FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 371

SWEDISH AMERICAN LINE—APPLICATION TO REFUND IN PART FREIGHT CHARGES COLLECTED ON SHIPMENT VIA MS VASAHOLM FROM NEW ORLEANS, LOUISIANA, TO OSLO, NORWAY

Decided June 11, 1964

Application of Swedish American Line to refund certain overcharges pursuant to Rule 6(b) granted.

Edward S. Bagley for Swedish American Line.

REPORT

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

Swedish American Line (the carrier) filed an application pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure for permission to make a refund of $593.94 on a shipment of binder twine which moved via carrier's vessel *Vasaholm* on February 19, 1964, from New Orleans, La., to Oslo, Norway.

Carrier is a member of the Gulf Scandinavian and Baltic Sea Ports Conference (the Conference), and charges conference rates. In Tariff No. 8, page 115, effective November 23, 1962, the Conference named a rate on binder twine, New Orleans to Oslo, of $1.95 per 100 pounds. But in filing Tariff No. 9, which took effect on January 15, 1964, the Conference failed to include a rate on binder twine.

Bemis Bros. Bag Company (Bemis) has been shipping twine via Conference vessels for years. On February 19, 1964, Bemis shipped 76 cartons of binder twine on the *Vasaholm* from New Orleans to Oslo. Since the Conference had no rate for twine on file at that time, carrier necessarily charged and Bemis prepaid freight computed at the N.O.S. rate of $80 per 2,240 lbs./40 cu. ft.

Almost immediately thereafter, the Conference noticed its oversight and failure to carry forward in Tariff No. 9, the rate on binder twine. Therefore, it filed, effective February 26, 1964, a rate on twine of $43.75

of $1.95 per 100 pounds). No other shipment of binder twine moved during this period so that there is no possibility of discriminatory treatment should Bemis be refunded the difference between the N.O.S. rate and the rate on binder twine.

In an initial decision served March 20, 1964, the examiner concluded that there was no indication that the parties had agreed in good faith that the lower rate which had been in effect prior to the shipment in question in Tariff No. 8 and which subsequent to the shipment was introduced in Tariff No. 9 would apply to the contract of affreightment. He therefore denied the application.

The carrier has since filed exceptions clarifying this point and indicating that it was the intent and understanding of the parties that the rate of $43.75 per 2,240 pounds would apply to this shipment as had been the case in the past. On the basis of this further clarification we will grant the application for the partial refund. In the past we have granted such applications where a shipper through previous shipments has come to rely on a given rate only to discover that subsequently, the rate was inadvertently omitted from a new tariff and therefore theoretically inoperative, *Lykes Bros. Steamship Co. Refund of Freight Charges* 7 F.M.C. 602 (June 4, 1963). As in that case, the relief granted here will relieve an innocent shipper of the carrier's failure to file a proper rate.

An appropriate order will be entered.

John Harllee, *Chairman*, and John S. Patterson, *Commissioner*, dissenting:

The Commission has ordered that the application of Swedish American Line to refund to a shipper a portion of the freight charges collected should be granted. The Commission has reversed an Examiner's decision denying the Swedish American Line's application for an order authorizing it to refund the amount of $593.94 to Bemis Bros. Bag Company because the shipper was required to pay freight on the basis of the rates and charges specified in the carrier's tariffs on file with the Commission and published and in effect at the time instead of on the basis of a rate established by the carrier which, by mistake, was omitted from the tariff, not published, and not on file at the time of the shipment.

Facts show that Swedish American Line transported 76 cartons of binder twine from New Orleans to Oslo, Norway, at a time when the legally filed and effective tariffs of the Gulf/Scandinavian and Baltic Sea Ports Conference Tariff No. 9 observed by Swedish American Line did not include a rate for such a classification of commodities. Accordingly, Swedish American Line charged the rate for commodities not classified, commonly known as "not otherwise specified" or the "N.O.S." rate. There is no question and no party contends that any

other applicable rate than the N.O.S. rate was specified in the tariffs governing the Swedish American Line service and that such tariff was on file with the Commission and duly published and in effect at the time.

Section 18(b)(3) of the Shipping Act, 1916, enacted by Congress in Public Law 87–346, approved October 3, 1961, provides as follows:

> No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

Whatever rights Rule 6(b) of the Commission's "Rules of Practice and Procedure," effective July 31, 1953, may give, the rule may not sanction disregard of the clear terms of the above congressional enactment. Moreover, Rule 6(b) authorizes reparation for injury caused by a violation of the Act to the extent indicated in section 22. No statement admitting any violation of the Act was included in the application here under consideration, and no violation exists.

The Commission's reversal was made on the basis of exceptions indicating an intent that the subsequently filed rates should apply, but section 18(b)(3) makes no exception for intentions, or for mistakes. The Examiner's decision reached the correct result.

FEDERAL MARITIME COMMISSION

Special Docket No. 371

Bemis Bros. Bag Company v. Swedish American Line Application To Refund in Part Freight Charges Collected on Shipment * * * From New Orleans, La., to Oslo, Norway, Granted

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 Swedish American Line to refund to Bemis Bros. Bag Company the sum of $593.94 is hereby granted.

By the Commission, June 11, 1964.

(Signed) Thomas Lisi,
Secretary,

FEDERAL MARITIME COMMISSION

No. 947

INTERNATIONAL TRADING CORPORATION OF VIRGINIA, INC. AND INTERNATIONAL TRADING CORPORATION OF NEW ENGLAND, INC.

v.

FALL RIVER LINE PIER, INC.

Decided June 11, 1964

Upon further proceedings to determine the amount of reparations due complainants as a result of respondent's violation of sections 16 and 17, Shipping Act, 1916, reparation equalling the unlawful excess charged to complainants over the lawful rates charged to similarly situated shipper is awarded to complainants.

W. B. Ewers, for complainants.
Frank L. Orfanello and *John F. Dargin, Jr.*, for respondent.

REPORT

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

FACTS

International Trading Corporation of Virginia (ITC Virginia), the original complainant in this proceeding, is a Virginia corporation, with its principal place of business in Norfolk, Virginia. Complainant is engaged in the importation of cement in bags from northern Europe and Sweden for its own account and subsequent resale in the New England market area served by a municipal marine terminal located at Fall River, Massachusetts, and operated by respondent Fall River Line Pier, Inc. Foreston Coal Company (Foreston), not a party to this proceeding, also conducts a cement importing business. Complainants and Foreston are the only regular users of respondent's terminal with respect to ocean borne cargoes. In its complaint filed June 8, 1961, and subsequently amended on June 30, 1961, complainant alleged that respondent had violated sections 16 First and 17 of the

Shipping Act, 1916:[1] (1) giving undue and unreasonable preference and advantage to Foreston in the allocation of berthing space and pier storage space at respondent's terminal during 1959, 1960, and 1961; (2) by charging complainant storage rates greater than those charged Foreston for the same type of cargo; and (3) by subjecting complainant to undue and unreasonable payment of terminal charges. Complainant, ITC, Virginia, further alleged that it had been damaged in the amount of $14,265.50 by the respondent's unlawful acts, and sought reparation in that amount. Complainant also sought an order directing respondent to cease and desist its alleged unlawful activities.

In its prior Report in this proceeding, 7 FMC 219 (1962), the Commission found that the billing practice of respondent with regard to the matter of storage charges and free time allowances was unjustly discriminatory against complainant in comparison with Foreston but that complainant had not established any undue or unjust discrimination by respondent in the matters of storage space allocation and berthing arrangements. However, from the record the Commission was unable to determine the extent of the injury and whether ITC Virginia or its wholly-owned subsidiary, International Trading Corporation of New England, Inc. (ITC New England), was the injured party. It had developed during the course of the hearing that the charges as billed were paid by ITC Virginia or by ITC New England, but ITC New England had not been made a complainant in the proceeding and no evidence had been offered to show how much was paid by either. The Commission therefore remanded the case to the Examiner to authorize an amendment to the complaint to include ITC New England and thereafter to determine the amount of reparation due under the complaint as amended.

In the hearing on remand held November 8, 1962, the Examiner permitted the amendment of the complaint to join ITC New England as a party complainant and received evidence bearing on the amount of reparation due under the complaint as amended. The Examiner concluded in the Initial Decision on Remand, dated May 10, 1963, that both complainants paid and bore the charges on the storage of cement; that they were damaged thereby to the extent of the differences between the storage charges and free time allowances unlawfully assessed

[1] The pertinent provisions of these sections are:

"Sec. 16 * * * That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly: First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Sec. 17 * * * every * * * person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or concerned with the receiving, handling, storing, or delivery of property."

against them in comparison with those assessed Foreston; and that they were entitled to reparation in the total sum of $11,778.99.[2]

During the hearing on remand, respondents offered a written motion to dismiss. The Examiner declined to consider the motion, relying on Rule 5(o) of the Commission's Rules of Practice and Procedure, (46 CFR § 502.74) which requires that all motions to dismiss must be addressed to the Commission. Respondent subsequently presented the motion to the Commission during the oral argument on exceptions to the Examiner's decision on remand. It was thereafter denied by the Commission in an order served October 10, 1963 (copy of which appears as an appendix to this Report).

DISCUSSION AND CONCLUSIONS

Respondent in excepting to the Initial Decision on Remand alleges that the Examiner erred:

1. In refusing to entertain respondent's motion to dismiss.
2. In permitting ITC of New England to be joined as a party complainant without opportunity for respondent to reply to new issues said to be raised by ITC New England being so joined.
3. In receiving in evidence a stock certificate, allegedly representing ten shares of stock in ITC New England owned by ITC Virginia, without requiring further proof of genuineness; and
4. In basing his findings with respect to damages on an unsupported assumption that complainants and Foreston Coal Company conducted a competitive cement importing business; and in awarding reparations without an adequate basis on the record.

We need not treat respondent's first exception here, as it has already been treated in our denial of respondent's motion to dismiss (see Appendix).

Respondent's second exception asserts that the amended complaint was really a new complaint, introducing new issues, and that respondent was not given an opportunity to reply to these issues. The violations alleged against respondent in the amended complaint were identical to those set forth in the original complaint and were provable by the same evidence. Whether ITC New England was made a

[2] The Examiner found that there was insufficient evidence to justify part of complainant's claim in the amount of $1,606.35, that $877.51 was paid by ITC New England more than 2 years prior to ITC New England's joinder as a party complainant, and that $2.65 was paid by check drawn on the account of International Trading Corporation of Florida, which is not a party to this proceeding. The Examiner accordingly reduced complainants' reparation by $2,486.51, leaving a remainder of $11,778.99.

party to the proceeding by an amended complaint or a new complaint makes no difference. Neither procedure raised new issues of which respondent was not apprised. By prior Report and Order of the Commission, respondent was given ample notice that the proceeding was remanded to the Examiner so that the complaint could be amended to include ITC New England 7 FMC 219 (1962).

In its third exception respondent asserts that adequate proof of the ownership of ITC New England by ITC Virginia was not offered. This contention is without merit. While the original complaint was brought by ITC Virginia for damages sustained by itself and by its agent ITC New England, ITC New England has now been joined as a party complainant, seeking reparation from respondent in its own right, and its ownership is therefore immaterial. Even if that were not so, ITC Virginia offered evidence at the original hearing to show its ownership of ITC New England and this evidence is sufficient to establish that all the outstanding stock of ITC New England is owned by ITC Virginia.

Respondents fourth exception questions the sufficiency of the record to find that ITC and Foreston were in competition with each other, that the commodities for which storage charges were assessed or the services rendered to ITC and Foreston were the same or similar, and that ITC has suffered any actual damage by respondent. The record leaves no doubt that the commodity upon which storage charges were assessed is bagged cement, and that the services in question are those normally connected with the day-to-day operation of a terminal (*e.g.* unloading and storage). The commodities and services involved are identical.

Respondents also contend that the Examiner erred in failing to find that complainants had failed to prove their damages and thus were not entitled to reparation. We think the Examiner properly disposed of this contention in his initial decision.

Respondents rely upon *Eden Mining Co.* v. *Bluefield Fruit & SS. Co., et al.* 1 U.S.S.B. 41 (1922). In that case, two Philadelphia shippers were engaged in the business of mining and furnishing power and transportation in Nicaragua, Central America. They claimed reparation on the basis of unjust discrimination. The Board found that respondent carriers, by entering into certain exclusive patronage contracts with other shippers on shipments out of New Orleans to Nicaragua, had unjustly discriminated against complainants in violation of sections 16 and 17 of the Act. The Board, however, denied reparation because no evidence was introduced "relative to any expense incurred, loss of profits or damage of any sort suffered as a result of the wrong of respondent. * * *"

In the *Eden* case, unlike here, there was no contention that the business of complainants were competitive with those of the contract shippers, or for that matter any one else, or that they were otherwise of a nature that would raise a presumption of damage as the normal and probable consequence of the assessment of discriminatory rates.[3]

More in point in this proceeding is *Isbrandtsen Co. Inc.* v. *States Marine Lines, Inc. et al*, 6 FMC 422 (1961). In that case complainant Isbrandtsen entered into a fixed price contract with a shipper to transport raw cotton from United States Gulf ports to Japan. Isbrandtsen had intended to charter a nonconference vessel for this transportation but when shipment was to be made no such vessels were available. Isbrandtsen then arranged shipment on two conference lines and in order to obtain the lower contract rate offered to sign a conference dual rate contract. Isbrandtsen's offer was refused by respondent. Isbrandtsen paid the higher contract rates and filed a complaint with the Board alleging unjust discrimination in violation of section 17. The Board sustained the claim and awarded reparation in the amount of the difference between the contract and noncontract rates. On appeal, *States Marine Lines, Inc.* v. *Federal Maritime Commission, et al*, 313 F. 2d 906 (CADC, 1963) the Court of Appeals for the District of Columbia Circuit had the following to say in upholding the decision of the Board:

> Assuming that [the Eden] case sets forth the correct measure of damages on the facts there involved, reliance upon it here is misplaced. That case merely holds that proof of the differential does not *"as a matter of course"* establish the damages. It does not hold that the differential can never be the measure of damages. [Italics supplied.]

By footnote the Court observed that, "There has been no judicial determination of the correct measure of damages under the Shipping Act. Supreme Court decisions in similar situations have not been consistent." We think the principle of the *Isbrandtsen* case is equally applicable here.

Complainants and Foreston both import the same commodity through the same terminal, at the same time for sale in the same gen-

[3] Indeed the Board's report in the *Eden* case does not even disclose the type of cargo, or its ultimate disposition, e.g. for use by shipper in its mining operations or for resale in Nicaraguan market. The complainants there simply insisted that under the statute mere proof of the discriminatory rates and the amount of the differential ipso facto proved injury and the amount of damage. Thus the question before the Board in Eden was a limited one, and it was in answer to this limited issue that the Board stated:
"the fact of injury and the exact amount of pecuniary damage must be shown by further and other proof before the board may extend relief. We think it is clear that proof of unlawful discrimination within the meaning of the act, by showing the charging of different rates from shippers receiving the same service, does not, *as a matter of course*, establish the fact of injury and the amount of damage to which the complainants may be entitled by way of reparation." Id. at 47–48. [Italics supplied.]

eral market area. This commodity, cement, is a thoroughly standardized product and in a normal market the price will undoubtedly approach uniformity. *Cement Manufacturers Assn.* v. *U.S.*, 268 U.S. 588, 591, 506 (1925). Thus, complainants could not, without fear of loss of customers, increase prices to compensate for respondent's prejudicial charges.

The Shipping Act is designed to place similarly situated shippers and importers on equal footing when using the facilities of our oceanborne foreign commerce. There is no place in this design for undue preference or unjust discrimination in the form of differing rates and charges to like users of those facilities. Respondent has in no way justified the unduly prejudicial charges imposed and has subsequently discontinued the practice of charging complainants more than Foreston Coal Company for the use of the same facilities. Until respondent changed its policies, complainants were directly damaged by paying the excess charges. We therefore affirm the conclusions of the Examiner: that complainants received the shipments as described, paid and bore the charges thereon, were damaged thereby to the extent of the difference between storage charges and free time allowance unlawfully assessed against them over and above those charges assessed Foreston, and that they are entitled to reparation in the total sum of $11,778.99. Based upon evidence introduced as to which of the complainants bore each of the unlawful charges, it is found that complainant ITC Virginia is entitled to reparation in the sum of $8,678.38; and complainant ITC New England is entitled to reparation in the sum of $3,100.61.

An appropriate order will be entered.

FEDERAL MARITIME COMMISSION

DOCKET NO. 947

INTERNATIONAL TRADING CORPORATION OF VIRGINIA AND INTERNATIONAL TRADING CORPORATION OF NEW ENGLAND

v.

FALL RIVER LINE PIER, INC.

DENIAL OF MOTION TO DISMISS

By an order dated April 16, 1962, the Commission remanded this proceeding to the Examiner to authorize an amendment to the complaint to include International Trading Corporation (I.T.C.) of New England as a party complainant. I.T.C. Virginia, the initial com-

plainant, had sought unsuccessfully to make this amendment during the original hearing before the Examiner. At the hearing on remand, held on November 8, 1962, the Examiner permitted the amendment adding I.T.C. New England as a party complainant. At the same hearing, respondent offered a motion to dismiss which the Examiner refused to entertain since such a motion must be addressed to the Commission under its Rules of Practice.

Respondent did not then submit its motion to the Commission. Instead, respondent presented its motion to us on August 14, 1963, in the course of oral argument on exceptions to the Examiner's decision on remand, determining the reparations due complainants. Without in any way countenancing such dilatory procedure, we agreed to consider this motion provided it was properly filed and served and complainants were afforded an opportunity to reply. This was done and the motion and the reply are now before us.

In its motion, respondent contends I.T.C. New England is not properly a party because a formal motion to amend the complaint should have been filed instead of the amended complaint which was offered and accepted at the hearing on remand. But, as above noted, such a motion to amend was made and denied at the original hearing. I.T.C. Virginia excepted to the Examiner's action in this respect, respondent replied arguing that the Examiner was right, and we ruled with complainant and directed that the amendment be allowed. Respondent therefore had the opportunity and in fact did argue this issue to the Commission, but the final ruling went against it. No basis existed for requiring the filing of a second such motion at the hearing on remand.

The purpose of including I.T.C. New England as a party complainant was to enable the Examiner to award this company reparations if he found that it, rather than its parent, I.T.C. Virginia, was the party actually damaged by the acts of respondent. The illegal acts alleged against respondent in the amended complaint were identical to those set forth in the original complaint and were provable by the same evidence. No new issues were raised of which respondent was not apprised. Moreover, the Commission's order of April 16, 1962, remanding the case was ample notice to respondent that I.T.C. New England would be included as a party complainant. The lack of a second formal motion for this purpose could not have prejudiced respondent.

Respondent also argues that I.T.C. New England is suing it in a Massachusetts State court and has thus elected to waive any rights before the Commission and seek relief elsewhere. Nothing appears in the record of our proceeding as to the existence of this suit. We were first told of it by respondent on August 14, 1963, during the oral argument on remand. Even so, the existence of such a suit would not

bar I.T.C. New England from bringing a complaint before the Commission. As we pointed out in our report of April 16, 1962, respondent, by virtue of its carrying on the business of "furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water" is an "other person" subject to the Shipping Act, 1916, and hence is subject to our jurisdiction with respect to violations of the Act. Pendency of a State court suit cannot defeat our jurisdiction and this would be so even if the suit and the complaint before us were predicated on the identical matter.

In consideration of the foregoing, respondent's motion to dismiss is hereby denied.

By the Commission, October 8, 1963.

FEDERAL MARITIME COMMISSION

No. 947

INTERNATIONAL TRADING CORPORATION OF VIRGINIA, INC., AND INTERNATIONAL TRADING CORPORATION OF NEW ENGLAND, INC.

v.

FALL RIVER LINE PIER, INC.

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

It is ordered, That the complainants in this proceeding are entitled to reparation as stated below; and

It is ordered, That respondent, Fall River Line Pier, Inc., shall pay:

to International Trading Corporation of Virginia, Inc., the sum of $8,678.38 and

to International Trading Corporation of New England, Inc., the sum of $3,100.61.

By the Commission, June 11, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 374

DEPARTMENT OF STATE, AGENCY FOR INTERNATIONAL DEVELOPMENT, U.S. AID MISSION TO DOMINICAN REPUBLIC

v.

LYKES BROS. STEAMSHIP CO., INC.

Application to waive collection of a portion of charges assessed on a used automobile shipped from San Juan, P.R., to Santo Domingo, Dominican Republic, granted.

J. D. Kearns for applicant.

INITIAL DECISION OF C. W. ROBINSON, PRESIDING EXAMINER[1]

Under bill of lading dated March 12, 1963, Lykes Bros. Steamship Co., Inc. (Lykes), transported on its *Reuben Tipton* from San Juan, P.R., to Santo Domingo, Dominican Republic, one unboxed used automobile shipped by and consigned to Rafael Pol Mendez, care of American Embassy. The bill of lading was stamped with the words "Government B/L #A-0911904," and the application shows "Department of State, Agency for International Development, United States Aid Mission," as complainant.

The shipment was at the rate of $40 per measurement ton, applicable to cargo n.o.s., as published in Lykes's Puerto Rico/Dominican Republic and Haiti Freight Tariff No. 1 (FMC No. 3), and the basic freight charges amounted to $537. In addition, there were assessed a wharfage charge of 1 cent per cubic foot ($5.37), an arrimo charge of $4 per 1,000 kilos ($5.44), and an emergency surcharge of $3 per short ton ($4.50). Total charges of $552.31 have not been collected although the bill of lading is stamped "FREIGHT PREPAID."

The n.o.s. rate of $40 was assessed in the absence of a commodity rate on automobiles. Effective March 16, 1964, Lykes published a commodity rate on automobiles of $17 per [40] cubic feet. On such basis, the total charges for the automobile in question would be $243.54,

[1] This decision became the decision of the Commission on June 16, 1964 (rules 13(d) and 13(h), rules of practice and procedure, 46 CFR 502.224, 502.228).

and Lykes seeks authority to assess and collect this amount rather than the original amount of $552.31 (this represents a reduction of $308.77).

By letter of August 5, 1963, complainant's administrative officer (presumably at San Juan) refused to honor Lykes's bill for the charges originally assessed, for the following reason:

> It is beyond the realm of our comprehension that the freight from San Juan, P.R., to Santo Domingo could be in excess of the freight from east coast ports; and we cannot find the Federal Maritime Commission ruling, which authorizes your charge of $40 per measurement ton.

The reason assigned by Lykes for the reduction from $40 to $17 is that "such rating ($40, n.o.s.) is unwarranted in the trade, most unreasonably high, detrimental to the commerce of the United States, and was definitely applied through the above oversight." The application states that "this is a singular shipment of this commodity."

Section 18(b)(3) of the Shipping Act, 1916, as amended (Public Law 87-346), forbids any common carrier in foreign commerce to "charge or demand or collect or receive a greater or less or different compensation for the transportation of property * * * than the rates and charges which are specified in its tariff on file with the Commission and duly published and in effect at that time * * *." Section 18(b)(5) provides that the "Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States * * * which, after hearing, it finds to be so unreasonably high * * * as to be detrimental to the commerce of the United States."

As previously pointed out, the shipment consisted of one used automobile, apparently connected in some way with an agency of the Government. It, therefore, does not come within the purview of the statute as it was not that type of "commerce of the United States" which could be detrimentally affected by the level of the rate; in other words, it was not a *commercial* movement. In *Agreement No. 6870*, 3 F.M.B. 227, appendix page IV (1950), it was stated: "To be a detriment to the commerce of the United States there must be at least a plausible possibility that the action complained of will affect commerce adversely."

No mistake was made by Lykes in assessing the $40 n.o.s. rate; indeed, it was required to do so in the absence of a commodity rate. Nor is there any indication that complainant was misled. On the other hand, as the shipment moved on a Government bill of lading and it does not appear that the $17 rate is unduly preferential or discriminatory, the application is granted.

C. W. ROBINSON,
Presiding Examiner.

MAY 26, 1964.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 372

BERNARD BOWMAN CORP.

v.

AMERICAN EXPORT LINES, INC.

Application of American Export Lines for authority to refund a portion of freight charges in connection with a shipment from New York to Izmir, Turkey, denied.

Applying contract rates to a shipment made prior to the effective date of a dual-rate contract by the device of granting retroactive effect to such contract, is in violation of section 18(b)(3) of the Shipping Act, 1916, as amended.

Elliott B. Nixon for applicant.

INITIAL DECISION OF HERBERT K. GREER, EXAMINER[1]

American Export Lines, Inc., has filed an application pursuant to rule 6(b) of the Commission's rules of practice and procedure, designating Bernard Bowman Corp. as the nominal complainant, and requesting authority to pay to Eris Insaat ve Ticaret, Ltd., of Izmir, Turkey,[2] the equivalent in Turkish currency of $441.05 as a refund in connection with two shipments of machinery parts from New York to Izmir.

The application discloses the following facts:

1. American Export Lines, Inc. (applicant), at all material times was a member of the North Atlantic Mediterranean Freight Conference (conference), which conference had filed with the Federal Maritime Commission (Commission) its tariff No. 8, establishing rates for machinery parts as follows:

	Contract rate	*Non-Contract rate*
Boxed, per measurement ton	$46.50	$53.50
Unboxed, per measurement ton	54.25	62.50

[1] This decision became the decision of the Commission on June 16, 1964, (rules 13(d) and 13(h), rules of practice and procedure, 46 CFR 502.224, 502.228).

[2] Eris Insaat ve Ticaret, Ltd., is not named party complainant although it is the party to whom payment is sought to be made. The application includes the certificate of complainant that the charges referred to in the application were paid and borne by Eris Insaat ve Ticaret, Ltd., and no other. Bowman is named complainant, according to applicant, because it is responsible to its customer for the amount of freight difference. The person to receive reparation is a proper party complainant, however, the principles stated in this decision would be applicable whether payment was sought to be made through Bowman to Eris Insaat ve Ticaret, Ltd., or direct to such firm.

2. On December 20, 1963, applicant received from Bernard Bowman Corp. (shipper) two shipments of machinery parts to be carried from New York to Izmir, and issued bills of lading No. 6 and No. 7, on both of which Bowman was designated as the shipper, the shipment consigned to order of Yapi ve Kredi Bankasi A.S., notice of arrival to be addressed to Eris Insaat ve Ticaret, Ltd., (actual consignee).[3]

3. Bill of lading No. 6 covered boxed machinery parts and specified the noncontract rate of $53.50 for a total charge of $1,108.79 (plus heavy lift charges not here involved), which sum was paid by the actual consignee.

4. Bill of lading No. 7 covered unboxed machinery parts and specified the noncontract rate of $62.50 for a total charge of $2,242.19 (plus heavy lift charges not here involved), which sum was paid by the actual consignee.

5. The total charge for both shipments would have been $441.05 less than the actual charge had the contract rates been applied.

6. On December 20, 1963, the date of the shipments, the shipper was not party to a conference dual-rate contract covering the trade between New York and Turkey; the actual consignee was not at any material time party to a dual-rate contract covering such trade.

7. On December 27, 1963, the shipper executed a merchant's freight contract (dual-rate contract) and mailed it to the conference with the request that the contract rates be applied retroactively to the two shipments made on December 20, 1963. The conference replied, regretting its inability to apply the contract rate to the two shipments.

8. On January 6, 1964, the shipper requested authorization from the Commission to date the dual-rate contract as of December 20, 1963; on January 21, 1963, the Commission's Division of Informal Complaints replied, suggesting the filing of an application under rule 6(b).

9. In its letter to the Commission of January 6, 1964, the shipper supported its request for predating the contract, and has similarly supported this application, on the following basis:

> We have been shipping regularly, practically on every vessel, goods to Israel since 1948, and always paid freight on the contract rate. It was somehow never brought to our attention that shipments to Israel were eliminated from the contract rate system of the Conference, and we thus took it for granted that shipments to Izmir, Turkey, were also within the same category and within the same rules as those to Israel. It is quite obvious that we acted in good faith and we feel that we should not be penalized by paying ocean freight of $441.06 higher than would normally apply.

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[3] The person to be notified of arrival of shipment under the terms of an order bill of lading is considered as the "actual" consignee. *McDowell and Gibbs, Ocean Transportation*, 1954 edition, p. 135.

10. The dual-rate contract signed by the shipper on December 27, 1963, provided that the effective date would be the date specified in the contract. The application does not specify the effective date but the contract was not signed by the conference until after December 27, 1963, the date it was mailed to the conference by the shipper.

11. Applicant, shipper, and the actual consignee have consented to a refund of $441.05 in connection with the two shipments of machinery parts.

12. The shipper holds itself responsible to its customer, the actual consignee, for the amount of the rate differential.

13. No other shipments of similar commodities moved via applicant's vessels during the approximate period of time here concerned.

DISCUSSION

In support of the application, applicant points out the importance of expanding the ability of American shippers to sell their goods abroad. It takes the position:

> * * * that if this end is to be achieved, it calls for a broad minded interpretation of the recent amendments to the Shipping Act, not a narrow and hypertechnical one. Plainly no carrier or Conference should itself have the discretion to grant contract rates on a retroactive basis; the possibilities of improper discrimination and prejudice would be too great. However, we submit that the Commission can and should permit such a freight adjustment where, as here, the facts have been put before it and formal permission requested. Otherwise, any misunderstanding by a shipper of the complicated procedures and laws governing our foreign trade would be irremediable. We cannot believe that this is the proper meaning or intent of the recent amendments to the Shipping Act or that any such interpretation would serve to encourage the smaller American exporters to expand their activities into previously unfamiliar trade areas.

Recent amendments to the Act include section 18(b)(3), which provides:

> No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

The basic issue is the Commission's authority to grant retroactive effect to a dual-rate contract as a means of authorizing a refund, regardless of the prohibitions of section 18(b)(3) against refunds *in any manner or by any device*. Applicant argues that under a "broad minded" interpretation, it may be determined that the proper meaning and effect of that section does not prevent authorization for a refund under

the circumstances here disclosed. To support its contentions, applicant attributes to the Commission the authority to remedy "any shipper misunderstanding of the complicated procedures and laws governing our foreign commerce." Applicant does not cite precedent for its contention or relate this broad authority to a specific statutory provision but, apparently, proposes that this power may be implied from the Commission's responsibility to foster foreign commerce. In *Martini & Rossi* v. *Lykes Brothers Steamship Company*, 7 F.M.C. 453 (1962), the Commission implied from its responsibility to administer the Act the authority "to see that equity and justice are done in the matter of reparations." Further, that in a case involving a bona fide rate mistake or inadvertence "it seems clear that we may exercise our discretion to remedy the situation." However, an examination of that decision and other similar decisions makes clear that the Commission did not assert the authority to remedy every type of rate mistake, but only where the mistake was related to a carrier's error or omission in filing a rate it intended, in good faith, to apply to a shipment. *Barr Shipping Company* v. *Royal Netherlands Steamship Company*, special docket No. 282, supplemental decision, March 17, 1964. Although not so specifically stated in prior decisions, the Commission has permitted relief only when a carrier, or conference has failed to file the new rate in accordance with section 18(b)(2) of the Act, although the shipper had been led to believe such rate would become the lawful rate.

The application fails to present grounds for the relief requested not only because it fails to relate a rate mistake to the carrier's omission to file a rate it intended to apply to the shipments, but for the further reason that the circumstances do not warrant application of the principles of equity and justice. It was held in *Nydia Foods Corporation* v. *Java Pacific Line*, special docket No. 313, January 8, 1964, that business men engaged in the import and export trade are not innocent, but negligent when they make no effort to determine the cost of a shipping service they intend to utilize. Here, the shipper "took it for granted" that a rate it had been paying on shipments to Israel would apply to shipments to Turkey. Although there may have been some basis for the assumption, the carrier did not mislead the shipper. Unilateral assumptions by shippers, unrelated to a misleading act of a carrier, will not support equitable relief. A shipper is charged with knowledge of the correct rate and the only lawful rate is the one on file with the Commission. *Silent Sioux Corporation* v. *Chicago & N. W. Ry. Co.*, 262 F. 2d 474 (1959).

Precedent does not support applicant's concept that the Commission is possessed of authority to correct "any" shipper misunderstanding of

law or regulation by permitting freight adjustments. It would seem that applicant and its conference may have attributed such wide regulatory authority to the Commission for the exclusive purpose of permitting a freight adjustment by means of a refund. It was established in *Aichmann & Huber* v. *Bloomfield Steamship Company*, special docket No. 290, March 3, 1964, that rule 6(b) does not provide a panacea for every wrong or misunderstanding arising from the business relations between carriers and shippers. It was further made clear in that proceeding that rule 6(b) does not provide a loophole for escape from the prohibitions of section 18(b)(3) of the Act.

