourth) and 16 (First) of the Shipping Act, 1916.

By the Commission, September 16, 1963.

(Signed) Thomas Lisi,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1144

SEA-LAND SERVICE, INC.—DISCONTINUANCE OF JACKSONVILLE/PUERTO RICO SERVICE

Decided October 3, 1963

1. The discontinuance by embargo of Sea-Land's Jacksonville/Puerto Rico service found not to be lawful since no emergency exists which would justify such action.
2. Sea-Land ordered to comply with the tariff filing requirements of section 2 of the Intercoastal Shipping Act, 1933, in its discontinuance of its Jacksonville/Puerto Rico service.
3. Order of investigation in Docket 1143 modified so as to vacate suspension of rates.

Raymond W. Mitchell for Thatcher Glass Manufacturing Company, Inc.

C. H. Wheeler for Sea-Land Service, Inc.

Donald J. Brunner and *Robert J. Blackwell* as Hearing Counsel

REPORT

BY THE COMMISSION. (John Harllee, *Chairman*, Ashton C. Barrett, *Vice Chairman*, James V. Day, *Commissioner*) :

This proceeding was instituted by the Commission's order of September 19, 1963, giving notice of a hearing affording all interested parties an opportunity to present their positions to the Commission in connection with the discontinuance by Sea-Land Service, Inc. (Sea-Land) of its Jacksonville/Puerto Rico service.

Sea-Land is a common carrier by water engaged in the transportation of property between ports in the United States and ports in Puerto Rico and, as such, is subject to the provisions of the Intercoastal Shipping Act, 1933 ("Act").

From February, 1960, until about April, 1963, Sea-Land served the Jacksonville/Puerto Rico trade by providing an indirect service via Newark, New Jersey, with a minimum charge of $500 per dry-cargo container and $1000 per refrigerated container. In April, 1963, Sea-Land vessels began providing a direct service from Jacksonville, Florida, to Puerto Rico and the minimum charges were withdrawn. On

approximately August 6, 1963, Sea-Land discontinued direct calls at Jacksonville; reinstituted its indirect service via Newark; and filed with the Commission tariff revisions which would have re-established the minimum charges. The minimum charges were protested by several shippers and, on September 5, 1963, were suspended by the Commission and placed under investigation in Docket No. 1143.

By an "Embargo Notice" of September 10, 1963, Sea-Land notified shippers that, effective September 18, 1963,[1] it would "embargo" Puerto Rican/Jacksonville cargo. The embargo was protested by a number of shippers who urged that the Commission take any action that may be necessary to the continuance of the Jacksonville/Puerto Rico service which, it appears, is vital to their business. Meanwhile, Sea-Land advised the Commission that the "embargo" would be suspended temporarily if an opportunity was granted for Sea-Land to present its position to the Commission. Accordingly, "in order better to inform itself in the premises," the Commission issued its order of September 19, 1963. Pursuant thereto, memoranda of law and statements of fact were filed by Sea-Land and by Hearing Counsel. Oral argument was heard before the Commission on October 1, 1963, with these parties and counsel for Thatcher Glass Manufacturing Company participating.

Sea-Land contends (1) that the "embargo" of September 10th is lawful and (2) that the Commission should vacate its suspension of the minimum charges.[2]

Hearing Counsel contends (1) that the embargo is unlawful because no emergency exists which would warrant its imposition and (2) that if Sea-Land desires to discontinue its Jacksonville/Puerto Rico service, it must comply with the requirements of section 2 of the Act. Hearing Counsel also urges that the Commission vacate its suspension.

Thatcher Glass Manufacturing Company takes the position that the embargo is unlawful and the rate minimums unjust and unreasonable.

The other shippers who protested the embargo urge that Sea-Land's embargo be lifted and its service continued, even though the minimum charges remain in effect.

Discussion and Conclusions

The issues presented are (1) whether the "embargo" is lawful and (2) whether the Commission should vacate its suspension of the minimum charges.

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[1] The effective date was postponed to September 25, 1963, and then to October 8, 1963.

[2] Sea-Land's counsel orally withdrew its request that Docket 1143 be dismissed.

1. The right of a common carrier to impose an embargo under certain circumstances is well established in the law. *Order That A. H. Bull SS Co. Show Cause*, 7 FMC 133 (1962) and cases cited therein. However, the conditions which warrant an embargo are limited and must constitute an impossibility to transport. As pointed out in *Boston Wool Trade Assn.* v. *Merchants and Miners Trans. Co.*, 1 U.S.S.B. 32, 33 (1921):

> * * * an embargo is an emergency measure to be resorted to only where there is congestion of traffic, or when it is impossible to transport the freight offered because of physical limitations of the carrier.

There is no evidence that Sea-Land is unable to continue its Jacksonville/Puerto Rico service because of physical limitations. There is evidence that certain mishaps, which occurred to two of Sea-Land's vessels, resulted in the discontinuance of its direct calls at Jacksonville in August, 1963, but indirect service has been provided via Newark. However, the two vessels involved in the mishaps have been redelivered to Sea-Land and are now back in service (though not in the Puerto Rican trade). Therefore, whatever physical limitations may have existed in August, 1963, are no longer present and it would seem to be clear that the primary reason for not continuing the service concerns considerations of financial gain or loss, not physical limitations. This is borne out by the "Embargo Notice" of September 10, 1963, which states:

> Unfortunately, we have been unsuccessful in our efforts to establish these minimum charges and therefore, have been left with no alternative but to decline the acceptance of all future shipments for movement between Jacksonville, Florida and the Commonwealth of Puerto Rico.

While the vessel mishaps may have resulted in discontinuance of Sea-Land's direct service (which service did not involve the minimum charges under suspension), the discontinuance of its indirect service is directly attributable to its lack of success in reinstating its minimum charges. Financial loss, even if such would occur without the minimums, is not justification for the imposition of an embargo. *Bull SS Co., supra.*

In view of the above, we find that the action of Sea-Land taken pursuant to the "Embargo Notice" of September 10, 1963, does not constitute a lawful embargo. If Sea-Land desires to discontinue its Jacksonville/Puerto Rico common carrier service it must withdraw and cancel its "Embargo Notice" and file with the Commission, pursuant to section 2 of the Act, new tariff schedules. Such schedules must be filed at least thirty days prior to the effective date of the discontinuance.

2. By its order of September 5, 1963 (Docket 1143), the Commission in the exercise of its discretion suspended Sea-Land's minimum charges, and ordered an investigation thereof to determine whether they are unjust, unreasonable, or otherwise unlawful, in violation of the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act, 1933, as amended.

Upon further consideration of this action, we are of the opinion that continuation of the suspension, in the over-all, is not in the public interest. We base this determination primarily on the fact that a large number of shippers who will be injured if Sea-Land's Jacksonville/Puerto Rico service is discontinued urge the Commission to take action to maintain the service, whereas only one, Thatcher Glass Manufacturing Company, presently contends it will be damaged by the minimum charges in question. Thatcher is the complainant in Docket 1082, in which it alleges the minimum charges are unlawful and claims reparations. Its position is, therefore, fully protected in that case. We, of course, express no opinion here as to the lawfulness of the rates and will continue our investigation thereof in Docket 1143.

In view of the foregoing, our judgment is that the suspension of the minimum charges should be vacated. An appropriate order to that effect will be entered in Docket 1143.

COMMISSIONERS PATTERSON AND STAKEM, DISSENTING:

We dissent from the majority decision insofar as it revokes the Commission's order of September 5, 1963, in Docket No. 1143, suspending until January 6, 1964, Item 37 on the 13th Revised Page 30–F, Tariff FMC–F No. 3, and Item 3–A on 11th Revised Page 12, FMC–F No. 2. We agree that the respondent's embargo action, the subject of Docket No. 1144, is contrary to law.

First, we believe the revocation of the Commission's suspension order is not justified because (a) such action necessarily involves a judgment about the justness and reasonableness of the proposed rates under investigation in Docket No. 1143 which we are not prepared to make, and (b) no new facts have been shown to exist that did not exist when the suspension order was originally issued.

If we permit the respondent to increase its tariffs to cover its alleged increased costs of the newly revised indirect service from Jacksonville, Florida, to Newark, New Jersey, to Puerto Rico, when the justness and reasonableness of such service and rates are under suspension and investigation in Docket No. 1143, we impliedly say that there may be some justification for the increased rates before we have reviewed any record of facts showing their reasonableness, or have stated whether they are discriminatory as alleged in Docket No. 1082. All we know

now is that service has been changed with no revision of the tariffs and a termination of service is threatened because of a misleading representation that an embargo of direct common carrier service is justified by circumstances.

What facts are available show that nothing whatever has changed since the suspension order was issued.

In spite of the fact that small shippers affected by the proposed minimum rates are not represented in the proceeding (other than Thatcher Glass Co.), the Commission must consider their interests as part of the public interest. The newly proposed minimum charges (13th Revised Page 30–F effective September 7, 1963, cancelling 12th Revised Page 30–F originally effective July 4, 1963) may not affect the large shippers, but the new tariff does affect complainant Thatcher Glass Company and others similarly situated, and all are affected by the threatened loss of service which will come about if respondent does not get its way in increasing the minimum quantities and charges to cover the apparently abandoned direct service to Puerto Rico. Until the reasonableness and justness of the rates can be adjudicated, respondent, absent any changed facts, should continue the status quo at least for the period authorized by law for suspension. The order of suspension should not be vacated.

Second, respondent's tariffs show that Sea-Land Service, Inc., Puerto Rican Division, in FMC–F No. 3 (3rd Revised Page 7) under "ports and terminals from and to which rates herein apply" offers the public common carrier service from its established terminals at Jacksonville, Florida, to its established terminals at the ports of Mayaguez and Ponce in Puerto Rico. Nothing is stated in the tariffs about the routing, but in fact direct service to and from Puerto Rico was provided until about August 6, 1963. Approximately August 6, 1963, according to an "Embargo Notice" of September 10, 1963, Sea-Land "was caused to discontinue direct service between Jacksonville, Florida, and ports within the Commonwealth of Puerto Rico, due to the temporary withdrawal of two vessels from its service." The temporary withdrawal was caused by two separate marine casualties involving Sea-Land's vessels. but these vessels have since been repaired and the two ships were back in service by August 31 and September 21, 1963, as shown by sailing information in Journal of Commerce advertisements. Nevertheless, the embargo which is stated to be "effective September 18, 1963", deferred until September 25 by Supplemental Embargo Notice and to October 8, 1963, by a Second Supplemental Embargo Notice, remains "in effect until further notice." The Commission is not informed of any further notice. The deferrals were made to permit the Commission to hear Sea-Land's arguments.

It has been correctly pointed out that an embargo is an emergency measure of temporary duration justifying suspension of common carrier service because of physical limitations on the carrier's ability to provide service. This physical limitation has ended, but the embargo continues in spite of the offer of common carrier service in the tariffs.

The tariff rates covering direct service were still in effect during the suspension period, and even though the suspension is lifted the tariffs remain silent as to any change in the direct routing service. We consider that the so-called embargo (pursuant to the last paragraph of the September 10, 1963, embargo notice) of "the transportation of all commodities via its service between Jacksonville, Florida, on the one hand and ports within the Commonwealth of Puerto Rico on the other hand" is not a true embargo, but has been imposed for the convenience of the respondent for economic reasons. As the embargo states: "Unfortunately, we have been unsuccessful in our efforts to establish these minimum charges [the reference is to charges based on service via Newark, N.J.] and, therefore, have been left with no alternative but to decline the acceptance of all future shipments for movement between Jacksonville, Florida, and the Commonwealth of Puerto Rico." Furthermore, we consider that the tariffs do not correctly state the nature of Sea-Land service and that there has been a drastic change in service without any revision of the description of the service other than is implied by the proposed increase in rates. The improper use of the embargo, the failure properly to describe the service offered in the tariffs, and the proposed refusal to continue service by means of the embargo notice instead of a revision of the tariff are practices which in our opinion are unjust and unreasonable in violation of Section 4 of the Intercoastal Shipping Act, 1933. The foregoing constitute our reason for supporting the issue of a cease and desist order against the "embargo" in Docket No. 1144.