Stripped of nonessentials, the application is designed to effect a refund by the device of granting retroactive effect to a dual-rate contract, although the carrier has not violated the Act or employed a practice which offends the principles of fair dealing. Granting the application would be in direct contradiction to the prohibitions found in section 1(b)(3) of the Act.

CONCLUSION

Under the circumstances here disclosed, the Commission is without authority to grant retroactive effect to a dual-rate contract for the purpose of permitting a refund of a portion of freight charges imposed in accordance with the carrier's tariff on file with the Commission.

The application is denied. An appropriate order will be entered.

(Signed) HERBERT K. GREER,
Presiding Examiner.

MAY 19, 1964.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1091

ORLEANS MATERIALS AND EQUIPMENT CO., INC.

v.

MATSON NAVIGATION COMPANY

Charges assessed and collected by respondent on shipments of structural steel from New Orleans, La., to Honolulu, Hawaii, found applicable and not unreasonable.
Complaint dismissed.

John B. Gooch, Jr., for complainant.
Edward S. Bagley for respondent.

INITIAL DECISION OF GUS O. BASHAM, CHIEF EXAMINER [1]

By complaint originally received on August 6, 1962, and refiled on February 6, 1963, complainant alleges that the charges assessed and collected by respondent on certain shipments of structural steel from New Orleans, La., to Honolulu, Hawaii, were in excess of the applicable charges; also that they were unreasonable in violation of section 18 of the Shipping Act, 1916. Reparation is sought.

Complainant stated that it filed the papers received on August 6, 1962, in order "to have these claims of record with the Commission within the (2-year) statutory period provided in section 22 of the 1916 Act, in the event the court in New Orleans should rule that the Commission has exclusive primary jurisdiction." The filing consisted of a copy of a petition filed in court by complainant in a suit to recover the alleged overcharges, together with an affidavit of an employee of complainant verifying the facts stated in the petition.

Nothwithstanding the fact that complainant's attorney was advised by the Secretary of the Commission that this filing was not in accordance with the Commission's rules of practice and procedure, and that

[1] This decision became the decision of the Commission on June 24, 1964 (rules 13(d) and 13(h), rules of practice and procedure, 46 CFR 502.224, 502.228).

there was a possibility, therefore, that it would not stop the running of the statute of limitations, nothing further was filed with the Commission until the revised complaint was received on February 6, 1963.

In view of the findings and conclusions herein, and the fact that the U.S. District Court for the Eastern District of Louisiana, before which the suit [2] is now pending, has stayed the proceeding pending the decision of the Commission, the question whether the claims are time barred [3] here will not be considered further.

Neither party called witnesses, and the matter was submitted on the following stipulated facts.

1. Complainant is a Louisiana corporation engaged in the manufacture and sale of structural steel.

2. Respondent is a common carrier by water, engaged in ocean transportation between New Orleans, Louisiana, and Honolulu, Hawaii, and in connection with these proceedings is subject to the provisions of the Intercoastal Shipping Act and the Shipping Act, 1916.

3. During the period beginning in May 1960 and ending in January 1961, complainant shipped via respondent's line consignments of structural steel for carriage to the port of Honolulu.

4. The freight rate to be applied to complainant's shipments was $29.96 per ton of 2,000 pounds or $29.96 40 cubic feet, whichever produced the greater revenue.

5. Freight tariff number 13 (F.M.B. 20) of the Atlantic and Gulf/Hawaii Freight Conference was the tariff applicable to the shipments referred to above.

6. The freight on said shipments was determined by respondent as follows: The above-mentioned shipments were received on the wharf by the carrier's clerks, who thereupon measured each of the pieces or packages as received from the shipper, taking their depth, width and length in feet and inches in such a manner that the cubage of a piece of cargo was determined by the carrier's agents through the ascertainment of the smallest rectangular container (which container is conceived geometrically without wall thickness) into which the piece or package would fit. As an example, if pieces of steel were fabricated to resemble a carpenter's square measuring 20 feet on its length (along one side of the square) by 10 feet in width (along the other side of the square) by 1 foot in depth or thickness, the cubage for freighting purposes would be 200 cubic feet, the product obtained through Tweed's Accurate Cubic Tables by multiplying the length by the width by the depth. Once these dimensions were so determined, they were then furnished to the rate clerks in the office of States Marine-

[2] CA—11935—A.

[3] The freight charges were paid on June 8, 1960, Aug. 25, 1960, Oct. 5, 1960, Nov. 17, 1960, Dec. 21, 1960, and Feb. 8, 1961.

Isthmian Agency, Inc., where the cubic measurement of each individual piece or package was obtained from Tweed's Accurate Cubic Tables, as referred to in the tariff, which provide as follows:

HOW TO USE THE TABLES TO FIND CUBIC DISPLACEMENT

After measuring depth, width and length in feet and inches; take the smallest dimension and find that particular page by using the index on the right-hand side of the book. Then find the next largest dimension at the top of the page (listing is in feet and inches). The largest dimension will be found in a vertical line on the extreme left-hand side of this page. At the angle of the meeting of the last two dimensions will be the corresponding cubic for one such package listed in feet and thousandths of a foot.

To get the total cubic for more than one package of the same size; multiply this listed cubic by the total number of packages and point off.

After the cubic measurement had been obtained from the Tables, the freight applicable to the shipment was computed from the rates contained in the Conference tariff on both a weight and a measurement basis. The method producing the greater revenue prevailed and in the case of cubic measurement, the measurement, the tariff rate and the freight derived therefrom were entered on the bill of lading.

7. The weight or measurement tonnage basis and the freight, minus wharfage and insurance, as ascertained by respondent were as follows: Measurement of cargo, 46,362 cubic feet; and freight charged, $40,581. The freight herein charged by respondent on each of the shipments referred to above was paid by complainant to respondent's agents, States Marine-Isthmian Agency, Inc.

8. The freight on said shipments determined solely on a weight tonnage basis (without consideration of the alternative weight or measurement tonnage basis) would have been $21,710.12.

9. In order to conserve space in the vessel compartments, individual pieces and packages, in some instances and where practicable, were stowed in a manner resulting in their stowage in the form sometimes referred to as "nesting," that is, by other cargo or other pieces or packages occupying a part of the "rectangularized" cubic measurement volume of such individual piece or package as referred to in paragraph 6 hereinabove. In addition to the space occupied by the individual pieces or packages, whether "nested" or not, stowage of cargo of this nature results in what is sometimes referred to as "broken stowage," that is, unoccupied space in, about or over the shipment required for blocking, lashing, tomming, chocking, and otherwise securing the shipment, as well as space which is not suitable for the stowage of any other available cargo. The cubic measurement occupied by the shipments was not measured after they were stowed and secured in the vessel compartments, and while stowage was arranged to conserve space to the extent practicable, the difference, if any, between the

space occupied in the vessel by the shipments and their cubic measurement for freighting purposes is unknown.

Rule 14(a) of the carrier's applicable tariff provided that:

"Weight or measurement shall be assessed on accurate measurement calculated when cargo is delivered to carrier;" (and that) "When measurement has been obtained in accordance with the above (method of disposing of fractions), cubic measurement of the shipment must be obtained from, and ocean freight charges billed in accordance with Tweed's Accurate Cubic Tables."

Rule 17(a) of the tariff provided that:

rates are per ton of 2,000 lbs. or 40 cubic feet, whichever creates the greater revenue. Gross weights and outside measurement shall govern.

Rates applying to weight or measurement of cargo, whichever produces the greater revenue, are customary in the ocean trades of the United States; and in measuring irregular packages, the three greatest dimensions are used to determine cubic. See *Modern Ship Stowage*, page 12, U.S. Department of Commerce, 1942, appendix A.[4]

As to a piece or package with six rectangular sides, the ascertainment of cubage presents no difficulty. In the case of other articles, packed or not packed, the cubage for freighting is generally taken to be that of the smallest rectangular container—conceived geometrically without thickness—into which the package or other object, as it stands, would fit. See *Grossman on Ocean Freight Rates*, pages 5–7, 1956. Professor Grossman states that: "This standard appears to be reasonable because such an imaginary container would ordinarily represent the space needed for the accommodation of the object and made unavailable for other cargo".[4]

Structural steel is susceptible to damage by being bent during handling and requires extensive shoring and dunnaging, is limited for stowage purposes as to cargoes which can be safely stowed about it, and represents a dangerous cargo for the personnel engaged in loading it. See *Handling and Stowage of Cargo*, Ford and Webster, 3d Ed. (1952), pages 284–285.[4]

The record is not clear as to the size, shape and weight[5] of the articles shipped, but it is clear that the pieces were assembled, and that a typical shipment was in the shape of a carpenter's square, used as an example in paragraph 6 of the stipulation.

Tweed's Accurate Cubic Tables is one of two standard references utilized in our ocean trades for the determination of cubage for freighting purposes. (See footnote 4.) Its purpose is to provide

[4] Official notice is taken of these facts under rule 13(g) of the Commission's rules of practice and procedure. These authorities were mentioned in respondent's brief and were not challenged by complainant in its reply brief.

[5] Official notice is taken of the fact that steel displaces 1 cubic foot for every 490 pounds of weight, which was asserted in respondent's brief and not challenged in complainant's reply brief.

steamship clerks with a fast and efficient method for ascertaining cubic area without the necessity of making actual arithmetic computations, much like the function of a sliderule as used by engineers and others who deal with many figures. As a preface to the directions for using the tables (par. 6 *ante*), is the following statement: "Listing Corresponding Cubic in Feet and Thousandanths for Three Given Dimensions in Feet and Inches * * *."

DISCUSSION AND CONCLUSIONS

The use as a example of an L-shaped carpenter's square measuring 20 feet in length (along one side of the square) by 10 feet in width (along the other side of the square) by 1 foot in depth or thickness, clearly illustrates the difference between the contentions of the parties as to how a shipment so shaped should be measured for the purpose of freighting. Respondent calculates the measurement as 200 cubic feet; i.e., 20 x 10 x 1. Complainant, on the other hand, would measure the square as if it were disassembled into two parts—one being 20 feet in length and the other 9 feet in length. Then, the freight cubage would be 20 x 1 x 1 plus 9 x 1 x 1, equaling 29 cubic feet.

Respondent assumes that the carpenter's square would occupy 200 cubic feet of space as if it were shipped in a rectangular container measuring 10 feet by 20 feet by 1 foot, conceived geometrically without wall thickness. It contends that the applicable tariff in connection with Tweed's Tables provides for "rectangularizing" the shipments.

Complainant contends that this method of computing the cubage is arbitrary, illegal and unreasonable, since the shipments are "nested" insofar as practicable, that is, much of the rectangular space for which it is charged is used for other cargo, resulting in respondent's receiving "double freight" for the same cargo space. Therefore, complainant maintains that it should have to pay only for the actual displacement of the carpenter's square or 29 cubic feet. Moreover, complainant argues that Tweed's Tables merely provide a quick method for calculating cubage for "three given dimensions" as noted in the preface to such tables; that they do not provide for "rectangularizing" the shipment, or any other manner in which the three dimensions are to be ascertained; and that they apply only *after* the dimensions of width, length and depth are obtained.

Put in another way, respondent contends that the shipment should be weighed and measured as a rectangle (the smallest into which it would fit) as it comes to the dock before being loaded, and the alternative weight or measurement basis applied according to which yields the greater freight charge. On this basis the charges on the measurement basis would be higher and therefore applicable under the tariff.

Complainant, on the other hand, contends that respondent's method of "rectangularizing" the shipment produces a fiction; that the space actually used in the ship should govern; that if such space is used in the calculation, the charges on the weight basis would yield the greater revenue, and therefore would be applicable under the tariff. As noted in the stipulation, if the rate had been applied to weight instead of measurement the charges would have been $21,710.12 instead of $40,481, or a difference of $18,870.88, which complainant seeks as reparation.

Complainant's contentions, though ingenious and plausible, cannot be sustained on this record.

In the first place, a carrier's tariff must provide a certain and unvarying method of weighing and measuring cargo and of calculating the proper freight charges thereon. This can be accomplished only by taking the weight and measurement of the cargo as it is received on the dock by the carrier. The applicability and reasonableness of the charges cannot be determined after the shipments are loaded in the vessel; or by determining how much the shipment would measure or how it would stow—on the assumption that it was disassembled into its component parts.

Complainant's argument that refund should be made on the unused part of the rectangular space, because other cargo is "nested" therein, is untenable. The record shows that "nesting" is done in *some instances* and *where practicable*, resulting in other cargo occupying a *part* of the rectangular space; that stowage of this cargo results in "broken stowage" or unoccupied space required for blocking, lashing, etc., and otherwise securing the shipment, as well as space which is not suitable for other available cargo; that the cubic measurement occupied by the shipments was not measured after being stowed and secured; and that the difference, if any, between the space occupied in the vessel by the shipments and their cubic measurement for freighting purposes is unknown. From this evidence, it would be highly speculative to say how much of the alleged 191 cubic feet (200-9) of unused space in the "rectangularized" carpenter's square, for instance, was occupied by "nested" cargo, and how much was actually occupied by the shipment together with the timber and other material required to secure it safely.

As stated, respondent's tariff provided that accurate measurement was to be calculated when the cargo was delivered to carrier, on each package, and that *outside measurement would govern.* Respondent took the measurements in the above manner which, according to *Modern Ship Stowage*, *ante*, is in accordance with the usual practices pertaining to cargo freighted on a measurement or alternative weight-

or-measurement basis. Note that this authority states specifically that in measuring irregular packages, the three greatest dimensions are to be used to determine cubic.

Another authority [6] relied upon by respondent recognizes that respondent's method of "rectangularizing" the shipment is generally followed in our ocean trades; and states that such method is reasonable because such imaginary container would ordinarily represent the space needed for the accommodation of the shipment and made unavailable for other cargo.

Upon the foregoing facts, and contentions made in connection therewith, it is found and concluded that the charges assessed by respondent on the shipments in question were calculated in accordance with the applicable tariff; and that such charges have not been shown to be unreasonable or otherwise unlawful, as alleged.

The complaint will be dismissed.

(Signed) Gus O. Basham,
Presiding Examiner.

June 3, 1964.

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[6] *Grossman on Ocean Freight Rates, ante.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 1115

APPLICATION FOR FREIGHT FORWARDING LICENSE
DIXIE FORWARDING CO., INC.

DOCKET NO. 1116

APPLICATION FOR FREIGHT FORWARDING LICENSE
MR. L. H. GRAVES, d.b.a PATRICK & GRAVES

Decided June 26, 1964

On reconsideration, order served April 22, 1964, is withdrawn and applications for licenses as independent ocean freight forwarders are granted subject to certain conditions.

Cunningham, *Yznaga*, and *Duncan* for respondents.

Robert J. Blackwell, *Wm. Jarrell Smith*, *Jr.*, and *J. Scot Provan*, Hearing Counsel.

Paul D. Page, *Jr.*, Hearing Examiner.

REPORT ON RECONSIDERATION

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

By applications filed May 18, 1962, Dixie Forwarding Co., Inc. (Dixie), and Mr. L. H. Graves, d.b.a. Patrick & Graves (Patrick & Graves), applied for licenses as independent ocean freight forwarders pursuant to section 44, Shipping Act, 1916 (46 U.S.C. 841(b)).

In the prior report herein, served April 22, 1964, the Commission denied the applications. On May 21, 1964, applicants petitioned for reconsideration of that decision. The material facts are set forth in the prior opinions and need not be restated here.

The applicants in their petition emphasize that their continued business activity depends almost entirely on their being licensed to engage in freight forwarding, and that the denial of such licenses

would destroy a well-established business built up over a number of years. The question before us is whether applicants' past history of lax practices (as detailed in the prior report) requires a denial of the applications. This is a close question upon which the Commission, on further consideration, has concluded that the applications should be granted with certain conditions attached, as hereinafter noted.

Applicants' lax practices began prior to the passage of Public Law 87–254 (75 Stat. 522), which established new requirements and safeguards applicable to the operations of independent ocean freight forwarders. In light of the statute and the possible loss of their forwarding business, applicants have committed themselves to cooperate fully with the Commission and adhere scrupulously to the requirements of the law and the conditions which the Commission is imposing. We believe this provides a proper basis under which these applicants may be given the opportunity, under close supervision, to continue to offer their otherwise qualified services to the shipping public.[1]

Accordingly, the applications for licenses as independent ocean freight forwarders are granted subject to the following conditions:

(1) That Dixie Forwarding Co., Inc., and L. H. Graves, d.b.a. Patrick & Graves, submit to this Commission every 6 months an independently certified audit of their financial status; and

(2) That the above requirement shall remain in effect for the period of two (2) years from the date of this order.

Chairman Harllee and Commissioner Patterson dissenting:

For the reasons set forth in the original report served April 22, 1964, we dissent from the decision herein to grant the licenses of these applicants. There is nothing new contained in the petition for reconsideration or the above majority decision which would warrant a reversal of our prior decision.

[1] The matter of past violations of law by the applicants can be handled in this case like all other similar violations that come to the Commission's attention.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1115

APPLICATION FOR FREIGHT FORWARDING LICENSE
DIXIE FORWARDING CO., INC.

DOCKET NO. 1116

APPLICATION FOR FREIGHT FORWARDING LICENSE
MR. L. H. GRAVES, d.b.a. PATRICK & GRAVES

ORDER ON RECONSIDERATION

On April 22, 1964, the Commission served a report and order in the above-entitled proceedings, denying the applications. Upon petition for reconsideration filed by applicants, and for good cause shown, these proceedings were reopened for reconsideration on the present record. Reconsideration of the matters involved having been had, and the Commission on the date hereof having made and filed its report on reconsideration, which report is made a part hereof:

It is ordered, That the order served April 22, 1964, is hereby vacated and set aside;

It is further ordered, That the applications for licenses of Dixie Forwarding Co, Inc., and L. H. Graves, d.b.a. Patrick & Graves, are hereby granted pursuant to section 44(b), Shipping Act, 1916, and rule 510.8 of General Order 4, subject to the following conditions:

(1) That Dixie Forwarding Co., Inc., and L. H. Graves, d.b.a. Patrick & Graves, submit to this Commission every 6 months an independently certified audit of their financial status; and

(2) That the above requirement shall remain in effect for the period of two (2) years from the date of this order.

(Signed) FRANCIS C. HURNEY,
Special Assistant to the Secretary.

FEDERAL MARITIME COMMISSION

No. 1100 (Sub. 1)

IN THE MATTER OF AGREEMENT No. 9218 BETWEEN THE MEMBER LINES OF THE NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE AND THE CONTINENTAL NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE

Decided June 30, 1964

Agreement No. 9218, providing that in all instances where a member line of either of the respondent conferences operates within the scope or range of the other conference, it must be a member of both conferences, approved pursuant to section 15, Shipping Act, 1916.

Burton H. White and *Elliott B. Nixon* for respondents.
Robert J. Blackwell and *H. B. Mutter* as Hearing Counsel.

REPORT

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

This proceeding is before us upon exceptions to the initial decision. The North Atlantic Continental Freight Conference (Eastbound Conference) and the Continental North Atlantic Westbound Freight Conference (Westbound Conference) filed an agreement (F.M.C. No. 9218) with the Federal Maritime Commission which provides that in all instances where a member line of either conference operates any vessel within the scope or range of the other conference, it must be a member of both conferences. This proceeding was instituted for a determination of whether the agreement, if approved, would deny conference membership on reasonable and equal terms and conditions, or would otherwise contravene the standards of section 15 of the Shipping Act of 1916, and whether the agreement should be approved, disapproved, or modified in any respect pursuant to section 15. The agreement provides:

It is hereby agreed by and between the undersigned conferences that they will impose as a condition of admission to, or for continuance of membership in, their Conferences the requirement that any line offering services within the

jurisdiction of both Conferences and seeking admission, or desiring continuance of membership in one, be a member of the other Conference.

The undersigned Conferences further agree to take all steps necessary or appropriate to effectuate this agreement.

The Westbound Conference lines operate from ports of Germany, Holland, and Belgium to U.S. ports in the Portland, Maine/Hampton Road range. The Eastbound Conference lines operate from U.S. ports in the same range to ports in Germany, Holland, and Belgium. A combination of the routes constitutes a round voyage. The importance of the trade covered by each conference to the commerce of the United States is established. Both conferences have active competition from nonconference carriers and the trade is overtonnaged in both directions. Membership in the conference is common with the exception of the French Line which does not operate westbound, and Isbrandtsen, which joined the Eastbound Conference in July of 1963 and has signed the joint agreement demonstrating its consent to the provisions of agreement No. 9218. Finn Line was formerly a member of the Eastbound Conference and operated westbound as a nonconference carrier. On March 31, 1963, Finn Line resigned from the Eastbound Conference because of its disapproval of the proposed dual membership requirement and for the further reason of "business economics."

In an initial decision, the Examiner recommended disapproval of the agreement because it failed to provide reasonable and equal terms and conditions for membership in the respective conferences as required by section 15. Respondents excepted to the Examiner's decision.[1] Pointing out that the conferences had chosen to maintain their separate existence, the Examiner concluded that it was unreasonable to condition membership in one upon membership in the other. Respondents, however, contend that the Examiner misinterpreted the applicable law, and that neither section 15 nor any other section of the Act requires that we disapprove the agreement. For the reasons set forth below we agree with respondents.

Prior to the enactment of Public Law 87–346 (75 Stat. 762), the Shipping Act did not include specific reference to conference membership requirements and all proposed conditions on conference membership were considered under the general provision of section 15 which precludes approval of any agreement or portion thereof found to be:

* * * unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their

[1] A portion of respondents objections go to the alleged failure of the Examiner to make the findings required by sec. 8(b) of the Administrative Procedure Act and certain other alleged deficiencies in the initial decision. In view of our decision herein we find it unnecessary to deal with these exceptions.

foreign competitors, or to operate to the detriment of the United States, or to be in violation of this Act.

The Commission and its predecessors consistently interpreted this statutory language to preclude approval of agreements excluding from conference membership any common carrier who was regularly engaged in the trade covered by the agreement, or who furnished evidence of ability and intention in good faith to institute and maintain a regular service between ports within the scope of the conference agreement. *Black Diamond S.S. Corp* v. *Cie M'T'ME Belge*, 2 U.S.M.C. 755 (1946). However the past policy in this respect was never intended to prevent approval of reasonable membership requirements, whose existence was justified, and whose provisions were not unjustly discriminatory, or detrimental to the commerce of the United States.

By Public Law 87–346 the so-called steamship conference dual-rate law, Congress included in section 15 of the Act an amendment dealing expressly with the problem of open membership, requiring the Commission to disapprove after notice and hearing, any agreement which fails to provide:

* * * reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade * * *.[2]

Thus, any provision in a conference agreement, establishing criteria for conference membership, must now meet two statutory tests: (1) The terms of membership must be reasonable and equal; and (2) they must not be unjustly discriminatory, contrary to the public interest, detrimental to the commerce of the United States or otherwise in violation of the Act. The similarity of these two statements of congressional policy regarding conference membership is evident. It would be difficult to conceive of a membership provision which could be called "reasonable" if it were contrary to the public interest or detrimental to the commerce of the United States; or "equal" if it were unjustly discriminatory.

The "reasonable and equal" provision of section 15, constitutes legislative recognition of the prior administrative policy of "open" conference membership. But the statute permits "reasonable and equal" conditions to be imposed; thus, it necessarily does not envision a situation where the mere fact of application will guarantee a carrier admission to the conference. Some conditions may be imposed so long as they are "reasonable and equal." The determination that a particular condition of membership is reasonable or unreasonable is necessarily a factual one, and on the record before us, we find that agreement No. 9218 should be approved.

[2] This specific requirement was in some measure due to congressional sanction of the dual-rate system with the resultant preservation of the economic power inherent therein.

It has been demonstrated by the respondents that although they have chosen, for administrative reasons, to exist as separate conferences, the trades of each are so interrelated and interdependent, they must be considered, for reasons of practicality, as a single trade. Membership in the conferences is common (with the exceptions indicated above); the trades covered by each of the conferences constitutes a round voyage, the vessel owners operating in each of the trades are identical; the same vessels are used both eastbound and westbound; accounts are kept on a round voyage basis, and the rates charged both eastbound and westbound are based on profit and loss figures computed on the basis of a round voyage.

With such compelling circumstances as these, it would be excessive deference to formality to say that what is acceptable conduct for a single two-way conference (i.e. a single conference covering both the inbound and outbound trade),[3] becomes unreasonable, and detrimental to the commerce of the United States, when practiced by two conferences under the circumstances and conditions existing in this trade. In our view the resolution of such questions as the existence of detriment to the commerce of the United States must be based upon more substantial distinctions than these.

An important reason for the existence of the conference system is the elimination of rate competition between member lines. Thus, whatever competition might exist between conference members as to service, frequency of sailings or other factors which could lead a shipper to prefer one conference line over another, all conference members must offer prospective shippers the same rate.[4] However, as respondents point out a one-way conference member in the subject trade would be in the unique position of being able to lure the cargo of a shipper who conducts both an import and an export business. Thus, were a line operating conference outbound but as an independent inbound, that line could by offering reduced rates inbound induce the exporter-importer to ship with it both ways. Thus, while those carriers operating conference both ways would be bound to charge the higher conference rate both ways, the dual capacity carrier gains the advantage of the conference rate outbound but is not committed to charge conference rates inbound. We do not think it unreasonable for the conferences to protect themselves from this possibility through an agreement providing for joint membership. Nor do we consider it unreasonable for them to protect themselves from a one-way in-

[3] There are fifteen two-way conferences listed in the Commission's list of "Approved Steamship Conference and Related Agreements" (1962); see also Marx, "International Shipping Cartels" p. 138 (1953) where eleven such two-way conferences are listed.

[4] Admittedly, there is the exception to the principle of no rate competition when a rate or rates are declared "open" and the individual member is then free to charge rates which may differ from those charged by the other members.

dependent having a voice and a vote in conference decisions which affect both the eastbound and the westbound trades. We think it would be unrealistic to accept Hearing Counsel's contention that conference members in two such closely related trades, can completely ignore eastbound factors when discussing westbound policies, and vice versa. The one-way conference member is in the fortunate position of having a voice in setting policies which, in turn, have a strong influence on the trade in the opposite direction, where he competes as an independent with the same conference members whose policies he helps determine.

We consider the existence of strong nonconference competition in the trades involved an important factor in this decision. The agreement in question is not likely to drive nonconference competition from the trade, since nonconference lines have always been a strong factor in these trades. This agreement is not likely to deprive the shipping public of its opportunity to ship on nonconference lines. Moreover, the trade is overtonnaged, and there does not appear to be any likelihood that this agreement will restrict the movement of goods.

A reasonable term and condition of admission may be one which facilitates the elimination of differentials in rates for transporting the same goods over the same routes but in a different direction as well as one which promotes rate stability in each direction. The Commission has been concerned with the existence of such differentials, particularly as a result of facts brought out in the hearings before the Joint Economic Committee (*Discriminatory Ocean Freight Rates and the Balance of Payments* hearings pursuant to section 5(a) of Public Law 304). Official notice is taken of the contents of the reports of these hearings printed for the use of the Joint Economic Committee.

The committee has suggested that one of the reasons for the decline in steel sales abroad "may well be the transportation advantage enjoyed by foreign steel producers due to ocean freight rate differentials." It was shown "that ocean freight rates established by the conferences which control most United States shipping are much higher from a given port in the United States to a Western European port" than are rates "on identical products shipped inbound from the same ports to a given American port" (hearings, pt. 1, p. 2). Both of the conferences' parties to agreement No. 9218 transport commodities between ports in the United States and Western European ports.

One of the causes for this condition is the fact that rates in each direction are established by separate conferences in each direction. This will still be the case, but now membership will be identical where any line offers services within the jurisdiction of both conferences. Without such an identity of interests between the two conferences,

it would be impossible to take any rate action reflecting the common interests. The members of a westbound conference will have different economic problems and different national loyalties affecting their decisions on the rates to charge than members of an eastbound conference. The diversity of interests resulting from a diversity of membership inhibits the establishment of rates which reflect a common interest. If the members of the conferences in each direction are substantially identical, they will approach rate problems on the basis of the round voyage economics of all the members rather than on the basis of competition with carriers operating independently in the opposite direction.

Studies and investigations are not going to make owners change their rates to eliminate differentials as long as we have decisions made by private property owners in a free enterprise system and, it is to their diverse interests to charge different rates in each direction. To the extent the world economy is free and competitive, it will be promoted by rates made in this manner even though disparities may result. The advantages of a free economy rest on the enlightened self-seeking of sellers and buyers of transportation service. Disparities are the result of this self-seeking at present. The government may provide incentives and legal means for accomplishing the result of eliminating differentials by private decision, if it is in the public interest to have such differentials removed, by actions which promote elimination of incentives to continue disparities. The proposed agreement is a very limited step in this direction by facilitating discussion of ways and means to eliminate differentials and still maintain rates at levels that will produce a reasonable profit on a round voyage basis.

There is a need for discussion based on common interests. The committee hearings refer to an acknowledgment of the need by an owner's representative who said there have been some differences in rates which make "little sense at all" and "we in the steamship business agree that any disparities between inbound and outbound rates must be based on sound causes or adjusted" (pt. 3, p. 593). If this is true, the mutual membership agreement will promote the ascertainment of sound causes or adjustments which will be in the public interest of a free competitive economy rather than a government-controlled one.

We find, therefore, that the agreement is a *reasonable* one, according to the terms of the statute.

The question of whether it is *equal* as well as reasonable, is less difficult of determination. The statutory mandate that provisions governing membership be "equal" is satisfied if an outsider is granted membership on the same terms as those already in the conference, and on the same terms as other applicants. No contention was made

that the agreement is not "equal" in this sense, and we find that this requirement of the statute is satisfied.

We have examined the proposed agreement, and find nothing which warrants its disapproval under section 15. We conclude that agreement No. 9218 is a reasonable and equal condition of conference membership, and is not discriminatory as between carriers, detrimental to the commerce of the United States, contrary to the public interest, or otherwise violative of the Act. It should be approved under section 15 of the Act. An appropriate order will be issued.

Chairman Harllee and Commissioner Barrett dissent from the majority opinion and their views thereon will be subsequently expressed.

FEDERAL MARITIME COMMISSION

No. 1100 (Sub. 1)

IN THE MATTER OF AGREEMENT NO. 9218 BETWEEN THE MEMBER LINES OF THE NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE AND THE CONTINENTAL NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE

This proceeding having been instituted upon our own motion and having been duly heard and full investigation of the matters and things having been had, and the Commission, on the date hereof, having made and entered of record a report on further hearing stating its conclusion and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That agreement No. 9218 is hereby approved.

By the Commission.

FEDERAL MARITIME COMMISSION

No. 1100 (Sub. 1)

IN THE MATTER OF AGREEMENT NO. 9218 BETWEEN THE MEMBER LINES OF THE NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE AND THE CONTINENTAL NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE

Chairman Harllee and Commissioner Barrett dissenting:

While the majority purports to agree with the "open door" policy regarding admission to conference membership, it has proceeded to place obstacles in that doorway never intended by Congress.

The Antitrust Subcommittee of the Committee on the Judiciary, has observed that:

Since 1940, the Commission or its predecessors have committed themselves to an affirmative policy of assuring relatively easy access to conference membership for newcomers. Support for this position can be found, at least indirectly, in the Shipping Act itself. It is safe to generalize by saying that today, *as a matter of law,* a line must be admitted to any steamship conference provided it has the ability to maintain, and has the good faith intention of instituting, a regular service in the trade included *within the ambit of the conference agreement.* [Emphasis ours.] [1]

By approving agreement No. 9218, however, the Commission is now sanctioning an agreement which would allow each conference to impose upon applicants a condition for membership affecting their participation in a trade not included "within the ambit of the conference agreement." Thus, the Westbound Conference may now prevent its members and prospective members from operating as independent carriers in the eastbound trade from the United States to Continental Europe, in our view a different trade entirely. In a similar manner, the Eastbound Conference may influence the participation of its members in the westbound trade.

Apropos of such a condition, the House Antitrust Subcommittee's investigation showed that:

Various reasons have been offered, over the course of years, for excluding applicants from conferences. Since it is now recognized by conferences that few, if any, of these alleged justifications would be considered valid today in view of the Board's "open door" policy with respect to membership, current efforts to exclude new members from steamship conferences have had to assume more subtle guises. These have taken the form of efforts to persuade applicants to remain outside the trade because of the thinness of traffic, delay and procrastination in the processing of applications for admission, or exacting as conditions of membership agreement with respect to rate practices *in areas beyond the scope of the conference.* Unless vigorously enforced, therefore, the Board's "open door" policy may prove largely hortative in light of the many devious means which conferences continue to employ to gainsay admittance to outside lines. [Emphasis ours.] [2]

The concern expressed by the subcommittee over the very type of agreement now approved by the majority is not, in the language of its opinion, "an excessive deference to formality." It is an expression of concern over what could be a highly anticompetitive device, disadvantageous to many carriers in the trades served by the conferences. As pointed out by the Examiner, the respondents have chosen to maintain their separate existence notwithstanding *their* contention that

[1] Report of the Antitrust Subcommittee of the House Committee on the Judiciary, H. Rept. No. 1419, 87th Cong., 2d sess., p. 97 (1962).

[2] Report of the Antitrust Subcommittee of the House Committee on the Judiciary, H. Rept. No. 1419, 87th Cong., 2d sess., p. 98 (1962).

the two trades are in reality but one. The only reasons proffered for the retention of their separate existence are some rather vague references to "administrative reasons." [3]

Respondents point to the "unique" competitive position of the one-way operator as justification for the imposition of the membership condition here at issue. Yet the record contains not one scrap of evidence that such competition has ever been faced by the conference in the absence of the proposed condition.[4] The entire testimony on this count is prospective only and is continually characterized by such prefatory phrases as "It is conceivable . . .," "It may well be . . ." or "It is possible . . ." Such conjecture is a thin thread by which to suspend a condition to membership particularly in the face of the announced policies of the Congress, this Commission and its predecessors.[5] When the conjectures of respondents are weighed against the experience of Finn Line which for economic reasons resigned from the Eastbound Conference rather than join the Westbound Conference, we find it difficult to understand either the majority's reasoning or its conclusions.

The record shows that the ability to operate as an independent is a substantial factor in allowing a new carrier to break into a trade. As one witness, the agent for Finn Line in this country, testified:

A. . . . obviously, being new in a trade, and coming into the Westbound Conference as a new line, certainly this would apply to any trade, it would be very difficult to succeed, quoting the same rate, as against lines who had been in that trade for years.

* * *

Q. Then, it is your opinion that to go conference would require a considerable amount of effort to establish a different contact?

A. We would have naturally lost all of our customers that we had developed as a nonconference line and then going into the conference, we just would have to start afresh and develop new customers.

A line's status as an independent has been a valuable opening wedge in the trades served by the two conferences. When, in the exercise

[3] Respondents point to the fact that different representatives attend the meetings of the respective conferences. We fail to see the efficacy of the point, particularly in view of virtually identical membership in both conferences. Indeed the testimony on this point seems to indicate merely that the two conferences are not "prepared to consider (forming a single conference) at the moment."

[4] Finn Line was formerly a member of the Eastbound Conference and operated westbound as an independent, but the record nowhere discloses any injurious effect on the Eastbound Conference's operations by virtue of Finn Lines' "unique" position.

[5] There are no exhibits or testimony in the record which provide any basis for a reasonable determination as to the number of dual capacity shippers (i.e., the person who both exports and imports in these trades) or the amount of cargo they ship. Thus, there is no way of determining the degree of probability that the fears of the respondents would be realized without the proposed condition.

of a line's business judgment, it felt that it was sufficiently established in the trade to be able to get the advantage of conference membership and still hold its customers, it would apply for conference membership. The record further shows, that while some goods moved in both directions, this was generally not the case. It is only natural, therefore, that a carrier's fortunes eastbound and westbound did not develop at precisely the same rate, and there might be a considerable period of time when his business judgment would dictate that he operate conference in one direction, and nonconference in the other. Thus, under the subject agreement, in order to share the advantages of conference membership in one direction, a carrier might be forced to assume a disastrous loss of business in the other.

The views of the majority to the effect that rate disparities can be better eliminated through this agreement is pure speculation and, in any event, irrelevant. The membership of the two conferences is practically identical now, and it is difficult to see just how the requirement of common membership can possibly contribute to a solution of the problem of inbound/outbound rate differentials.[6] If the problem were that simple, the Commission would, we are sure, seek legislation which would authorize only two-way conferences. The approval of this anticompetitive, exclusionary device contravenes not only section 15 of the Act, but runs contrary to the majority's desire for "a free competitive economy" in that trade.

While it is true that "reasonable" conditions have been approved, they have been routine in nature, designed mainly to meet conference expenses, and insure the financial integrity and operational readiness of the applicant. Many conferences have admission fees, which range from $100 to $2,500. One conference exacts a readmission fee for lines seeking to rejoin the conference within 3 years after resignation. A bond or security deposit in lieu of an entry fee is required by a number of other conferences. Several conferences impose both an admission fee and an indemnity bond. However, even an admission fee high enough to deter some smaller carriers from entering the conference has been disapproved as detrimental to the commerce of the United States. *Pacific Coast European Conference*, 3 U.S.M.C. 11 (1948). In our view any further inroads on the "open door" membership policy, beyond the requirement that the applicant be operating or show intent or ability to operate in the trade (and such other routine conditions as described above) are contrary to the essential

[6] In this connection, the majority would appear to accept statements made before the Joint Economic Committee as "facts" proven here and which are entitled to weight in reaching our decision in this proceeding. Until the parties to this proceeding have been afforded an opportunity to test the validity of such statements they cannot be used as a basis for our decision here.

and well-defined administrative policy governing conference membership, and are unreasonable, unjustly discriminatory as between carriers, contrary to the public interest, and detrimental to the commerce of the United States. We would uphold the Examiner and disapprove the agreement as imposing an unreasonable condition on membership in contravention of section 15.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1072

INVESTIGATION OF CERTAIN PRACTICES OF STOCKTON ELEVATORS

Decided June 30, 1964

The record does not show and will not support a finding that either respondent participated in any act which was unjust, unfair or unreasonable. Accordingly, neither the initial paragraph of section 16 nor the last paragraph of section 17 of the Shipping Act, 1916, are shown to have been violated.

H. Stanton Orser for respondent, Stockton Elevators.
Alexander D. Calhoun, Jr., for respondent, Mitsui & Co., Ltd.
Frank Gormley and *Robert J. Blackwell*, Hearing Counsel.

REPORT

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

This is an investigation on our own motion into (1) the practices of Stockton Elevators in connection with terminal charges assessed the Department of Agriculture and other owners, shippers, or exporters of grain during 1961 and 1962 to determine whether the Elevator may have violated sections 16 First and 17 of the Shipping Act, 1916, and (2) into the transactions between the Elevator and Mitsui & Co., Ltd., to determine whether Mitsui violated section 16 of the Act. The Examiner concluded that neither the Elevator nor Mitsui had participated in any act which was unfair, unjust or unreasonable within the meaning of sections 16 and 17 and that the proceeding should be discontinued. Hearing Counsel filed exceptions to the initial decision.

The exceptions are in the nature of general conclusions that Stockton Elevators, in granting "allowances or commissions" to Mitsui engaged in a practice which was unjust and unreasonable in violation of section 17 of the Act; and Stockton Elevators in arranging for Mitsui to pay wharfage at a reduced rate, engaged in an unjust and unreasonable

practice in violation of section 17. Hearing Counsel agrees that there is no "meaningful disagreement as to the facts" and in essence the exceptions are nothing more than a disagreement with the Examiner's evaluation of the evidence. A careful consideration of the record leads us to the conclusions that the exceptions are without merit and that findings and conclusions in the initial decision are well founded and proper. Accordingly we adopt the attached examiner's initial decision as our own and make it a part hereof.

Commissioner Patterson dissenting:

Stockton Elevators (Elevators) is an "other person" defined in the first section of the Shipping Act, 1916 (Act), as a person "carrying on the business of furnishing wharfage * * * or other terminal facilities in connection with a common carrier by water" and is a respondent herein subject to our jurisdiction. There is no dispute as to Elevators' status nor as to the facts which show respondent required Mitsui & Co., Ltd. (Mitsui), a consignor, to pay wharfage in amounts from ½ to 1 cent a bushel less than the applicable tariff rates in 1961 and 1962 and less than other shippers were required according to the tariffs to pay during the same period for identical services.

The Examiner found that the Director of the Port of Stockton agreed to charge Mitsui wharfage "at one cent per bushel for not more than ten thousand tons, rather than one and one-half cents per bushel as provided by the Port's then effective tariff." Elevators' manager and vice president, Mr. Harley, acknowledged a similar agreement. The manager agreed that in response to requests by Mitsui if Elevators felt a need for business and "we could afford a one-half cent per bushel or 20 cents a ton, or whatever it might be" to make a trade possible, he would "authorize them (Mitsui) to try to make the trade."

A July 14, 1961, debit memo from Mitsui to Elevators refers to ½ cent per bu., $658.28 "above arrangement made through Mr. Harley/Mr. Lyons" (Mr. Lyons was an agent of Mitsui). Mr. Harley wrote Lyons, "I don't deny the agreement; I don't remember it. Will you refresh my memory?" Mr. Harley replied on August 3, 1961, referring to May 26 notes showing "we agreed on a one-half cents (½¢) per bushel discount in order to realize this business."

Other notations, references, and conduct of the parties substantiate the existence of a continuing agreement to allow Mitsui less than the tariff wharfage by means of lower charges, refunds, or direct payments to Mitsui.

The tariffs in effect during the period covered by the transactions in evidence were the Port of Stockton's tariff No. 3, superseded by tariff No. 5, which provided up to June 30, 1961:

Rates provided in this item are in cents per 2,000 pounds or 40 cubic feet.
Column A—Rates apply for Inland Waterway Trade.
Column B—Rates apply for Coastwise Trade.
Column C—Rates apply for Offshore Trade.

	A	B	C
Merchandise n.o.s. in bulk, direct between vessel and car, truck, barge, or terminal; or direct to or from another vessel	21	35	50

The wheat in question was transported to Japan, Formosa, Korea, and elsewhere, so column "C" applied.

Elevators' regulations provided "wharfage is applicable to all grain moving to and from vessels over our dock at rates published in Port of Stockton tariff No. 3."

Before June 30, 1961, the Port of Stockton billed Elevators for wharfage and Elevators passed the charge on in its own billing for wharfage pursuant to the Elevators' tariff regulations.

After June 30, 1961, pursuant to Federal Maritime Board agreement No. 8695, approved January 3, 1962, "Franchise To Operate Shipside Grain Terminal Elevator," Elevators charged wharfage directly under its own tariffs. Elevators' tariff No. 1, original page No. 9, section "B," "Wharfage," effective July 1, 1961, provided for wharfage in identical terms as the Port's tariff, and no longer used the Port's tariff by reference. During both periods the effect on Mitsui was the same and Mitsui did not pay the tariff wharfage, at the same time that Government agencies were required to pay the full 1½ cents per bu.

It was established that 50¢ per 2,000 lbs, or 40 cu. ft. is equal to 1½ cents per bushel.

Pursuant to the agreement and before June 30, 1961, the following typical transactions involving lower charges were proven:

1. Elevators by invoice dated April 7, 1961 (No. A10665), billed Mitsui "wharfage on wheat loaded on *SS Oregon Bear* 3,161,620 lbs. or 52,693.67 bu." at the rate of $0.01 per bu. and total charges of $526.94.

2. Elevators by invoice dated April 27, 1961 (No. A10737), billed Mitsui "wharfage on purchase of wheat ex CCC for loading on *Oregon Bear* 3,306,900 lbs. or 55,115 bu." at the rate of $0.01 per bu. and total charges of $551.15.

These two transactions were pursuant to the agreement between the Port of Stockton and Mitsui and to the arrangement whereby Elevators passed on the Port's charges which were 1 cent per bu. instead of 1½ cents as they should have been under both tariffs.

Pursuant to the agreement and after July 1, 1961, when Elevators obtained the franchise, the method of dealing with Mitsui changed.

Mitsui was no longer charged wharfage, but billed Elevators and was paid directly as follows:

1. Mitsui by "debit memo" dated July 14, 1961, on a *China Bear* total shipment of 7,899,520 lbs., 131,658.66 bushels of soft white and dark hard winter wheat billed Elevators "½¢ per bu., $658.29," with the notation "Above arrangements made through Mr. Harley/Mr. Lyons." The "arrangements" related to wharfage payments.

2. Mitsui by "debit memo" dated February 7, 1962, for "wheat allowance" billed Elevators as follows:

Oregon Bear	31,884.92 bu. @ 1¢ bu. (your invoice No. B2070)	$318.05
	6,869.036 lbs. @ 20¢ S/T	686.90
Fairport	78,630.33 bu. @ 1¢ bu. (your invoice B2070)	786.30
California Bear	55,118.12 bu. @ 1¢ bu	551.18
Washington Bear	63,568.55 bu. @ 1¢ bu	1635.69
	25,766 bu. @ 1¢ bu	257.66
Anna C	4,300 S/T @ 33¢ S/T	1,419.00
Lancelot overcharge per your invoice B2274		882.00
Total		5,536.78

3. Elevators by invoice No. B2746 dated March 19, 1962, to Mitsui stated, "we credit your account" for "wheat allowances" on 3 ships listed a total of $1,873.77 at rates of 20 cents per ton and 1 cent per bushel.

Elevators paid directly the foregoing billings, or gave Mitsui credit.

The purchases of the wheat were proven as well as the movement through Elevators' facilities. Evidence of charges of full 1½ cents per bu. wharfage to Commodity Credit Corporation, Agriculture Stabilization & Conservation Service, E. D. Wilkinson Gr., Balfour Guthrie, and Port of Stockton was in the record.

On the shipments covered by Item 1, the record showed Elevators billed Commodity Credit Corporation and the latter paid July 11, 1961, charges amounting to $1,974.88 for "Wharfage as per Port of Stockton Invoices SS *China Bear*." The allowances to Mitsui are no longer expressly stated as being related to wharfage, but follow the original arrangement in being measured as ½ and 1 cent per bushel. The transactions in Items 2 and 3 followed the same course. The payments were posted in Elevators' records as "Conditioning Wheat," although no conditioning service was performed by Mitsui.

Other record evidence showed that Mitsui was the addressee of letters of credit covering the financing of the wheat and confirmed the various sales to purchasers in the Far East. The letters of credit required Mitsui to provide documents including "full set of at least two clean on board ocean bills of lading marked freight prepaid," in order to receive payment from the buyer's credit established in

Mitsui's favor. Mitsui was thus shown to be the owner or party controlling the shipment of the wheat through Elevators' terminal facilities and over the Port's dock facilities into the transporting ships, in accordance with instructions from buyers who were also the shippers (sales were made f.o.b.).

From the foregoing facts it is found that:

1. Elevators arranged and participated in transactions whereby Mitsui was allowed to obtain wharfage at less than Elevators' tariff regulations applicable to and paid by others.

2. Elevators made payments to Mitsui called "allowances" not made to any other customers and permitted Mitsui to obtain wharfage services without charge although under the same circumstances other customers would be liable for wharfage pursuant to the terms of Elevators' tariffs.

The variance between what Elevators' records stated payments to Mitsui covered (i.e., performance of a service) and what actually happened (i.e., no service was performed) conceals a continuation of a practice of giving Mitsui an allowance in the form of a rebate of part of the wharfage actually due by means of the lower wharfage billing, by a shifting of the obligation to pay wharfage to a government agency and thereafter giving Mitsui an allowance payment measured in the same manner as before. Normally wharfage is paid by the person who owns or controls the cargo. In this case such control or ownership is found to be in Mitsui (*Terminal Rate Increases—Puget Sound Ports*, 3 USMC 21, at p. 24). Mitsui was relieved of this obligation and got 1 cent a bushel in addition, but no other customer was similarly treated.

From these findings it must be concluded that in arranging a reduction in wharfage chargeable to Mitsui and in making allowances and repayments to Mitsui on account of wharfage and not to other customers contrary to its published tariffs applicable to the public, Elevators has not observed a just practice relating to or connected with the handling, or delivering, of property consisting of wheat, in violation of the second paragraph of section 17 of the Act. The Examiner should be reversed on this issue.

It is further considered that the Examiner was correct in holding that neither Mitsui nor Elevators as an other person subject to the Act violated the first paragraph of section 16 as charged, because the prohibition applies only to obtaining transportation by the proscribed means. Wharfage is not transportation.

Section 17 does not apply to consignors; therefore, Mitsui has not violated section 17.

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1072

INVESTIGATION OF CERTAIN PRACTICES OF STOCKTON ELEVATORS

This proceeding having been instituted on our own motion and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission this day having made and entered of record a report containing the conclusion and decision thereon, adopting the initial decision of the Examiner, which report and decision are hereby referred to and made part hereof;

It is ordered, That this proceeding is hereby discontinued.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1072

INVESTIGATION OF CERTAIN PRACTICES OF STOCKTON ELEVATORS

The record does not show and will not support a finding that either respondent participated in any act which was unjust, unfair, or unreasonable. Accordingly, neither the initial paragraph of section 16 nor the last paragraph of section 17 of the 1916 Act are shown to have been violated.

H. Stanton Orser for respondent Stockton Elevators.
Alexander D. Calhoun, Jr. for respondent Mitsui & Co., Ltd.
Frank Gormley and *Robert J. Blackwell* Hearing Counsel.

INITIAL DECISION OF JOHN MARSHALL, EXAMINER

On October 1, 1962, the Commission, pursuant to section 22 of the Shiping Act, 1916, as amended (the Act), instituted on its own motion an investigation (1) into the practices of Stockton Elevators (the Elevator) in connection with terminal charges assessed the Department of Agriculture and other owners, shippers, or exporters of grain during 1961 and 1962 to determine whether the Elevator may have violated sections 16 First and 17 of the Act, and (2) into the transactions between the Elevator and Mitsui & Co., Ltd. (Mitsui), to determine whether Mitsui violated section 16 of the Act. The order of investigation names the Elevator and Mitsui as respondents.

Hearings were held October 18, 1962 and November 27, 1962 at San Francisco, Calif. Following the close thereof, Hearing Counsel filed proposed findings of fact and conclusions of law. Thereafter the Elevator, Mitsui, and Hearing Counsel filed briefs. Mitsui's brief was accompanied by a motion to dismiss as to itself. By reply, Hearing Counsel requested that the Commission deny the motion. The Elevator did not file a reply but in its aforesaid brief urged that Mitsui be dismissed from the proceeding. On March 5, 1963, the Commission ruled that the motion presented issues which could not properly be resolved at the then existing stage of the proceeding and that it would therefore be held in abeyance pending the Examiner's initial decision and the submission of the entire case for final decision.

THE FACTS

Identity of respondents

The Elevator is a private corporation which owns and operates, as a public utility, grain elevators and terminal facilities at the Port of Stockton, Calif. It also maintains additional grain storage facilities in warehouses located from ½ to 3 miles from the terminal. The primary area served consists of "the entire Great Central Valley from Red Bluff down to Bakersfield." A secondary area includes Nevada, Utah, and southern Idaho. As the hereinafter referred to Oriental market for hard red winter wheat develops, the Elevator will also serve the Midwestern States, especially Kansas, Colorado, and Nebraska. Over the past it has handled or processed commodities for virtually every grain farm of any size on the west coast. In order of magnitude, its main customers are the local farmers; local grain dealers and merchants; international grain traders, exporters, and importers; and the U.S. Commodity Credit Corporation (CCC). Normally, it does not own any of the grain that it handles.

Mitsui (not connected with the steamship line of the same name) is a grain trading company with offices in Portland, Oreg. It does not own or operate any elevators on the west coast and its business is in no way competitive with that of the CCC. During 1960 and 1961 Mitsui stored quantities of its own grain at the Elevator, bought grain from CCC, both "f.o.b. vessel" and "in store" at the Elevator and, in some instances, shipped its own grain from the Elevator.

Warehouse tariffs and wharfage tariffs

At least since June 1955 the Elevator has operated under Warehouseman License No. 3–4088, granted by the Production and Marketing Administration, Department of Agriculture, pursuant to the United States Warehouse Act, 7 U.S.C.A. 241 *et seq.* Its *warehouse tariff* for storing and handling grain in bulk, effective June 15, 1955 and filed with the Department of Agriculture June 20, 1955, provided that "Wharfage is applicable to all grain moving to and from vessels over our dock at rates published in Port of Stockton tariff No. 3."[1] There was no indication in the Elevator's tariff of the specific rates or rules applied by the Port of Stockton (the Port) in determining its wharfage charges. These charges were assessed by the Port which, in most instances, submitted its invoices directly to, and received payment directly from, the user.

In July 1961 the Elevator entered into an agreement with the Port[2] under which the Elevator was granted a franchise to operate a shipside

[1] This was eventually superseded by Port of Stockton tariff No. 5.

[2] This agreement was executed by Stockton Port District on June 23, 1961, and by Stockton Elevators, Inc., on July 5, 1961.

grain terminal elevator. This was duly approved January 3, 1962, by the Federal Maritime Commission as agreement No. 8695. As anticipated by the terms of the agreement, the Elevator issued on July 1, 1961, effective the same date, its terminal "Tariff No. 1 Naming Rates, Rules and Regulations Applying at Facilities of Stockton Elevators." Section "B" thereof prescribed a *wharfage rate* applicable to wheat shipments in bulk in the offshore trade of 50 cents per 2,000 pounds[3] or 40 cubic feet. This rate was the same as that contained in the Port's tariff. The agreement, in providing for payment by the Elevator to the Port of certain sums based upon the tonnage movements of specified cargoes and the wharfage and service charges earned by the Elevator, expressly contemplated the reduction of wharfage and other charges on grain originating, as did the grain in this case, outside of California.

By cancellation supplement No. 1, effective July 1, 1961, the Port canceled its counterpart tariff and served notice that future rates, rules, and regulations would be as published in the Elevator's tariff No. 1. Thereafter, the Elevator issued and filed with the Department of Agriculture a revised *warehouse tariff*, effective July 10, 1961. This provided that "wharfage is applicable to all grain moving to and from vessels over our dock under Wharfinger Tariff published July 1, 1961." Although not required by law or regulation, copies of all of the above tariffs were voluntarily submitted to the Commission, or its predecessor, for information.

Demands in excess of Elevator capacity

The Elevator's problems, as a terminal operator, are more complicated than others throughout the country because it serves an extensive and important producing area and consequently a considerable part of its business comes directly from the harvesters. The volume of grain[4] to be received following a given spring or fall harvest cannot be forecast with certainty. Nor can the capacity that the Elevator will have open or available at any future time. On occasion there have been two to three hundred trucks as well as a number of railcars awaiting discharge. The trucks must be returned to the fields as promptly as possible in order to pick up additional loads and the holding of the railcars results in congestion on sidings and the accrual of demurrage charges. While most of the non-Government commodities, or so-called "free stocks," are moved to the Elevator under schedules providing at least approximate times for export shipment, the CCC

[3] Future references to quantities of wheat are mainly in terms of bushels. For conversion purposes, 60 pounds equals 1 bushel, 33⅓ bushels equals 1 short ton, and 50 cents per short ton equals 1½ cents per bushel.

[4] The record shows that the principal commodities handled by the Elevator are wheat rice, corn, barley, and milo.

stocks are ordinarily deposited for an indefinite period pending a buyer * * * an unknown buyer, who may come forward within a short time or not for a prolonged time. The CCC does not, as a general practice, ship grain on its own account. Moreover, the Elevator does not and, for corporate organizational reasons not clearly disclosed by the record, cannot engage in the grain merchandising business.

The Elevator, as a public utility and as a commercial enterprise, is obligated to exert every reasonable effort to provide the handling, processing, and storage services required by its customers, especially those in the local area. When it becomes inadvertently overbooked, or grain awaiting receipt exceeds capacity, there are three possible solutions.

(a) Leave railcars on demurrage until space opens up. This is expensive and can only provide limited additional capacity for limited times.

(b) Rehandle the grain and truck it to warehouses away from the terminal elevator and then back for shipping. This costs at least $1.50 a ton (4.5 cents per bushel) and outside warehouse space is not always available.

(c) Arrange for immediate shipment of some commodity thereby freeing space. Since the CCC sells only to those who come to buy, and the Elevator cannot engage in grain merchandising, this involves solicitation of the cooperative efforts of grain traders to expedite export sales.

Program to develop Oriental grain market

Hard red winter wheat from the Great Plains area (a high-protein wheat used for bread flour) constitutes the predominant grain surplus in the United States. Historically exports have been almost entirely through gulf, Great Lakes, and Atlantic ports to European and Near East markets. During the late 1950's the Department of Agriculture (through its Commodity Stabilization Service), working with a number of Midwest farm groups represented by the Great Plains Wheat Market Development Association, port authorities up and down the west coast, grain traders and rail carriers, initiated a concerted effort to develop a market for this wheat in the Orient * * * Japan, Korea, and Formosa. The Elevator and Mitsui were in the forefront of this activitiy. John Harley, the manager and a vice president of the Elevator, over a period of more than 3 years contributed "thousands" of hours to this program. It was recognized that this market offered the only sizable growth potential for wheat consumption and could provide an export outlet for as much as 50 million bushels a year. This would not only result in the Government's recovering the funds invested in surplus stocks of this grain, and avoid continuing storage expenses, but would also beneficially affect

this country's critical balance of payment's deficit. Japan, recently referred to by Secretary of Agriculture Freeman as "Our number one agricultural customer" is a major dollar market.

The Department of Agriculture and other interested groups used demonstration teams in Japan to encourage the people to change their dietary habits and eat bread and toast rather than rice and noodles. These teaching efforts were successful but the desired increase in U.S. exports did not occur. It was found that the Japanese were buying their wheat from Canada. This was due to the fact that rail freight rates from the Midwest had always been based on the previously noted distribution of this wheat to the east through gulf, Great Lakes, and east coast ports and the rates for westbound movements had remained too high to permit a price competitive with Canadian wheat. In other words, the Canadians could place wheat stocks at Vancouver appreciably cheaper than Midwest wheat could be placed at U.S. west coast ports. The significance of this problem, and the concern of the Department of Agriculture, were indicated by the following letter, written in February 1960 by Clarence D. Palmby, associate administrator, Commodity Stabilization Service, to the president, Great Plains Wheat Market Development Association:[5]

Dear Mr. Hope:

Thank you very much for your kind letter of January 30, 1960, acknowledging receipt of my report on the wheat team trip to Japan last December. I was particularly pleased to read in your letter that grain exporters are showing interest in ways and means to cooperate with the wheat market development program.

You inquired as to what we have been able to work out in Commodity Credit Corporation with reference to possibilities for exporting hard red winter wheat from the west coast. Before commenting on this, I want to differentiate between two separate aspects of this question. The first is the big, challenging problem of the increasing potential in Japan for hard winter wheat and the fact that U.S. exportable supplies do not lie adjacent to the west coast, which is the advantageous coast, freightwise, for Far East shipping. The second aspect concerns what action CCC might be able to take in some small way to ease the situation temporarily. Presently, our CSS commodity office at Portland has authority to maintain an inventory in California of 500,000 bushels of hard red winter wheat, the wheat to be supplied by our Kansas City office for movement to California without freight penalty. This, as I have inferred, is not the longtime answer or even a very significant contribution to the temporary situation. CCC just does not have freedom to move any substantial volume of high protein hard winter to the west coast because of the freight penalties that would need to be absorbed.

You may be sure that importance of the potential for hard wheat business in the Japanese market will be kept in the foreground until some means is found for the United States to offer such wheat competitively.

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[5] John Harley testified "In effect, Palmby had direct responsibility for the development of these particular merchandizing programs. He was extremely interested in the development of the Orient as a market for surplus winter wheat which the Government had running out of its ears. * * * I have this letter because it was I who prepared the exhibits for the Great Plains people and for the U.S. Department of Agriculture, and all the rest, in an effort to induce the railroads to lower these rates and to permit the wheat to move."

With continued appreciation for the work that you and your association are doing, I am,

Sincerely yours, /s/ CLARENCE D. PALMBY.
Clarence D. Palmby,
Associated Administrator."

In November 1960 the railroads reduced the grain freight rate from the Midwest to the west coast from 90 cents per hundred pounds (cwt.) to 82 cents per cwt. This, however, was insufficient to overcome the advantage held by the Canadians and efforts were continued to obtain still lower rates. Under date of January 16, 1961, the Secretary of Agriculture addressed a memorandum to the Under Secretary and Assistant Secretaries of the Department which, in pertinent part, stated:

Subject: Expanded Agricultural Export Activities

I approve and endorse the recommendations from the Committee on Agricultural Exports on ways and means of expanding U.S. agricultural exports. These recommendations, listed below, are the result of studies made as directed in memorandum No. 1441, May 31, 1960, and take into account the past several years of highly successful market development activities by the Department and cooperating farm and trade organizations.

In order to give American farmers the best possible opportunities for expanded markets and to give the free world fullest advantage of our agricultural abundance, you are requested to take appropriate steps to put these recommendations into operation as rapidly as possible.

1. EXPORT POLICY

1. Develop export policy to improve the competitive position of U.S. hard red winter wheat in Far Eastern markets.

Throughout 1960 and 1961 the movement of hard red winter wheat through west coast ports to the Orient continued to be of a promotional nature. Finally, in May 1962, the rail freight rate was further reduced to 70 cents per cwt. which rendered the Midwest wheat competitive with the Canadian wheat. Reference to subsequent developments is noted by the following item contained in a Department of Agriculture release dated December 5, 1962, covering trade problems discussed by Secretary Freeman and Japanese Minister of Agriculture and Forestry Shigemasa:

"The discussions also ranged over Japan's growing interest in imports of high quality hard winter wheat from the United States and of its continuing interest in imports of western white wheat. Secretary Freeman pointed to the steps taken by the United States to obtain necessary freight rate adjustments and to make stocks of wheat available at west coast locations in order to facilitate Japan's purchase of winter wheat.

Transactions in issue in this investigation.[6]

Immediately following the first rail rate reduction, in November 1960, the various interests that were working on the program decided

[6] Details regarding individual shipments are contained in the appendix hereto which is incorporated in these findings of fact.

that "despite the fact that the (rail rate) gap had not been closed, they should make every effort to get grain out from the Midwest, through the Elevator, and into the Orient, in order to maintain the interest of the oriental buyers, and in order to show good faith in the (rail) carriers." Everyone agreed "that it was the necessary thing to do, that once you start a promotion you just can't stop it because the fellow hasn't been able to bend quite as far as you wanted." The original plan was to solicit orders from buyers in the Orient and then purchase the amount of wheat required from free stocks in the Midwest. This would get the wheat moving and demonstrate the potential to the railroads and to the oriental buyers.

Mitsui, while realizing that movement of the wheat at the then effective 82-cent rail rate would be very difficult, volunteered to attempt it. Mr. Harley, although not requested by Mitsui to do so, went to Elmo Ferrari, director of the Port, and told him that, even though the rail rate deemed necessary had not been obtained, an attempt would be made to move some wheat out of the Midwest into oriental markets, but that sacrifices would have to be made by everyone. Mr. Ferrari agreed that the Port would help by charging wharfage at 1 cent per bushel for not more than 10,000 tons, rather than the 1½ cents per bushel provided by the Port's then effective tariff. However, after purchasing 52,694 bushels from free stocks held by farmers and dealers in Kansas, Colorado, and Nebraska, and shipment to the Elevator, it became apparent that the loss to Mitsui would be excessive. Accordingly, an additonal 55,115 bushels, the balance required to make up the total needed to satisfy sales which had already been arranged, were purchased from CCC stocks in the Elevator. The terms of this purchase were "in store" rather than "f.o.b. vessel" as the CCC wheat had to be blended with the free stocks in order to provide the desired protein content. The only way this blending could be accomplished was to buy in-store.

This shipment, totaling 107,809 bushels, was lifted to the Oregon Bear on or about April 27, 1961, for export to the Orient. The Port contrary to its usual though not entirely consistent practice of billing wharfage charges directly to the user, addressed its invoices to the Elevator. These were for $551.15 and $526.94, or a total of $1,078.09 representing the agreed upon wharfage charge at 1 cent per bushel. The Elevator merely attached the Port's invoices to its own cover invoices in the same amount and forwarded them on to Mitsui. Mitsui made payment of the full amount to the Elevator and the Elevator issued its check in the same amount to the Port. This was a "wash" transaction in which the Elevator was nothing more than a conduit. Its accountant, acting on his own initiative, posted the amounts in the ordinary books of account under "Prepaid Wharfage" and immediately charged them out by invoice to Mitsui.

In addition to the foregoing shipment through the Elevator to the Orient, there are five other shipments in issue in this proceeding. All involved the purchase by Mitsui, on "f.o.b. vessel" terms, of CCC wheat stored in the Elevator. Wharfage charges at the rate of 50 cents per ton (1½ cents per bushel) prescribed by the tariff were paid by CCC. The Elevator, at least once by check and otherwise by account credit, paid to Mitsui so called "allowances" [7] which varied from ½ cent per bushel, to 1 cent per bushel, to 20 cents per ton. This wheat, totaling 475,265 bushels, had been sold by Mitsui to buyers in the Oriental market but, as Mr. Harley freely testified, this fact was not the consideration for the Elevator's payment to Mitsui of these allowances, amounting to $3,636.41.