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FEDERAL MARITIME COMMISSION

No. 1144

SEA-LAND SERVICE, INC.—DISCONTINUANCE OF JACKSONVILLE/PUERTO RICO SERVICE

ORDER

The Commission having fully considered the above matter and having this date made and entered of record a Report containing its conclusions and decision thereon, which Report is hereby referred to and made a part hereof;

It is ordered, That Sea-Land Service, Inc., withdraw and cancel the "embargo" imposed by its "Embargo Notice" of September 10, 1963 (and supplements thereto), in the same manner in which the "embargoes" were instituted.

By the Commission, October 3, 1963.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1095

AGREEMENT No. 150–21, TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN AND AGREEMENT No. 3103–17, JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE

Decided October 30, 1963

1. Section 15 does not require, in the absence of a provision in the basic agreement to the contrary, that modification strengthening self-policing system of conference be adopted only upon unanimous vote of the parties to such approved agreements.
2. Agreement No. 150–21 and Agreement No. 3103–17, approved pursuant to section 15, Shipping Act, 1916.

Leonard G. James and *Charles F. Warren* for respondents.

George F. Galland and *Amy Scupi* for States Marine Lines.

Thomas K. Roche and *Sanford L. Miller* for A. P. Moller-Maersk Line, intervener.

Wm. Jarrel Smith, Jr., Hearing Counsel.

REPORT

BY THE COMMISSION (John Harllee, *Chairman*, Ashton C. Barrett, James V. Day, Thos. E. Stakem, *Commissioners*) :

This proceeding was instituted to hear protests against the approval under section 15, Shipping Act, 1916, of certain proposed modifications of two existing conference agreements. Agreement No. 150–21 is a proposed modification of the basic agreement of the respondent Trans-Pacific Freight Conference of Japan which seeks to strengthen the "neutral body" system presently employed by Trans-Pacific to police the obligations of its members under the basic agreement. States Marine Lines and Isthmian Lines, Inc., parties to Agreement No. 150, the basic agreement, have protested approval of the proposed modification on several grounds.

Agreement No. 3103–17 is a proposed modification of the basic agreement of the respondent Japan-Atlantic & Gulf Freight Conference which also seeks to strengthen the "neutral body" system presently employed by Japan-Atlantic to police the obligations of its members under the basic agreement. States Marine Lines, a party to Agreement

No. 3103, the basic agreement, has protested approval of this modifica tion on the same grounds as its protests of Agreement No. 150-21.

Except for differences not relevant here both basic agreements anc the proposed modifications thereto are identical in their terms and foı the purposes of this report they shall be treated as one. The present self-policing systems of both respondent conferences are provided foı in Article 25 of their respective basic agreements. (For the full text of present article 25 see Appendix A to this Report.)

Under their present systems, respondents select and appoint a neutral body from responsible accountants or other persons, but the person appointed may not be employed by nor financially interested in any party to the basic agreement. Once appointed, the neutral body is empowered to receive and investigate complaints in writing from members of the conference, and to engage agents, lawyers and other experts and receive evidence from members in the conduct of such investigations. In turn, the conference members are obligated to cooperate with the neutral body in the course of its investigations and must make available to it all records, correspondence and documents of every kind wherever located. When its investigation is completed, the neutral body has the sole discretion to determine whether or not there has been an infringement of the basic agreement and the conference has no right to question its decision. If an infringement is found, the neutral body fixes the amount of the fine [1] and reports, to the extent it deems appropriate, the results of its investigation to an "Ethics Committee." The Ethics Committee, composed of the conference chairman and three members selected by him, then informs the member lines through the chairman.

Under the proposed modifications the powers of the neutral body are somewhat enlarged and the procedures by which it conducts its investigations are set forth in greater detail. (The full text of the proposed modifications appears in Appendix B to this report.)

Under the proposed system a person would not be disqualified to act as the neutral body by virtue of employment by or interest in a party to the basic agreement if, prior to appointment, the person selected divulges such interest and the conference appoints him with knowledge thereof. The neutral body, in addition to investigating written complaints of "malpractices," would be empowered to institute such investigations on its own motion. "Malpractice" is defined in the proposed modification as "any direct or indirect favor or benefit or rebate, granted by a member or its agents to a shipper, consignee, buyer or

[1] The maximum fines are specified in Article 25 as $10,000 for the first offense; $15,000 for the second offense; $20,000 for the third offense, and $30,000 for the fourth and subsequent offenses. These maxima are unchanged under the proposed modification.

other cargo interests or any of their agents, or any other act or practice resulting in unfair competitive advantage over other members." While under the present Article 25 the member lines are obligated to make available all books, records, etc., the proposed modifications affirmatively grant the neutral body right of access to the books, records, etc. of the members "immediately and without prior screening by the member or its agents." In addition, the failure of a member to supply materials and cooperate with the neutral body in its investigations would constitute a breach of the basic agreement. Procedures to be followed by the neutral body in granting a "hearing for respondent" are set forth in the proposed modifications, and "the respondent is granted an opportunity to appear before the neutral body with his accountants or counsel or both and offer such explanations as he may have." The present Article 25 is silent as to any right of the respondent to a hearing.

The foregoing represent the major changes respondents seek to make in their present systems. There are other differences but these are primarily differences in language only and will be discussed only if and where germane to issues raised by the protests.

In addition to protesting specific provisions of the proposed modifications on their merits States Marine and Isthmian in their original protests contend that the modifications are invalid under section 15 because they were not adopted by unanimous vote. In our order instituting this proceeding we expressed our particular interest in receiving argument on the question of whether section 15 of the Shipping Act requires such unanimity. Respondents did not file any memorandum directed to the merits in this proceeding, taking the position in a motion to dismiss that a full evidentiary hearing was required before the Commission could disapprove an agreement under section 15. Memoranda, directed solely to the unanimity issue, were filed by States Marine; by A. P. Moller-Maersk Line, as intervener; and by Hearing Counsel. States Marine, of course, takes the position that unanimity is required while Hearing Counsel takes the opposing position. Moller-Maersk contends that the question is not susceptible of an unqualified answer but requires an *ad hoc* determination based upon specific modifications.

Section 15 provides in part:

"That every common carrier by water * * * shall file immediately with the Commission * * * every agreement with another such carrier * * * to which it may be a party or conform in whole or in part."

From the above quoted provision of section 15, States Marine argues that because it voted against the proposed modifications they are not agreements to which it is party or to which it conforms in whole or in part and thus they are not proper agreements under section 15.

Articles 18 and 19 of respondents' basic agreements set forth the voting procedure and requirements by which the respondents conduct their operations as conferences in our foreign commerce. Pursuant to Article 18, three-fourths of all parties entitled to vote constitute a quorum, except when changes in the basic agreement are being considered, when it requires four-fifths of those parties entitled to vote to make a quorum. Article 19(a) provides that once the four-fifths quorum is present, all parties agree to be bound by changes to the basic agreement made with the consent of two-thirds of all parties entitled to vote. Articles 18 and 19 were a part of the basic agreement when States Marine was admitted to membership.

States Marine contends that notwithstanding the language of Articles 18 and 19, a modification of the basic agreement without unanimous consent of the parties alters the contractual relations of the dissentient parties contrary to the principles of contract law and is thus invalid. States Marine argues, in an attempt to avoid its obligations under Articles 18 and 19, that because it was not among the original organizers of the respective conferences and had no part in the formulation of their basic agreements it remains free to attack those portions of the agreements which it considers improper. For States Marine to prevail, some provision of section 15 must render the voting requirements of Articles 18 and 19 invalid, for if they are valid States Marine as a subscriber to the agreement is bound thereby.

In attempting to show that the voting requirements are invalid States Marine attempts to draw analogies from the field of private contract law. We think these analogies improper. Private contracts, normally between two parties, cannot reasonably be equated with agreements approved under section 15. An agreement providing for the organization of a conference to operate in our foreign commerce is of necessity an agreement which attempts to reconcile a number of divergent interests insofar as is consistent with Congressional policy and the public interest in the free flow of our foreign commerce. Such an agreement must provide for the continuing commercial operations of a relatively large number of conference members with as little friction and obstruction as possible. The very heart of such an agreement is that each individual line relinquishes some of its freedom of action, in exchange for the benefits resulting from participation in the conference arrangement.[3]

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[3] This is by no means a novel relationship. Analogous situations pervade our political, economic and social structure. Just one example in the economic sphere is found in corporate organizations. A corporation can make fundamental changes in its charter, changing the very nature of the corporate business, and most states require only that the consent of two-thirds or three-fourths of the stockholders be given to this change. The dissenting stockholder must either bow to the will of the majority or sell his stock. The latter alternative is, in effect, resignation from the corporation.

This concept of majority rule is not uncommon in the ocean freight industry. A good many agreements on file with the Commission provide for the modification thereof by a stated majority. We do not consider it unreasonable for a conference to make such a provision in its basic agreement, provided it is not applied so as to contravene the standards of section 15. We find nothing in the concept of majority rule as applied to the proposed modifications here under consideration which renders it discriminatory as between carriers or shippers, detrimental to the commerce of the United States, contrary to the public interest or otherwise contrary to the requirements of section 15. States Marine in accepting membership in the respondent conferences has bound itself to the terms of the basic agreement, and so long as it chooses to remain a member it must conform to all modifications thereto which are regularly made and duly approved by the Commission.

Both States Marine and Isthmian object to the conferences' system of recording affirmative action on proposed modifications when they are filed with the Commission for approval under section 15. When the required majority has voted to amend the conference agreement, the approved amendment is subscribed in the following standard form:

"In witness whereof the Trans-Pacific Freight Conference of Japan [or the Japan-Atlantic & Gulf Freight Conference] the members of which are all hereinafter listed, has authorized the foregoing amendments by resolution passed at its Regular Conference Meeting held [date] in [place]."

This is followed by an alphabetical listing of all the members of the conference, including those who had voted against the proposal, and then by the signature of the conference chairman, who signs on behalf of all its members.

Protestants claim that the signature of the conference chairman on behalf of the entire membership falsely implies that the modification was carried unanimously.

We agree. The method used by respondents is misleading at best, and we are of the view that the respondents should adopt a signature form which removes any possibility of a false impression as to the unanimity of an action when in fact unanimity does not exist.

Protestants also challenge several of the substantive features of the proposed modifications. Basically they object to the following:

1. The provision allowing the neutral body to have an "interest" in a party to the basic agreement so long as that interest is divulged prior to appointment.
2. The asserted vagueness of the neutral body's jurisdiction under the proposed modification.
3. The provision making the failure of a member to report a suspected malpractice a breach of the basic agreement.

4. The unlimited investigatory power of the neutral body and the absence of a statute of limitations.
5. The failure to apprise the accused of the identity of his accuser and the lack of procedural safeguards.
6. The failure to inform the accused of the disposition of complaints other than those in which a violation is found.

In a recent amendment to section 15, Congress expressed its concern over past failures of steamship conferences operating in our foreign commerce to live up to the terms of their agreements when it directed this Commission to disapprove any agreement upon a finding of inadequate policing of the obligations under it.[3] Congress, however, left to the individual conferences the responsibility of selecting the method best suited for their particular trade and situation. In furtherance of this intent of Congress we have adopted a broad policy respecting self-policing systems of conferences operating in our foreign commerce.[4] While section 15 requires self-policing modifications to be approved under that section as comprising a part of the complete agreement of the parties, we are not inclined when considering approval to specify the procedures by which the parties seek to insure that each will fulfill its obligations to the others. It seems to us that the prime concern when considering whether to approve such an agreement is whether it is unjustly discriminatory as between the carriers party to it and whether it is reasonably probable that the agreement will insure adequate policing, thereby fostering the free flow of our commerce unhampered by malpractices.

The proposed modifications now before us are designed to strengthen the self-policing systems of the respondent conferences. The essence of protestants' argument against approval of these agreements is that the power vested in the neutral body is capable of abuse. The Commission must assume, however, that once the agreement is approved the conference will live up to its obligation to apply that agreement so that it does, in fact, adequately and without discrimination police conference obligations. We are of course under a continuing duty to maintain surveillance of these and all section 15 agreements, and should respondents fail to apply the agreements approved herein effectively and without discrimination, we shall take such steps as are necessary under the circumstances.