The Elevator's purpose involved two separate and distinct operating problems. The first concerned temporary but acute space shortages experienced during the 1961 spring and fall harvests. Its facilities were overtaxed on a number of occasions. At times, necessary additional space at or within reasonable distance of the terminal was unobtainable even on a temporary basis. Mr. Harley, in keeping with his usual practice, increased his efforts to get various grain traders and others engaged in the grain exporting business to expedite sales of CCC wheat for early export. Numerous such sales were arranged and consummated under the usual terms and conditions common to this trade but the volume moved was not always sufficient to remove the congestion problem. William A. L. Lyons, a grain trader representing Mitsui as resident agent in its Portland, Oreg. office, was particularly cooperative in these circumstances. In most instances the sales which he was able to arrange were on at least a break-even basis and no allowances were paid. There were several times, however, when he found that the price he would have to pay CCC for wheat was higher than competitive world markets and that these particular sales could only be made at a loss. He reported these findings to Mr. Harley, indicating the potential volume of wheat and financial loss concerned in terms of so much per bushel or per ton. After considering the dollar amount required to make up the loss, the exigencies of the Elevator's space problems, and the availability of alternative solutions, Mr. Harley would decide which of these possible sales he should tell Mr. Lyons to forgo and which he should ask him to try to make, it being understood that the Elevator would assume the loss.

In those cases, identified in the appendix hereto as shipments No. 2, 3, part of 5, and 6, Mr. Lyons, at the request of Mr. Harley, sold 364,830 bushels of wheat to buyers in the Orient and received allowances from the Elevator totaling $2,432.06. These allowances were computed to offset the losses that would otherwise have been sustained

[7] While the record contains interchangeable characterizations of these transactions as

by Mitsui and contained no element of profit to Mitsui. They were proposed by the Elevator (Mr. Harley) and not Mitsui, were for the benefit of the Elevator, and Mitsui understood that they were not to serve as a basis for its seeking or anticipating other allowances in the future. The Elevator's ordinary books of account show the exact amounts, under "Conditioning Wheat" which is a catchall account for miscellaneous, nontariff services in connection with grain handling. In addition, its working files contain invoices and memoranda which clearly publish the fact that these payments were in the nature of allowances, the methods by which they were computed, and the particular shipments to which they applied.

The other operating problem here concerned had to do with a sale of 11 percent protein CCC wheat made by Mitsui to a buyer in Formosa in September 1961. The following month when this wheat was scheduled to be lifted for export, the Elevator found that its fall drying operations were blocked by the placement of a quantity of 12 percent protein CCC wheat held in storage. The Elevator superintendent asked Mr. Harley to try to get Mitsui to take the 12 percent in lieu of the 11 percent wheat as otherwise drying operations would have to be limited or the 12 percent wheat would have to be trucked to an outlying warehouse. At his time the price of 12 percent CCC wheat was 1 cent per bushel more than 11 percent wheat. Mr. Lyons advised that he would buy the 12 percent wheat to "free up" the Elevator's bins but that the Elevator would have to pay the differences because the Formosans, having bought 11 percent wheat, would not pay more if a higher grade was delivered. Mr. Harley concluded that this was the least difficult and most economical solution to the problem and asked Mr. Lyons to proceed accordingly. This transaction, identified in the appendix hereto as shipment No. 4 and part of No. 5, involved a total of 110,435 bushels on which the Elevator paid Mitsui an allowance of 1 cent per bushel or $1,104.35. This was duly recorded in the Elevator's books under "Storage Wheat" as it involved a wheat storage problem. It was further detailed by invoices and memoranda contained in the Elevator's files.

Without exception the CCC wheat sold to Mitsui was bought and sold to foreign purchasers by Mitsui before shipment was effected. In each instance the sale was pursuant to Public Law 480, under which program Mitsui was a "supplier" and by regulation could not affect foreign shipment. The purchasers effected shipment and freight payments were by purchaser's letters of credit payable to the carriers.

All of the allowances involved wheat purchased from CCC during the spring and fall of 1961. There were no allowances granted during the nonharvest seasons. The allowances and the wharfage reduction of $539.05 totaled $4,175.46, or less than ½ of 1 percent of the Elevator's handling charges during the 18-month period under investigation.

In August 1962 a Department of Agriculture auditor, Mr. Olen Lane, undertook an audit of the Elevator's books covering the period January 1, 1961, to July 1, 1962. Mr. Harley suggested that, if it would be of assistance to him in the preparation of his report to his superiors, he (Mr. Harley) would be willing to prepare a memorandum regarding the wharfage reduction and the allowances that had been granted. Mr. Lane agreed and on August 24, 1962, Mr. Harley gave him a memorandum containing frank and specific references to these transactions.

THE POSITION OF PARTIES

There is no really meaningful disagreement between the parties as to the facts here concerned. Differences go only to the conclusions to be drawn therefrom and the interpretations of law applicable thereto.

Hearing Counsel urge that in granting allowances to Mitsui, the Elevator engaged in a practice which was unjust and unreasonable in violation of section 17; that in arranging for Mitsui to pay wharfage at a reduced rate it similarly engaged in an unjust and unreasonable practice in violation of section 17; and that in accepting wharfage at less than the applicable tariff rate, Mitsui violated the introductory paragraph of section 16 of the Act.[8] It is the proposal of Hearing Counsel that the Commission should accordingly (1) by rule prescribe that the Elevator cease and desist from paying allowances to users of its facilities in connection with the movement of Government-owned grain, and (2) direct the Elevator to recover from Mitsui (a) the difference between the applicable *rate for wharfage* and that actually paid, and (b) the *allowances* granted in connection with the Government-owned grain.

The Elevator and Mitsui urge that the investigation has failed to show that either has violated any section of the Act.

The applicable paragraphs of sections 16 and 17 provide:

> SEC. 16. That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.
>
> SEC. 17. * * * 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.

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[8] By amended proposed findings and on brief Hearing Counsel noted that they would not argue that the record establishes a violation of section 16 First by the Elevator.

As recited by the foregoing facts, this case concerns one shipment involving a *reduction in wharfage* and five shipments involving *allowances*. With regard to the *allowances*, Hearing Counsel contend that payments to a user of terminal facilities or services are akin to rebates and constitute a practice which ends to frustrate the fairness and equality of treatment which the Act requires be accorded all similarly situated users; that although there was no existing competition relationship between CCC and Mitsui, they were similarly situated users; that the grant of anything of value to one user, to the exclusion of others, is condemned by the Act; and that in these instances the practice was secret and surreptitious.

Hearing Counsel further contend that the Elevator arranged for and permitted a *wharfage reduction* which Mitsui, knowingly and willfully, by an unjust device or means, received; that the wharfage reduction was in connection with the transporation of goods by water; that it resulted in payment, by Mitsui, of a wharfage charge at less than the applicable rate therefore; and that whether Mitsui was a "shipper" or merely a "supplier" within the context of section 16 is a distinction without a difference. Extensive reference is given to the legislative history of the introductory paragraph of section 16 [9] to validate the position that the phrase "transportation by water" encompasses terminal services and is not restricted to actual water carriage.

The Elevator, on the other hand, urges that in most instances where Mitsui bought and sold Government grain from the Elevator at the Elevator's request in order to free up space, no allowances were made; that the five *allowances* here concerned were isolated actions out of hundreds of trades; that they were open and above board without concealment or falsity, made in the regular course of business and fully accounted for; that Mr. Harley voluntarily prepared a complete memorandum disclosing the facts; that the Elevator usually absorbed the costs of moving grain to other warehouses, as well as rail demurrage accumulated during the interim but that in these instances there was no outside warehousing space. Further, that the allowances merely equaled the difference between the world market and the CCC price and consequently provided no profit to Mitsui; that they were paid as good consideration for the results achieved, "freeing-up the elevator," and in each case constituted a much less expensive solution of the problem than available alternatives, if any; that it was never the *practice* of the Elevator to grant allowances as its management knows that such a practice, open or hidden, will destroy its business; and that Mitsui at no time solicited any allowance or reduction or realized any profit therefrom, did not know when if ever it might

[9] Hearings on S. 3467, Apr. 28, 1936, before the House Merchant Marine and Fisheries Committee, 74th Congress.

again be called upon to help, and did not expect future allowances of any kind.

Finally, the Elevator contends that the *wharfage reduction* was given as a contribution or sacrifice by *the Port* [10] in support of the program to promote the sale of surplus Midwest wheat in the Orient, a program sponsored directly and actively by the U.S. Government; that its purpose was to assist in offsetting the then existing rail freight differential; and that the Government, among its contributions to the program, moved several parcels of wheat from the Midwest to the west coast and absorbed the rail freight penalty. In summary, the Elevator argues that none of these transactions were unjust, unfair or unreasonable and that no one was prejudiced thereby in any way. On the contrary, it concludes that they were beneficial to the Government's program to promote the development of the oriental market, provided the farmers with elevator capacity for their current harvests, and improved this Nation's trade balance.

Mitsui, by exceptionally well-prepared motion to dismiss, memorandum in support thereof, and brief, all simultaneously submitted and incorporated each within the other by reference, takes little exception to Hearing Counsels' proposed findings of fact but urges the conclusion that no violation of any section of the Act has been shown. The entire proceeding, argues Mitsui, was ill-conceived and no case has been made against it "for the simple reason that there has at no time been any case to be made." A detailed analysis of the law and the facts is offered in support of the proposition that a showing of violation of the introductory paragraph of section 16 must be founded upon affirmative findings with regard to five elements. These elements and the basis of Mitsui's denial may be summarized as follows: (1) The alleged violator must be a "shipper, consignor, consignee, forwarder, broker, or other person * * *," within the terms of the paragraph, but that Mitsui, in all pertinent transactions, was none of these; (2) there must be use of some unjust or unfair device, or some falsity, but that there was none; (3) the alleged violator must have been in a position to effect transportation by water, but that Mitsui was not; (4) there must be a showing that other rates than those actually received were the only lawful ones, but that there has been no such showing; and (5) the action of the alleged violator must have been knowing and willful, but that this was not shown.

It is unnecessary to burden this decision with detailed discussion of every legal point raised by the parties. The issues are simple and direct: (1) Did Mitsui violate the above-quoted paragraph of section 16 by accepting wharfage at less than the applicable rate, and (2) did the Elevator violate the above-quoted paragraph of section 17 by (a)

[10] The Port is not a party to this proceeding.

granting the specified allowances to Mitsui [11] and (b) by arranging for Mitsui to pay wharfage at less than the applicable rate?

In urging that the word "receipt" and in turn "accepting" should be read into section 16 as being synonyms for "obtain," Hearing Counsel reasons that to hold otherwise would be to permit "an insulated avenue for the manipulation of preferences and discriminations which could readily wreck the congressionally intended regulatory scheme that requires similarly situated persons to be treated alike." Be that as it may, the terms are not synonymous [12] and the amendment of the statute, by interpretation or otherwise, is beyond the power of the Commission. There is no ambiguity in the word "obtain" and therefore there is no necessity to look elsewhere to determine its meaning in this statute. *U.S.* v. *Turner*, 246 F. 2d 228; *Colgate Palmolive Peet Co.* v. *D.C.*, 110 F. 2d 264. The law as enacted is clear. If it proves inadequate it may be amended, but only by the Congress.

In any event, these provisions of the statute do not provide flat and unqualified prohibitions. Section 16 prohibits only unjust or unfair devices or means to avoid payment of the applicable rate. Section 17 prohibits only "unjust or unreasonable" practices. Thus, even if Hearing Counsel's contention that accepting wharfage at less than the applicable rate could be designated as a "device or means," a violation has not occurred unless the record supports an additional finding of unjustness or unfairness. Similarly, even should it be found that granting allowances in five instances constituted a "practice," there is no violation in the absence of a finding that the practice was unjust or unreasonable. The same must hold true with regard to the single instance of "arranging" for reduced wharfage.

The Shipping Act was not drawn to bring about absolute equality of treatment of all persons subject to the Act by all other persons subject to the Act. This is evident from the language used by Congress in considering amendments recently enacted as Public Law 87–346 (75 Stat. 762).

> This section would amend section 14 Third, Shipping Act, 1916, to insert the word "unjustly" before the word "discriminating." This will conform that section to all other portions of the Shipping Act, 1916, where not all "discriminatory" conduct is forbidden but only that which is "unjust." Senate Document No. 100, 87th Congress, 2d session, at page 210.

There has been no showing that any party suffered a disadvantage by reason of the allowances or reduced wharfage. No party has appeared to claim disadvantage or loss of competitive posture or any-

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[11] The allowances were not related to tariff charges. The wharfage charge was, but it was assessed by the Port, as a deviation from the Port's tariff, before the Elevator had a terminal tariff.

[12] According to Webster's New Collegiate Dictionary (1961) obtain is held to mean "1. To get hold of by effort; gain possession of; procure." This clearly involves more than passive receipt or acceptance.

thing else. Insofar as Mitsui's competitors may be involved, Hearing Counsels' proposed finding that allowances made by the Elevator to Mitsui were not solicited by Mitsui but were made in order to free-up space for the benefit of the Elevator, and represented nothing more than the difference between the price paid by the ultimate purchaser and the cost to Mitsui to obtain the grain from Government stocks stored with the Elevator, negates a finding that Mitsui benefitted. If Mitsui did not benefit, it is difficult to determine how its competitors could have suffered. The mere fact that Mitsui accepted a reduced wharfage rate does not, in the absence of proof to the contrary, imply that it was dishonest or used a device or means which was unjust or unfair. The record does not show and will not support a finding of this nature.

In adopting such broad and undefined terms as unfair and unjust and unreasonable, Congress granted the Commission wide discretion in determining whether the circumstances in any given case violated the statutes. *Lykes-Harrison Pooling Agreement*, 4 FMB 511, 527; *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 616, rehearing denied, 323 U.S. 809; *Isbrandtsen* v. *U.S.*, 239 F. 2d 933, 937, aff'd 356 U.S. 481, 495. Hearing Counsel offer the phrase "elemental fairness and equality of treatment" as the standard by which the conduct of the parties should be judged and cite the "banana" cases as authority.[13] There can be no quarrel with this as a general statement. However, as above pointed out, the term "equality" cannot be used in its copybook sense. There may be inequality if it is not unjust, unreasonable, or unfair. The banana cases were decided on the basis of unjust discrimination and equality of treatment was an incidental consideration. In *Consolo* v. *Grace Line*, *supra*, the Commission concerned itself with justification for the different treatment of shippers. All of the banana cases were based on "unjust" discrimination and did not condemn discrimination or inequality of treatment which was justified. Moreover, those decisions turned upon the specific statutory provisions of sections 14 Fourth and 16 First, neither of which are here concerned. In *International Trading Corp. of Virginia* v. *Fall River Line Pier*, 7 FMC 219, also relied upon by Hearing Counsel, there was reference to certain "practices" but the true issue was undue or unjust discrimination between competitors and the injury resulting therefrom. In the instant case the absence of competition and of injury is admitted.

It cannot be found that the Elevator engaged in a "practice" within the meaning of section 17. The essence of a practice is uniformity. It is something habitually performed and it implies continuity * * * the

[13] *Consolo* v. *Grace Line Inc.*, 4 FMB 293; *Banana Distributors, Inc.* v. *Grace Line Inc.*, 5 FMB 615, aff'd 280 Fed. 2d 790; *Consolo* v. *Flota Mercante Grancolombiana*, 5 FMB 633.

usual course of conduct. It is not an occasional transaction such as here shown. *Intercoastal Investigation*, 1935, 1 U.S.S.B.B. 400, 432; *B & O Ry. Co.* v. *U.S.*, 277 U.S. 291, 300; *Francesconi & Co.* v. *B & O Ry. Co.*, 274 Fed. 687, 690; *Whitman* v. *Chicago R.I. & P. Ry. Co.*, 66 Fed. Supp. 1014; *Wells Lamont Corp* v. *Bowles*, 149 Fed. 2d 364. In this case, Hearing Counsel specifically propose the finding that "In most instances where Mitsui bought and sold Government grain from the Elevator at the Elevator's request in order to free up space, no concessions or allowances were made by the Elevator to Mitsui." However, even if the granting of the five allowances or the arranging for the single wharfage reduction could be designated practices, neither could be found to be unjust or unreasonable. The commerce of the United States was not deterred. To the contrary, the public interest was served by (1) the opening of the oriental market as an outlet for surplus wheat and (2) the favorable contribution to efforts to right the U.S. balance of payments deficit. The benefit to the Elevator was, by virtue of the incidental opening of space for the accommodation of new crops, a benefit to farmers in the vicinity who were dependent on the Elevator. Although the method employed by the Elevator in saving Mitsui from loss by reason of assisting in making space available may be arguable by lawyers and accountants on various procedural grounds, in relation to other customers, Government agencies, and the public in general, it was not unjust or unreasonable. No one was denied anything, prejudiced, disadvantaged or discriminated against in any way. Mitsui obtained no advantage. The allowances were to save Mitsui from loss by reason of accommdating the Elevator. They were in no way related to tariff rates or charges and cannot be considered as involving rebating in any fashion. There is no suggestion of injury or loss to anyone. While the transactions between the parties were not advertised, they were in no sense hidden or tainted with falsification. All arrangements were knowingly and wilfully entered into but there was no intent, purpose, or effect which can possibly be related to an evil scheme or device which the Act was designed to prevent. Any such finding would be unsupported and unwarranted.

Ultimate Conclusion

Regardless of other legal points raised, there has been no showing that either respondent participated in any act which was unjust, unfair, or unreasonable.

The proceeding should be discontinued.

(Signed) John Marshall,
Presiding Examiner.

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APPENDIX

Wheat Exports on Which Mitsui & Co., Ltd., Received Wharfage Reduction or Other Allowance During the Period Jan. 1, 1961–July 1, 1962

Ship. No.	Vessel	Lifted to—			Purchased by Mitsui			Reduction or allowance to Mitsui			Elevator account No. and subject	Objective
		Date	Bushels	Type	From	Date	Terms	Rate	Amount	Nature		
1	Oregon Bear	Apr. 27, 1961	51,441	Dark hard water.	CCC	Mar. 28, 1961	In store	½ cent per bushel.		Wharfage	No. 237, prepaid wharfage.	To support program to create U.S. grain market in Orient.
		do	3,674	do	do[1]	Mar. 30, 1961	do	do		do		
		do	52,694	do	Dealers		do	do		do		
	Total		107,809						$539.05			
2	China Bear	June 10, 1961	35,467	Dark hard water.	CCC	May 3, 1961	F.o.b	½ cent per bushel.		Allowance	No. 3A90-5, conditioning wheat.	To open up elevator capacity for current grain harvest.
		do	30,947	do	do	May 29, 1961	do	do		do		
		do	65,245	Soft white water.	do	June 1, 1961	do	do		do		
	Total		131,659						658.29			
3	California Bear	Oct. 16, 1961	55,118	Dark hard water.	do	Sept. 14, 1961	do	1 cent per bushel.	551.18	do		
4	Fairport	Oct. 22, 1961	78,630	Hard water	CCC	Sept. 22, 1961	F.o.b	1 cent per bushel.	786.30	Allowance	No. 3-10-5, storage wheat.	To move grain blocking processing operation.
5	Oregon Bear	do	31,805	do	do	do	do	do	318.05	do		
		do	114,484	Hard water	CCC[2]	Sept. 29, 1961	F.o.b	20 cents per ton.	686.90	Allowance	No. 3A90-5, conditioning wheat.	To open up elevator capacity for current grain harvest.
6	Washington Bear.	Nov. 9, 1961	44,278	do	do	Oct. 20, 1961	do	1 cent per bushel.	442.78	do		
		do	19,291	do	do	Nov. 3, 1961	do	do	192.91	do		
	Total		583,074						4,175.46			

[1] Purchased by Mitsui from free stocks held by farmers and dealers in Kansas, Colorado, and Nebraska and moved by rail to Stockton.
[2] CCC invoice (exhibit 16) shows only 81,019 bushels. However, debit and credit memos exchanged between Mitsui and Elevator (exhibits 14 and 43) show 6,869,036 pounds (114,484 bushels) and an allowance of $686.90.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 268

CHAVE RAMIREZ

v.

SOUTH ATLANTIC & CARIBBEAN LINE, INC.

Decided June 30, 1964

Application of South Atlantic & Caribbean Line, Inc., to waive collection of undercharges on certain shipments of used automobiles from the ports of Jacksonville and Miami, Fla., and Savannah, Ga., to San Juan, P.R., denied.

John Mason, for applicant.

REPORT

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

On June 19, 1963, South Atlantic & Caribbean Line, Inc., (SACL), made application pursuant to rule 6(b) of the Commission's rules of practice and procedure, for permission to waive collection of undercharges on a number of shipments of used automobiles from the ports of Jacksonville and Miami, Fla., and Savannah, Ga., to the port of San Juan, P.R. These autos were transported on vessels of SACL which arrived in San Juan mainly during the months of September, October, and November, and December 1962. In the initial decision, the Examiner denied the application.

Exceptions to the initial decision were filed by applicant SACL. In its exceptions applicant attempts to introduce certain new material into the record. Applicant did not attempt to introduce such material for the benefit of the Examiner, nor did the Examiner call for any additional information from applicant during the pendency of the application. The failure of applicant to submit the subsequently proffered material apparently stems from its misconception

of the nature of a special docket application. Applicant states the application "is, after all, a pleading, it is not a statement of all evidentiary facts." The special docket proceeding is designed to relieve applicants of the time and expense of litigating formal proceedings. Under it no hearings are contemplated since all the relevant facts are admitted by both the carrier and the shipper. Thus, the application itself must set forth all the facts relevant and material to a decision on the merits of the application, for how else are these facts to be placed before the Examiner.[1] A special docket application is in the nature of a complaint alleging facts establishing a violation of the Shipping Act, for which reparations may be awarded and an answer admitting those facts. As the Examiner correctly noted in his inital decision the Commission's authority in an informal proceeding is no greater than its authority in a formal proceeding. The special docket proceeding is designed to reduce, insofar as possible, the time and expense of the parties, the Commission and its staff.

However, these aims cannot be achieved if applications filed under rule 6(b) are incomplete or improperly prepared. In this connection we call applicant's attention to form No. 5, appendix II, to the rules of practice and procedure. This form prescribes the manner in which all 6(b) applications must be made, and the information called for therein represents the minimum upon which a decision on the merits could be made. This is not to say, however, that some cases would not require that additional information be submitted to prevent discriminations or preferences in the granting of applications under rule 6(b). Applicants seeking relief should exercise the greatest of care to insure that all relevant facts are in the application. We shall, of course, expect the foregoing to serve as a guide to future applicants under rule 6(b). In order to avoid any unnecessary prejudice to the merits of the application, we have accepted the supplemental material and considered it in reaching our decision.

On June 2, 1962, one Chave Ramirez, president of the Used Car Importers Association of Puerto Rico, wrote to Eagle, Inc., then agents of SACL in Miami, Fla., inquiring as to the possibilities of contracting with SACL for the carriage of automobiles for the members of the Association, from Miami, Fla., and Savannah, Ga., to San Juan and Ponce, P.R. The Association estimated that it would ship

[1] Applicants point to our decision in special docket 244, *Martini & Rossi* v. *Lykes Bros., S.S. Co.*, 7 FMC 453 (1962) wherein we stated that the Examiners should freely utilize their authority to obtain any "additional information deemed necessary" to insure that approval of applications would not result in discrimination. From this the applicant excepts to all conclusions of the Examiner based upon lack of evidence or clarity in the application. The extent to which an Examiner will go in trying an applicant's or complainant's case for him is essentially within the discretion of the Examiner and after a review of the record, we certainly cannot say that he has abused that discretion.

approximately 200 units per month, with the "possibility that on some months this figure will be under or over the established amount." The rate then in effect on used cars was $0.32 per cu. ft., as published in SACL's freight tariff FMC–F No. 1.

In reply to this inquiry on June 13, 1962, R. H. Halsey, Jr., then vice president of SACL, stated that his company was most desirous of assisting the Association with its transportation problem and further stating, "we are willing to establish in our new tariff a freight rate covering unboxed automobiles not exceeding 400 cu. ft., each at the rate of $115 each. For automobiles exceeding 400 cu. ft. but not exceeding 550 cu. ft., we will establish a flat rate of $150 each. For all automobiles exceeding 550 cu. ft., a flat rate of $175 will apply." Halsey, however, added the following conditon to the establishment of the new rates:

> In view of our establishing this particular rate, we will expect you to pay us dead freight at the rate of $150 each during any month in which you do not ship the agreed minimum of 200 units.

These three rates covering unboxed automobiles actually shipped but not the "dead freight" rate of $150 were included in Tariff FMC–F No. 2 filed by SACL on June 27, 1962.[2] This filing was rejected on July 6, 1962, for failure to comply with certain requirements of our Tariff Circular No. 3. Again the same rates were filed on August 13, 1962, in Tariff FMC–F No. 3 to become effective September 14, 1962. This tariff was subsequently withdrawn by SACL with the result that the original rate of $0.32 per cu. ft. remained in effect throughout the period during which the shipments in question were made. On the same day that Tariff FMC–F No. 3 was filed with the Commission, August 13, 1962, Halsey also wrote to SACL's agent at San Juan instructing that agent effective immediately to place members of the Association on an "open account" basis.

> * * * with the understanding that each consignee is to pay you for cars forwarded on a collect basis not less than $156 per unit of which $150 is to apply to ocean freight, $5 to Miami wharfage and handling, and $1 to San Juan arrimo charge.

After SACL changed agents in San Juan, Halsey on September 7, 1962, directed the new agents to charge the Association members $150 for ocean carriage, $5 for Miami handling, and $1 Miami wharfage.

Submitted as a part of the additional material offered on exceptions is a bill of lading covering a freight-collect shipment of one unit made by Chave Ramirez aboard the SS *New Yorker* on October 16, 1962.

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[2] We note that in Tariff FMC–F No. 2 the $150 rate was for automobiles not exceeding 560 cu. ft. instead of the 550 cu. ft. offered in Halsey's letter. For the purposes of discussion, we will assume that the limitation intended was 550 cu. ft.

The unit measured 531 cu. ft., and was rated at $0.32 per cu. ft. for ocean freight of $169.92. Miami wharfage and handling of $6 and Puerto Rico arrimo of $10.62 brought the total charges to $186.54. Upon receipt of the shipment, $156 was paid and SACL issued a due bill for the balance of $30.54.

From the foregoing, several crucial facts appear. Although it is argued that the Association understood that it had an agreement with SACL for the new rates as early as June of 1962, the Association was still being billed at the old rate, $0.32 per cu. ft., as late as October, 1962. Yet it does not appear from the record that the Association ever questioned the bills of lading as rated by SACL. Moreover, SACL issued due bills against the Association on the basis of the difference between the flat $156 rate and the published rate. Again the record does not show that the Association ever questioned the additional freight charges due under the due bill. Thus, applicant knew or should have known that the $0.32 per cu. ft. rate was still in effect. Moreover, there is nothing whatsoever in the record that supports any contention that the complainant was entitled to rely upon a flat across-the-board rate of $150 for all units shipped regardless of the actual measurement of the particular unit. The record contains only two instances in which the $150 rate was mentioned, and both are found in Halsey's letter of June 13, 1962, *supra*. In the letter Halsey offered a flat rate of $150 not on all automobiles shipped regardless of measurement but only on those exceeding 400 cu. ft. but not exceeding 550 cu. ft. Hence, for this to be applied to all of the shipments involved in this application each automobile must have measured somewhere between 400 and 550 cu. ft. There is nothing in the record to establish this fact and no such inference is warranted.

The only other mention of a charge of $150 is found in Halsey's condition to the new rates that should the Association fail to ship 200 units in any given month it would then have to pay "dead freight" of $150 for each unit short of the 200 unit commitment. We must assume that the term "dead freight" was meant to be understood in its general accepted sense. Under the accepted definition, "dead freight" is a claim exacted for nonfulfillment of a charter and it is levied on cargo space which is contracted for but not used.[3]

Thus, even were we to assume that all of the automobiles shipped by applicant measured between 400 and 550 cubic feet and further that because of Halsey's offer, the $150 rate was applicable then it also follows that pursuant to the same offer, applicant would expect to pay some amount of dead freight for the months in which it shipped less than 200 automobiles. There is no suggestion, however, that ap-

[3] DeKerchove, *International Maritime Dictionary*, 1956, New York.

plicant ever agreed or is now willing to pay any dead freight, nor does it appear that applicant in fact ever paid any dead freight charge.[4]

The record in this proceeding is replete with inconsistencies. For instance in paragraph 6 of the application the following appears:

> 6. While * * * it appears that (Halsey) attempted to establish reduced rates on unboxed automobiles, including a rate of $150 per unit in certain categories, the fact remains that the ocean rate authorized to be collected (by Halsey's letters to SACL's agents) was never the rate lawfully applicable, *and in consequence of these unauthorized acts, SACL stands in technical violation of the applicable statute in that transportation was performed at rates not lawfully applicable.* [Emphasis ours.]

In his Initial Decision, the Examiner found that "the law was being violated insofar as the applicable tariff charges were not being collected on these shipments." Notwithstanding the above admission, applicant's second exception to the Examiner's decision is that, "The Examiner erroneously, gratuitously and prejudicially concludes that applicant has violated the law and engaged in unlawfully practice [sic]." Applicant, however, points to the terms of Halsey's instructions to the San Juan agents to collect "not less than" $156 on an "open account." Applicant points out that the words "open account" have clearly understood meaning and refer to "an account with a debtor or creditor having a balance due or payable."[5] They contend:

> It is clear then, that the payment of "not less than" $156 was not accepted as full payment, but that a balance would remain unpaid, to be paid in the future.

Applicant further stresses the already noted fact that the bills of lading were freighted at the lawful rate of $0.32 per cu. ft. and that due bills were issued for the balance due. All this according to applicant points to nothing more than an extension of credit which in no way is unlawful. This may be true, but how, if everything is so clear, can the applicant further contend that "the question here is not what the facts were, but what the used car dealers believed the facts to be and they believed the fact to be that the $156 charge was the full charge." It is difficult to understand how this belief could be held to despite the fact that the bills of lading were freighted at the old rate and due bills were issued for additional freight money due.

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[4] According to attachments VI and VI A of applicant's request for permission to waive collection of undercharges only 75 automobiles were shipped during the month of September 1962. Then pursuant to the offer contained in Halsey's letter of June 13, 1962, the members of the Association are responsible for paying dead freight on 125 automobiles at $150 or a total of $18,750. For the month of January 1963, only 26 automobiles were shipped which means that the members of the Association would be charged dead freight on 174 automobiles totaling $26,100. According to these calculations the Association for these 2 months would owe SACL in dead freight more than $44,000, the sum closely approximating the undercharge which applicant seeks to waive.

[5] Applicant takes this definition from *Webster's Third New International Dictionary.*

From the foregoing it is readily apparent that applicant was never entitled to rely upon a flat $150 rate for all automobiles shipped with SACL, and that applicant knew or should have known that the lawful tariff rate of $0.32 per cu. ft. remained in effect and was the actual rate being applied to their shipments. Accordingly,

It is ordered, That the application of South Atlantic & Caribbean Line, Inc., be, and it is hereby, denied.

Commissioner Patterson concurring:

I concur with the majority's decision to deny the application of South Atlantic & Caribbean Line, Inc., to waive collection of claimed undercharges on certain shipments of used automobiles from the ports of Jacksonville and Miami, Fla., and Savannah, Ga., to San Juan, P.R., but for different reasons.

The Intercoastal Shipping Act, 1933, is applicable to common carriers by water in interstate commerce of the United States, and section 2 thereof, after requiring the filing of certain tariffs, provides that any common carrier by water in interstate commerce shall not:

> * * * charge or demand or collect or receive a greater or less or different compensation for the transportation of passengers or property or for any service in connection therewith than the rates, fares, and/or charges which are specified in its schedules filed with the board and duly posted and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such schedules.
>
> * * * * * * *
>
> Any violation of any provision of this section by a common carrier by water in intercoastal commerce shall be punished by a fine of not less than $1,000 nor more than $5,000 for each act of violation and/or for each day such violation continues, to be recovered by the United States in a civil action.

Based on the record before me, the facts showed that the original rate of 32 cents per cu. ft. for the transportation of the automobiles in question was contained in tariffs filed as aforesaid and remained in effect throughout the entire period during which the shipments in question were made. The record contains no evidence or claim that this rate was unreasonable or in any way invalid.

The shipper was billed for freight in accordance with the tariffs but did not pay the entire amounts due. The full tariff charges must be charged and collected.

In my opinion it is deemed unnecessary for the majority to consider any of the other alleged conditions and circumstances in denying the application. Therefore, I do not associate myself with any of the various expressions and comments contained in the majority's report.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

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.

Complaints against certain respondents dismissed with prejudice as result of settlement between complainants and said respondents of claim for reparation on shipments of cotton from U.S. Gulf ports to ports in the Mediterranean and the Far East.

Delmar W. Holloman for complainants.
Herman Goldman for respondents.

FOURTH INITIAL DECISION ON REMAND OF GUS O. BASHAM, CHIEF EXAMINER, DETERMINING REPARATION DUE COMPLAINANTS[1]

The decision of the Federal Maritime Board in *Isbrandtsen Co., Inc., et al.*, v. *States Marine, et al.*, 6 F.M.B. 422 (1961) dismissing the com-

[1] This decision became the decision of the Commission on July 7, 1964 and an order was issued dismissing the complaints, with prejudice, as to respondents named in the Stipulation and Agreement only.

plaint herein was reversed by the United States Court of Appeals (D.C.) on January 10, 1963. The Court remanded the proceeding to the Commission (successor to the Board) for the assessment of reparation, if any, due to complainants.[2] In turn, the Commission by order of November 21, 1963, remanded the proceeding to the Examiner for that purpose.

Complainants, on June 4, 1964, submitted the following Stipulation and Agreement between them and respondents executed on June 1, 1964, and requested the dismissal with prejudice of the complaints against them:

This Stipulation and Agreement, entered into between H. Kempner, a Massachusetts trust, Galveston Cotton Company, a Texas corporation, and Texas Cotton Industries, a Texas corporation, ("shippers"), on the one hand, and Nippon Yusen Kaisha Limited, a Japanese corporation, Kawasaki Kisen Kaisha Limited, a Japanese corporation, the carrier or carriers constituting the Fern-Ville Far East Lines, Waterman Steamship Corporation, an Alabama corporation, and States Marine Corporation, a Delaware corporation, ("carriers"), on the other, all of which are more fully described in the complaints and answers in Docket Nos. 732, 733, 734 and 735 before the Federal Maritime Commission;

WHEREAS, the aforesaid shippers are the complainants in the proceedings in Docket Nos. 732, 733, 734 and 735 before the Federal Maritime Commission (which terms, where appropriate shall include the Federal Maritime Board), seeking to recover reparations against the above-named carriers, among others; and

WHEREAS, in addition to the reparations claimed against the above-named carriers for the period through December 31, 1952 by the aforesaid shippers as set forth in the complaints in the said proceedings, the said shippers shipped at noncontract rates consignments of cotton via vessels of said carriers from the date of January 1, 1953 to the date of the interim legislation enacted by Congress which made lawful the dual rate contract systems of the aforesaid Conference insofar as it might be applied subsequent to the date of the enactment of the legislation on August 12, 1958; and

WHEREAS, the United States Court of Appeals for the District of Columbia Circuit by decision dated January 10, 1963 reversed the decision of the Federal Maritime Commission in the aforesaid proceedings and ordered the proceedings remanded to the Commission for the assessment of reparations due the complainants thereunder; and

WHEREAS, the carriers named hereinabove deny that they are liable to the aforesaid shippers for any alleged reparations and/or damages; and

WHEREAS, the parties are desirous of settling, satisfying and compromising and avoiding the necessity for further proceedings and the expenses, inconvenience, and delays which may be occasioned thereby;

NOW, THEREFORE, for and in consideration of the mutual undertakings of the parties hereto, it is hereby stipulated and agreed by and between the said parties that:

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[2] The Court said: "The discriminatory (dual) rates here involved were not approved by the regulatory agency merely because it was silent concerning them, and the rates were therefore illegal."

NOTE.—On Sept. 17, 1964 the Commission issued an Order dismissing the complaints in their entirety and with prejudice as to all respondents named in said complaints.

1) H. Kempner, Galveston Cotton Company and Texas Cotton Industries, hereby release any and all claims which they may have had against Nippon Yusen Kaisha Limited, Kawasaki Kisen Kaisha Limited, the carrier or carriers constituting the Fern-Ville Far East Lines, Waterman Steamship Corporation, and States Marine Corporation, in connection with the matters alleged in the complaints in Docket Nos. 732, 733, 734, and 735 before the Federal Maritime Commission, including all claims for damages and/or reparations arising out of the shipments by the said H. Kempner, Galveston Cotton Company and Texas Cotton Industries, at noncontract rates under the dual rate systems involved, including those covering shipments which were effected during the period subsequent to December 31, 1952;

2) Upon the execution of this Agreement, the parties hereto shall advise the Federal Maritime Commission that the controversies which are the subject of the complaints in Docket Nos. 732, 733, 734, and 735 before the Federal Maritime Commission have been settled insofar as they apply to the respondent carriers named in paragraph #1 hereinabove and that the complainant shippers named in paragraph #1 hereinabove have withdrawn their complaints, as amended, insofar as they pertain to the said respondents and request an order by the Commission dismissing the said complaints, with prejudice, insofar as they pertain to the said respondents;

3) The respondent carriers will pay to the indicated complainant shippers sums which shall include principal, interest thereon, costs and any other amounts which may be due, as follows:

a) Waterman Steamship Corporation, a total of $16.95, to Galveston Cotton Company in Docket No. 734;

b) Kawasaki Kisen Kaisha Limited, a total of $158.55 to H. Kempner in Docket No. 733;

c) Nippon Yusen Kaisha Limited, a total of $15,335.54, by paying to H. Kempner, $7,180.08 in Docket No. 733, Galveston Cotton Company, $7,364.20 in Docket No. 734, and Texas Cotton Industries, $791.26 in Docket No. 735;

d) The carrier or carriers constituting the Fern-Ville Far East Lines, a total of $5,794.26, by paying to H. Kempner, $3,672.57 in Docket No. 733, Galveston Cotton Company, $1,646.78 in Docket No. 734, and Texas Cotton Industries, $474.91 in Docket No. 735;

e) States Marine Corporation, a total of $44,780.81, by paying to H. Kempner, $26,690.13 in Docket Nos. 732 and 733, Galveston Cotton Company, $17,511.83 in Docket No. 734, and Texas Cotton Industries, $578.85 in Docket No. 735.

4) This agreement is entered into by and between the parties for the purpose of settling, satisfying and compromising the cases set forth hereinabove, and for the avoidance of the expense, inconvenience, and delays which would be involved in any further litigation between them. Neither this agreement nor any payment hereunder shall be construed as an admission that H. Kempner, Galveston Cotton Company and Texas Cotton Industries are entitled to recover damages and/or reparations against the respondents named hereinabove in any amount whatsoever.

This document was served upon the attorneys for all other respondents herein, who have filed no objection to the proposed settlement.

The complaints herein were filed timely, therefore none of the shipments are time barred. The reparation claimed therein was calculated on basis of the difference between the noncontract rate paid

and the contract rate sought, applied to the weight of the shipments involved.

The amounts agreed upon in settlement of the claims are equivalent to the reparation originally sought plus a nominal amount of interest.

Premises considered, an order will be entered dismissing the complaints, with prejudice, as to respondents named in the Stipulation and Agreement only. This action should not be construed as an approval of any particular amount of interest on the claims involved; and is without prejudice to any findings which may be made with reference to the remaining claims for reparation against any remaining respondent.

(Signed) GUS O. BASHAM
Presiding Examiner.

JUNE 19, 1964.

FEDERAL MARITIME COMMISSION

No. 1096

THE NORTHERN PAN-AMERICA LINE, A/S (NOPAL LINE)

v.

MOORE-MCCORMACK LINES, INC., ET AL.

Decided July 20, 1964

Nopal Line's share of the revenues from the carriage of coffee from Brazil to U.S. Gulf ports fixed under Agreement No. 9040 found to be unjustly discriminatory and unfair within the meaning of section 15.

Thomas K. Roche and *Sanford C. Miller* for complainant Nopal Line.

W. B. Ewers for respondent Moore-McCormack Lines.

Frank J. McConnell for respondent Lloyd Brasileiro.

Seymour H. Kligler for respondent Empresa Lineas Maritimas Argentinas (E.L.M.A.).

Donald Macleay, *Harold Mesirow*, and *Edward S. Bagley* for respondent Delta Line.

Edwin Longcope for respondent Brodin Line.

Donald D. Webster for respondents Columbus Line, Ivaran Lines, and Holland Pan-American Line.

Elmer C. Maddy for respondent Norton Line.

James N. Jacobi for respondent Montemar.

John R. Mahoney for Wilbur Van Emburg, Administrator, Brazil, United States Coffee Agreement (not a respondent).

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

Benjamin A. Theeman, Hearing Examiner.

REPORT

By JOHN HARLLEE, *Chairman* and JAMES V. DAY, *Commissioner:*

This proceeding arises out of a complaint filed by Northern Pan-America Lines, A/S (Nopal), alleging primarily that the Brazil/ United States Coffee Agreement (Agreement 9040) is unjustly dis-

criminatory and unfair as between carriers in violation of sections 15 and 16 of the Shipping Act, 1916.[1]

The Examiner, in his initial decision, found that complainant had failed to show that Agreement 9040 violated sections 15 and 16 of the Act, and that the complaint should be dismissed. The proceeding is before us on exceptions to the initial decision.

Before proceeding to a resolution of the issues set forth in the complaint, some preliminary discussion of the parties to this proceeding and their participation herein is necessary. While Nopal's complaint is directed only to its percentage allocation or share in the Gulf pool, it neverthless named as respondents to the complaint all signatories to Agreement 9040, including certain lines which were participants in the Atlantic pool but not the Gulf pool. The parties and their participation in the proceeding are as follows:

There are four lines participating in the Gulf pool: Nopal Line, the complainant; and three respondents in this proceeding, Delta Steamship Lines (Delta), Lloyd Brasileiro (Patrimonio Nacional) (Lloyd), and Empresa Lineas Maritimas Argentinas (E.L.M.A.).

Complainant, Nopal, is a Norwegian corporation operating Norwegian-flag vessels, some of which are owned and others chartered by A/S Sobral, which owns 97 percent of the stock of Nopal. The stock of A/S Sobral, a Norwegian corporation, is owned by members of the Lorentzen family. Its vessels generally proceed southbound from Gulf ports in the United States and Mexico to ports in Brazil, Uruguay, and Argentina, on the east coast of South America, and thereafter northbound from Argentina, Uruguay, and Brazil to Gulf of Mexico ports. Nopal entered the trade in 1949, at which time all of its coffee carryings were on chartered vessels. From that time through the end of 1962 (the last full year of operations covered by this record), its proportion of sailings on owned vessels has constantly increased in relation to its charter operations so that by 1962, 22 of its 28 sailings from Brazil to U.S. Gulf ports were with owned vessels. In 1962, revenues from the carriage of coffee accounted for 95 percent of Nopal's total revenue from all cargoes carried northbound from Brazil, and 63.5 percent of its northbound gross freight revenues from

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[1] A copy of Agreement 9040 is attached as app. A hereto. The agreement is discussed in detail where pertinent; however, generally speaking, it provides for the pooling of revenues derived from the carriage of coffee from Brazil to U.S. Gulf and Atlantic ports. Since its inception the Brazil/United States coffee pool has been divided into two "money" pools: (1) The Gulf pool providing for pooling of revenues on coffee carried from Brazil to U.S. Gulf ports, and (2) The Atlantic pool providing for the pooling of revenues on coffee carried from Brazil to U.S. Atlantic ports. Under the agreement each signatory is required to maintain a minimum number of sailings and is assigned a percentage of the revenues realized from the total amount of coffee carried by all signatories. Failure to provide the required minimum service results in a proportionate reduction of the percentage allocation. Eligibility for participation in the pool is conditioned upon membership in the Brazil/United States-Canada Freight Conference and an applicant must be approved by three-quarters of the pool membership.

South America. It is the second largest carrier of coffee in the Gulf trade and generally maintains a fortnightly service.

Delta is a subsidized American-flag carrier and, like Nopal, is engaged in the trade between U.S. Gulf ports and ports in Brazil, Uruguay and Argentina on the east coast of South America. It has been engaged in the carriage of coffee from Brazil to U.S. Gulf ports since 1919, and is the largest carrier of coffee in that trade. It is the only Gulf carrier which transports coffee on passenger vessels as well as freighters. Since 1949 its utilization of chartered tonnage has been minimal. It operates about four sailings per month in the coffee trade from Brazil to U.S. Gulf ports. From 1959 to 1963, its coffee carryings constituted an average of 63.8 percent of its total revenue northbound and southbound combined.

Lloyd is owned and controlled by the Republic of Brazil. At its head is a director appointed by the President of Brazil, assisted by a commercial superintendent appointed by the Minister of Transportation. It operates in the name of the Brazilian Government and is required to carry out governmental policy, which dictates that Lloyd's vessels call at ports in Brazil to transport cargoes from which the earnings are poor. In order to further the growth of industry in Brazil, Lloyd must each year visit many of these ports which the other carriers in the trade do not visit because they are unprofitable. As a result of such lengthened itineraries, Lloyd's operations are subsidized by the Brazilian Government and the transit time of Lloyd's vessels in this trade has more than doubled from 1955 to 1963.

Lloyd is the oldest carrier in the trade. It is the only one of the Gulf carriers in this trade whose vessels do not call at ports in Uruguay or Argentina as part of their round-trip voyages. It offers an average of about two sailings per month in the trade with owned tonnage. For the period from 1959 through 1962, its total coffee carryings were the smallest of the four Gulf carriers.

E.L.M.A. is owned and controlled by the Republic of Argentina in a manner similar to that by which Lloyd is owned and controlled by Brazil. E.L.M.A. is an instrument of policy of Argentina and is required to further the development of that country's foreign commerce. Its transportation services are directed by its president who is appointed by the President of Argentina, subject to confirmation by the Argentine Senate. By a series of transactions it is the successor to Cia. Argentina de Navegacion Dodero, S.A., which commenced carriage of coffee in the trade in 1948. Dodero was purchased by the Government of Argentina in 1949 and in 1954 its name was changed to Flota Argentina de Navegacion de Ultramar (F.A.N.U.). In 1961, F.A.N.U. was merged with Flota Mercante del Estado and became E.L.M.A. E.L.M.A. had approximately 12 sailings per year in the

trade from 1959 through 1962 and averaged the third largest carriage in the trade.

The other respondents to this proceeding are common carriers participating in the coffee trade from Brazil to U.S. Atlantic ports.

Brodin Line, flying the Swedish flag, entered in effect a general denial to the complaint. Generally, its position was in agreement with the Gulf respondents. Its participation in the proceedings was limited, and it presented no evidence.

Montemar is an entity of the Uruguayan Government. It became a member of the Atlantic pool in March 1963, when it signed Agreement No. 9040. Montemar's participation in the proceeding was limited to the filing of an answer which in effect set forth a general denial.

Moore-McCormack Lines, Inc. (Mormac) is a private U.S. corporation operating under the U.S. flag. Like Delta Line, it operates under a subsidy agreement with the U.S. Government. Mormac entered in effect a general denial to the complaint, and took part in the proceedings to show that Mormac, in its corporate capacity, did not participate in the Gulf pool negotiations but that any such participation was by Mormac representatives as individuals and not in their representative capacity when so doing. Mormac's position supported that of the gulf respondents.

Torm Lines, flying the Danish flag, took no part in the proceeding. Torm stated that since it does not serve the Gulf ports, it would refrain from comment because the dispute was confined to lines serving the Gulf ports, but in stating its position in a letter to the Examiner wrote: "In reply, please note that we fully understand and sympathize with Nopal's views in this matter."

Columbus Line, flying the West German flag, Ivaran Lines, flying the Norwegian flag, Holland Pan-American Line flying the Netherlands flag, and Norton Line, flying the Swedish flag appeared by attorneys. They filed no answer to the complaint and presented no evidence but participated actively in cross-examination and argument. The position of these respondents generally supported that of Nopal Line.

Carriers participating in the coffee trade were generally referred to by the conference as either "national flag" or "third flag" carriers. A carrier was considered "national flag" if it flew the flag of the country of origin or destination of the coffee (Brazil or the United States); or if the carrier was a government-owned line of a South American country within the conference trading limits; i.e., Brazil, Uruguay, or Argentina. Mr. Lorentzen of Nopal Line testified that in his opinion E.L.M.A. (Argentina) and Montemar (Uruguay) should not be considered as "national flag," but never expressed this view to the

conference. E.L.M.A.'s agent claimed that E.L.M.A. was entitled to the "special consideration" accorded national flag lines, since it has "obligations to the development of the Argentine trade and traffic which restrict her commercial activities to a degree, and she performs essential traffic development service for * * * many branches of the Argentine Government * * *."

In the Gulf pool, Delta Line, Lloyd, and E.L.M.A. are considered and designated "national flag," and Nopal Line is the only third flag line. In the Atlantic pool, Mormac, Lloyd, E.L.M.A. and Montemar are considered "national flag," and Brodin Line, Columbus Line, Ivaran Lines, Holland Pan-American Line, Norton Line, and Torm Line are "third flag" lines.

The pooling agreement here in issue (Agreement 9040) was approved by the Commission on June 11, 1963, with the condition that it be modified by adding the following provision:

"* * * provided that no monies shall be paid into the escrow fund established by the agreement, nor shall any monies be distributed from such fund or otherwise among the parties, until such time as the Commission issues its final decision in Docket No. 1096, and provided further that distribution at that time shall be made in accordance with such decision."

The parties to 9040 agreed to the said modification and 9040, as modified, became effective on August 22, 1963.

Nopal is not opposed to the principle of pooling embodied in Agreement 9040, but claims that the share of the trade allocated to it under the agreement is unreasonably low, considering its history of past coffee carryings. Nopal alleges that Agreement 9040 will deprive it of substantial revenue from the carriage of coffee, and that its share in the pool is discriminatory, detrimental to the commerce of the United States, and in violation of sections 15 and 16 of the Shipping Act, 1916, as amended. Its prayer for relief seeks a Commission order "modifying proposed Agreement No. 9040 so as to accord to Nopal Line a fair and nondiscriminatory share in the Gulf money pool, and approving said proposed Agreement No. 9040 as so modified; or, in the alternative, disapproving said agreement unless the proposed parties thereto so modify said agreement, together with such other and further relief as the Commission shall deem just and proper."

Following Nopal's complaint four respondents (Norton Line, Columbus, Ivaran, and Holland Pan-American Line) signatories of Agreement 9040 participating in the Atlantic pool petitioned the Commission for a declaratory order resolving the following questions:

"*Controversy No. 1*

"Whether, under Sec. 15, Shipping Act, 1916, the Commission can approve a pooling agreement among ocean common carriers when it is admitted by a number of members of the proposed pool that the shares therein have been allocated on a basis which is designed to and does accord (a) preferred status to certain

carriers because their vessels fly the flags of either the importing or exporting nation (so-called 'national flag' lines), and (b) in relation to those carriers, prejudiced status to certain other carriers because their vessels fly the flags of other nations (so-called 'third flag' lines)?

Controversy No. 2

"Whether, when a pooling agreement approved by the Commission provides that the agreement shall be effective through a certain date and that thereafter, in negotiating an extension of the agreement, 'the percentages and minimum sailings shall be subject to review and adjustment taking into consideration the service and carryings during the past two (2) year period,' any members or group of members of the pool may 'refuse to consider' the services and carryings of another member or group of members during the past two year period?"

The Commission denied the petition for a declaratory order stating that the issues presented were capable of resolution in Docket 1096, the present proceeding. During the hearing, the Examiner excluded evidence pertaining to the allegedly discriminatory effect of the Atlantic pool, and confined the proceedings to the issues involved in the Gulf pool.

Brazil is the world's principal producer of coffee, and the United States is Brazil's chief customer, importing about 8 million bags per year. The conference rate for transportation of coffee has been stabilized at $2.50 per bag, but a tariff revision recently filed with the Commission has increased this rate to $3. Thus, prior to this recent increase, the yearly freight on the coffee to the United States was about $20 million. During 1962 the value of coffee imported to the United States was about $362,528,000. The United States is the only nation that permits the entry of coffee without import duty. The coffee trade provides about 70 percent of Brazil's foreign exchange, and Brazil considers this the mainstay of its exchange structure.

In the latter part of 1959 rumors, allegations, and complaints of malpractices spread in the trade, and the Chairman of the Green Coffee Association, a shipper group, complained to the conference about these practices. From this the conference members foresaw the breakup of the conference and a damaging rate war in the offing.[2]

In May 1960, a conference meeting was called for the purpose of discussing these problems and agreeing on appropriate remedies. Prior to this meeting, Captain Clark, president of Delta Lines, discussed the possibility of a pool with the conference chairman, and was told that "anything [Clark] could do to bring order out of chaos might be the salvation of the conference."

Prior to this meeting, a caucus of the national flag lines was held during which Captain Clark presented his proposal to the other lines in attendance. The representatives of Lloyd, the Brazilian line, and

[2] While the record clearly shows that malpractices were rumored, and complained of, nothing therein indicates whether or not any malpractices were in fact engaged in.

E.L.M.A. were initially hostile to the pool proposal, but subsequently agreed in principle to the establishment of a pool. An initial memorandum was then prepared by the national flag conferees for submission to the conference as a whole. The memorandum did not purport to be an agreement among national flag lines, nor were its terms necessarily agreeable to any of them. Rather, this initial proposal was designed to be presented to the conference as a point of departure for further discussion. The proposal provided for two pools of coffee carryings from Brazil to the United States, one for the Atlantic ports and one for the Gulf ports. The pool shares allotted for the Gulf were: Delta Line, 59 percent; Lloyd, 19 percent; F.A.N.U., 9 percent; Nopal Line, 13 percent.[3] The quotas were purportedly arrived at by striking an average for the 10 previous years, excluding 1959 [5] as a year which was considered by some to be atypical because of alleged malpractices, and considering among other factors each carrier's "past service, cubic capacity, frequency and number of sailings, pioneering effort, and over-all length of service."

It was during the discussions on this proposal, the Brazilian delegation first made known its position that Lloyd was entitled to an allocation of 50 percent because of its status as a national flag line and more particularly because Brazil was the exporting country. Lloyd subsequently retreated from this position but stood firm in its insistence that in no event would it accept a quota lower than a third flag carrier, which in practical terms meant that despite any differences that might exist in past carryings between Lloyd and Nopal, Lloyd would insist on a quota at least equal to Nopal's. Nopal maintained that considerably more weight be given to past carryings. According to statistics before the parties at the time of these discussions, Nopal had carried 29.4 percent of the coffee between April 1, 1959, and March 31, 1960. Nopal agreed to accept a quota of 26 percent, but a final offer of 19 percent made by the other Gulf carriers was refused by Nopal. In July 1960, as a result of Nopal's refusal to accept the 19 percent allocation, a coffee pool was formed by the other three Gulf carriers without Nopal (Agreement 8505).[5] Nopal continued to carry coffee outside the pool at conference rates (Nopal was still a conference member albeit not a pool participant).

Despite the remedial effect the pool was expected to have on the coffee trade, rumors of malpractice continued, and it was about this time that so-called "outsiders" began to appear on berth, i.e., nonconference nonpool carriers loading coffee.

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[3] This initial memorandum also proposed pool shares for an Atlantic pool.

[4] Some conflict appears in the record as to whether the year 1959 or 1960 was excluded in computing the 10-year average. The distinction is not crucial to our decision herein.

[5] Agreement 8505 also had a separate pool for the Atlantic.

On October 13, 1960, the Brazilian Government's Superintendent of Money and Credit issued a decree known as SUMOC 202, which read in pertinent part as follows:

1. Brazilian export products with destination United States of America or Canada will be transported exclusively by shipping companies which are members of the Brazil/United States/Canada Freight Conference.

3. In the case of products which transportation is regulated by specific accords or agreements between member lines of the conference signed under the auspices of the above conference and not rejected by the Brazilian authorities, loading of these products will be effected exclusively on vessels of those shipping companies that are signatories of said accords or agreements.

SUMOC 202 had and still has the force of law in Brazil.

Put in its essential terms, SUMOC 202 prohibited the carrying of coffee by any carrier who was not a member of the pool. Despite Nopal's success in persuading shippers to request Brazilian authorities to allow Nopal's service to continue, and despite its attempts, without success, to persuade the conference to intervene on its behalf, the Brazilian Government refused to rescind or modify the decree and as of October 21, 1960, its effective date, Nopal could no longer load coffee at Brazilian ports.

Shortly after the promulgation of SUMOC 202, the coffee pool administrator at the request of Delta Line urged nonpool members to apply for membership in the coffee pool. On November 7, 1960, Nopal made its application and on November 11, 1960, a meeting of the Gulf carriers was held in Rio to consider that application. Prior to that meeting the President of Delta Line met with the Director of Lloyd and urged Nopal's prompt admission to the pool. At the November 11 meeting the Gulf lines were receptive to Nopal's admission, but there were no specific discussions of pool quotas.

During the next few days, however, the hard bargaining took place. Lloyd's position remained firm. While it continued to assert that it was entitled to 50 percent of the trade, Lloyd flatly refused to accept a lesser percentage than Nopal. F.A.N.U., the Argentine line, made an oral proposal to allot Delta 50 percent, Lloyd 25 percent, Nopal 15 percent and F.A.N.U. 10 percent.

Delta's proposal, while not making specific recommendation as to quotas, set forth what it considered to be appropriate factors in arriving at quotas. Its proposal stated in pertinent part:

* * * * * * *

D. Allocation of percentages should be based on:

(1) Previous experience over a representative number of years, with due weight to pioneering effort.

(2) National interest.

Previous Experience

As a first step, we suggest a review of previous experience, and we attach statistics covering carryings of coffee by Gulf Lines during the past 10 years * * *. We feel a good deal of weight should be given to the 10-year averages, and that little, if any, weight be given to the year 1960, due to the unusual circumstances, including malpractices prevailing during the past 10 months. It is imperative that agreement be reached on previous experience (the number of years) before proceeding to discusss future divisions. We believe a minimum period of five (5) years' experience should be offered as a basis for negotiations.

National Interests

It is our opinion that Lloyde Brasiliero, as an instrument of policy of the Brazilian Government, should receive special consideration on the basis of both national interest as well as its position as the oldest carrier in the trade * * *.[6]

Delta Line Proposal

We are agreeable to accept a substantial reduction in the last complete five (5) years' average carryings by Delta Line, in favor of the legitimate aims of Lloyde Brasiliero, provided Nopal Line will also agree to a similar reduction in favor of Lloyde Brasiliero.

Nopal countered with a proposal based on an estimate that 2,600,000 bags of coffee would move annually from Brazil to U.S. Gulf ports. Of the 2,600,000 bags, Lloyd would be guaranteed 375,000 bags, and F.A.N.U. 150,000 bags, based on 15 sailings per year for each of the above lines. Should Lloyd and F.A.N.U. fail to carry 375,000 bags and 150,000 bags, respectively, the deficit up to those amounts would be paid at $1.00 per bag, by Delta and Nopal, in proportion to their actual carryings. Under this proposal Nopal proposed to limit its sailings to 26 per year.

Nopal's proposal was strongly opposed by both Delta and Lloyd. Among the reasons given by Delta for its opposition was its belief that "the proposed limitation of service would probably be interpreted as an unwarranted restriction of trade, and therefore illegal."

Finally, on November 23, 1960, after considerable negotiation during the course of the previous week, agreement was reached, and an informal statement of agreement was executed by the parties, which became Agreement 8505–1. As finally executed the agreement provided for a percentage allocation of the revenue from the total coffee transported by the parties to the agreement. Excluded from the computations were the carryings on Delta Line's passenger vessels up to 23.5 percent of the total Gulf carryings.[7] The revenue from Delta's

[6] Delta's proposal under this *National Interests* heading went on to point out that the national interests of the United States and Argentina were also entitled to consideration in allocating quotas. Although not an exporter of coffee the national interest of Argentina was thought entitled to consideration because Argentina was within the scope of the conference trading area.

[7] Under the prior agreement (8505) Delta was allowed to exclude 800,000 bags from the pool carried on passenger vessels. This would normally be a greater exclusion than the 23.5% excluded under Agreement 8505–1. This represented a concession by Delta. In order to get full advantage from this exclusion, Delta actually had to carry 23.5% of the total movement to the Gulf on its passenger vessels. If it carried less, only the amount it actually carried would be excluded.

passenger vessel carryings beyond the 23.5 percent was placed in the general pool. The revenues thus pooled after a deduction by each line of $1.15 per bag for handling charges, were divided as follows:

	Percent
Delta Line	38.64
Lloyd Brasileiro	25.37
Nopal Line	25.37
F.A.N.U. (E.L.M.A.)	[8] 10.62

In order to qualify for the percentages specified above, the following minimum sailings, during each 6-month pool accounting period, were to be maintained:

Delta	13
Lloyd	12
Nopal	12
F.A.N.U. (E.L.M.A.)	6

If any line failed to provide its minimum sailings, the percentage allocated to it was to be reduced in direct proportion to its reduction in service and the surrendered portion was to be allocated to the other lines in ratio to their percentage quota allocations.

However, as a concession to Nopal, Delta accepted a 50 percent reduction in whatever compensation might accrue to them by reason of noncompliance by the other pool members with the specified minimum sailing requirements, and E.L.M.A. accepted a similar reduction of 33⅓ percent.

Nopal expressed dissatisfaction with its quota but was told that its record did not entitle it to more, that the national flag lines had "a certain right in the trade" which Nopal did not have, and that in any event Lloyd would not permit Nopal to have a higher quota than Lloyd.

A provision which was later to give rise to much controversy was embodied in Article 18 of Agreement 8505-1 and read in pertinent part:

> * * * This Agreement and percentages established herein shall be effective through August 29, 1962. Thereafter the percentages and minimum sailings shall be subject to review and adjustment taking into consideration the service and carryings during the past two (2) year period.[9]

As a condition of Nopal's acceptance of the agreement, Lloyd immediately advised Brazilian authorities that Nopal was now a pool

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[8] These percentages total 100%. It is to be noted that this does not represent the total Gulf carryings. The latter include the carryings of Delta Line's passenger vessels. On the basis of total Gulf carryings these percentages become Delta Line, 53.06%; E.L.M.A., 8.12%; Lloyd, 19.41%; and Nopal Line, 19.41%. Figures and percentages hereinbefore and hereinafter referred to, unless otherwise specified, refer to and are based on total Gulf carryings.

[9] A 6-month extension to Agreement 8505-1, designated as Agreement 8505-2, was later approved by the Commission. Pursuant to the latter agreement, the Aug. 29, 1962, date found in art. 18 was changed to Feb. 28, 1963.

member, and therefore eligible to lift coffee. The ban was lifted and Nopal was back on the berth.

The combination of SUMOC 202 and the pool was apparently an effective one and during the period of 8505-1 rumors of malpractice disappeared from the trade as, of course, did all so-called "outsiders."

Since Agreement 8505-1 had an expiration date of August 29, 1962, a meeting of principals was scheduled for June 1962, in New York, to consider, among other things, the extension of the coffee pool.

In February/March 1962, Delta Line and Mormac arranged through their respective representatives in Brazil that an invitation be issued to Lloyd's representatives for a meeting in New York in advance of the scheduled meeting. As a result, Commandante Loris, Commercial Superintendent of Lloyd, and several other Lloyd officials met with Messrs. Clark of Delta Line, and Mattman, Vice President of Mormac, several times in May 1962, the main topic of discussion being the desire of Lloyd to transfer the seat of the Conference to Brazil in order to enhance the prestige of that country. Both Delta and Mormac agreed to support the move. Some discussion of pool quotas also took place between these national flag carriers, but apparently no conclusions were reached.

At the June 1962 principals' meeting Commandante Loris' proposal to transfer the seat of the Conference to Brazil was approved, and a further proposal was made by Lloyd to extend the pool for 6 months, so that Conference machinery could be set up in Rio, and the first meeting to be held in Rio would be the renegotiation of the pool. Nopal made no objection to transferring the base of the Conference, but did express its reluctance to agree to any extension. Nopal stated that since it considered its quota under Agreement 8505-1 to be inadequate, and had relied on Article 18 of the agreement to get an upward revision of its quota as of August 29, 1962 (the terminal date of Agreement 8505-1), any extension of that date would be "a very definite hardship." After expressing these views at the meeting, however, Nopal joined with the other principals in approving the extension of the pool to February 28, 1963.[10] Nopal was assured by Commandante Loris of Lloyd, that Article 18 would be fully discussed when the principals convened in Rio.

The principals met in January/February 1963 against a background of the following history of coffee carryings in the Gulf trade:[11]

1. Although Nopal's quota under Agreement 9040 was 19.41 percent, its carryings during the pool period (November 23, 1960–December 31, 1962) averaged

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[10] This extension was approved by the Commission on Jan. 31, 1963, as Agreement 8505-2.