We have examined the proposed modifications and the protests thereto. We find nothing in the proposed modifications which war-

[3] Public Law 87-346 (75 Stat. 764) amended section 15 by including *inter alia* the following provision: "The Commission shall disapprove any such agreement, after notice and hearing on a finding of inadequate policing of the obligations under it * * *"

[4] See statement of the Commission upon promulgation of rules governing self-policing systems, 28 F.R. 9257, August 22, 1963.

rants their disapproval under section 15. Thus we conclude that Agreements No. 150-21 and 3103-17, are not discriminatory as between the carriers party thereto nor detrimental to the commerce of the United States, contrary to the public interest, or otherwise violative of the Act, and they should be approved under section 15 of the Act.

In the light of this conclusion, we deem it unnecessary to rule on respondents' contention that we may deny approval of the modifications only after a full evidentiary hearing and respondents' motion to dismiss is hereby denied. An appropriate order will be issued.

COMMISSIONER PATTERSON, DISSENTING:

Based on the record before me in this proceeding, my conclusions are as follows:

First. I concur in the result reached in the preceding report as to the adequacy of all parts of Article 25 with the exception of sub-articles 25(a) and 25(f) proposed for approval by the Conference.

Second. I dissent from that part of the Commission's majority decision which approves sub-articles 25(a) and 25(f) of Appendix B.

As regards my dissent which is stated above as my second conclusion, I find inadequate policing of the obligations pursuant to section 15 of the Act as a result of sub-article 25(a), paragraphs (1) and (2), which provide for the appointment of an impartial, independent person or firm as a neutral body which shall not have any "interest" in the form of any material professional or business relationships, financial interests or service contracts in a Conference member. Paragraph (2) says that in case of such an interest it shall be divulged and will not thereafter affect the qualification of the neutral body, but such interested neutral body must disqualify itself "in the event of a complaint *against* a member with which it may have such an interest." (Underscoring added.) The provision in paragraph (2) which requires disqualification only in the event of a complaint against a member but not by a member in which the neutral body may have an interest belies the high standards of neutrality set up in paragraph (1).

The two conditions are incompatible. The second condition in paragraph (2), if it means anything, means that the neutral body is not independent and can not in fact be impartial. The effectiveness of this cancellation of the independent and impartial standard is reinforced by a further obligation that the Conference members "will not raise an objection, based on such grounds * * *" (i.e., employment by a complaining party). The effect of these provisions is to permit the neutral body to have a commercial bias through business relationships as long as the bias does not favor the accused. If the neutral body is the regular accountant or auditor of the complaining carrier and discloses such relationship, it is qualified to pass on alleged

violations, but if it is the same thing for the accused it is powerless to act. Such a provision which creates and then contradicts the expressions of independence through such a distortion of the neutrality concept of favoring neither side in a dispute, by permitting a spurious neutrality or bias in favor of an accuser and against an accused, provides inadequate policing in my view.

This inadequacy through a defiance of the rules of fair play may be thought to have been invited by the Court in *Trans-Pacific Freight Conference of Japan* v. *Federal Maritime Commission*, 314 F. 2d 928 (9th Cir., 1963), when, in the course of an opinion holding valid and affirming our order in Docket No. 920 and 920 (sub. 1), the court remarked whether "a further amendment eliminating this requirement of true neutrality would have ultimately been approved by the Board is something on which we are not required to speculate." In Docket No. 920 and 920 (Sub. 1), the Commission reviewed the same Conference's Article 25 before the presently proposed amendment, which simply provided for the appointment of a neutral body policing unit and stated that the neutral body "could not be a party to nor employed by nor financially interested in any party to the Agreement." Because of the facts showing that the neutral body was an agent of a regular auditor of one of the members of the Conference, the Commission said: "If the person selected was not actually neutral or impartial, then unquestionably there was a departure from that which the Board had approved and to which the conference membership had agreed." It is my opinion that the Commissioners held that the facts showed non-conformity with the terms of the contract's neutral body provisions. The presence or absence of true neutrality is still the issue, in spite of the changed language, and on this issue the inconsistent provisions fall down just as the Conference's deeds failed to measure up to the true neutrality provisions of its contract in the case before the Court. Believing true neutrality to be the proper standard, then non-neutrality in the proposed Agreement involves inadequacy as regards this norm, and it is my opinion that the Commission should make a finding of inadequacy of the revised provisions.

My dissent from approval of sub-article 25(f) is not directed at any specific provision, but to the absence of any provision putting a time limit on how far back into the past a neutral body can go in investigating complaints. To the extent of the absence of a limit, such as two years, the policing provisions are inadequate.

Ideally, the hearing procedure provided for in sub-article (f) should provide a method for determining the full truth in connection with an alleged malpractice. An adequate provision will at least provide a rudimentary method for obtaining the truth so the neutral body can

make a fair decision. If the neutral body is allowed to investigate complaints based on past occurrences where the evidence will be imprecise or nonexistent, where peoples' memories will be vague and documents will have been destroyed, the opportunity for obtaining the truth and a fair hearing is lost. When this lack of safeguard for the discovery of the true facts is coupled with the other provisions of sub-articles (e) and (f), denying the accused the right to know about the evidence against him, not providing a true hearing, with witnesses, and argument, but only the right to offer explanations; giving notice of charges only "after the Neutral Body has completed its investigation and arrived at a tentative decision that there was a breach * * *" determined in secret deliberations on a secret complaint of an unknown complainant, the absence of any provision to prevent stale complaints compels disapproval.

Unless Article 25 is further modified to prevent complaints based on events that occurred before the neutral body system is approved by the Commission and to forbid thereafter examination into stale occurrences, say over two years ago, the policing provision in (f) is inadequate.

APPENDIX A

Article 25 as approved provides:

25. *NEUTRAL BODY.* There shall be a Neutral Body selected and appointed by the conference from responsible accountants or other person or persons, not a party to, nor employed by or financially interested in any party to the agreement upon such terms as are agreed between the conference and the Neutral Body. The Neutral Body shall have the following powers, duties and responsibilities.

1. To receive complaints in writing from members of the conference pursuant to their obligations hereunder to report malpractices.
2. To investigate said complaints and receive evidence thereon from members of the conference or from the conference offices or otherwise.
3. To engage agents, lawyers or other experts in connection with its investigation and consideration of complaints and to pay on behalf of the conference all costs incidental to engagement and use of such agents, lawyers and other experts.
4. To have absolute discretion to decide whether or not an infringement has taken place and the conference shall have no right to question such decision, subject to the maximum fines set forth below.

   The maximum fines assessed by the Neutral Body shall be:

   (a) First offense up to a maximum of U.S. $10,000.00
   (b) Second offense up to a maximum of U.S. $15,000.00
   (c) Third offense up to a maximum of U.S. $20,000.00
   (d) Fourth offense and subsequent offenses up to a maximum of U.S. $30,000.00
5. To report to the extent appropriate the result of its investigation to Ethics Committee but without disclosing the names of complainants.

The Ethics Committee shall notify the member lines through the conference Chairman.

6. To give directions as to payment of fines after assessment and notification to the Ethics Committee.
7. The undersigned lines promise to report immediately to the Neutral Body directly any apparent or alleged deviation from the conference agreement of its rules and regulations of correct and ethical practices thereunder which come to their attention or knowledge.
   All lines agree to accept the decision(s) and any assessment(s) of fines thereof by the Neutral Body as final and binding.
8. To enable complaints to be investigated, the conference shall make available to the Neutral Body all records, correspondence and documents of every kind wherever located and give all assistance and information whatsoever verbal or otherwise which may be required by the Neutral Body at their absolute discretion. All the records of the freight conference at the secretary's office will also be available to the Neutral Body.
9. The conference members jointly and severally shall indemnify the Neutral Body against any liability to third parties including employees under any libel or other action which might be brought against the Neutral Body arising from the performance of its duties under this agreement. The conference members jointly and severally shall have no right to claim against the Neutral Body or their agents in any such libel or other action.
10. The retainer fee and other compensation for services of the Neutral Body shall be as agreed between the member lines and the Neutral Body.

APPENDIX B

The proposed modification of Article 25 is as follows:

Article 25. *NEUTRAL BODY*

(a) *Appointment and Qualifications of the Neutral Body:*

(1) The Conference shall appoint, upon terms to be fixed by separate contract, an impartial, independent person, firm or organization to be designated the Neutral Body which shall be authorized to receive written complaints reporting possible breaches of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice, and to investigate and decide upon such alleged breaches and, if such breaches are found, to assess damages, and in addition, to collect damages assessed, after payment thereof becomes delinquent.

(2) Appointment of the Neutral Body hereafter will be by vote of the Conference membership under Article 19 of the Conference Agreement. The appointment will be made from amongst candidates which are qualified and willing to serve.

Prior to such appointment, a candidate will be required to divulge to the Conference any material "professional or business relationships, financial interests or service contracts" (hereafter in this Article simply "interests") which it may have with any of the members, their "employees, agents, sub-agents or their subsidiaries or affiliates" (hereafter in this Article simply "agents"). The candidate will also be required to agree, in the event of appointment, to divulge any future proposals it might receive to create such interest, and promise to obtain Conference approval thereof before accepting any such proposal. Such interest so divulged, if any, will not affect the qualification of the Neutral Body

when appointed by the Conference with knowledge thereof, and the members will not raise an objection, based on such grounds, to an investigation or decision made or damages assessed by the Neutral Body or its agents; provided, however, that the Neutral Body will be required before appointment to agree to disqualify itself in the event of a complaint against a member with which it may have such an interest. After disqualifying itself the Neutral Body is authorized to appoint an agent without such interest in the respondent to conduct the particular investigation and handle the complaint on behalf of the Neutral Body and such appointee shall have all the authority and duties of the Neutral Body for that particular matter up through the date when the appointee reports its decision to the Ethics Committee under this Article 25(f)(4).

(3) The Neutral Body will have the authority and responsibility to engage agents, lawyers and/or experts, including shipping experts, who can assist with its investigation and consideration of complaints and to pay on behalf of the Conference all costs incidental thereto. Such agents or experts appointed by the Neutral Body must not have any interest in the particular member named in the particular complaint.

(b) *Jurisdiction of the Neutral Body:*

(1) The Neutral Body shall have jurisdiction to handle, in accordance with the procedures of this Article all written complaints submitted to the Neutral Body by the Conference Chairman or a member alleging breach of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice or, on its own motion, any breaches of this Article 25; provided, that nothing herein contained shall change the functions of the Misrating Committee.

(2) "Malpractice" as used in this Article shall mean any direct or indirect favor, benefit or rebate, granted by a member or its agents to a shipper, consignee, buyer, or other cargo interests or any of their agents, or any other act or practice resulting in unfair competitive advantage over other members.

(c) *Member Lines' Responsibility to Report Breaches and Assist Investigations:*

(1) The members and/or the Conference Chairman shall report promptly to the Neutral Body in a written complaint any and all information of whatsoever kind or nature coming to their knowledge which, in their opinion, indicates a breach of the Conference Agreement, Tariff Rates or Rules and Regulations involving malpractice or any breach of this Article 25 by a member or its agents, and failure to report such information by any member will be a breach of this Article.

(d) *Investigation:*

(1) The Neutral Body and/or its agents, shall have the power, authority and responsibility to investigate written complaints and in investigating said complaints to call upon a member or its agents at any of their offices during office hours and inspect, copy and/or obtain "correspondence, records, documents, signed written statements or oral information and/or other materials" (hereinafter in this Article "materials"), which materials are deemed by the Neutral Body in its sole discretion to be relevant to the complaint. Upon making such a call the Neutral Body shall have the right to see and copy such materials immediately and without prior screening by the member or its agents.

(2) Correspondingly each of the members shall have the duty and responsibility to supply such materials, and to cooperate in interviews promptly upon demand made in person by the Neutral Body or its agents and without prior screening, whether said materials or personnel are located in the member's own

offices or in its agents' offices. Failure of a member or its agents to supply the materials required by the Neutral Body or its agents promptly will constitute a breach of this Agreement by the member, and the member undertakes to thoroughly inform its agents of the member's liability for their conduct and obtain their commitment to comply with the Conference Agreement, Tariff Rates and Rules and Regulations. In addition the members undertake an affirmative duty to cooperate and assist the Neutral Body in obtaining other required information whenever possible.

(3) The records of the Conference will be made available to the Neutral Body on request and the Conference Chairman and staff will render all assistance possible to the Neutral Body during investigations.

(e) *Confidential Information:*

(1) The Neutral Body will under no circumstances disclose the name of the complainant to the respondent or anyone else including the Neutral Body's agents, unless specifically authorized to do so by the complainant.

(2) The Neutral Body will treat all information received during investigations regardless of the sources, as confidential and will not divulge any such information to anyone, except in reporting breaches found and damages assessed to the Ethics Committee, and then only to the extent that the Neutral Body itself deems appropriate.

(f) *Hearing for the Respondent; Neutral Body Decisions and Announcement Thereof:*

(1) On concluding its investigation, the Neutral Body will consider the information obtained and decide in its absolute discretion whether the facts have been sufficiently established to constitute a breach of the Agreement, Tariff Rates or Rules and Regulations, and if a breach is found which was not covered by the complaint, such breach may also be reported and damages may be assessed thereon against any member liable.

(2) In deciding whether a breach exists based on the results of its investigation, the Neutral Body will not be restricted by legal rules of evidence or the burden of proof required to establish criminality, or even a civil claim. Instead it will employ rules of common sense in determining breaches and assessing damages and the only standard required is that the information developed is persuasive to the Neutral Body itself that the breach probably occurred.

(3) After the Neutral Body has completed its investigation and arrived at its tentative decision that there was a breach (but before announcing the breach to the Ethics Committee, and even before the amount of damages is decided), the Neutral Body will inform the respondent of the nature of the breach indicated, as well as such supporting information and evidence as the Neutral Body in its absolute discretion may choose to disclose. Within fifteen (15) days, if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or counsel, and offer to the Neutral Body such explanations as it may choose at such meeting.

(4) The Neutral Body will then make its final decision and either discharge the respondent or assess liquidated damages against him. In assessing said damages, the members recognize that breaches of the Conference Agreement, Tariff Rates or Rules and Regulations cause substantial damages, not only in lost freight but in consequent instability of the Conference rate structure. The members further recognize that the damages caused are cumulative with the number of breaches, but the members further recognize that it is difficult to assess such damages precisely. Therefore the Neutral Body is authorized to assess liquidated damages in accordance with the following schedule:

(a) First breach: maximum of Ten Thousand Dollars ($10,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

(b) Second breach: maximum of Fifteen Thousand Dollars ($15.000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

(c) Third breach: maximum of Twenty Thousand Dollars ($20,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

(d) Fourth breach and subsequent breaches: maximum of Thirty Thousand Dollars ($30,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

After its decision the Neutral Body will then report to the Ethics Committee the decision and the amount of the damages assessed, if any. In addition the Neutral Body may report evidence or information discovered during its investigation, but the extent of such further reporting, if any, shall be subject to the absolute discretion of the Neutral Body, and in no event will the Neutral Body report the name of the complainant without consent, or report confidential information.

(5) The Ethics Committee will notify the members through the Chairman, of the decision and damages, if any, and will also at the same time instruct the Chairman to notify the respondent of the decision, but only if a breach is found, and in such case the respondent will be furnished with the Neutral Body report and a Conference debit note covering the liquidated damages assessed.

(g) *Unquestioned Recognition of Decisions of the Neutral Body:*

(1) The members agree to accept the decisions of the Neutral Body as valid, conclusive and unimpeachable, but it is understood between the members that decisions of the Neutral Body are not admissions or proof of guilt or liability under law.

(2) The members further agree that neither jointly or severally will they bring any action whatsoever against the Neutral Body or its agents for damages allegedly arising out of its acts, omissions and/or decisions as the Neutral Body. In addition, each member agrees to hold the other members of the Conference and the Neutral Body and its agents harmless from any claims which may be brought by its agents or employees against another member, the Conference or the Neutral Body or its agents for damages allegedly arising out the Neutral Body's acts or functions.

(h) *Payment of Damages:*

(1) The members will pay all damages duly assessed by the Neutral Body upon receipt of a debit note from the Chairman, and if not paid within thirty (30) days of receipt of the debit note, the damages will become delinquent under Article 28 of the Conference Agreement.

(2) The Neutral Body will have the power and responsibility immediately, without notice to or further authority from the Conference, to collect as agent for the Conference and by any measures recommended by legal counsel, any damages duly assessed, as soon as they become delinquent, from the deposit or substitute security submitted and maintained by the members under Article 12 of this Agreement. The Neutral Body will pay over to the Conference immediately all damages collected.

FEDERAL MARITIME COMMISSION

No. 1095

AGREEMENT NO. 150–21, TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN AND AGREEMENT NO. 3103–17, JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE

ORDER

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 Agreements No. 150–21 and 3103–17 are hereby approved.

By the Commission, October 30, 1963.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

Special Docket No. 266

CORPORACION AUTONOMA REGIONAL DEL CAUCA, ET AL.

v.

DOVAR S.A. INTERNATIONAL SHIPPING & TRADING CO.

Application under Rule 6(b) for permission to waive undercharges is granted, and applicant is directed to refund an overcharge.

Andrew A. Normandeau, Donoghue, Ragan & Mason, for applicant.

INITIAL DECISION OF WALTER T. SOUTHWORTH, EXAMINER [1]

Dovar S.A. International Shipping & Trading Co. (Dovar) applies for permission under Rule 6(b) of the Commission's Rules of Practice and Procedure (1) to waive the collection from four shippers of undercharges aggregating over $31,000 on six commodities carried from Atlantic coast ports to ports in Colombia, Ecuador and Costa Rica at rates substantially below applicant's published tariffs in effect at the time of shipment; and (2) to refund to one of the same shippers an overcharge of $30.80 made on a shipmnet of household goods. The application involves a single southbound voyage of the M.V. *Adriana*, sailing from New York November 2, Norfolk November 6, and Savannah November 8, 1962. Details of the shipments, including names and addresses of the shippers (complainants), are shown in Schedule A attached. The application was originally filed April 8, 1963; a supplemental statement was filed July 22, 1963; and an amendment correcting certain errors was filed August 5, 1963. Certificates of complainants certifying as to amounts of freight paid and borne as such by each, as required by Rule 6(b), were not filed until September and October; the last two were filed October 23,

[1] This decision became the decision of the Commission on November 27, 1963, and an order was issued granting the application.

1963. Except as otherwise noted, the following facts appear from the application, as supplemented and amended:

Dovar is a small steamship line, engaged primarily in carrying explosives in berth service from United States ports to the Caribbean and South America. When space is available it also solicits general cargo. Apparently it has not made any effort to set up a comprehensive tariff for general cargo; it has filed N.O.S. ("Not Otherwise Specified") rates for some of its usual ports of call, but in general has filed rates for specific commodities only as the opportunity has arisen to carry such cargo. In the present instance, applicant claims to have prepared tariff amendments covering the shipments in question which were "typed, mimeographed and scheduled for mailing to the Commission", but inadvertently were not mailed. Tariffs were filed more than a month later, when the omission was "accidently" discovered. An exception was a tariff covering the shipment of household goods to Colombia, filed November 2, 1962 effective that date, which was the date the ship sailed from New York; and in this case the tariff filed was lower than the rate actually charged. This tariff was ignored; the shipper was charged $30.80 more than the filed rate would have produced, and the tariff was not mentioned in this application until the amendment of August 5, 1963. Even the amendment does not reveal that this tariff was filed November 2, 1962, the date of shipment; but this appears from the records of the Commission.

Tariffs purporting to cover the shipments in question were first filed in December marked "Issued December 7, 1962 Effective December 10, 1962." These tariffs omitted a surcharge of $5.40 per ton or 40 cu. ft. which had in fact been charged on certain items to Colombia, and a surcharge of $.56 per 40 cu. ft. which had been charged on the shipments to Ecuador; and corrected tariffs, adding the surcharges to all items (including some on which a surcharge had not been made) were issued December 18, 1962, effective January 17, 1963.

Also, the December 7, 1962 tariffs did not include a tariff for linerboard shipped to Costa Rica at $18.00 per 2,000 lbs. A linerboard tariff of $24.00 per 2,000 lbs. to Costa Rica had beeen in effect since February 1962. This earlier linerboard tariff was ignored in the original and first supplementary application, although it was mentioned in a letter to the Director of the Commission's Bureau of Foreign Regulation dated January 21, 1963, which was incorporated by reference in the first supplement. The same letter notes that the $18.00 rate was quoted to meet the identical rate offered by a competitor, and was "completely non-renumerative". It may be noted that the only new rate not filed with the first group issued

December 7, 1962, was this "non-renumerative" one; however, there have been so many errors and omissions in connection with the transactions here involved that this omission may not be significant.

Dovar has ascribed its failure to file seasonably to its being, administratively, a one-man organization, and has stated that steps have been taken to improve the situation. The series of errors which has attended its efforts—including the present application—to remedy the situation is not reassuring, but is not necessarily inconsistent with a sincere attempt by applicant to put its house in order; evidently it has, at least, sought the advice of counsel and employed a tariff service organization to try to straighten things out. It is concluded that the case is one of inadvertence, in the sense of carelessness and lack of heedfulness, as well as a mere mistake.

There is no basis for any finding of impropriety on the part of the undercharged shippers; at most it appears that they merely took advantage (as in the case of the linerboard) of a competitive situation. With the exception of the linerboard transaction, the only tariffs on file prior to the booking of shipments were N.O.S. rates more than twice the amount of the rates charged. "Ordinarily, N.O.S. rates are among the highest in the tariff * *." *S. H. Kress & Co.* v. *Baltimore Mail Steamship Co. et al.*, 2 U.S.M.C. 450, 452. The linerboard rate charged, while 25 percent less than the tariff on file, was available to the shipper from another carrier. Having in mind the nature of applicant's operation, the shippers were entitled to assume that applicant would make the minimal effort necessary to make its filed rates conform with its agreed charges.

Innocent shippers should not be made to bear the consequences of the carrier's neglect in filing a tariff rate that the parties, acting in good faith, had agreed would apply. *Martini & Rossi* v. *Lykes Steamship Co., Inc.*, Special Docket No. 244, decided November 13, 1962, citing *Y. Higa Enterprises, Ltd.* v. *Pacific Far East Line*, Special Docket 243, report served January 23, 1962. This is particularly so where, as in the present case, the carrier would receive a very substantial windfall at the expense of the innocent shippers, purely as a result of the carrier's own failure to make the filings that it could and should have made.

According to applicant's statement, there were no shippers, other than the named complainants, of the same or similar commodities on respondents' vessel during the period in question, including the period following the voyage until the correct rates were filed and became effective. Hence it is found that to grant the application will not result in discrimination.

In such circumstances, the Commission may exercise its discretion to remedy the situation, although such action cannot excuse a party from any statutory penalty to which it may be subject. *Martini & Rossi* v. *Lykes Steamship Co., Inc., supra; Lykes Bros. Steamship Co., Inc. Application for Authority to Refund*, etc., Special Docket No. 265, decided June 4, 1963.

Accordingly, the application for permission to waive collection from the four shippers of charges in excess of the amount paid with respect to each commodity where there was an undercharge, as shown in Schedule A attached, is granted, and applicant is directed to refund to the shipper of household goods the amount of the overcharge of $30.80, also as shown in Schedule A.

An appropriate order will be entered.

(Signed) WALTER T. SOUTHWORTH,
Presiding Examiner.

OCTOBER 30, 1963.

SCHEDULE A

Shipper—Perini Corporation, Framingham, Mass.

New York to Buenaventura, Colombia:		
865 cu. ft. rubber hose.		
411 cu. ft. tires.		
20,145 lbs. steel bars.		
Freight paid on all the above @ $21.30 per 2,000 lbs. or 40 cu. ft., plus "surcharge" of $5.40 on same basis	$1, 120. 42	
Freight @ N.O.S. rate on file—$60 per 2,000 lbs. or 40 cu. ft	*2, 518. 35	
Undercharge on above 3 commodities		$1, 397. 93
308 cu. ft. personal and household effects—freight paid @ 90¢ per cu. ft	277. 20	
Freight @ rate filed and effective November 2, 1962—$32.00 per 40 cu. ft	246. 40	
Overcharge on personal and household effects		(30. 80)

Shipper—Corporacion Autonoma Regional Del Cauca, Cali, Colombia

Norfolk to Buenaventura, Colombia:		
1,366,125 lbs. aluminum cable—freight paid @ $32 per 2,000 lbs. (including surcharge)	21, 858. 00	
Freight @ N.O.S. rate on file—$60 per 2,000 lbs	40, 983. 75	
Undercharge		19, 125. 75

Shipper—Blue Bird Sales Corp., Fort Valley, Ga.