[11] A table setting forth the sailings and carryings of the Gulf carriers from Nov. 23, 1960 to Dec. 31, 1962, the latest figure available to the principals at the Rio meeting, is attached hereto as app. A. A table showing the financial results of Agreement 8505-1 through Dec. 31, 1962, is attached hereto as app. B.

25.5 percent. During this period its carryings consistently increased and ranged from a low of 19.90 percent for the period November 23, 1960–August 28, 1961, to a high of 31.99 percent for the 4 months from August 29, 1962 to December 31, 1962.

2. As a result of carryings considerably in excess of its quota, Nopal for the period November 23, 1960–December 31, 1962, was the principal contributor to the pool, and paid $449,920.74 [12] into the pool—as against payments by Delta and E.L.M.A. of $383,155.19 and $734.58, respectively. Under the agreement, Lloyd (who actually carried a lower percentage of the coffee during the pool period than any of the Gulf participants) received $833,810.51.

3. Nopal's contribution per bag carried during the above period was 34.4 cents, Delta's was 12.6 cents and E.L.M.A.'s 0.2 cents per bag. Lloyd, during the period in question, received $2.16 for each bag it carried.

4. Nopal entered the Brazil-United States Gulf coffee trade in 1949. Its annual carryings since that year were as follows: [13]

	Percent		*Percent*
1949	4.8	1956	18.4
1950	7.6	1957	19.9
1951	7.7	1958	21.9
1952	13	1959	27.3
1953	15.3	1960	24.9
1954	12.4	1961	24.8
1955	13.3	1962	27.7

As can be readily observed, these latter figures with some slight fluctuation show a consistent upward trend.

The January/February 1963 meeting of principals was the scene of many days of difficult negotiation. The negotiations took place both at plenary meetings of all coffee pool participants, both Atlantic and Gulf, and at caucuses at which Atlantic and Gulf lines met separately to negotiate quotas for their respective pools.

Disagreement between the national flag lines and the third flag lines with regard to the application and effect of Article 18 on the quotas for the new period occurred on the first day and continued throughout the conference.

Nopal Line pointed out that its carryings for the preceding few months averaged about 32 percent of the total Gulf carryings but that its average for the total pool period was about 25.5 percent. On this basis Nopal contended that Article 18 entitled it to a higher quota than its old one and stated it was willing to accept 25.5 percent of the total Gulf carryings. Nopal Line recognized the fact that the primary purpose for which the pool had been formed was being achieved, but took the position that Lloyd had "received a tremendous (money)

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[12] This figure does not represent the amount actually paid by Nopal, but the amount payable. The record shows that as of July 23, 1963, the date testimony was given relating to Nopal's payments into the pool, Nopal had not yet made payment into the pool of $290,918.25, the amount due for the 6-months period ending Feb, 28, 1963.

[13] Comparative figures for the other Gulf carriers appear in app. C.

tribute from us and it is about time that we finish with this." Delta Line, Lloyd, and E.L.M.A. stated that, although each of them wanted a quota increase, each was willing to continue with the quotas as negotiated in Agreement No. 8505-1. Lloyd reasserted its position that it wanted 50 percent of the trade, but would not insist on that figure because its national obligations not only prevented it from carrying 50 percent but also prevented it from carrying even the 19.41 percent quota it had received under Agreement 8505-1. Lloyd maintained, however, that it had special rights and was entitled to special considerations as a national flag line to which Nopal was not entitled because of its position as a third flag line. It was apparently Lloyd's view that because Brazil was the exporting country, Lloyd was entitled to greater preferment than even the other national flag lines. Lloyd reiterated that in no event would it accept a quota less than Nopal Line's in the Gulf. Delta stated that it, too, was an over-carrier, and was seeking an increase in the quota of carryings for its passenger vessels to a little less than the 800,000 bag figure it had under Agreement No. 8505. E.L.M.A. adopted the flat position that it would take nothing less than the quota it already had, on the basis of its past service and carryings and its position as a national flag line.

These positions taken by the Gulf national flag lines were discussed and reached at two meetings at which no representative of Nopal Line was present. The first such meeting was held the night of the first day of the principals' meeting, and among the items discussed were the advisability of a new pool as distinguished from an extension of the old; the desire of each line for a greater quota; the fact that each was prepared to agree to the previous percentage; and the applicability of Article 18. At the second meeting of the national flag lines, about 5 days later, concern over the lack of progress at the principals' meeting was expressed and the three lines considered the possibility of forming a new pool without Nopal should it refuse to accept the offer of the national flag lines.

The discussion at the principals' meeting had made no headway. No party was willing to make any further concession, and faced with an apparent impasse, Captain Clark proposed that each line retain the same quota it held under Agreement 8505-1. In response to Nopal's protests, Captain Clark stated:

"I would like to remind Mr. Lorentzen of the sequence of events, which he has apparently not understood. Delta has made its position clear: We would be prepared to stay within our present quota with the understanding that the passenger ships must receive a fair allowance. E.L.M.A. has also made its statement. Lloyd said that, if Nopal asked for a percentual increase, they would have to follow this procedure too. We have told Mr. Lorentzen that he has reached a level beyond which he cannot go. Isn't that clear enough now?"

At a caucus of the Gulf lines held February 4, Nopal was informed that a new pool without Nopal would be formed if it would not accept its present quota by noon of the next day.

Captain Lorentzen protested at the plenary meeting that:

"* * * it was plainly explained to us what will happen if we did not join or maintain or accept the offer made to us * * * we understand the difficult position of Lloyd in this trade and we feel that, instead of working on quotas and insisting on the emphasis on quotas we should try to find some way of eliminating the incredible situation of when national lines do not get cargo. We are perfectly open and willing to explore any avenue we can find * * * because we believe * * * that the present percentage system, with large payments passing from one line to the other, is not healthy and is not in the best interests of the commerce of Brazil or the United States * * *. During that discussion this misunderstanding of our position came out, namely when we are insisting on consideration of Article 18 we do not expect or insist or hope for 100 percent consideration of our carryings in the adjustment to be made. We do expect some consideration * * *."

The following morning Captain Clark advised the meeting that the Gulf pool situation was settled as far as the national lines were concerned and that they were waiting only for Nopal Line's reply. Mr. Lorentzen restated his belief that Nopal's rights under Article 18 had been abrogated but accepted the quota offered, stating:

"* * * yesterday afternoon, in definite words, we were told that, if we don't accept the status-quo by noon today, a new pool will be organized without Nopal line. We must strongly protest against this kind of treatment, but, in view of the existence of regulations such as Sumoc 202, we have no alternative left to us. Nopal will sign only because refusal to do so will shut them off from the coffee trade.

The remainder of the next 2 days were spent in drafting Agreement No. 9040 and the issue arose as to whether the new agreement should take the form of an extension of Agreement 8505, or a completely new pool. Captain Lorentzen participated actively in the discussions dealing with, and the drafting of, the new agreement. At first Nopal Line objected to the new pool arrangement and favored an extension, but at Delta's insistence, Nopal subsequently withdrew its objection stating: "Of course we reserve all our rights under the old agreement, where we have them. We have no more objections against a new pool."

Agreement No. 9040 was drafted and distributed among the parties for signature. Nopal Line signed and returned its copy of the agreement to the coffee pool administrator, and in its covering letter dated February 25, 1963, Nopal stated:

"The signature of the Northern Pan-America Line, A/S, has been affixed under the circumstances which Mr. Per A. Lorentzen set forth in our behalf at length at the owner's meeting in Rio de Janeiro in January and February, 1963."

No copies of this letter were sent to the other parties either by Nopal Line, or by the Administrator, nor did Nopal Line request the Administrator to do so.

Thereafter, the agreement received the Commission's conditional approval as noted *supra.*

DISCUSSION AND CONCLUSIONS

Numerous exceptions to the Examiner's initial decision have been filed by Nopal, the complainant, by Hearing Counsel and by certain third flag lines who are members of the Atlantic pool.[14]

In substance, these exceptions urge that the Examiner erred:

(1) In failing to find that Agreement 9040 is unjustly discriminatory as between carriers, contrary to section 15 of the Act in that Nopal's share in the gulf pool is unreasonably low and was accepted under duress; and in failing to find that Agreement 9040 can be approved by the Commission only if modified to give Nopal a quota of 30 percent;

(2) In failing to find that Agreement 9040 is unjustly discriminatory between carriers in violation of section 15, in that national flag carriers were given preferred status in the gulf pool in relation to third flag carriers;

(3) In failing to find that the third flag carriers in the gulf pool refused to consider Nopal's carryings during the period Agreement 8505-1 was in effect, that this failure abrogated Nopal's rights under article 18 of that agreement, and was a departure from the terms of an approved section 15 agreement;

(4) In failing to find that Agreement 9040 is detrimental to the commerce of the United States and contrary to the public interest, in violation of section 15 of the Act;

(5) In failing to consider evidence pertaining to the Atlantic pool segment of Agreement 9040;

(6) In failing to find that Agreement 9040 should be disapproved because a substantial number of the parties thereto did not agree to its terms;

(7) In failing to find that the national flag carriers illegally combined to misuse the monopoly created by SUMOC 202 against the third flag lines by forcing them to accept unjust quotas or be excluded from the trade; and combined to discriminate against Nopal, in violation of section 16 of the Act; and

(8) In failing to impose upon the pool's proponents the burden of proving its necessity.[15]

Arguments and exceptions to the Initial Decision not discussed herein were considered by us and found not justified.

The main question presented here is whether the percentages allocated under the gulf portion of Agreement 9040 meet the standards of section 15 of the Act[16] which requires the Commission to dis-

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[14] A single memorandum of exceptions was filed on behalf of Columbus Line, Ivaran Lines, and Holland Pan-American Line. A separate memorandum was filed on behalf of Norton Line.

[15] Not all of the parties take every exception stated above, and where necessary to our discussion we will identify the specific party excepting.

[16] Nopal's complaint also charges that the national flag lines unlawfully combined to unduly prejudice Nopal in violation of sec. 16 of the Act. In view of our conclusion of the sec. 15 issue we find it unnecessary to consider this allegation.

approve any agreement which is unjustly discriminatory and unfair.

The Examiner concluded that, "The quota allocated to Nopal Line in Agreement No. 9040 has not been shown to be unjustly discriminatory or unfair." For the reasons set forth herein we disagree with the Examiner.

The record in this proceeding is clear, and the fact undisputed, that since 1960, when SUMOC 202 compelled Nopal either to become a member of the coffee pool or cease to carry coffee in the trade, Nopal has been the largest contributor to that pool, both in terms of total dollar amount contributed and amount contributed per bag of coffee carried.[17]

In short, a situation existed under Agreement 8505-1 where Nopal's pool quota did not nearly reflect that share of the coffee which Nopal was able to carry and did in fact carry. But despite Nopal's history as a substantial contributor to this first coffee pool, its quota remained unchanged when Agreement 9040, the subject of this proceeding, was negotiated by the parties. Thus, unless drastic changes occur in the trade (a likelihood which this record does not support) Nopal, should we approve this Agreement, will once again be a substantial contributor to this pool.

While it may be true that the mere fact that a party's carryings under a pooling agreement result in its paying large sums to other pool members would not in and of itself render the agreement discriminatory and thus compel our disapproval, other factors must exist which justify the payments, and these factors must be consonant with the policies and purposes of the Shipping Act.

While the record is not clear as to all of the factors considered in reaching the precise percentages allocated under the agreement, three such factors appear to have played the dominant role in the eyes of the parties. They are: (1) The so-called national interest, (2) previous experience including "due weight" given to "pioneering efforts" in the trade and (3) actual carryings under the previous pooling agreement. We shall discuss them in that order.

I. *The so-called national interest factor*

Throughout the extensive negotiations culminating in Agreement 8505-1 as well as Agreement 9040, the "national flag lines," Delta, Lloyd, and E.L.M.A., impressed upon Nopal their position that as a

[17] According to coffee pool statistics already cited herein, for the period Nov. 23, 1960, to Dec. 31, 1962, Delta with a pool quota of 53.06 percent carried 3,042,598 bags of coffee (59.39 percent); Nopal with a quota of 19.41 percent, 1,306,495 bags (25.50 percent); ELMA with a quota of 8.12 percent, 388,338 bags (7.58 percent); and Lloyd with a quota equal to Nopal's, 385,755 bags (7.53 percent). The statistics further show pool payments by Delta of $383,155.19; by Nopal of $449,920.74; and by ELMA of $734.58; in contrast to contributions received from these lines by Lloyd, in the sum of $833,810.51.

"third flag carrier" Nopal did not occupy the same status or enjoy the same rights in the trade as a national flag line. This national interest was an admitted factor in reaching the percentage allocated Nopal. The Examiner concluded that the inclusion of that national interest factor was proper. We disagree.

Every maritime nation in the world is, of course, intensely and legitimately interested in the economic well-being of its merchant marine. Thus, national interest plays an important part in the overall policies of the maritime nations. But it is of overriding importance to properly distinguish between promotional policies and regulatory policies. The Commission, of course, is a regulatory agency charged by Congress with the administration of this country's regulatory policy as expressed in the Shipping Act, 1916. And, while as an arm of the U.S. Government we are of course interested in the growth and economic well-being of our own merchant marine, we are bound by the Shipping Act to scrupulously insure that all carriers regardless of flag are accorded equal treatment under the laws we administer. As we said in *Mitsui Steamship Co.—Alleged Rebates*, etc., 7 F.M.C. 248 (1962):

> * * * all carriers regardless of flag or nationality are placed on equal footing under our laws * * *. Foreign flag carriers, although charged with the responsibility imposed by our laws, are also the recipients of the benefits they confer.

Agreement 9040 by granting preferred status to the so-called national flag carriers solely on the basis of the flag flown is contrary to this expressly avowed policy. The Shipping Act, 1916, imposes no burden and grants no privilege on the basis of a carrier's nationality. To the contrary it seeks to insure that all carriers operating in our foreign commerce regardless of flag do so as equals. Thus, we are prohibited under the law from approving such an agreement just as we would be prohibited from using our regulatory powers to attempt to insure that U.S. flag carriers received a given percentage of this country's export trades. We think it clear that a pooling agreement which allocates percentages or any portions thereof on the basis of flag or national interest is discriminatory as between carriers within the meaning of section 15.

II. *Length of service and pioneering efforts*

Also asserted in justification of the gulf quotas were the factors of length of service in the trade, and the so-called "pioneering efforts" of the individual lines, and the record demonstrates that consideration and an indeterminate amount of weight was given to these factors.

Nopal is the newest carrier in the trade, but it has carried coffee from Brazil to U.S. Gulf ports for 14 years. During that period,

Nopal has risen from a relatively small carrier to the second largest. It is firmly entrenched in second position, far ahead of Lloyd and E.L.M.A., but considerably behind Delta. Its service has been regular and dependable. The numerous requests received by the Government of Brazil requesting that Nopal be allowed to remain in the trade following the adoption of SUMOC 202, while solicited by Nopal, indicate a considerable amount of shipper support.

The pioneering efforts alluded to by the gulf respondents occurred in the distant past—Delta entered the trade about 1919, and Lloyd sometime prior to that time. E.L.M.A. entered the coffee trade in 1948 just a year ahead of Nopal. Pioneering effort, like national interest, is a factor to which it is extremely difficult to assign a value, particularly where as here the effort was made so long ago, and the record contains no indication of just what value was assigned to the pioneering efforts of Delta and Lloyd. After 14 years of dependable service we think it most unjust that Nopal be placed in the status of a junior member and penalized by some vague and undefined "pioneering efforts" expended several decades ago. Thus, in this instance we consider it improper to use so-called "pioneering efforts," as distinguished from carryings, as a factor in allocating percentages under the agreement.

III. *Actual carryings under the previous agreement*

While the contentions of the parties lead to some confusion as to whether or not actual consideration was given Nopal's carryings under Agreement 8505–1 and 8505–2, the record does clearly establish certain salient points.

All of the parties agree that previous carryings are a valid factor but they disagree as to the amount of consideration they should be given. The heart of the controversy is Article 18 of Agreement 8505–2 which provides:

This agreement and percentages established herein shall be effective through February 28, 1963. Thereafter, percentages and minimum sailings shall be subject to review and adjustment taking into consideration the service and the carryings during the past two (2) year period.

Certain respondents, Columbus, Ivaran, and Holland Pan-American Lines contend in effect that in allocating percentages under Agreement 9040 the only factors to be considered were the carryings and service of the parties during the previous 2-year period.[18] This result they contend was dictated by Article 18. This position is supported by Hearing Counsel. We think the Examiner was correct in rejecting this contention. Neither the record of the negotiations nor the lan-

[18] The latest statistics available to the parties at the time Agreement 9040 was negotiated were for coffee carryings up to Dec. 31, 1962.

guage of Article 18 dictates such an interpretation. Nopal itself is not now contending that it expects "100 percent consideration of [its] carryings in the adjustment to be made." Nopal did expect and does contend that *some* consideration of its past carryings was and is required under Article 18. We agree.

The gulf respondents appear to imply that some such consideration was in fact given. However, there remains the undisputed fact that Nopal's percentage remained the same notwithstanding such consideration if in fact it was given. We think it clear that the continuation of the status quo was directly attributable to the consideration given the factors dealt with in I and II above. It is equally clear that some adjustment under Article 18 was contemplated. However, our determination that the percentages allocated were unjustly discriminatory and unfair as between carriers is not dependent upon the existence of Article 18. Rather it flows from the consideration of improper factors in making the allocations.

In concluding that the use of the "national flag" and "pioneering" factors is contrary to the provisions of section 15, we do not mean to imply that past carryings is the sole permissible standard for allocating pool quotas. Where factors other than past carryings are employed, however, they must be acceptable ones under the act; and as we have indicated, no such acceptable factors have been suggested to us by the parties to this proceeding.

In his initial decision, the examiner has suggested that for the Commission to set down guidelines as to the factors to be used in fixing quotas "would be trespassing not only upon the rights of the parties to the contract but their contractual rights as well." We, of course, as already indicated from the foregoing, disagree with this conclusion. A section 15 agreement is not a private contract, *Swift & Co.* v. *Federal Maritime Commission* 306 F. 2d 277 (CADC 1962) *In re Pacific Coast European Conference* 7 F.M.C. 27 (1961). The rights of the parties to such an agreement are restricted to those which this Commission authorizes when, guided by and subject to the requirements of section 15, it approves the agreement. Thus, if the agreement does not meet the standards of section 15, the parties have no rights to be abrogated.

While we have indicated that in reaching the quotas fixed under the agreement the parties gave consideration to factors which are contrary to the standards of section 15, we are not prepared on the record before us to fix specific quotas. We will, however, grant the parties an opportunity to make adjustments in the quotas in a manner not inconsistent with this decision.

There remain yet a few issues requiring resolution. It is alleged that the examiner erred in failing to consider evidence pertaining to the Atlantic pool segment of the agreement. We think this was proper

under the terms of Nopal's complaint.[19] However, the record indicates that in fixing the quotas for the Atlantic pool, the parties may have given consideration and weight to factors which were herein found to be improper. If this be the case, we would expect the parties to reexamine in the light of our decision here all quotas fixed under the agreement.

Several respondents have asserted that if overcarriage under the agreement is to be rewarded by increased quotas the very same malpractices which prompted the establishment of the pool will again plague the trade and deprive shippers and carriers of the stability they both desire.

The thrust of this argument is that malpractices may only be curtailed by the absolute elimination of all competition between carriers in the trade.

The trade in question already has an approved conference in operation to which all the parties to the pool must belong. Agreement 9040 and SUMOC 202 combine to effect an absolute prohibition against any other carrier lifting any coffee and thus to grant a monopoly to the four gulf carriers. Now, it seems that the final incentive to free competition, i.e., any upward adjustment in a party's share of the trade, must be removed in order to preserve stability. Thus, under the contentions of these respondents once a carrier has been allotted a share of the trade it must forever be satisfied therewith. It seems plain that this theory which would forever freeze quotas because of potential rumors of possible malpractices, etc., would also preclude any hope of a return to even the limited competition allowed under a conference agreement.

We do not in any way intend to minimize the seriousness of malpractices or their effect on the desired stability in a trade. Congress itself recognized their seriousness when it amended section 15 to provide:

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

It would seem clear to us that an effective system of self-policing rather than complete elimination of all competition is the solution to rumored malpractices and alleged rebates.

For the reasons set forth above we find and conclude that the quota or share allotted Nopal under Agreement 9040 is unjustly discriminatory and unfair as between carriers within the meaning of section 15.

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[19] This proceeding was instituted by the filing of a complaint by Nopal requesting a modification of its share of the gulf pool. The Atlantic lines, although free to file complaints on their own behalf, failed to do so, and the issues in the proceeding were therefore properly confined to Nopal's quota in the gulf pool. Since the issues raised by exceptions 6 and 8 go beyond the scope of the complaints herein, we decline to rule thereon.

If the quotas fixed under the agreement were renegotiated and the agreement were modified in a manner not inconsistent with this opinion, we would give further consideration to the matter of approval.

Commissioner Patterson, Concurring and Dissenting in Part:

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

First. I join the conclusion of Commissioners Harllee and Day reversing the Examiner's approval of Agreement No. 9040, and on the following counts their decision has my concurrence:

(a) That a pooling agreement which allocates percentages or any portion thereof on the basis of flag or national interest is discriminatory as between carriers within the meaning of section 15;

(b) That Article 18 contemplated some adjustment of Nopal's quota based on its carryings under Agreements No. 8505-1 and No. 8505-2; and

(c) That there is discrimination in the quotas assigned to Nopal.

Second. I dissent from the conclusion reached by Commissioners Harllee and Day that a modification of the agreement changing the percentages allocated under the Gulf portion of Agreement No. 9040 may create an agreement that is in the public interest, not a detriment to commerce, and fair as between carriers.

Third. On the following counts I conclude that Agreement No. 9040 is in violation of section 15 of the Act and should be disapproved from the time it was entered into, namely February 27, 1963, irrespective of any modification:

(a) The pool quotas are unfair as between carriers.

(b) The failure to adjust quotas in accordance with the promises made in Article 18 of Agreement No. 8505 and the excessive payments for unperformed services are detrimental to the commerce of the United States.

(c) The method by which the agreement was entered into is against the public interest.

As regards my three conclusions as highlighted above, there are advanced on the following pages of this report cogent reasons and specific data related to them which support my concurrence and dissent.

The complainant in this case (Nopal) describes itself as "a corporation organized and existing under the laws of the Kingdom of Norway with its principal place of business at Smestad, Oslo, Norway." Complainant is a common carrier by water in the foreign commerce of the United States, as defined in the first section of the Act, having been

engaged since 1947 in operating ships in regular service between the U.S. Gulf of Mexico ports and ports in Brazil in South America and since 1949 has been in the coffee trade.

There is no question as to complainant's status nor as to the Commission's jurisdiction.

The basic question is whether Agreement No. 9040 must be approved, modified, or disapproved pursuant to section 15 of the Act. The complainant does not ask for approval or disapproval, but prays that the Commission either order modification of its share "in the Gulf money pool" or disapprove Agreement No. 9040 "unless the proposed parties thereto modify said Agreement." Nevertheless, section 15 makes it the duty of the Commission to approve or disapprove under the conditions stated therein as follows:

> "The Commission shall * * * disapprove * * * any agreement * * * that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act * * *."

The Commission must approve all other agreements.

Agreement No. 9040 was approved on June 11, 1963, subject to the condition that Article 8 be modified to add the following proviso:

> "* * * no monies shall be paid into the escrow fund established by the agreement, nor shall any monies be distributed from such fund or otherwise among the parties, until such time as the Commission issues its final decision in Docket No. 1096, and provided further that distribution at that time shall be made in accordance with such decision."

Thereafter the parties agreed to the modification and notified the Commission so that its approval became effective August 22, 1963.

At that time no facts showing reasons for disapproval were present and approval was ordered as required under the mandate that unless the foregoing conditions are shown the Commission "shall approve all other agreements * * *." After such approval the record of facts in this docket was developed and made known to the Commission. The further mandate of section 15 now applicable is that agreements "whether or not previously approved" by the Commission shall by order be disapproved if any of the stated conditions exist.

A review of this record convinces me that the agreement must now be found (1) to be contrary to the public interest, (2) to be unfair as between carriers, and (3) to operate to the detriment of the commerce of the United States and that no modification of the agreement can remedy its defects. The defects are in the circumstances under which the agreement was entered into and is to be performed. Exceptions from the provisions of the Act to protect trade against unlawful

restraints and monopolies, authorized under section 15 of the Act, ought not to be extended to agreements that have not themselves been arrived at under circumstances of genuine competition, as is the case here.

The proposed agreement has not been modified so as to accord Nopal a fair and nondiscriminatory share in the Gulf money pool, but the second alternative offered in Nopal's complaint of disapproving said agreement unless the parties modify the agreement has been taken.

It is on the issue of modification that I disagree, because it is not believed any modification is approvable and it is believed any further negotiations will be futile.

The foregoing conclusion is derived from the following facts and findings:

1. Complainants and respondents herein are signatories to an agreement establishing a conference of common carriers by water in the foreign commerce of the United States known as the Brazil/United States-Canada Freight Conference approved by the Commission pursuant to section 15 of the Act and identified as Agreement No. 5450 (Conference Agreement). The Conference covers trade inbound from Brazil.

2. Complainant Nopal and respondents Lloyd Brasileiro (Patrimonio Nacional) (Lloyd) and Mississippi Shipping Co., Inc. (Delta Line) (Delta) were also three signatory parties to Federal Maritime Board Agreement No. 8205 approved April 11, 1957, as amended by Agreement No. 8205–1 approved October 24, 1957 (exhibit 3).

This agreement was known as the Coffee Stabilization Agreement. It was terminated effective August 29, 1960.

After termination of the Coffee Stabilization Agreement, the respondents, including Empresa Lineas Maritimas Argentina (E.L.M.A.), were parties to a new agreement called the Brazil/United States Coffee Agreement No. 8505 (exhibit 4) approved August 29, 1960. The coffee agreement was amended by Agreement No. 8505–1 approved February 12, 1962, to include complainant Nopal as a participant effective "on and after November 23, 1960" and terminating August 29, 1962 (exhibit 5). The coffee agreement was further amended by Agreement No. 8505–2 approved January 31, 1962, to terminate February 28, 1963 (exhibit 6). The coffee agreement is what is generally referred to as the pooling agreement. The pooling agreement recited, insofar as relevant to the complaint herein, that the parties were engaged in the carriage of coffee from Brazil to U.S. Gulf of Mexico ports.

3. Respondent Lloyd is owned and operated by the Republic of the United States of Brazil. It cannot be divorced from the Brazil-

ian Government. Lloyd has as its head a director who is appointed by the President of the Republic and is directly subordinate to the Brazilian Ministry of Transportation and Public Works. The director is assisted by a commercial superintendent who carries out the policies of the Brazilian Government in the administration of his duties. Lloyd is also subordinate to other government agencies. (Tr., 1525–26.)

4. On October 21, 1960, "The Superintendence of Money and Credit [an agency of the Government of Brazil] upon the decision of the Council, at the meeting of October 13th, taking into consideration Article 3, Line H, and Article 6 of Decree Law 7293 of February 2, 1945 * * *" resolved:

"1. Brazilian export products with destination United States of America or Canada will be transported exclusively by shipping companies which are members of the Brazil/United States/Canada Freight Conference * * *

"3. In the case of products which transportation is regulated by specific accords or agreements between member lines of that conference signed under the auspices of the above conference and not rejected by the Brazilian authorities, loading of these products will be effected exclusively on vessels of those shipping companies that are signatories of said accords or agreements.

"4. Item 3 referred to above does not apply to accords or agreements in which the Brazilian flag does not participate.

"5. The issuance of loading permits by the Bank of Brazil Bank Fiscalization (FIBAN) will depend also on the observance of this instruction besides the other requirements presently in effect * * *."

The foregoing is titled "Transportation Regulations on Commodities Exported to the United States and Canada—Sumoc Instruction 202" and is herein referred to as "SUMOC 202." (exhibit 9).

5. After April 11, 1957, and before October 21, 1960, Nopal carried coffee pursuant to the Brazil/United States Coffee Stabilization Agreement (FMB No. 8205) (exhibit 3). During this period Nopal carried coffee as follows:

1960,[1] January–October, 618,280 bags, 27.44 percent (exhibit 67, sheet 8).
1960,[2] entire year, 636–551 bags, 24.9 percent (exhibit 53, p. 4).
1959,[2] entire year, 774,506 bags, 27.3 percent (exhibit 53, p. 4).
1958,[2] entire year, 414,221 bags, 21.9 percent (exhibit 53, p. 3).
1957,[2] entire year, 475,986 bags, 19.9 percent (exhibit 53, p. 3).

6. Between October 21, 1960, and November 23, 1960, by virtue of Sec. 3 of SUMOC 202, Nopal was barred by the Brazilian Government from carrying coffee as "export products with destination United States of America" from Brazil because transportation had to "be effected exclusively on vessels of those shipping companies that are signatories of said accords or agreements." (4 above.)

[1] Figures based on arrivals.
[2] Figures based on sailings.

The next two Nopal ships after October 21, 1960, that called at Brazilian coffee ports, the *Para* shown at Santos on November 4 and 5, and the *Nopal Express* shown at Santos on November 20–22, 1960, picked up no bags of coffee, and the *Nopal Trader*, on berth in Paranagua on October 21, 1960, loaded 1,250 bags already booked, and in Santos on October 22, 1960, loaded 1,000 bags and in Niteroi on October 23–24, 1960, loaded 1,000 bags, for a total of 3,250 bags already cleared for shipment in comparison with prior 1960 loadings varying from 5,950 bags to 53,400 bags (exhibit 25, p. 2, and Tr. 97, 103–104). The failure to carry coffee on these ships was caused by the operation of SUMOC 202.

7. Nopal became a pool participant "on and after November 23, 1960." (exhibit 5, p. 1, 1st par.) At this time it was "mutually agreed" Nopal's future participation obligations would be as follows:

"The carryings of Delta Line's passenger vessels *Del Norte, Del Sud* and *Del Mar* (in the event of a casualty to any of these passenger vessels, Delta Line shall have the right to substitute a freight vessel for any of these passenger vessels during the period of their layup), up to to a total of 23.5% of the total volume of coffee carried by the four participating lines in each accounting period, shall not be included in the following divisions nor counted in the minimum sailings. The revenue from any excess over 23.5% of the total volume of coffee carried by the four participating lines in each accounting period, transported on said vessels or their substitutes shall be divided among all lines including Delta Line after deducting $1.15 per 60 kilo bag on the percentage and minimum sailing basis hereinafter provided. The total carryings of all other Delta Line's vessels and of the vessels of the other lines listed below shall be included in the carryings on which the following percentage divisions shall apply.

Delta Line	38.64%
Lloyd Brasileiro	25.37%
Nopal Line	25.37%
F.A.N.U.[1]	10.62%

[1] Later, E.L.M.A.

(exhibit 5, p. 2.)

Agreement No. 8505, as amended, is one of the "specific accords or agreements between member lines of that conference [the Brazil/United States-Canada Freight Conference] signed under the auspices of the above conference and not rejected by the authorities, * * *" referred to in SUMOC 202 (4 above).

The agreement covering the above transportation in Article 18 was made "effective through August 29, 1962" and Article 18 further provided that "Thereafter the percentages and minimum sailings shall be subject to review and adjustment taking into consideration the service and carryings during the past two (2) year period." (exhibit 5, p. 5.) After Nopal signed the pooling agreement on November 23,

1960, the ban on its transportation of coffee was revoked, and it resumed carryings. (Tr. 212–213.)

8. Between November 23, 1960, and February 28, 1963, the service and carryings during the past 2-year period, referred to in Article 18 of the pooling agreement, was as follows:

	Nopal	Delta	Lloyd	E.L.M.A.
Pool quotas on total carryings	*Percent* 19.41	*Percent* 53.06	*Percent* 19.41	*Percent* 8.12
Actual carryings based on sailings (passenger and freight vessels combined):				
First period (Nov. 23, 1960–Aug. 28, 1961)	19.90	59.08	9.53	11.49
Second period (Aug. 29, 1961–Feb. 28, 1962)	26.73	54.67	10.26	8.34
Third period (Mar. 1, 1962–Aug. 29, 1962)	28.48	64.62	5.83	1.07
Fourth period (Aug. 30, 1962–Feb. 28, 1963)	[1] 35.59	57.77	0.70	5.94

[1] Somewhat high because of effect of dock strike in U.S. affecting other carriers.

The amounts paid thereunder were as follows:

EXHIBIT 16

Brazil/U.S. Gulf Coffee, Nov. 23, 1960–Feb. 28, 1963, amounts payable and receivable by lines

[Receivable shown in ( )]

	Nopal	Delta	Lloyd	E.L.M.A.
1st period (Nov. 23, 1960–Aug. 28, 1961)	$8,069.84	$147,617.83	($238,209.36)	$82,521.69
2d period (Aug. 29, 1961–Feb. 28, 1962)	139,869.45	30,668.50	(174,791.25)	4,253.30
3d period (Mar. 1, 1962–Aug. 29, 1962)	108,035.95	147,157.26	(195,580.40)	(59,612.81)
4th period (Aug. 30, 1962–Feb. 28, 1963)	[1] 290,918.25	86,567.40	(337,844.25)	(39,641.40)
Total, 4 periods	546,893.49	412,010.99	(946,425.26)	(12,479.22)

[1] Payments for 4th period not made, but subject to arbitration.

Based on freight vessel carrings.

9. Nopal refused to enter into a new pooling agreement after February 28, 1963, unless the promise made in Article 18 of the expiring agreement was honored by a change in its quota allocation to take into consideration the facts shown in 8 above. The other signatories refused, after Nopal was told, as a summarization of the positions of Delta, Lloyd, and E.L.M.A.:

"This traffic of coffee is a traffic that should belong actually to two flags: the American and the Brazilian flags, because this is business Brazil is making with the United States. Then the speaker makes mention of the fact that the USA are the only nation which does not charge a tariff, customs-duties, on coffee. And therefore I want to add: this is a business between Brazil and the U.S. Of course you have the right to compete in that market, but not trying to exclude from it what are the national lines of these two countries. They have a greater right than any of you may think that you have. I really don't want to talk to you in that manner, because this is not an assembly of Congress, but a meeting of businessmen—and you must understand this. My Government could very well (and I don't know exactly what they intend to do) demand

that a quite greater percentage of this commerce remain between the U.S. and the Brazilian lines. This I want to say to Mr. Hamsig—this is a national line. But the policy of Brazil has never been, in this trade, of excluding anybody. Therefore, I cannot be accused for wanting something for my flag which is of the utmost importance to my very life. You have the obligation to understand that our situation is such a one that we cannot afford the luxury, as said Mr. Mattmann, to let this trade escape our hands, just because you have been giving a better service. I am willing even to recognize that my own service may be bad; but accusing Moore McCormack of bad service makes no sense—and yet Moore McCormack carries less coffee." (exhibit 23, pp. 143–144).

"Delta has made its position clear: we would be prepared to stay within our present quota with the understanding that the passenger-ships must receive a fair allowance. ELMA has also made its statement. Loide said that, if NOPAL asked for a percentual increase, they would have to follow this procedure too. We have told Mr. Lorentzen that he has reached a level beyond which he cannot go. Isn't this clear enough now?"

* * * * * * *

"Mr. Lorris stated he informed Mr. Norton this morning about Clause 18, that if we discuss it, we will never get anywhere. I have never refuted Clause 18 but this way we are going to end up in Court. If Clause 18 is getting in our way, let us make a new pool." (exhibit 23, pp. 229–230.)

* * * * * * *

Before the Examiner, Captain Lorris recalled:

"* * * that Mr. Lorentzen requested consideration of Article 18 using as his principle this agreement that talks of two years before * * *." (Tr. 1570.)

"Who knows, maybe some day I will be a company strictly commercial in essence.

"I could then have the same consideration that Mr. Lorentzen has regarding Article 18." (Tr. 1557–1558.)

At a meeting on February 4, 1963, Nopal was told:

"*Capt. Clark.* I would also like to report that, at the request of Mr. Lorentzen, of NOPAL, the Gulf lines caucusses at 2 p.m. and went over very carefully our position. [sic] We reached no conclusion, but did explore every possibility that was left. I think we have advised Mr. Lorentzen that a reasonable time has already passed and have stated that he should advise us by noon tomorrow about his view regarding our offer that he remain with his present quota. It is our intention that, if he does not accept this by noon tomorrow, we see no other alternative than to form a new pool without NOPAL and we have very honestly declared him our thought as to the division of the quotas.

"*Capt. Lorris*—refers again to NOPAL's desire to increase its quota and says—I should satisfy NOPAL, but I cannot possibly diminish my own quota in any way." (exhibit 23, p. 289; and see Tr., 258–9, 263.)

On February 5, 1963, Mr. Lorentzen indicated what this meant to Nopal:

"We are disappointed that our proposal has not been considered worthy of further exploration. Instead, yesterday afternoon, in definite words, we were told that, if we don't accept the status-quo by noon today, a new pool will be organized without NOPAL line. We must strongly protest against this kind of treament, but, in view of the existence of regulations such as SUMOC 202, we

have no alternative left to us. NOPAL will sign only because refusal to do so will shut them off from the coffee trade." (exhibit 23, p. 303.)

10. Nopal signed the Brazil/United States Coffee Agreement as of February 27, 1963 (exhibits 18 and 19). The agreement provided the following quotas and sailings with regard to the Gulf of Mexico ports:

"The lines listed below operating to United States Gulf ports agree to the following percentage division of revenue from total coffee transported on their vessels on the following basis subject to the maintenance of minimum service specified.

"The carryings of Delta Line's passenger vessels *Del Norte*, *Del Sud* and *Del Mar* (in the event of a casualty to any of these passenger vessels, Delta Line shall have the right to substitute a freight vessel for any of these passenger vessels during the period of their layup) up to a total of 23.5% of the total volume of coffee carried by the four participating lines in each accounting period, shall not be included in the following divisions nor counted in the minimum sailings. The revenue from any excess over 23.5% of the total volume of coffee carried by the four participating lines in each accounting period, transported on said vessels or their substitutes shall be divided among all lines including Delta Line after deducting $1.25 per 60 kilo bag on freight vessels and after deducting $1.50 per 60 kilo on Delta Line's passenger vessels, on the percentage and minimum sailing basis hereinafter provided. The total carryings of all other Delta Line's vessels and of the vessels of the other lines listed below shall be included in the carryings on which the following percentage divisions shall apply:

"Delta Line	38.64%
Lloyd Brasileiro (Patrimonio Nacional)	25.37%
Nopal Line	25.37%
Empresa Lineas Maritimas Argentinas (E.L.M.A.)	10.62%

"To qualify for the above percentages and to offer adequate service to the trade, each line must maintain at least the following number of sailings during each six-month period. In determining the number of sailings during a period, the date on which a vessel reports at coffee loading port shall be considered a sailing during the period:

"Delta Line	11
Lloyd Brasileiro (Patrimonio Nacional)	10
Nopal Line	10
Empresa Lineas Maritimas Argentinas (E.L.M.A.)	5"

(exhibit 18, p. 2)

11. The aforesaid coffee agreement was designated Agreement No. 9040 and was approved by the Federal Maritime Commission as follows:

"* * * the approval herein ordered shall become effective at such time as the Commission receives notice that each of the parties to the agreement has agreed to the foregoing modification;"

The notice issued was as follows pursuant to a letter dated August 28, 1963, from the Commission's Division of Carrier Agreements:

"In view of the provision in the order that the approval of Agreement 9040 shall become effective at such time as the Commission receives notice that the parties have agreed to the modification and file a modification executed by each of the parties, as provided therein, you are advised that your letter and modification were received on August 22, 1963. Accordingly, approval of Agreement 9040 has been recorded effective as of said date."

12. The following amounts have been paid and received during the period from November 23, 1960, to December 31, 1962, pursuant to the pooling agreements as distribution for overcarryings:

Lines	Amount paid by lines	Amount received by lines
Delta	$383,155.19	
E.L.M.A.	734.58	
Lloyd		$833,810.51
Nopal	449,920.74	

Source: App. D, Examiner's initial decision.

These facts demonstrate, and because of them it is concluded that:

1. The complainant is an established participant in the foreign commerce of the United States as a common carrier by water in the coffee trade from ports in Brazil, South America, to ports on the Gulf of Mexico coast of the United States.

2. The Brazilian decree which denied loading permits to ships unless transportation of coffee was to be exclusively on ships of carriers having agreements with a Brazilian flag carrier prevented the conclusion of an agreement in response to free enterprise bargaining by giving the national flag carrier power to compel the results without regard to commercial market place necessities. The decree permitted a settlement dictated by carriers in agreement with the national flag carrier.

3. The promise made to complainant in Agreement No. 8505 to review and adjust quota percentages and carryings based on the prior 2 years' experience, when a new pooling agreement was concluded, was not kept.

4. The percentage of bags of coffee to be carried allocated as complainant's quota in Agreement No. 9040 deprives Nopal of an established position in the foreign commerce of the United States as the result of dictated contract conditions.

A purpose of this proceeding is to determine whether Agreement No. 9040 is still approvable or whether an agreement "previously approved" (sec. 15) by the Commission must be disapproved in view of the foregoing findings.

The facts showing that Nopal has been engaged in the Brazil to U.S. Gulf coffee trade since 1949 starting with 4.8 percent of the

coffee bags carried and continuing without interruption to the present, reaching as high as 29.4 percent of the trade, establishes complainant's position. There was no proof on this record that this position was achieved by other than fair means consistently with the act or by other than consistent good service to shippers. There are no valid grounds for impugning Nopal's entitlement to what it has earned by its efforts. The respondent carriers have likewise achieved their relative positions in the market by comparable effort.

Notwithstanding these efforts we are asked to approve an agreement by which Nopal relinquishes its position by reducing future activity from its 1960 high point of 29.4 percent to 19.41 percent while another signatory is authorized to increase its activity from its 1960 6.6 percent level to the same 19.41 percent level. Nopal's actual 19.41 percent allowance in comparison with the 25.37 percent quota in Article 4 of Agreement No. 9040 results from the operation of the second paragraph thereof wherein Delta is given an allowance which is not included in the quota divisions for carryings on its passenger ships. (See report of Commission, footnote 8.) Lloyd's increased quota is authorized in spite of an acknowledged "bad" service on the grounds the trade cannot be allowed to escape because another carrier is giving better service, as item 9 of the facts shows.

Complainant is entitled, in fairness, to not have its position eroded by governmental compulsion. Such compulsion is the result of a governmental decree which has stripped Nopal of bargaining power and has placed complete power in the hands of Lloyd. The record shows there has been no change of schedules, no change of ships, no deterioration of service, and no change in rates or policies by Nopal. The only change has been the new bargaining power given Lloyd by its owner government. By SUMOC 202, Lloyd acquired control over the market represented by "Brazilian export products with destination United States" and thereby control over the entire bargaining power of the Brazilian export coffee market, enforceable by the issuance or nonissuance of loading permits by the Bank of Brazil Bank Fiscalization. Exclusion from market is the price of refusal to acknowledge the dictates of the market's spokesman. A demonstration of this factor is to be found in the testimony that if Nopal "does not accept this by noon tomorrow, we see no alternative than to form a new pool without Nopal * * *." The absence of commercial considerations was shown by the testimony that the national carrier was not a company strictly commercial having to consider things the same as Nopal. There was the further concession in oral argument before us by counsel that there is nothing to prevent the happening of further slashes in the quotas of third-flag lines (i.e., non-Brazilian and non-U.S. lines). Expression of this power is reflected in the statement,

"We have told Mr. Lorentzen that he has reached a level beyond which he cannot go" (exhibit 23, p. 229). The statement was not that Nopal had reached a level beyond which the others were not willing to agree on, but had gotten all it was going to get or be excluded from the Brazilian coffee market.

The Brazilian coffee market is larger than the part shared by each carrier. Each must compete for a share. Lloyd's domination of access to the shares allows it to wrest more from the other carriers than would otherwise be possible. All of the parties to the agreement, including Delta, lost the protection of their own influence over the market represented by Brazilian coffee sellers, whether or not sellers are now satisfied with the service. Delta has as much to lose from approval of an agreement arrived at under these circumstances as anyone.

The issue as I see it is the way in which this agreement was arrived at, rather than the quotas or the terms of the agreement, although I agree that the quotas are discriminatory. It is contrary to our public interest to have our foreign commerce regulated by agreements arrived at as a result of noncommercial factors.

There is no objection to direct State action. The Brazilian Government may do anything it wants to do in relation to its commerce with the United States. All carriers are subject to action by the nations into whose jurisdiction they pass. The objection arises when Brazil converts what should be a freely negotiated agreement subject to our jurisdiction into one not freely negotiated.

In free enterprise negotiation, unity of interest occurs at the moment of contract and the Commission is usually only required to approve the result where the subject is covered by section 15. Concessions of interest before and after are submerged in the agreement and the final agreement obscures the fact that events before and after also affect public interest in our commerce. Here the facts shown remove the obscurity to disclose that the agreement happened as the result of concessions obtained by noncommercial considerations. Bargaining is only a formality under these circumstances. Brazil has obtained the results of direct State action without enacting any law directly controlling its commerce. Its action is disguised as bargaining and we are being asked to approve the resulting agreement giving its own line a preferred position in our commerce at the expense of the established position of a longtime participant in our commerce.

The deprivation of position does not result from a true agreement, but from an imposed settlement. An agreement subject to our jurisdiction which does not represent free enterprise bargaining is a sham and must be treated differently than other agreements processed under section 15.

To approve an agreement arrived at in the foregoing manner and achieving the results noted, if we are to be consistent later on, would project a need to approve an agreement achieving the same results by the same means against all carriers in the trade except the carrier chosen by the national carrier employing such means.

The end result of this process would be an end to multilateral trading in our ocean commerce. This too is contrary to our public interest.

Complainant in Agreement No. 8505 joined with the other parties in mutually promising each other that when the end of the term of the agreement arrived they would review and adjust the percentages and minimum sailings to take into consideration service and carryings during the past 2 years. One must assume that the obligations of Agreement No. 8505 were undertaken to acomplish practical objectives and to require some future change of position. It is not to be assumed the businessmen who negotiated and signed the agreement created an obligation to do nothing but contemplate and discuss the past. Rather, at the time, they meant to make significant new moves when the agreement was renegotiated based on their past ability to capture a share of the Brazilian coffee market.

The agreement provisions quoted in items 7 and 10 above show no change betwen No. 8505 and No. 9040.

If Article 18 requires no change in No. 9040 and only a mental exercise, it is simply a way of avoiding action. No written statement is necessary for such an obligation.

The evidence shows that Nopal had no such views of the obligation and took significant steps to increase its share of the market during the 2-year period with the promise of Article 18 clearly in mind. (exhibit 23, p. 140). To the losers Nopal's moves are, of course, distasteful, but this has never justified breaking promises. Nopal rightfully complains about the failure to perform the promise. Only the dominant influence of Lloyd over the bargaining process has made such action so easy to accomplish. In my opinion it is a detriment to our commerce to permit the products of broken promises to influence the shares of participants therein.

The effect of Lloyd's bargaining position and its ability to disregard promises to revise quotas showed up most clearly in the quota Nopal was required to accept which was far below its proven ability to carry and in the quota Lloyd received which was far above its proven ability to carry. Lloyd's quota represented not business consideration, but national policy as its counsel candidly recognized: Quota parity with Nopal "is a national policy of Brazil which Nopal as a private carrier for gain, has never apparently appreciated" (Lloyd brief, p. 59).

National policy may be enforced by legislation. Absent direct legis-

lation, Lloyd should not obtain quota advantages associated with competition between private carriers for gain in the form of a diminution of a hard-won position by means of an agreement approved under section 15.

Assuming the promise may be disregarded without detriment to the commerce, it is further believed that there is detriment to the commerce in any agreement which results in one carrier paying to a competitor such a disproportionately large part of its earnings (Nopal, $546,893.49 over the period November 23, 1960, to February 28, 1963; Delta, $412,010.99 during the same period) when its competitor performs no service whatever for such payment. Coffee consumers eventually pay the rates used to supply the funds needed to pay Lloyd, whose only power to obtain money by this means is the Government-backed control over access to the Brazilian "export products" market (SUMOC 202, par. 1). As Nopal's representative said: "* * * large payments passing from one line to the other is not healthy and is not in the best interests of the commerce of Brazil or the United States" (exhibit 23).

The noncompetitively inflicted loss caused by being allowed revenues from 19.41 percent of the trade and by having to pay expenses of carrying up to 29 percent of the trade, as well as the large pool payments to Lloyd for performing no service whatever cannot be continued by Nopal. Its loss is a loss to our commerce. Its payments are an expense to our consumers. Moreover, all respondents are faced with the possibility of the same future quota attrition as the result of the power of Lloyd to make future agreements with carriers of its choosing containing still lower quotas as the condition of admission to the market.

An agreement is unfair as between carriers if it is a pooling agreement in which the quotas are arbitrarily established so as to diminish without effective commercial restraint the market shares of participants in the foreign commerce of the United States.

In my opinion Agreement No. 9040 should be disapproved from the time it was entered into on February 27, 1963, irrespective of any modification, on the ground that it:

(a) Arbitrarily establishes pool quotas that are unfair as between carriers;
(b) Embodies the results of unfulfilled promises and requires excessive payments for unperformed services that are detrimental to the commerce; and
(c) Reflects the results of governmental action rather than market competition which is against the public interest.

APPENDIX A

FEDERAL MARITIME COMMISSION

AGREEMENT NO. 9040

BRAZIL/UNITED STATES COFFEE AGREEMENT

MEMORANDUM of AGREEMENT entered into at New York, N.Y. on 27 February 1963.

Witnesseth

The parties to the Brazil/United States Coffee Agreement (Federal Maritime Commission Agreement No. 8505, and amendments thereto designated as F.M.C. Agreements Nos. 8505–1, 8505–2, and 8505–3) which terminates February 28, 1963, have agreed to the establishment of a new agreement providing for the participation of MONTEMAR, S.A. COMERCIAL Y MARITIMA on and after March 1, 1963.

1. For the common good of shippers and carriers, by providing just and economical cooperation between steamship lines operating on the coffee trade from Brazil to United States Atlantic and gulf ports, the parties hereto who are members of the Brazil/United States-Canada Freight Conference (U.S.M.C. Agreement No. 5450) hereby agree, as set forth hereinafter, to a division of the revenue derived from the total coffee transported on their vessels from ports within the scope of the above-named Conference (i.e., ports in Brazil south of and including Victoria) to United States Atlantic and gulf ports.

2. The lines listed below operating to United States Atlantic coast ports agree to the following percentage division of revenue after deducting $1.25 per 60 kilo bag from total coffee transported on their vessels, excluding Moore-McCormack Lines, Inc. passenger vessel SS *Argentina* and SS *Brasil*, to United States Atlantic ports on the following basis subject to the maintenance of minimum service specified. The revenue from any excess over 350,000 bags per annum carried by the SS *Argentina* and the SS *Brasil*, after deducting $1.50 per 60 kilo bag, shall be divided among all the lines including Moore-McCormack Lines, Inc. on the percentage and minimum sailing basis hereinafter provided:

	Percent
Moore-McCormack Lines, Inc	37.10
Lloyd Brasileiro (Patrimonio Nacional)	19.40
Empresa Lineas Maritimas Argentinas (E.L.M.A.)	9.05
Montemar S.A	1.00
Brodin Line	9.50
Columbus Line	6.00
Ivaran Line	6.00
Torm Line	6.00
Norton Line	4.80
Holland Pan-American Line	1.15

3. To qualify for the above percentages and offer adequate service to the trade, each line must maintain at least the following number of sailings during each 6-month period. In determining the number of sailings during a period, the date on which a vessel reports at a coffee loading port shall be considered a sailing during the period:

Moore-McCormack Lines, Inc	25
Lloyd Brasileiro (Patrimonio Nacional)	12

Empresa Lineas Maritimas Argentinas (E.L.M.A.)	14
Montemar S.A	2
Brodin Line	9
Columbus Line	6
Ivaran Line	6
Torm Line	6
Norton Line	6
Holland Pan-American Line	6

Should any line fail to provide the above stipulated minimum service to transport its quota, the percentage alloted to it shall be reduced in direct proportion to the reduction in service and the surrendered portion shall be allocated to all the other lines in ratio to the percentages allotted to them in article 2 above.

4. The lines listed below operating to United States gulf ports agree to the following percentage division of revenue from total coffee transported on their vessels on the following basis subject to the maintenance of minimum service specified.

The carryings of Delta Lines passenger vessels *Del Norte*, *Del Sud* and *Del Mar* (in the event of a casualty to any of these passenger vessels, Delta Line shall have the right to substitute a freight vessel for any of these passenger vessels during the period of their layup), up to a total of 23.5 percent of the total volume of coffee carried by the four participating lines in each accounting period, shall not be included in the following divisions nor counted in the minimum sailings. The revenue from any excess over 23.5 percent of the total volume of coffee carried by the four participating lines in each accounting period, transported on said vessels or their substitutes shall be divided among all lines including Delta Line after deducting $1.25 per 60 kilo bags on freight vessels and after deducting $1.50 per 60 kilo on Delta Line's passenger vessels, on the percentage and minimum sailing basis hereinafter provided. The total carryings of all other Delta Line's vessels and of the vessels of the other lines listed below shall be included in the carryings on which the following percentage divisions shall apply:

	Percent
Delta Line	38. 64
Lloyd Brasileiro (Patrimonio Nacional)	25. 37
Nopal Line	25. 37
Empresa Lineas Maritimas Argentinas (E.L.M.A.)	10. 62

To qualify for the above percentages and to offer adequate service to the trade, each line must maintain at least the following number of sailings during each six month period. In determining the number of sailings during a period, the date on which a vessel reports at coffee loading port shall be considered a sailing during the period:

Delta Line	11
Lloyd Brasileiro (Patrimonio Nacional)	10
Nopal Line	10
Empresa Lineas Maritimas Argentinas (E.L.M.A.)	5

5. In consideration of the privilege of vessel substitution afforded Delta Line under article 4 above, Delta Line accepts a 50 percent reduction in whatever compensation might accrue to Delta Line by reason of noncompliance on the part of other lines with specified minimum sailings (art. 4), the balance to be divided among the other participants in direct proportion as otherwise agreed.

In consideration of the average per ship afforded to E.L.M.A. under this agreement, E.L.M.A. accepts a 33.3 percent reduction in whatever compensation might accrue to E.L.M.A. by reason of noncompliance on the part of other lines which specified minimum sailings (art. 4), the balance to be divided among the other participants in direct proportion as otherwise agreed.

Should any line fail to provide the above stipulated minimum service to transport its quota, the percentage allotted to it shall be reduced in direct proportion to the reduction in service and the surrendered portion shall be allocated to the other lines in ratio to the percentages already allotted to them, except as otherwise provided in Article 5, irrespective of their actual number of sailings as provided by Article 4.

6. It is mutually understood and agreed that a voyage can only be counted as one sailing to either the gulf ports or Atlantic coast ports by a line party to both such divisions of the pool even though both ranges of ports may be served on a single voyage but all coffee carryings are to be included in the respective divisions of the pool. It is agreed that the final decision in which division of the pool such a sailing shall be counted, shall be made by the Administrator. However, should any line carry coffee in a division of the pool in which it does not have an allotted percentage, the revenue, after deduction as provided in Articles 2 and 4 shall be divided among the lines in such division of the pool on the basis provided for above.

7. In the event any of the parties to this agreement is unable to provide the minimum service set forth in Articles 3 and 4 because of reasons of force majeure or any other cause beyond the control of the carrier and a dispute arises as to whether a good and valid reason existed for failure to maintain minimum service, the decision as to whether an exemption should be granted from the reduction in allotted percentage as stipulated in Articles 3 and 4 shall be resolved by arbitration procedure as provided in Article 14.

8. At the end of each period of 6 calendar months an accounting shall be made. Lines carrying in excess of the allotted percentage of the total coffee transported as provided above shall pay, within 30 days after an accounting has been submitted, into an escrow account to be established the revenue derived from their excess carrying after the deduction as provided in Articles 2 and 4 to cover only direct cargo handling expenses. In the event of increased costs these deductions may be adjusted by consent of not less than three-quarters of the parties hereto entitled to vote as stipulated in Article 12. The monies paid into the escrow fund shall be distributed to the lines to which payments are due under this agreement.

9. All coffee shall be transported strictly in accordance with rates, rules, regulations and agreements established by the Brazil/United States-Canada Freight Conference and any infractions shall be subject to the penalties provided for in the agreement of the Conference.

10. New members, who are members of the Brazil/United States-Canada Freight Conference, may be admitted to this agreement on application and by approval of not less than three-quarters of the parties hereto entitled to vote as stipulated in Article 12. No such admission shall become effective until an appropriate modification of this agreement has been filed with and approved by the Federal Maritime Commission.

11. This Agreement shall be administered in New York, N.Y., United States of America, by an Administrator elected by the member lines parties to the agreement. The Administrator is authorized to make appropriate arrangements for the receipt and checking of reports on coffee carryings, the accounts provided therein, such banking arrangements as may be necessary and apportion any ex-

penses for the maintenance of this agreement between Atlantic and gulf lines on the basis of coffee carryings and between the respective lines of such groups on coffee carryings as allocated under the agreement.

12. Meetings of the parties to this agreement will be held at the call of the Administrator of the agreement or upon the request of any party to this agreement. All actions within the scope of this agreement, except allocation of percentages which shall be by unanimous vote, shall be taken only upon assent of not less than three-quarters of all the parties to the agreement except that should a party cease to be a member of the Brazil/United States-Canada Freight Conference, withdraw from the trade, or not have a sailing in the Brazil/United States trade for a period of 6 months, such party shall not be entitled to vote on any matter including amendments to the agreement, but shall be bound by the vote of the other parties to the agreement on such matters. A minute record of the proceedings of all meetings, including all votes on matters coming before such meetings, shall be kept and copies of all minutes of meetings and true and complete records of all affirmative or negative actions of the parties hereto, pursuant to or giving effect to this agreement, shall be furnished promptly to the governmental agency charged with the administration of section 15 of the Shipping Act, 1916, as amended.

13. Copies of accounting shall be furnished promptly to the governmental agency charged with the administration of section 15 of the Shipping Act of 1916, as amended.

14. Any and all differences and disputes of whatsoever nature arising out of this agreement, including circumstances referred to in Article 7, shall be put to arbitration in the city of New York pursuant to the laws relating to arbitration there in force before a board of three persons consisting of one arbitrator to be appointed by the parties to the agreement complaining or complained against, one by the other party or parties to the agreement complained against or complaining and the third to be selected by the two so chosen. All such arbitrators shall be appointed immediately when the occasion arises. The decision of any two of the three on any point or points shall be final. Judgment may be entered upon any award made hereunder in any court having jurisdiction in the premises.

It is mutually understood and agreed that the expenses incurred in any arbitration shall be borne by the parties directly involved in the question of such arbitration.

15. In the event of war or war-like operations affecting the Brazil/United States coffee trade, the agreement may be suspended for the period of such war or war-like operations.

16. This agreement shall become effective March 1, 1963 subject to approval by the Federal Maritime Commission and it is mutually understood that no accounting or payment shall be made as provided herein until such approval has been granted. This agreement and percentages established herein shall be effective through February 29, 1964. Thereafter the percentages and minimum sailings shall be subject to review and adjustment. No extension of this agreement shall be effective until filed with and approved by the Federal Maritime Commission.

17. It is mutually understood and agreed that this Agreement shall conform with the laws, rules and regulations of the United States of America and of the United States of Brazil.

18. This Agreement may be executed in several parts, and the said parts shall be read and be effectual as one instrument.

IN WITNESS WHEREOF the parties hereto have caused this agreement to be executed by their respective officers or agents thereunto duly authorized.

REDERIAKTIEBOLAGET DISA REDERIAKTIEBOLAGET POSEIDON ANGFARTYGSAKTIEBOLAGET TIRFING (BRODIN LINE)
(as one member only),
By ERIK G. BRODIN
Title: ________________

HAMBURG - SUEDAMERIKANISCHE DAMPFSCHIFF - FAHRTS - GESELLSCHAFT EGGERT & AMSINCK (COLUMBUS LINE),
By COLUMBUS LINE, INC., *General Agents*,
By W. A. NIELSEN,
Title: *Executive Vice President.*

DELTA STEAMSHIP LINES, INC. (DELTA LINE),
By J. N. LALA,
Title: *Vice President.*

EMPRESA LINEAS MARITIMAS ARGENTINAS (E.L.M.A.),
By RENE CHARPENTIER,
Title: *O/Charge General Delegation.*

VAN NIEVELT, GOUDRIAAN & CO'S STOOMVAART MAATSCHAPPIJ N.V. (HOLLAND PAN-AMERICAN LINE),
By BLACK DIAMOND STEAMSHIP COMPANY, *General Agents*,
By FRANK R. JORDAN,
Title: *General Traffic Manager.*

A/S IVARANS REDERI (IVARAN LINES),
By STOCKARD SHIPPING COMPANY, INC., *General Agents*,
By RAYMOND HORGAN,
Title: *Executive Vice President.*

LLOYD BRASILEIRO (PATRIMONIO NACIONAL),
By HAROLD W. DILLON,
Title: *General Traffic Manager.*

MONTEMAR S.A. COMERCIAL Y MARITIMA,
By AMERIND SHIPPING CORP., *General Agents*,
By LEWIS C. PAINE, Jr.,
Title: *President.*

MOORE-MCCORMACK LINES, INC.,
By CHARLES T. MATTMAN,
Title: *Executive Vice President.*

THE NORTHERN PAN-AMERICA LINE, A/S (NOPAL LINE),
By OIVIND LORENTZEN INC., *General Agents*,
By PER A. LORENTZEN,
Title: *President.*

STOCKHOLMS REDERIAKTIEBOLAGET SVEA REDERIAKTIEBOLAGET FREDRIKA (NORTON LINE)
(as one member only),
By NORTON, LILLY & COMPANY, INC. *General Agents*,
By JOSEPH F. LILLY,
Title: *President.*

DAMPSKIBSSELSKABET TORM (TORM LINES),
By TORM LINES AGENCY, INC. *General Agents*,
By K. SCHMOLZE,
Title: *Vice President.*

APPENDIX B

Brazil/United States Coffee Agreement—F.M.C. Agreement No. 8505-1 as amended, reconciliation of carryings for period Nov. 23, 1960–Dec. 31, 1962, lines operating to U.S. gulf ports passenger and freight vessels combined

Period	Total bags carried	Delta			E.L.M.A.			Lloyd			Nopal		
		Bags carried	Percentage allocated	Actual percentage carried	Bags carried	Percentage allocated	Percentage carried	Bags carried	Percentage allocated	Percentage carried	Bags carried	Percentage allocated	Percentage carried
Nov. 23, 1960, to Aug. 28, 1961	1,845,712	1,090,557	53.06	59.08	212,020	8.12	11.49	175,837	19.41	9.53	367,298	19.41	19.90
Aug. 29, 1961, to Feb. 28, 1962	1,414,886	773,450	53.06	54.67	118,100	8.12	8.34	145,127	19.41	10.26	378,209	19.41	26.73
Mar. 1, 1962, to Aug. 29, 1962	993,356	641,892	53.06	64.62	10,651	8.12	1.07	57,956	19.41	5.83	282,857	19.41	28.48
Aug. 29, 1962, to Dec. 31, 1962	869,232	536,699	53.06	61.75	47,567	8.12	5.47	6,835	19.41	.79	278,131	19.41	31.99
Total	5,123,186	3,042,598			388,338			385,755			1,306,495		
Average			53.06	59.39		8.12	7.58		19.41	7.53		19.41	25.50

Brazil/United States Coffee Agreement—F.M.C. Agreement No. 8505-1, as amended, sailings Nov. 23, 1962–Dec. 31, 1962 [1]

Period	Delta		E.L.M.A.		Lloyd		Nopal	
	Min. Req.	Actual	Min. Req.	Actual	Min. Req.	Actual	Min. Req.	Actual
Nov. 23, 1960, to Aug. 28, 1961	19.87	21	9.17	13	18.34	18	18.34	19
Aug. 29, 1961, to Feb. 28, 1962	13	13	6	8	12	12	12	13
Mar. 1, 1962, to Aug. 29, 1962	13	13	6	4	12	12	12	14
Aug. 29, 1962, to Dec. 31, 1962	8.67	7	4	6	9	5	9	10

[1] Minimum sailing requirements in Agreement 8505-1 were based on a 6-month period. The first pool period listed on this table, however, is a 9-month period. The minimum sailing figures, therefore, are theoretical ones, computed by multiplying each carrier's minimum sailing requirement by 1.5. Similarly, minimum sailings listed for period Aug. 29, 1962-Dec. 31, 1962, are theoretical figures based on 4 months of operation.