Savannah to Buenaventura, Colombia:		
7,444 cu. ft. bus bodies and parts—freight paid @ $22.50 per 40 cu. ft. plus surcharge @ $5.40 per 40 cu. ft	5, 122. 44	
Freight @ N.O.S. rate on file—$60.00 per 40 cu. ft	*11, 166. 00	
Undercharge		6, 043. 56
Savannah to Guayaquil, Ecuador:		
1,555 cu. ft. bus bodies and parts—freight paid @ $22.50 per 40 cu. ft. plus surcharge @ $.56 per 40 cu. ft	896. 45	
Freight @ N.O.S. rate on file—$60.00 per 40 cu. ft	*2, 332. 50	
Undercharge		1, 436. 05
Total undercharge—this shipper		7, 479. 61

*The application shows a surcharge of $5.40 per 40 cu. ft. or 2,000 lbs. added to the N.O.S rate on items to Buenaventura marked with asterisk (but not in the case of the aluminum cable to the same port); and a surcharge of $.56 added to the N.O.S. rate on the item to Guayaquil. The tariffs on file with the Bureau of Foreign Regulation do not show any such surcharges on N.O S. items as of the time in question. Because of the inclusion of surcharges in amounts to be waived the application (as finally amended) shows a total of $31,447.61 in undercharges instead of $30,358.00.

SCHEDULE A—Continued

Shipper—Continental of Panama, Apartado 3344, Panama, Republic of Panama

Norfolk to Puerto Limon, Costa Rica:		
784,904 lbs. linerboard—freight paid @ $18.00 per 2,000 lbs	7, 064. 14	
Freight @ applicable tariff effective February 5, 1962—$1.20 per 100 lbs	9, 418. 85	
Undercharge		2, 354. 71
Summary of undercharges:		
Perini Corporation	1, 397. 93	
Corporacion Autonoma Regional Del Cauca	19, 125. 75	
Blue Bird Sales Corp	7, 479. 61	
Continental of Panama	2, 354. 71	
Total undercharges to be waived	30, 358. 00	
Overcharge to be refunded:		
Perini Corporation	30. 80	

FEDERAL MARITIME COMMISSION

No. 936

HELLENIC LINES, LTD.—VIOLATION OF SECTIONS 16 (FIRST) AND 17

Decided January 9, 1964

1. Respondent found to have violated sections 16 (First) and 17 of the Shipping Act, 1916, in charging different rates to similarly situated shippers for identical service.

2. Respondent's agent, who was empowered to solicit cargo and quote rates that would meet the competition, found to have been acting within the scope of his authority in charging different rates to similarly situated shippers for identical service.

3. Intent is not a prerequisite to a finding of violation of sections 16 (First) and 17 of the Act. It is enough that undue or unreasonable preference or advantage is given to any particular person, locality or traffic, or that any such person, locality or traffic is subjected to undue or unreasonable prejudice or disadvantage, or that a rate which is unjustly discriminatory between shippers is charged or collected.

4. The Act is primarily a regulatory and administrative statute. It evinces a strong policy of protecting the public. A carrier may not evade its responsibilities to the public thereunder by pleading ignorance of its agent's activities.

Edwin Longcope for respondent.

Roger A. McShea III, *Wm. Jarrel Smith, Jr.*, and *Robert J. Blackwell*, Hearing Counsel.

Edward C. Johnson, Hearing Examiner.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett, *Vice Chairman*; James V. Day, John S. Patterson, and Thos. E. Stakem, *Commissioners*):

This proceeding was instituted by our predecessor the Federal Maritime Board on its own motion pursuant to section 22, Shipping

Act, 1916, to determine whether respondent, Hellenic Lines, Ltd. (Hellenic), had made or given undue or unreasonable preference or advantage to particular persons, or subjected particular persons to any undue or unreasonable prejudice or disadvantage in violation of section 16 (First) of the Act, or had demanded, charged or collected rates or charges which were unjustly discriminatory between shippers in violation of section 17 of the Act.

The essential facts are few and are not disputed by respondent.

Hellenic is a common carrier by water engaged in the foreign commerce of the United States and is a member of the Red Sea and Gulf of Aden/United States Atlantic and Gulf Freight Conference. The conference serves ports in the range from Aden to Suez to United States Atlantic and Gulf ports. Prior to the shipments in question in this case conference rates had been declared "open" to meet outside competition and the member lines, including Hellenic, were free to quote rates individually.

On two of its voyages during 1960—one in late March, the other in mid-April—respondent carried several parcels of green Ethiopian coffee for various shippers from Djibouti, French Somaliland, to ports in the United States. The rates charged on these parcels varied between $20 and $36 per ton even though all of the coffee involved was subject to a single rate classification; the service rendered by respondent was identical; and the shippers were similarly situated. One shipper, for example, with parcels of coffee on both voyages, was overcharged $1,536.79 based on the difference between the $36 Hellenic charged it for some parcels, and the lowest rates Hellenic charged for other green coffee parcels carried on the same two voyages.

Compagnie Maritime Coloniale (later named Compagnie Maritime Est Africaine, Ltd.), with a person named Antypas in charge of its daily operations, was respondent's agent at Djibouti. Respondent advised this agent the rates were open and authorized it to quote rates that would meet the competition. Antypas booked the coffee shipments in question at the different rates.

The Examiner in his Initial Decision concluded that Hellenic Lines had violated sections 16 (First) and 17 of the Act. Respondent filed exceptions, Hearing Counsel replied, and we heard oral argument. For the reasons stated below, we agree with the Examiner's conclusion.

DISCUSSION AND CONCLUSIONS

The facts clearly show that sections 16 and 17 of the Act were violated. The coffee transported was subject to only one freight classification. The service rendered by respondent was identical. The shippers and consignees of the coffee were similarly situated and the

record shows they were in keen competition with one another and vulnerable to even small differences in ocean freight rates. They were not afforded equal treatment and no justification for this is evident. A mere desire to book the cargo obviously is not justification. It has long been settled that such treatment of shippers violates sections 16 (First) and 17 of the Act. *Eden Mining Co.*, v. *Bluefields Fruit & Steamship Co.*, 1 U.S.S.B. 41, 45–46 (1922); *American Tobacco Co.* v. *Compagnie General Transatlantique*, 1 U.S.S.B. 53, 56–57 (1923).[1]

Respondent has made no attempt to deny that the foregoing circumstances depict the mentioned violations, but it attributes the responsibility to its Djibouti agent. Respondent disclaims all responsibility itself, arguing that sections 16 and 17 of the Act are penal provisions, *i.e.*, their violation is a misdemeanor punishable by fine; that it had no intent to violate these sections since it did not authorize, assent to or have any knowledge of its agent's conduct in charging the different rates; and that it cannot be held liable for the unauthorized "criminal" conduct of its agent.[2]

For a number of reasons this position must be rejected. The Shipping Act is primarily regulatory and administrative; it is not a criminal statute. True, the Act provides monetary penalties for violating its requirement, but these are particular remedies that may be sought in proper cases. Their presence does not transform the Act into a criminal or penal statute. The main purpose of the Act was to confer upon an administrative agency general regulatory and supervisory powers over the water-borne foreign commerce of the United States. Incidential to this purpose the Government was also given the right to seek monetary penalties in appropriate cases. The function of adjudicating such penalties, moreover, is confided to the courts, not the Commission. The Commission is empowed solely to regulate and its jurisdiction and functions are purely regulatory and administrative. *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159, 164–5 (1962).

Respondent is not here on trial for penalties, nor "charged" with a misdemeanor. Nor may it escape responsibility by contending that intent is a prerequisite to a finding of violation of sections 16 (First) and 17. These sections proscribe and make unlawful certain conduct, without regard to intent. The offense is committed by the mere doing

[1] See also *Armstrong Cork Co.* v. *American-Hawaiian S.S. Co.*, 1 U.S.M.C. 719, 723 (1938); *Rates from Japan to United States*, 2 U.S.M.C. 426, 435 (1940); *Rates of General Atlantic S.S. Corp.*, 2 U.S.M.C. 681, 686 (1943); *West Indies Fruit Co.* v. *Flota Mercante Grancolombiana*, 7 F.M.C. 66, 69 (1962).

[2] Respondent has served Djibouti since the early 1950's. The record indicates that it had some difficulty in selecting a suitable agent there and in supervising and communicating with the agent in question. Respondent ultimately discharged this agent, though for activities unrelated to the matter involved here.

of the Act, and the question of intent is not involved. *Interstate Commerce Commission* v. *C. & O. Ry. Co.*, 128 Fed. 59, 69–70 (1904), 200 U.S. 361, 398 (1905).

To adopt respondent's position would do much to frustrate the objectives of the Shipping Act. Respondent necessarily performs its far-flung transportation business by utilizing agents to solicit and book cargo and attend to various other requirements of the business. Under respondent's theory, however, it could immunize itself from the common carrier responsibilities placed upon it by the Act simply by dissociating itself from any of its agents' activities which are brought into question. This could take the form, as here, of a plea of ignorance of the agent's conduct and a claim that the carrier lacked any intent itself to violate the law. The Act does not permit of any such evasion. *United States* v. *American Union Transport, Inc.*, 327 U.S. 437, 457 (1946). It is regulatory legislation which evinces a strong policy of protecting the public, and there is ample authority for the view that a principal is liable his agent's violation of such a statute, including a violation which is a misdemeanor.[3]

The agent involved here was empowered by respondent to solicit cargo and quote whatever rates would meet the competition. In booking the parcels of green coffee he was acting within the scope of that authority and on respondent's behalf. Certainly, it cannot be said that the agent was on some personal excursion or beyond the scope of his authority because he booked the coffee at differing rates. Respondent therefore must clearly answer for the agent's action in this regard.

We will add that we cannot agree with respondent's denial of any actual fault. Respondent knew that an intensely competitive situation or rate war existed, with the conference rates declared "open," but there is no evidence that it took any precautionary steps in light of these unstable conditions in granting the broad authority to its Djibouti agent to quote whatever rates would meet the competition. It seems to us respondent's claim that it had had some difficulty in supervising and communicating with this agent serves only to underscore that greater precaution was needed under the circumstances, particularly in the matter of instructing the agent that rates to shippers must be non-preferential and non-discriminatory. According to respondent it did take action of this kind, but this was after the shipments in question had been made.

We conclude that respondent in charging different rates to similarly situated shippers for identical service, as hereinabove set forth, vio-

[3] *Mechem on Agency* (1952), pp. 276–278 and cases there cited.

lated section 16 (First) of the Act by giving undue and unreasonable preference or advantage to certain shippers and subjecting certain other shippers to undue and unreasonable prejudice or disadvantage, and violated section 17 of the Act by charging and collecting rates which were unjustly discriminatory between shippers. The record indicates that respondent, after some delay, effected refunds to injured shippers. It was proper, of course, for respondent to make such adjustments. Since there is no evidence of any continuing violation by respondent in the respects noted, we have no occasion to issue an order against it and the proceeding will be discontinued. An appropriate order is attached.

FEDERAL MARITIME COMMISSION

No. 936

HELLENIC LINES, LTD.—VIOLATION OF SECTIONS 16 (FIRST) AND 17

ORDER DISCONTINUING PROCEEDING

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

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

By the Commission, January 9, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1070

SELDEN & CO., INC.,

v.

THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES

Decided January 9, 1964

It is not unlawful *per se* for a terminal to increase demurrage charges on cargo already consigned to or received by the terminal. Complaint therefore dismissed.

Less than 30 days' notice of changes in terminal tariffs may constitute an unreasonable practice under certain circumstances. Where rate increases are involved, terminal operators under the Commission's jurisdiction would be well advised to give at least 30 days' notice.

Harry L. Selden for complainant.
F. G. Robinson for respondent.
C. W. Robinson, Hearing Examiner.

REPORT

BY THE COMMISSION: (John Harllee, *Chairman*; Ashton C. Barrett, *Vice Chairman*; James V. Day, John S. Patterson, Thos. E. Stakem, *Commissioners*)

This complaint proceeding was instituted by Selden & Co., Inc. (complainant), a New York corporation engaged in the import, export and sale of jute goods. Respondent is the Board of Trustees of the Galveston Wharves, a terminal operator "carrying on the business of . . . furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water" within the meaning of section 1 of the Shipping Act, 1916.

Most of complainant's jute is imported from India and is consigned to various ports, including Galveston. No advance arrangement is made

by complainant with respondent for jute routed to respondent's facilities. Between approximately July 1 and September 30, 1961, complainant instructed its suppliers to route certain shipments to the Port of Galveston. Pursuant to such instructions, approximately 4,842 bales of jute bagging were discharged into respondent's facilities. About 300 bales were removed soon after discharge and are not the subject of this complaint. The weight of the remaining bales was about 1,103 net tons.

By tariff supplement issued November 8, 1961, and filed with the Commission on November 9, 1961, respondent's demurrage rules and rates were changed effective November 25, 1961.[1]

These changes (as they pertained to complainant's cargo both on the pier and enroute thereto on and after November 25, 1961) resulted in demurrage charges against complainant's cargo in the amount of $9,165.07 for the period September 1961 through February 1962. Had the tariff not been changed, only $451.68 would have been due for demurrage. Neither amount has been paid by Selden. Complainant seeks an order prohibiting respondent from collecting any amount in excess of the charges at the old rate, contending that the action of respondent in increasing its charges after complainant's shipments "had already been received by or were irrevocably consigned to respondent's facilities" constitutes an unfair and unjust practice under section 17 of the Act.[2]

Complainant further contends that respondent's tariffs and invoices were ambiguous as to whether or not respondent provided storage at its facilities, pointing to certain statements in respondent's tariffs and correspondence which, Selden urges, indicate that the cargo in question was rightfully considered by Selden to be in storage, rather than under pier demurrage.

The Examiner in his Intial Decision found, *inter alia* that any notice by respondent of less than 30 days would be unreasonable, except where a shorter period is warranted by the circumstances; that the "irregularity and inconsistency" of respondent's tariff changes from 1959 through 1962 constitutes an unreasonable practice under section 17; but that "[n]o reason appears why complainant should not pay the higher storage charges". He thus denied complainant the relief it seeks. The Examiner states that the "failure to give adequate notice

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[1] The tariff provisions in effect on the pertinent dates are set forth in Appendix A and Appendix B, *infra*.

[2] Section 17 reads in pertinent part as follows:

"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."

of the increase did not, of itself, make the increase unlawful, especially since, as previously stated, complainant does not question the reasonableness of the increased rate." [3]

Complainant filed exceptions to the conclusions of the Examiner (1) that complainant should pay the higher charges and (2) that there is no need to consider whether respondent's tariffs are ambiguous as to the holding out of storage facilities. Specifically, complainant reargues its contention that respondent's tariffs, invoices and correspondence were reasonably construed by it, Selden, as indicating that its goods were in storage rather than subject to pier demurrage charges and alleges error in a decision which, complainant says, allows respondent to benefit by a practice which the Examiner found to be unreasonable. Respondent took no exception to the Initial Decision but did reply to complainant's exceptions. Oral argument was had before the Commission.

DISCUSSION AND CONCLUSIONS

There is no doubt that respondent as a terminal facility is an "other person subject to [the Shipping Act]" pursuant to section 1 of the Act and thus that the Commission can order respondent to observe reasonable practices pursuant to section 17.

The gravamen of the complaint is that "the action by respondent in increasing terminal charges in reliance upon a tariff provision which was filed after the shipments involved had already been received by or were irrevocably consigned to respondent's facilities, and of publishing conflicting and ambiguous rules and regulations and/or tariffs, constitutes an unfair and unjust practice, in violation of Section 17. . . . " In other words, complainant alleges that respondent could not have increased its charges, *regardless of the amount of notice given*, as to shipments enroute to or already on its facilities. Therefore, the question of whether the notice given was reasonable is not here in issue.

The position taken by complainant is untenable. A terminal operator must be free to change its tariffs when circumstances warrant. It would be unreasonable to hold that a terminal must continue in effect the rates and rules applicable when a cargo first landed, no matter how long that cargo might be left on the facility. This would mean that a terminal could only change its rates when its facility had no cargo at all (a condition which might never occur), or that a terminal could charge different rates for identical services depending on the date the

[3] The pleadings and record make clear that complainant is not attacking the rate itself as unreasonable, but merely the practice of increasing it as to complainant's shipments which were then on respondent's facilities or enroute thereto.

cargo happened to arrive at its facility. *A fortiori*, it would be unreasonable to attempt to apply such a principle to cargoes which have merely been routed to the facility but have not yet arrived at the time of a rate change.

Concerning the alleged ambiguity in respondent's tariffs and invoices, complainant states that respondent's invoices (issued with respect to the shipments in question) contain charges for "storage" instead of demurrage and that respondent's Local Tariff No. 27–D provides in Item 170 as follows:

> Galveston Wharves does not engage in the business of storage or warehousing of property on its wharves or piers. All property landed or received on any of its wharves or piers, not removed by the party entitled to receive it within a reasonable length of time, will be removed to, and stored in, a public or licensed warehouse at the place of delivery or other available space, at the cost of the owner and there held without liability on the part of Galveston Wharves, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

Complainant argues that Item 170 required respondent to place complainant's goods in a warehouse, subject only to a "reasonable charge for storage." In other words, as we understand complainant's argument, a shipper may leave its goods on the terminal facility for as long as it desires and rely upon the terminal operator to remove them to suitable storage. We do not read Item 170 that way. Rather, we construe Item 170 as (1) granting to the terminal the option of removing the goods to storage if it desires (when the owner does not remove them within a reasonable length of time) and (2) fixing the liability of the owner of the goods in connection with such removal and storage.[4] In any event, Local Tariff No. 27–D contains no charges for storage or pier demurrage and we think it clear that a user of respondent's facilities would have to look to Tariff Circular No. 4–B to ascertain the charges applicable to goods remaining on the terminal facility. A reasonable interpretation of Tariff Circular No. 4–B (Appendix A) is that cargo left on respondent's pier after the expiration of free time is subject to the charges set forth under Item 160 of that Tariff. The question of whether such charges are termed storage or demurrage is irrelevant to this proceeding. Moreover, we see no reason why complainant did not remove its goods when it received notice that the charges—whatever they might have been termed on the invoices—were increased.

[4] We note also that the last paragraph of Item 160 (see Appendix A) reserves the same right of removal to respondent. In this connection, the record is not clear as to whether or not there was "storage" space available either on or off the terminal facilities or what the cost of removing the goods and subsequent storage charges would have been.

We emphasize that this decision should not be construed as casting any doubt on prior decisions which have held that less than 30 days notice of changes in terminal tariffs may be unreasonable under certain circumstances. Further, where such changes involve rate increases, we think that terminal operators under the Commission's jurisdiction would be well advised to give at least 30 days' notice.[5] As was stated above, the reasonableness of the notice here given is not before us in this case. And, in any event, the record in this proceeding would appear inadequate upon which to base a determination as to the reasonableness of the notice given.

In view of the above, we can find no basis for granting the relief sought by complainant. An appropriate order will be entered dismissing the complaint.

APPENDIX A

Charges in effect prior to November 25, 1961, as contained in Galveston Wharves Tariff Circular No. 4–B.

Item No. 160 Pier Demurrage Rules and Charges

The waterfront warehouses, docks and piers of the Galveston Wharves are designed primarily for use in the handling of cargo interchanged between railroads, trucks and water carriers, on the one hand, and vessels and barges, on the other, and these waterfront facilities are not intended to be used for the storage of freight.

Cargo, except bulk crude sulphur, which is discharged into or onto the waterfront facilities of the Galveston Wharves from railroad cars, trucks and/or water carriers, shall be subject to the following pier storage and pier demurrage rules and charges:

(a) * * *

On inbound cargo, except bulk crude sulphur, 10 running days, Saturdays, Sundays and Holidays being included, will be allowed free when such cargo is discharged from vessels or barges. Free time will begin the next 7:00 a.m. after the day the vessel or barge completes discharging such inward cargo (See Exceptions 2 and 3). Cargo discharged from vessels and later reloaded aboard the same or other vessels, shall be subject to the free time rule applying on outbound cargo.

(b) After expiration of free time, the following pier demurrage charges will be assessed on cargo discharged into closed or shedded piers or warehouses:

(1) On cargo, except cotton and/or cotton linters, 10 cents per net ton for each 7 days or fraction thereof.

* * * * * * *

(3) On cargo assigned open space, 5 cents per net ton each 7 days or fraction thereof.

[5] In this same connection, while we agree with the Examiner's conclusion that inconsistency in giving the public notice of changes in terminal charges may constitute an unreasonable practice, that question was not an issue in this proceeding.

Pier demurrage charges cease running against the cargo the day that th vessel or barge actually starts loading such cargo and, in case of inbound ship ments to be forwarded beyond by either rail or truck, pier demurrage charge cease running against the cargo when same is removed from the facilities.

* * * * * * *

EXCEPTION 2. Fifteen (15) days free time (excluding Saturdays, Sundays an legal Holidays) will be allowed on inbound shipments of Pulp, Cellophan and/or Woodpulp. (Files 1492 and 495–4)

EXCEPTION 3. Cargo not susceptible to weather damage may be assigned ope space for a free time period of thirty (30) days, inclusive of Saturdays Sundays and holidays. The free time accorded under provision of thi exception will be subject to the availability of suitable open space and t the making of arrangements for the use thereof in advance of arrival o the cargo at this port. (File: 495–4)

Vessels, owners, or their agents, using the facilities of the Galveston Wharve beyond the free time herein described, thereby contract to pay, and are re sponsible for, the pier demurrage charges accruing on such cargo at the rate shown herein.

On all property landed or received in or on the wharves, piers and docks o the Galveston Wharves, which is not removed by the vessels, owners, or thei agents within a reasonable time, the Galveston Wharves reserves the right t remove such property to and store it in, a public or licensed warehouse or othe available place of delivery or storage at the expense of the vessels, owners, o their agents, without liability on the part of the Galveston Wharves, and subjec to a lien against such property for all charges accruing thereon.

APPENDIX B

Amended paragraph (b) of Item 160 (as it pertained to com plainant's shipments) effective November 25, 1961.

(b) After expiration of free time the following pier demurrag charges will be assessed on cargo discharged into closed or sheddec piers or warehouses or in open space:

* * * * * * *

Item No. 160

Inbound:	*Charge per ne ton per day*
For each of the first 7 days or fraction thereof	5 cents
For each of the next 7 days or fraction thereof	10 cents
For the 15th day and each succeeding day thereafter until removed	15 cents

* * * * * * *

FEDERAL MARITIME COMMISSION

No. 1070

SELDEN & CO., INC

v.

THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES

ORDER DISMISSING COMPLAINT AND DISCONTINUING PROCEEDING

This proceeding having been duly heard and the Commission having considered the matters involved and having this date entered a report thereon containing its findings and conclusions, which report is made a part hereof by reference:

It is ordered, That the complaint of Selden & Co., Inc. be, and it is hereby, dismissed and this proceeding be, and it is hereby, discontinued.

By the Commission, January 9, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1090

GENERAL INVESTIGATION INTO COMMON CARRIER FREIGHT RATES AND PRACTICES IN THE FLORIDA/PUERTO RICO TRADE

Decided January 21, 1964

Tariffs and transportation practices of respondent TMT Trailer Ferry, Inc., C. Gordon Anderson, Trustee, not shown to be unlawful; no finding made that rates of South Atlantic and Caribbean Line, Inc., are "unjust, unreasonable, and otherwise unlawful" at present and said respondent ordered to clarify certain aspect of its tariffs, to file monthly financial reports, and to submit to certain audits of its books of entry; no findings made and this proceeding discontinued as to respondent Sea-Land Service, Inc., and as to respondent Motorships of Puerto Rico.

Donald Macleay and *Edward T. Cornell* for respondent, TMT Trailer Ferry, Inc., C. Gordon Anderson, Trustee.

John Mason and *Charles J. Colgan* for respondent, South Atlantic & Caribbean Line, Inc.

C. H. Wheeler for respondent, Sea-Land Service, Inc., Puerto Rican Division.

Alan F. Wohlstetter for respondent, Motorships of Puerto Rico.

John T. Rigby for the Commonwealth of Puerto Rico.

Donald J. Brunner and *Robert J. Blackwell* as Hearing Counsel.

Charles E. Morgan, Hearing Examiner.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Thos. E. Stakem, *Vice Chairman;* Ashton C. Barrett, James V. Day, John S. Patterson, *Commissioners*)

PROCEEDINGS

Pursuant to sections 18(a) and 22 of the Shipping Act, 1916, and sections 2, 3, and 4 of the Intercoastal Act, 1933, the Commission upon its own motion, by its order served February 1, 1963, entered into this investigation to determine whether the present rates and practices of certain respondent water carriers in their operations in the Florida/

Puerto Rico trade (the trade) "are unjust, unreasonable, and otherwise unlawful" under the said Acts.

The four respondents, as named in the original order, the first supplemental order served March 6, 1963, and in the second supplemental order served April 18, 1963, are South Atlantic & Caribbean Line, Inc. (SACAL), TMT Trailer Ferry, Inc., C. Gordon Anderson, Trustee (TMT), Sea-Land Service, Inc., Puerto Rican Division (Sea-Land), and Motorships of Puerto Rico, Inc. (Motorships). The Commonwealth of Puerto Rico intervened in the proceeding.

Hearings before an Examiner were held in Washington, D.C. and Miami, Florida, commencing May 7, 1963. After recesses from time to time to permit the parties to compile certain statistical and cost data, the hearings were closed on July 25, 1963, subject to the late filing of further exhibits. A petition to reopen for further hearing was denied by the Examiner, but concurrently certain new facts contained in the petition, by agreement of the parties, were stipulated into the record. Opening and reply briefs were filed by SACAL, TMT and Hearing Counsel. The Examiner, on October 28, 1963, issued a Recommended Decision to which TMT and SACAL excepted. Replies to exceptions were filed by TMT, SACAL and Hearing Counsel. No oral argument was requested, and none was held.

FACTS

As no respondent carrier offered a regular service between Florida's Gulf ports and Puerto Rico, the investigation concerned operations from the Florida ports of Jacksonville and Miami only.

The cargo moving to Puerto Rico through the port of Miami is basically local cargo, originating in the Miami area, whereas cargo coming through the port of Jacksonville originates in areas as far away as the upper midwest. The single commodity moving in largest volume is sugar, transported northbound.

Motorships has never operated in the trade, and does not presently intend to do so. As soon as it learned of this proceeding, it took steps to cancel its rates between Florida and Puerto Rico. Motorships had nominal rates in effect in the trade on automobiles between April 15 and May 31, 1963, but no service.

Sea-Land stipulated through its counsel on the first day of the hearing that it was the high-cost carrier in the trade, and that its rates were the same as or higher than the rates of other carriers in the trade. At present Sea-Land offers only an indirect service between Florida ports and Puerto Rico with transshipment at Newark, New Jersey. This transshipment, necessitating as it does many extra miles of back haul in Sea-Land's indirect service betwen Florida and Puerto Rico as compared with direct service, is the reason it considers itself the

high-cost carrier. The lawfulness of the rates of the indirect service is now under investigation in our Docket No. 1143.

The two principal respondents, therefore, are SACAL and TMT. While these respondents carry other cargoes, the principal competition between them is for the passanger automobiles transported southbound and much of the evidence herein relates to their automobile rates and practices. The issues so far as they concern automobiles are not whether the rates are too high but whether they are too low and whether the carriers engage in destructive competitive practices in connection with automobile rates.

Both SACAL and TMT had inauspicious beginnings in this Florida/Puerto Rico trade. Admittedly both have operated inefficiently in the past and have lost considerable monies. TMT is the older carrier in the trade, having acquired some of its vessels and started operations in 1956, whereas SACAL commenced operating in April 1962. TMT at first utilized converted LST barges under tow. Later it embarked upon a program of using self-propelled vessels, but this operation failed and TMT was forced into "trusteeship" in June 1957. The self-propelled vessels were repossessed, but TMT retained three barges. Under its trustee in 1958, TMT re-entered the trade with the three barges under tow. In November 1960, TMT extended its service to include Miami, as well as Jacksonville. Prior to that time, the shippers of autos from Miami were required to transport their autos overland from Miami to Jacksonville in order to ship them to Puerto Rico. The TMT service from Miami provided a savings of about $40 per car to the automobile shipper. TMT's operations are of a roll-on, roll-off nature. The only dock facilities required are a ramp to permit driving equipment on or off the weather deck of its vessels, and a piece of ground on which to drop the bow gate to allow roll-on, roll-off access below deck. TMT has no need for anything more than minimal terminal facilities, and does not need covered storage facilities.

Since October 1962, TMT has operated with four barges under tow. It has averaged from November 1962, through March 1963, about six sailings per month from Jacksonville. Bad weather has an adverse effect on barges under tow, necessitating some elasticity in TMT's performance. Generally TMT takes about 20 days on its present triangular service for a complete voyage, Miami-Jacksonville-San Juan-Miami. TMT's barges are unmanned, and towed by tugs under contract hire. TMT has found this type of operation considerably more economical than an operation with self-propelled vessels.

TMT's principal service to Puerto Rico has been from Jacksonville, and this has been true particularly in the handling of trailer-load cargo. TMT can load as many as 38 trailers on the weather decks of its barges, which have a maximum carrying capacity for an entire

barge of 56 trailers, each 35 feet long, 100 standard size autos, and 1,568 cubic feet of space for other cargo. Autos are second to trailer-load cargo in producing revenues for TMT. Generally, TMT has handled more autos from Miami than from Jacksonville, but both ports have supplied TMT with substantial amounts of automobiles and of trailer-load cargoes.

From its operations prior to the trusteeship TMT suffered a total deficit of $4,753,092.88. Under the trustee's operations, using only towed barges, TMT through March 31, 1963 enjoyed an earned surplus of $1,696,134.40, including for the year 1962, profit from operations of $517,255.60 and including similar profits for the first quarter of 1963 of $124,919.96. There is some dispute as to the proper method of computing TMT's vessel depreciation and operating expenses. However, under any method suggested, it appears that although TMT still had a negative net worth, it has been recently and presently is operating at a substantial profit.

SACAL originally entered the trade as a break-bulk carrier carrying palletized cargo, but this in time proved most inefficient. At first, SACAL operated in a triangular service from Miami, to Savannah, Georgia, to San Juan, Puerto Rico, and back to Miami with irregular service at Ponce and Mayaguez, Puerto Rico. SACAL used two self-propelled vessels, the *Floridian* and the *New Yorker*, each originally designed to handle small containers, and each with underdeck cargo space consisting of a single hold, with access by a single ramp designed for roll-on, roll-off use at the stern of the ship. Each vessel was capable of carrying 73 autos on its upper (weather) deck.

In about September or October, 1962, SACAL changed its management, started to acquire trailers in numbers, and switched to a trailer-load cargo operation. SACAL carries refrigerated ("reefer") trailers, the only carrier in the trade providing a direct service for refrigerated commodities. While SACAL and TMT compete for cargo carried in "dry", i.e., nonrefrigerated trailers, they do not now compete for refrigerated cargo.

Commencing in October, 1962, SACAL abandoned its triangular service and operated one vessel on a shuttle service between Miami and San Juan, and the other vessel between Savannah and San Juan. The Savannah shuttle continued largely as a break-bulk operation, was very uneconomical, and finally was abandoned after a December 23, 1962 sailing, Voyage 23 of the *Floridian*. Following the abandonment of the Savannah service, SACAL began a shuttle service between Jacksonville and San Juan, commencing with a sailing from Jacksonville on January 22, 1963, Voyage 24 of the *Floridian*. On Voyage 23, the *Floridian* arrived in Jacksonville on January 2, 1963, but because of annual repairs and a strike, the *Floridian* did not leave Jack-

sonville on Voyage 24 until January 22, 1963. The Miami shuttle service remained intact.

On June 30, 1963, the *New Yorker* was redelivered to her owners, and SACAL subsequently maintained service from Miami and Jacksonville with one vessel, the *Floridian*. The itinerary then was Miami, Jacksonville, San Juan, Miami, i.e., the same as that of TMT. The transit time for this itinerary was faster for SACAL than TMT because of the latter's use of towed barges. The Examiner found "where other factors are equal from the shipper standpoint, the slower transit time is a service disadvantage." SACAL terminated its direct service at Jacksonville in July 1963. Its one vessel can now carry, due to a modification of its deck space, 106 automobiles and 30 trailers, including 24 reefer trailers. This modification has taken place subsequent to the close of the hearing, but is the subject of late filed exhibit 97, which was received in evidence by agreement of the parties. Of the 345 trailers carried by SACAL in the first quarter of 1963, 230 were reefer trailers. During that same period, 114 reefer trailers were handled from Miami on 11 voyages, or about 10 per voyage.

For the 9 months it operated in the Savannah-Miami-Puerto Rico trade (April to December 1962) SACAL suffered a total loss in excess of three quarters of a million dollars. For the first 3 months it operated in the Jacksonville-Miami-San Juan trade (January to March 1963), SACAL suffered losses from vessel operation in excess of $84,000. There is some dispute as to the amount of expenses of the 21 terminated voyages in the first quarter of 1963, the Examiner finding it to be $761,399 or an average of $36,257 per voyage.

The balance sheet of SACAL as of March 31, 1963, shows capital stock of only $10 for only one share authorized and outstanding, a deficit from operations of $844,248, and listed under current liabilities is $1,002,299 payable to affiliated companies.

SACAL, an American corporation, is a wholly owned subsidiary of the United Tanker Corp., also an American corporation. It, in turn, is practically wholly owned by The China International Foundation, Inc., an American charitable corporation. This company is the corporate parent of a complex of some 20 companies. The China International Foundation owns all of the voting common stock and 95 percent of the nonvoting preferred stock of United Tanker. United Maritime Corp., another American corporation, also is a wholly owned subsidiary of United Tanker. It is the principal stockholder in three other American corporations which own and operate through United Maritime, as agent, four American flag tankers. The China Foundation also owns directly or indirectly all of the stock of eight foreign corporations, five of which own or operate foreign flag vessels. The China Foundation also owns, directly or indirectly the controlling

stock in five other foreign corporations presently inactive. All of the activities of these corporations are managed from offices at 250 Park Avenue, New York, N.Y. The allocation of overhead expense of these many related companies is a complex matter, and the Examiner concluded that no determination could be made on the present record as to whether or not a proper share of overhead was allocated to SACAL.

As noted, for the first quarter of 1963, SACAL suffered a loss from vessel operation of over $84,000. If there are eliminated certain voyages serving Jacksonville and San Juan only and one voyage which had no Miami revenue, as well as a voyage from Jacksonville to San Juan to Miami to Jacksonville, the total revenue on the remaining 11 Miami-Puerto Rico voyages is $399,107.18, or an average revenue per voyage of $36,282.47. This figure is approximately the same as the average expense per voyage as found by the Examiner.

The order of investigation brought into issue the tariff and transportation practices of the respondent carriers. SACAL maintains a rate of $300 on the movement of each empty trailer when SACAL uses the cargo space therein. Of 13 bills of lading showing transportation of trailers under the $300 rate, 8 were charged only that rate, 3 were charged the $300 rate plus the Miami handling charge of $10 each and Miami wharfage charges of $2 each, and 2 were charged the $300 rate plus the Miami wharfage and handling charges plus the Puerto Rican arrimo charge of 5 cents per 100 pounds. SACAL's tariff is silent with respect to charges on this type of movement.

SACAL formerly had a rate for trailer-load quantities of $700 per trailer for dry cargo and $1,000 per trailer for refrigerated cargo, plus Miami or Jacksonville wharfage and handling charges and Puerto Rican arrimo charges. Effective February 20, 1963, the SACAL tariff provided that the wharfage, handling and arrimo charges above would not apply, or in effect would be absorbed by SACAL. However, these accessorial charges never were assessed by SACAL prior to February 20, 1963, even though they were then applicable.

SACAL has carried a substantial number of automobiles in the trade with personal effects inside the trunks of the autos. A review of about 100 bills of lading showed that the applicable charges on these effects were fully assessed in some instances, partially in others, and not at all in others. These personal effects generally were in autos consigned to individuals rather than to used car dealers, and the reasons for the variety of treatment were mainly improper ratings by the rating clerks of SACAL's agent in Miami. SACAL's tariff is silent with respect to charges on this type of movement.

In Special Docket No. 268, SACAL seeks authority to waive collec-

tion of undercharges on certain shipments of automobiles from Florid
to Puerto Rico, and the record in this special docket, by stipulation o
the parties, was incorporated into the present proceeding. An Initia
Decision has been issued by the Examiner in the special docket pro
ceeding, and as detailed therein and acknowledged by SACAL, i
billed and collected less than the applicable charges specified in it
tariff on numerous shipments of autos from Florida to Puerto Ric
made mainly in the last quarter of 1962. Generally, SACAL col
lected only $156 for the average car, instead of about the $170 du
under its applicable tariff. This practice by SACAL ceased abou
January, 1963, and apparently has not been resumed.

Since the entry of SACAL into the trade, TMT's revenues from al
ocean freights have increased over the corresponding periods of th
preceding year. Also, for the 15-month period of January 1, 1962
through March 31, 1963, compared with the 15 months for January 1
1961, through March 31, 1962, TMT's revenues for ocean freight in
creased to $4,707,310 from $3,713,837. There has been a decrease
however, in Miami auto revenue for the first quarter of 1963 over th
first quarter of 1962. An alleged error with respect to the amount o
this is raised in TMT's exceptions, but at any rate TMT suffered
substantial decrease in Miami auto revenues for the second half o
1962 compared with the first half of 1962, whereas SACAL sub
stantially increased its Miami auto revenues in the same period.

The Examiner in his decision recommended that the investigatio
be discontinued as to respondent Motorships of Puerto Rico and tha
no findings be made in this proceeding as to respondent Sea-Lan
Service, Inc. He found that the tariffs and transportation practice
of respondent TMT Trailer Ferry, Inc., C. Gordon Anderson, Trustee
have not been shown unlawful and that this record does not disclos
whether the rates of respondent South Atlantic & Caribbean Line
Inc., presently are compensatory and lawful. The Examiner als
mentioned the desirability of several carriers in a trade where ther
is sufficient traffic to support them. Finally, he recommended tha
SACAL be required to amend its tariff to clarify the rates and charge
on the movement of personal effects in autos and on the movement o
trailers when the respondent carrier utilizes the inside cargo space
and that SACAL be required to file a monthly financial report and t
make available its book of entry upon which such financial report shal
be based for the purposes of auditing by the Commission's staff t
enable the Commission to make a determination as to the lawfulnes
of its rates.

DISCUSSION AND CONCLUSIONS

SACAL urges generally that we accept the Examiner's decision an
takes only two exceptions to it.

One exception deals with the Examiner's denial of SACAL's motions to strike certain matters in TMT's opening brief and reply brief. SACAL admits this is only made to "preserve its position" as the Recommended Decision of the Examiner does not rely upon any of the challenged matters. The challenged matters are likewise not used as a basis for our report.

SACAL's other exception is to the finding of the Examiner that TMT's slower transit time was a service disadvantage. This finding, however, did not affect the Examiner's decision and our view, as noted more fully below, is that this record does not support such a finding.

TMT takes three exceptions to the Recommended Decision. In the first of these it asserts the Examiner erred in not utilizing the finding that TMT was a disability carrier because of its slower transit time to grant it a rate differential under SACAL to offset this disability. The basis for this argument is the Examiner's finding that "where other factors are equal from the shipper standpoint, the slower transit time is a service disadvantage."

We are unable here to find that TMT's slower transit time is a disadvantage. SACAL argues that it is not, and to support its position marshals facts showing that TMT has made gains in revenues from freights over its revenues prior to SACAL's operation, that TMT outcarried SACAL on direct sailings to San Juan from Jacksonville on the same day, and that TMT has outcarried SACAL inbound 10 to 1. SACAL points out that TMT's general manager has testified that the trade is one in which frequency of service is more important than time in transit. SACAL further claims that any loss in revenue in Miami to San Juan traffic TMT may have suffered is due to shipper dissatisfaction with TMT's indirect Miami-San Juan service as compared with SACAL's direct service.

TMT, on the other hand, argues that the fact that it outcarried SACAL on sailings from Jacksonville on the same day is explained by the larger capacity of TMT's vessels. It says that TMT had not felt the full impact of SACAL's competition at Jacksonville because of the newness of SACAL's Jacksonville service and the backlog of Puerto Rico traffic built up by the strike, coupled with the Mother's Day rush. It contends that at Miami, where comparative results are of record for a 12-month period, SACAL greatly outcarried TMT on sailings on the same day. TMT says its general manager's statement merely explains why a triangular service is used rather than a direct service and is not intended to mean that a slower transit time is not a service disadvantage.

Although TMT did outcarry SACAL at Jacksonville on sailings leaving the same day, this fact may be due to a diversion of cargo by the strike, the size of TMT's vessels, the Mother's Day rush, or the newness of SACAL's Jacksonville service. At any rate, SACAL's

direct Jacksonville service has now been discontinued and any conclusions with reference to it cannot be used for guidance with respect to SACAL's present service. As for the statement of TMT's general manager, its meaning as indicated is debatable. But aside from this the fact is that no witness was produced who testified to the necessity for rapid transit time in the trade.

The significance of a finding of a service disability is that it may be a reason for allowing a rate differential between the carriers offering the superior and inferior services. The granting of such differential, however, depends upon a finding that the rates of one of the carriers are unlawful and must be adjusted. TMT's present rates were not shown on this record to be unlawful and no change in them is proposed. Thus the granting of a differential to TMT must rest upon a showing that SACAL's rates are unlawful.

TMT in its second exception attempts to make such a showing. It argues that the Examiner erred in not finding that the rates of SACAL were, are, and for the future will be, noncompensatory. It says he failed to take into consideration (a) some $88,000 in deferred mortgage payments applicable to the first quarter of 1963, (b) an equitable allocation of the overhead of parent and related owning and operating companies, which it claims would increase costs for the first quarter of 1963 by at least $12,000, and (c) other items of overhead amounting to $22,000.

SACAL, on the other hand, contends that before its rates can be declared unlawful, even if found to be noncompensatory, there must be a showing that they are unjust and unreasonable. It is of course true that before we may hold rates to be unlawful under our statutes (Intercoastal Shipping Act, 1933, section 4, 46 USC 845(a) and Shipping Act, 1916, section 18(a), 46 USC 817), they must be found to be unjust or unreasonable. SACAL further contends that, even accepting the additional expenses brought out by TMT, the first quarter of 1963 shows an almost 80 percent improvement over the averaged quarterly results for the operations in 1962, and that it should have the opportunity TMT had to work out the kinks in its operation.

TMT is incorrect when it states that the Examiner failed to find that the rates of SACAL were noncompensatory. In fact, the Examiner found that the rates of SACAL were not compensatory, based on the total period on which evidence was presented at the hearings. This proceeding, however, is concerned primarily with whether the rates and practices presently used by the carriers are lawful. On this record, we are unable to state that the rate structure currently used by SACAL is unjust or unreasonable.

New carriers in a trade should be allowed a reasonable opportunity to develop their services, and the fact that immediate operating results

may not show a profit, is not in our opinion a sufficient ground for declaring the rates unlawful.

The most accurate projected determination which can be made of the revenues and expenses of SACAL's current service is one which balances against the expenses for the most recent period of record the revenues for the service most nearly approximating the present service of SACAL. As noted above, such a determination (utilizing the expense figures used by the Examiner) shows that SACAL revenues are approximately equal to operating expenses. The additional expenses which TMT argues should be included in the weighing of expenses and revenues may raise some doubt about SACAL's future financial success, but there are other factors which suggest that the new operation of SACAL may in the long run prove profitable. SACAL has since the close of the hearing, as reported in late filed exhibit 97, modified its deck space to enable it to carry 33 more automobiles, a change in service which SACAL estimates will increase its outbound voyage revenues by $5,280 or almost 15 percent. Further, since October 1962, SACAL has made other potential improvements. It has changed its management, acquired trailers in numbers and switched to a trailer-load cargo operation. It provides the only direct service for the transportation of refrigerated cargoes from Florida to Puerto Rico, and in addition provides facilities for break-bulk non-trailerized cargo, which TMT does not.

In light of these activities and the limited evidence we have with which to make a projection, we cannot find that SACAL's rates will be noncompensatory in the future. Furthermore, TMT itself had a financially disastrous beginning in this trade, yet it was able thereafter to achieve a profitable position. Since entering the trade SACAL has increased its revenues. It should, we think, be given a reasonable opportunity similarly to achieve a profitable position without having its rates condemned as unlawful.

Lastly, TMT argues that the Examiner erred in not finding that the impact of SACAL's rates and "destructive competitive practices" has seriously endangered TMT's continued operations at Miami. It says the Examiner misunderstood the sailing dates of certain of TMT's southbound sailings from Miami and maintains that the fact that its overall revenue has not suffered in no way lessens the impact of lost traffic and revenue at Miami.

Because of confusion as to sailing dates of certain TMT vessels, the Examiner misstated by some $40,000 the loss to TMT in revenue at Miami in the first quarter of 1963 over the first quarter of 1962. This error, however, had no material effect upon the Examiner's ultimate conclusions, as he did realize that TMT's cargo carryings from Miami were appreciably less in the first quarter of 1963 as compared to the first quarter of 1962. There is no showing that this loss in TMT's

traffic is due to SACAL's rate structure. The record shows, moreover, that many shippers of automobiles were dissatisfied with TMT's indirect service.

TMT seems to feel that the Examiner's conclusion as to SACAL's rates was based upon the fact that TMT's overall revenue position was profitable, and had he considered the Miami situation alone, he would have made a different conclusion as to the lawfulness of SACAL's rates. The Examiner's conclusion, however, was based on the fact that the record does not show that SACAL's rates are noncompensatory at present. The newness of SACAL's present service, the possible improvements made in stowage space on SACAL's vessel after the hearing, and other matters mentioned above were all factors underlying this conclusion.

Regardless of what caused the loss in TMT's Miami traffic, there is no showing that the rate structure of SACAL at the present time damages TMT. Such a finding, as we have said, would depend on a determination that SACAL's present rates are unreasonably low, and this we are unable to make on this record.

SACAL has in the past engaged in unlawful practices. In part, these have ceased. But SACAL's practices with respect to the carriage of personal effects inside the trunks of autos and the assessment of accessorial charges on the transportation of trailers when it utilizes the inside cargo space, are apparently still continuing and its tariff remains silent with respect to charges on these types of movements. The Examiner recommended that SACAL be required to state clearly in its tariff the rates and charges applicable on these movements to remove the discrimination which can now take place with respect to them. We agree with the Examiner that the portions of SACAL's tariff relating to these movements must be modified to prevent these practices from occurring in the future, and we shall require that this be done.

While we are unable on the present record to find that SACAL's rates are "unjust, unreasonable and otherwise unlawful," we shall require that SACAL file with us for the 12-month period beginning with the month of January, 1964, monthly financial reports reflecting the results of operations during each month. Such reports shall contain a detailed statement of operating revenues and other income items, operating expenses (including a reasonable allocation of overhead of the related China Foundation Companies to SACAL), with balance transferred to profit and loss, and a detailed statement of revenues and expenses of individual voyages included in the accounts for the month, including data showing the number of tons of cargo carried and the number of voyage days. The books of entry upon which the financial reports are based shall be made available to our staff for the purpose of auditing said monthly reports, and SACAL shall furnish

such additional information as the staff or the Commission deems necessary for a proper evaluation of the reports. At the end of this yearly period, we will be in a better position to make a determination as to the justness and reasonableness of SACAL's rates, and if any adjustment is warranted, it will be ordered at that time.

With respect to TMT, the facts as hereinbefore noted show that it recently has been and presently is operating profitably. There is no basis in this record for concluding that its rates are not compensatory or too low. We accordingly find that the rates and practices of TMT have not been shown to be unlawful.

The proceeding will be discontinued without findings (a) as to Motorships because of its lack of participation in the trade, and (b) as to Sea-Land because the lawfulness of the rates of its indirect Florida-Puerto Rico service is under investigation in Docket No. 1143.

An appropriate order will be entered.