APPENDIX C

Brazil/United States Coffee Agreement—F.M.C. Agreement No. 8505-1 as amended, reconciliation of carryings and accounting for period Nov. 23, 1960–Dec. 31, 1962, lines operating to U.S. gulf ports, passenger and freight vessels combined

Period	Delta		E.L.M.A.		Lloyd		Nopal	
	Amount paid by lines	Amount received by lines	Amount paid by lines	Amount received by lines	Amount paid by lines	Amount received by lines	Amount paid by lines	Amount received by lines
Nov. 23, 1960, to Aug. 28, 1961	147,617.83	----------	82,521.69	----------	----------	238,209.36	8,069.84	----------
Aug. 29, 1961, to Feb. 28, 1962	30,668.50	----------	4,253.30	----------	----------	174,791.25	139,869.45	----------
Mar. 1, 1962, to Aug. 29, 1962	147,157.26	----------	----------	59,612.81	----------	195,580.40	108,035.95	----------
Sept. 29, 1962, to Dec. 31, 1962	57,711.60	----------	----------	26,427.60	----------	225,229.50	193,945.50	----------
Subtotals	----------	----------	86,774.99	86,040.41	----------	----------	----------	----------
Totals	383,155.19	----------	734.58	----------	----------	833,810.51	449,920.74	----------

EXHIBIT D

Yearly coffee carryings and sailings, Brazil/U.S. gulf, for Nopal, Lloyd, Delta and E.L.M.A. (F.A.N.U.) (1947–1962)

		Total	Nopal	Lloyd	Delta	E.L.M.A. (F.A.N.U.)
1947	Bags, number	2,986,711	0	286,121	2,700,590	0
	Bags, percent		0	9.6	90.4	0
	Sailings, number	74	0	9	65	0
	Sailings, percent		0	12.2	87.8	0
1948	Bags, number	4,111,081	0	731,141	3,278,317	106,623
	Bags, percent		0	17.8	79.7	2.5
	Sailings, number	89	0	19	61	9
	Sailings, percent		0	21.3	68.5	10.27
1949	Bags, number	4,340,261	208,197	953,104	3,103,100	75,860
	Bags, percent		4.8	22	71.5	1.7
	Sailings, number	94	9	23	52	10
	Sailings, percent		9.6	24.5	55.3	10.6
1950	Bags, number	3,022,979	230,886	469,075	2,261,598	61,420
	Bags, percent		7.6	15.5	74.9	2
	Sailings, number	90	11	18	51	10
	Sailings, percent		12.2	20	56.7	11.1
1951	Bags, number	3,541,304	271,863	437,104	2,651,450	180,887
	Bags, percent		7.7	12.3	74.9	5.1
	Sailings number	87	10	18	46	13
	Sailings, percent		11.5	20.7	52.9	14.9
1952	Bags, number	2,996,783	389,608	429,555	2,102,422	75,198
	Bags, percent		13	14.3	70.2	2.5
	Sailings, number	89	14	12	52	11
	Sailings, percent		15.7	13.5	58.4	12.4
1953	Bags, number	2,508,699	383,720	251,971	1,783,202	89,806
	Bags, percent		15.3	10	71.1	3.6
	Sailings, number	87	16	11	47	13
	Sailings, percent		18.4	12.6	54.7	15
1954	Bags, number	1,896,821	236,130	147,499	1,451,173	62,019
	Bags, percent		12.4	7.8	76.5	3.3
	Sailings, number	88	16	12	50	10
	Sailings, percent		18.2	13.6	56.8	11.4
1955	Bags, number	2,340,403	311,788	142,360	1,853,505	32,750
	Bags, percent		13.3	6.1	49.2	1.4
	Sailings, number	88	19	12	51	6
	Sailings, percent		21.6	13.6	58	6.8
1956	Bags, number	3,115,173	573,616	200,429	2,211,118	130,110
	Bags, percent		18.4	6.4	71	4.2
	Sailings, number	100	21	12	52	15
	Sailings, percent		21	12	52	15
1957	Bags, number	2,386,687	475,986	209,264	1,644,007	57,430
	Bags, percent		19.9	8.8	68.9	2.4
	Sailings, number	99	23	12	50	14
	Sailings, percent		23.2	12.1	50.5	14.2
1958	Bags, number	1,884,419	414,221	120,214	1,292,019	57,965
	Bags, percent		21.9	6.4	68.6	3.1
	Sailings, number	91	20	10	52	9
	Sailings, percent		22	11	57.1	9.9
1959	Bags, number	2,831,007	774,506	171,474	1,663,483	221,544
	Bags, percent		27.3	6.1	58.8	7.8
	Sailings, number	110	29	8	50	23
	Sailings, percent		26.4	7.3	45.5	20.9
1960	Bags, number	2,557,431	636,551	217,801	1,409,350	293,729
	Bags, percent		24.9	8.5	55.1	11.5
	Sailings, number	104	28	12	46	18
	Sailings, percent		26.9	11.5	44.3	17.3
1961	Bags, number	2,459,490	610,218	208,484	1,441,349	199,439
	Bags, percent		24.8	8.5	58.6	8.1
	Sailings, number	109	26	20	51	12
	Sailings, percent		23.9	18.3	46.8	11
1962	Bags, number	2,390,352	663,143	114,178	1,475,194	137,837
	Bags, percent		27.7	4.8	61.7	5.8
	Sailings, number	108	28	23	45	12
	Sailings, percent		26	21.3	41.7	11

FEDERAL MARITIME COMMISSION

No. 1096

The Northern Pan-American Line, A/S (Nopal Line)

v.

Moore-McCormack Lines, Inc., et al.

Ashton C. Barrett, *Commissioner*, dissenting:

I respectfully dissent, and would approve Agreement No. 9040 as the examiner did. The opinion of Chairman Harllee and Commissioner Day (a majority of the majority) indicates that the attached order does not preclude further consideration by the Commission, but, on the other hand, assures such further consideration if Agreement No. 9040 is "modified in a manner not inconsistent with this opinion." The Harllee-Day opinion can be read to require one modification and only one—an adjustment upward of Nopal's share in the money pool. While in my opinion such adjustment should not, and legally cannot be made the price of approval, I am willing to join in such further consideration. I am indeed inclined to feel that absent further favorable consideration and eventual approval, we may expect a super SUMOC 202 and real chaos in the trade. Certainly to avoid such a situation which would substantially destroy operating efficiency and seriously endanger the continuation of first-class transportation service on the route should be a prime objective of this regulatory body. I hope, therefore, that the agreement, with some reasonable adjustment of Nopal's carryings, not diminished by reason of flag or length of service, will be returned to the Commission for further consideration in this proceeding.

There being no assurance that such further consideration will be requested, it is my unpleasant duty to indicate as briefly as possible, unsound reasoning and legal error in the decisions of my colleagues. I feel that the ultimate conclusions of both are unsupported by indispensable subordinate findings of fact and substantial evidence, and that the decision to disapprove Agreement 9040 is therefore arbitrary and capricious. I am convinced that both those opinions fly in the face of the policy unanimously stated in *Alcoa-C.A.V.N.*, 7 F.M.B.

345, 364, that in acting upon pooling agreements the Commission applies the standards set out in section 15 of the Shipping Act, 1916, and no others. This statement was approved by the United States Court of Appeals for the District of Columbia Circuit, and *certiorari* was not requested.

The standard upon which the Harllee-Day opinion is based is that a pooling agreement may not be approved if a combination of parties to the agreement who are nationals of the countries served, successfully insist upon a little better deal than this Commission thinks they should get. Section 15 sets out no such standard.

The Harllee-Day opinion falls into a well-laid snare by equating our duty to enforce our regulatory statutes without distinction between flags, with a non-existent prohibition [1] against approval of an agreement in negotiating which "national interest" played a "dominant role in the eyes of the parties." It also has been entrapped into feeling that an approval of such an agreement to which an American-flag line is a successful party would necessarily be a "promotional" act, which is an obvious *non sequitur.*

The Harllee-Day opinion also finds that the consideration and giving an indeterminate amount of weight to the pioneering efforts of Lloyd and Delta was "improper." Section 15 does not set up the use of any particular factors as a standard. It is concerned only with agreements, not the negotiations in which they are formulated, or factors taken into account by negotiators. Nothing in section 15 justifies an ultimate finding that "percentages" are and the contract containing them is unjustly discriminatory and unfair as between carriers because "it flows from the consideration (by the parties) of improper factors in making the allocations." It is to be noted that the Harllee-Day decision which absolutely rules out of consideration the pioneering of Lloyd and Delta, does not even find that these lines have recovered their pioneering costs, much less a reasonable profit on their investments. They were under no obligation to Nopal to make it possible for coffee growers to profit and grow more coffee for Nopal to carry. Nopal is profiting from the past efforts of the other lines. In my opinion the pioneers are fully entitled to special consideration, and Nopal is in no position to complain if it were accorded. The development of this particular trade into a stable and dependable service was highly desirable; the protection of the endeavors of these pioneering lines which have so served would be a legitimate objective of any pooling arrangement.

The Harllee-Day opinion does not find that Nopal's carryings were not considered in the negotiations; at most it seems to "suggest" a probability that they were not given *enough* consideration. To the

[1] See p. 22; "we are prohibited."

contrary, the record showing the minutes of the Rio meeting, points out the extensive negotiations made in discussing the issue involved and states the facts and arguments advanced by the various parties in support of their contentions.

Nowhere in this opinion as above discussed can I find subordinate findings of fact or reference to substantial evidence to support its ultimate conclusion of unjust discrimination. In view of the practical and economic side of the presented issue, the import of one factor must be constantly realized—coffee is Brazil's greatest economic asset. That Lloyd should benefit in a major way from its transportation to and from the United States is a normal and natural objective of Brazilian national policy. It seems to me far preferable that recognition be given to the legitimate objectives of that policy through agreement arrived at by negotiation among the lines, rather than by a Brazilian decree, which would naturally support the national interest.

Before briefly discussing Commissioner Patterson's opinion, I must say that I strongly believe that we should consider pooling agreements as they really are, and realize what our limitations in dealing with them are; and especially, that no decision of ours is going to turn a hard-boiled, intensively competitive business into an association of dedicated altruists. Even my brief experience here teaches me that the lines in the strongest bargaining position get a bigger cut in any pool than their weaker competitors, which bigger cut may well be justified where the greater strength of such lines stems not from predatory and discriminatory tactics, but is the result of pioneering efforts, heavy investments in the trade, and other factors. If we can keep this in bounds, I think we will do all that can be expected of us, and this I think we can do. As we indicated in *Alcoa-C.A.V.N.*, *supra*, if the result of a pooling agreement is so to impair the revenues of a valuable carrier as to lead it to abandon or seriously curtail its service, we will not hesitate to disapprove it. However, where, as here, the division of revenues appears to be within a zone of reasonableness, I think we should approve. I cannot read section 15 as imposing pinpointed equitable allocation of pool percentages as a condition to the approval of pooling agreements, and I doubt if any of the valuable pooling agreements now functioning with Commission approval could meet such a test. We certainly should not take seriously any suggestion by proponents or opponents of pools that revenue percentages are fixed by feeding "factors" into computers, and accepting the result, or indeed, upon any considerations other than those dictated by enlightened self-interest.

Commissioner Patterson's opinion makes no additional subordinate findings of fact and points to no additional evidence to support the findings of unjust discrimination in which he concurs. His decision

that this agreement must be disapproved as contrary to the public interest is based upon his finding that it "reflects the results of governmental action rather than market competition." [2]

I cannot read section 15 as permitting the approval of contracts only if they reflect "market competition" or forbidding approval of a contract which "reflects the results of governmental action." I have thought and still thing that section 15 requires us to approve or disapprove an agreement upon its merits, not upon consideration of what it may "reflect."

I agree with decision of the Examiner that Agreement No. 9040 should be approved.

(Signed) THOMAS LISI,
Secretary.

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[2] Although he approved the Grace-C.A.V.N. pooling agreement which certainly "reflected" the action of *two* Governments.

FEDERAL MARITIME COMMISSION

No. 966

REDUCTION IN RATES—PACIFIC COAST-HAWAII

OLIVER J. OLSON & CO., C. R. NICKERSON, AGENT

Decided July 20, 1964

Rates from, to, and between Pacific coast ports and ports in the Hawaiian Islands found to be lawful and just and reasonable. Order should be entered discontinuing the proceeding.

Russell S. Bernhard for respondent.
George D. Rives and *Robert N. Lowry* for Matson Navigation Co., intervener.
Shiro Kashiwa for State of Hawaii, intervener.
Richard S. Harsh and *Robert J. Blackwell*, Hearing Counsel.
A. L. Jordan, Hearing Examiner.

REPORT

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

PROCEEDINGS

This is an investigation into the lawfulness of certain tariffs filed by Oliver J. Olson & Co. (Olson), covering transportation of cargo between the Pacific coast and Hawaii. The investigation is being conducted by the Commission on its own motion pursuant to section 18 of the Shipping Act, 1916 (Act), and section 3 of the Intercoastal Shipping Act, 1933 (Intercoastal Act).

The tariffs under investigation are those contained in Olson's revised pages to its local Freight Tariff No. 5, FMC–F No. 32, naming reductions in freight rates from, to, and between Pacific coast ports and ports in the Hawaiian Islands. The order of investigation, dated December 27, 1961, embraces those revisions in Olson's tariff to be-

come effective December 28, 1961, and "all subsequent revisions of the said rates subsequently filed by respondent in this proceeding." The order suspended the rate on one item in the tariff, lumber, to and including April 27, 1962, but allowed the other items in respondent's tariff to remain in effect during the course of the investigation.

We discontinued the investigation insofar as the suspended lumber rate was concerned when it was canceled by Olson. Thereafter, Olson filed new rates on lumber which were placed under investigation.

Matson Navigation Co. (Matson) and the State of Hawaii intervened. The State of Hawaii did not submit any evidence or file any brief.

FACTS

A. *History of the rates under investigation:*

The initial tariff filed by Olson for the Pacific coast-Hawaii trade became effective on September 9, 1961. Generally, the rates set forth by this initial tariff were at the same level as those of intervener Matson.

By revised schedules, effective November 27, 1961, Olson made a general 5% reduction in its September 9, 1961 rates. This reduction was not protested by Matson.

Effective December 28, 1961, Olson made still further reductions on a selected list of commodities. Generally, these reductions were of an additional 5% below the November 27, 1961 level. However, the rate for lumber, previously a uniform rate of $37.62 per 1,000 board feet, was revised by Olson to range from $30.00 per 1,000 board feet for shipments in excess of 2,000,000 board feet to $37.62 for those under 500,000 board feet. These proposed reductions on 31 commodities were protested by Matson, the present investigation was ordered, and the new rate on lumber was suspended by the Commission.

The rate on lumber was restored to the November 27, 1961 rate of $37.62 per 1,000 board feet, effective January 25, 1962.

Olson then further revised its rate on lumber, effective February 5, 1962, setting a rate of $36.00 per 1,000 board feet for lumber stowed below deck and $32.50 when carried on deck.

The final tariff revision relevant to this proceeding became effective on August 20, 1962, when Olson revised its tariff and restored all but 8 of the 31 commodities whose rates were originally protested by Matson to a level set by Olson without protest by Matson.

In addition, a new rate structure was established for commodities for which rates were not otherwise specified in the tariff (N.O.S.). The September 9, 1961 rate for N.O.S. commodities was $28.34 per ton. The reduction of November 27, 1961, brought this rate down to $26.92, where it remained until August 20, 1962. Pursuant to the revision

effective on that date, cargo which was unitized or palletized, so as to be suitable for forklifting, was carried at the $26.92 rate, while the rate for loose stow cargo was increased to $30.00 per ton. This rate differential was intended to reflect the greater suitability of unitized cargo for movement in a barge operation, such as the one run by Olson, and the relative ease of handling and lower stevedoring costs possible with a cargo of this type.

An analysis of Olson's August 20, 1962 rates reveals that where shipments are unitized or have similar transportation characteristics, Olson's present rates are below Matson's by amounts ranging from 7 to 19 percent. Where the commodities are such they they are not adapted to unitized shipment, Olson's $30.00 merchandise N.O.S. rate is applicable, resulting in differentials below Matson's corresponding rates, with unimportant exceptions of 3 to 4 percent. The purpose of the foregoing rate adjustments is to provide attractive rates for all palletized or unitized cargo and for cargo having similar transportation characteristics, and to subject any non-unitized cargo to the merchandise N.O.S. rate of $30.00.

The differentials of 3 to 4 percent on non-unitized cargo are less than those necessary to compensate shippers for the added cost of insurance when shipping by barge.

B. *Olson's operations in the Pacific coast-Hawaii trade:*

1. *The 1961 voyages.* Olson first entered the Pacific coast-Hawaiian trade in September 1961, when the west coast maritime strikes made it necessary for additional carriers to handle the backlog of goods. The first such strike extended from June 16, 1961 to July 3, 1961; the second extended from September 29, 1961 to October 12, 1961; and the third extended from March 16, 1962 to April 11, 1962.

Olson made five voyages during 1961, the first commencing on September 5. There were no exceptions to the finding of the Examiner that Olson suffered a loss of $53,262.72 on these voyages.

These 1961 voyages, the first undertaken by Olson in the Hawaiian trade, should not be regarded as typical; and the financial data collected for them is not a reasonable index of what Olson could expect from its Hawaiian operations in the future.

In the first place, Olson's 1961 voyages were made under rates which were in effect prior to those under investigation. The reduced rates, protested by Matson, did not become effective until December 28, 1961, except lumber which became effective February 5, 1962.

Secondly, the strikes produced abnormal conditions resulting in the immediate availability to Olson of large volumes of traffic that would normally not be present for a newly instituted service in an established trade. On the other hand, the strikes resulted in abnormally high costs of operation. Freight was delivered to the carrier without

proper booking and was delivered to the carrier up to the time of sailing. All types of cargoes were received, including those which would not ordinarily move by barge, and which were not suitable for shipment via barge. Docks and warehouses were overcrowded, with the result that cargoes could not be loaded and unloaded quickly. Because of shortage of dock space and stevedoring gangs, loading and unloading had to continue around the clock, with necessary additional overtime compensation. To accommodate the extra stevedoring crews necessitated by the urgency for rapid unloading, extra cranes had to be rented. Moreover, vessels were not loaded selectively and some were loaded to 100 percent capacity with miscellaneous cargoes as they arrived at the dock, thereby producing inefficient utilization of space and excessive stevedoring time. Thus, the strikes resulted in the production of a large volume of traffic, but they also caused a high cost of performing service.

2. *The 1962 completed voyages.* Olson made six voyages in 1962 in its Pacific coast-Hawaiian operation. All of these voyages were made under the new rates effective December 28, 1961, and the new rates for lumber, effective February 5. The Examiner found that Olson suffered a loss of $63,082.21 on these voyages, and no exception was taken to his finding.

3. *Olson's 1962 projections.* Olson conducted two types of studies in an effort to predict revenues and expenses from its voyages in the Hawaii trade scheduled for the last 6 months of 1962.

The first of these sought to apply the August 1962 rates to what Olson contended was a typical cargo, based on what it had carried in the first 6 months of 1962. No separate cost analysis was made for this typical cargo. Rather, the average cost of the six 1962 voyages was adjusted to reflect the savings that Olson believed would be effected. The anticipated decline in expenses was attributed to the reduction in handling cost of pineapple, based on the new F.I.O. rate and the reduced cost of handling palletized cargo. Estimated revenue from the so-called typical future voyage was $174,476. Expenses were estimated at $147,174, leaving a profit of $27,302.

The Examiner found these estimates to be overly optimistic on the basis of the record and we find nothing in the record which leads us to differ with his conclusion. However, whether or not respondent is able to turn a $63,082 loss into a $27,302 profit per voyage in the short span of 6 months is not essential to deciding the issues before us. As respondent points out, "The future typical voyage, as portrayed on Exhibit 41, cannot be expected to materialize immediately. The new structure of rates is designed to attract palletized and unitized cargoes. This will require a change in the packing procedures of many shippers. Such changes take time and require selling."

In the second type of study, Olson sought to determine the effect of the lumber and paperboard rates by constructing exhibits (39 and 40) assuming a round trip voyage carrying an optimum load of the commodity westbound and coming back empty. With respect to lumber, a rate of $32.50 produced revenue of $97,500 which after expenses of $75,250 yielded a profit of $22,250. Regarding paperboard, a rate of $27.92 produced a profit of $21,072. The Examiner also found Olson's forecast for lumber to be too optimistic. We agree and further believe the record does not support Olson's projection of pulpboard profits. The record in this proceeding, however, is concerned with a new and experimental service. Experience under the new system is required before an accurate appraisal of its financial feasibility is possible.

DISCUSSION

The Examiner found that Olson had failed to establish that its rates were compensatory. He stated, however, "Merely because Olson's revenues do not meet fully distributed costs is no bar to a finding that the rates are lawful, just and reasonable. If Olson is permitted to continue operating at its present level of rates, its new barge service will be afforded a reasonable opportunity to realize its full potential. It should have this chance." He concluded Olson's rates were lawful, just and reasonable.

Exceptions by Matson to the Examiner's initial decision are that his decision errs:

(1) In concluding that the only alternative to approving the proposed rates was a return to prior rates which were noncompensatory;

(2) In concluding that the rates of Olson do not need to cover fully distributed costs in order to be found just and reasonable;

(3) In finding that there is no evidence that Olson has taken unfair advantage through the use of short-term competitive measures to capture cargoes from established operators in the trade;

(4) In concluding that the proposed rates are lawful, just and reasonable in the absence of probative evidence to support the conclusion;

(5) In failing to make specific findings with respect to the lawfulness of reduced rates on lumber and paperboard.

A. *Matson's first exception:*

By reading into the initial decision the finding that the only alternative to approving the proposed rates was a return to preinvestigation rates which were also noncompensatory, Matson misconstrues the Examiner's meaning.

Matson correctly cites the initial decision in its brief, when it calls attention to the following segment of the initial decision:

Since Olson's August 20 rates result generally in no reduction over the preinvestigation rates there may be no reason to adopt the compensatory test here,

as the issue of compensatory rates may have become moot. For instance, if the Commission were to find new rates unlawful because noncompensatory, it would presumably mean a return to the rates in effect prior to those investigated. In this connection, the record shows that the preinvestigated rates were equally noncompensatory.

However, had Matson proceeded to the next three sentences in the initial decision, the full import of the Examiner's words would have become clear. The Examiner continues:

It is doubtful if any rate structure which Olson could adopt would be immediately compensatory. Olson's primary need is to attract a greater volume of cargo at rate levels sufficiently high to defray all expenses. Until this is done it is doubtful that Olson at any level rates could meet the compensatory test.

The Examiner's language makes clear that a return to the preinvestigation rate structure is not the only alternative. It is merely the alternative that will prevail, if the rates under investigation are rejected, and if no other alternative is offered, and adopted.

Since no rate had been considered which satisfied the Examiner as being compensatory for the amount of cargo Olson now carries or can be expected to carry in the near future, the Examiner could have rejected the present revisions, thereby adopting by default the preinvestigation rates; or could have allowed the revised rates to stand. He chose the latter course.

The Examiner's decision that Olson's revised rates should be allowed to stand at least until Olson has had the opportunity to experiment and discover the rates at which traffic will be attracted and provide a profit is reasonable. Olson does not have to charge compensatory rates during the preliminary period of its operations in this new service. The first exception is rejected.

B. *The second and third exceptions:*

Where the Commission has held a rate structure to be unlawful because it was noncompensatory it has been on a finding that rate reductions were adopted by the carriers in order to fight competition or take unfair advantage of other carriers in the trade through rate levels not based upon costs of operation. *Cargo to Adriatic, Black Sea and Levant Ports*, 2 U.S.M.C. 342 (1940); *Intercoastal Rate Structure*, 2 U.S.M.C. 285, 299–302 (1940); *Baltimore, Md.-Virginia Ports Wine Rates*, 2 U.S.M.C. 282, 284 (1940); *West-Bound Alcoholic Liquor Carload Rates*, 2 U.S.M.C. 198, 204–205 (1939); *Pacific Coastwise Carrier Investigation*, 2 U.S.M.C. 191, 196–197 (1939); *West-Bound Carload and Less-Than-Carload Rates*, 2 U.S.M.C. 180, 186–187 (1939). In addition, the disapproved rates were frequently intended as a short-term competitive measure. Thus, the conclusion follows that the compensatory test was designed primarily to test a carrier's good faith motives in establishing reduced rates.

There is nothing in the record to indicate that the rate under investigation herein was adopted in the furtherance of unfair competitive practices. Indeed, the evidence points to the fact that these very rates under investigation could one day be compensatory, if Olson is successful in attracting additional cargo to its new service.

The crux of the problem is not that the rates are inherently noncompensatory. The major question is whether or not Olson can attract sufficient cargo to its new service to make these rates compensatory. Had the Examiner found that no matter how much cargo was loaded, and no matter how efficiently it was carried, the proposed tariff could not possibly earn a fair return for Olson, the rates might have been properly rejected. However, when the Examiner decided that the rates under investigation were noncompensatory, he did so on the basis of the fact that the studies submitted by Olson in an effort to project this rate into its operations for the last 6 months of 1962, were "overly optimistic" regarding the amount of cargo which Olson could expect to carry. Whether one is a shipowner or a corner grocer, his prices will be noncompensatory if the customers don't come to the store.

The Examiner found that if these rates were allowed to remain in effect, there was a reasonable chance that Olson might attract sufficient cargo at some future time, to make a profit, and that Olson should be given that chance. It is evident that some period of operation is required in order to overcome the natural reluctance of the shipping public against trying this or any other new transportation form. If new transportation experiments are to be adequately tested, they must be given sufficient time to realize their inherent advantages. To compel them to fully compensate the owner from the first days of their operation would doom many promising services to the shipping public to an early death.

Exceptions 2 and 3 are rejected.

C. *The fourth exception:*

Matson's fourth exception charges that the Examiner's decision errs in concluding that the proposed rates are lawful, just and reasonable in the absence of probative evidence to support the conclusions.

Olson put in evidence a complete record of its operating revenue and expenses. Aside from the data respecting the 1961 voyages, it presented figures concerning its voyages in 1962, including the number of days of service, the miles covered and tonnage carried. Olson provided cost and depreciation figures for its barges, voyage statements showing the commodities carried and the freight money received and the expenses for each barge trip. Olson's balance sheets and profit and loss statements were in evidence with supporting detail. Olson made a complete statement of its plans and described the existing and proposed operations. Estimates of future operations were offered.

As previously indicated the Examiner found that given a reasonable chance to attract cargo Olson might realize a profit. New carriers in a trade should be afforded a reasonable opportunity to develop their services, and the fact that immediate operating results may not show a profit is not sufficient ground for declaring the rates unlawful.

The fourth exception is rejected.

D. *The fifth exception:*

In support of the fifth exception concerning rates for lumber and paperboard, it is argued that the rates have not been justified on the basis of competitive necessity or cost and the Examiner erred in not making specific findings in regard thereto.

The evidence on competition was conclusive. Olson showed that it was trying to meet competition with a noncommon carrier, Pacific Hawaiian Co. It was also shown that another potential competitor, States Steamship Co., had lower rates.

Respondent also presented evidence showing that at the published rates of $32.50 on deck and $36.00 under deck per 1,000 board feet for lumber and $27.92 per ton for paperboard, Olson could make a profit after fully distributed costs if it carried nothing but these commodities to Hawaii and returned the barges empty. Such loads are regularly carried to Hawaii by a competitor offering contract service.

Olson's rates are attacked as unlawful, because they are 16% to 17% below Matson's. But the evidence of this differential was not accompanied by any comparison of relative costs between shipments on the fast self-propelled ships Matson operates and the slower barge service of Olson. This is not sufficient to overcome Olson's estimates, and Olson's managerial judgment should be allowed a chance to prove itself. There is no rule of law which says Olson must here charge as much as the dominant carrier. The fifth exception is rejected.

In our opinion the record supports the Examiner's conclusions as to the justness, reasonableness and lawfulness of all the rates under review and the exceptions to his initial decision have not been supported.

The initial decision has properly found that all of Olson's tariffs subject to this investigation are just and reasonable under section 18 of the Act and are lawful under section 3 of the Intercoastal Act. An order will be entered dismissing the proceeding.

By the Commission.

FEDERAL MARITIME COMMISSION

No. 966

REDUCTION IN RATES—PACIFIC COAST-HAWAII

OLIVER J. OLSON & CO., C. R. NICKERSON, AGENT

Full investigation of the matters and things involved in this proceeding having been had, and the Commission on July 20, 1964, having made and entered of record a report stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof, and having found that the proposed rates, charges, tariffs and regulations herein under investigation are just and reasonable and lawful;

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

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

The Dual Rate Cases

Order Granting the Deletion of Certain Clauses

Decided July 31, 1964

Various respondents in these proceedings have petitioned the Commission to permit certain modifications in their dual-rate contracts as approved by the Commission in its report and orders in *The Dual Rate Cases*, dated March 27, 1964, and served March 30, 1964. Notices of these petitions were published at various times in the Federal Register and by notice dated June 17, 1964, published in the Federal Register on June 18, 1964, the Commission indicated that it was considering modifying the aforesaid report and orders so as to permit all respondents the option of deleting certain contract provisions relating to the applicability of the Shipping Act, 1916, and the Rules of the Commission.

Interested persons were invited to comment on these proposals and the only comments filed objected to permitting the deletion of:

(*a*) That part of the "Disclosure" clause approved by the Commission in its report at page 33 which reads: "and there shall be no disclosure of any information in violation of section 20 of the Shipping Act, 1916, as amended."; and

(*b*) The provision required to be included in all "Arbitration" clauses approved by the Commissiion in its report at page 37 of its report which reads: "nothing herein shall deprive the Federal Maritime Commission of its jurisdiction."

It was suggested that as to (*a*), above, the specific mention of section 20 of the Shipping Act, 1916, might be dropped from the contracts but that the contracts nevertheless prohibit the disclosure of information. Inasmuch as the purpose of the disclosure provision in the contracts is merely to make it possible for the conferences to investigate suspected breaches of the contracts, it is only proper that limits be placed upon the use of such information. We are therefore approving the optional deletion of the reference to section 20 of the Shipping Act provided the language set out below is used.

As to (*b*), above, it was argued that to drop the mention of the jurisdiction of the Commission would be to risk depriving contract shippers of their right to file complaints with the Commission under section 22 of the Shipping Act, 1916. It was suggested that the following language be permitted in lieu of the provision quoted above:

Nothing herein shall be construed as preventing either party hereto from resorting, either before arbitration has been initiated by the other party hereto or within 30 days after such initiation, to any other forum which would, but for this agreement to arbitrate, have jurisdiction to decide the dispute.

As was the case in *Swift & Co.* v. *Federal Maritime Commission*, 306 F. 2d 277 (D.C. Cir., 1962), arbitration may sometimes present the question of whether a particular construction of a dual-rate contract is lawful under the Shipping Act, 1916, a question which ordinarily would not be a proper matter for arbitration. And, as we stated in our Report of March 27, 1964, herein, the terms of dual-rate contracts should not, nor cannot, relieve us of our duties and responsibilities under the Shipping Act. None of this is to say, however, that disputes under dual-rate contracts could not be properly and finally resolved through arbitration where there is no substantial question of violation of the Shipping Act involved.

The problem presented by the proposed language is that it appears to be so broad as to effectively bar arbitration of *any* dispute except where both parties desire to arbitrate.

In view of the holding in the *Swift* case, *supra*, that the Commission may upset the decision of the arbitrators where their decision is not in conformity with the Shipping Act, notwithstanding the absence of any provision to that effect in the contract, it would appear that the deletion of the language in (*b*) above would not change in any fashion the exercise of jurisdiction by the Commission in the proper case. We are therefore authorizing the deletion of such language.

As no comment was received as to the deletion of other references to the Shipping Act and as it appears that the deletion of these references can have no effect upon the applicability of the Shipping Act, we are permitting certain deletions as set out below.

Now, therefore, it is ordered, That the aforesaid Report and Orders are amended by making the following contract provisions optional rather than mandatory.

1. That part of paragraph (a) of the "Rate Increases" clause approved by the Commission in its report at pages 15–17 which reads:

The Carriers shall make no change in rates, charges, classifications, rules or regulations, which results in an increase or decrease in cost to the Merchant, except as provided by Section 18(b)(2) of the Shipping Act, 1916, and the Rules of the Federal Maritime Commission: *Provided, however,*

2. That part of paragraph (c) of the "Rate Increases" clause approved by the Commission in its report at pages 15–17 which reads:

through filing with the Federal Maritime Commission

3. That part of the "Disclosure" clause approved by the Commission in its report at page 33 which reads:

and there shall be no disclosure of any information in violation of section 20 of the Shipping Act, 1916, as amended.

Provided, however, That where this language is deleted the following language must be inserted:

and there shall be no disclosure of such information without the consent of the merchant except that nothing herein shall be construed to prevent the giving of such information (1) in response to any legal process issued under the authority of any court, or (2) to any officer or agent of any government in the exercise of his powers, or (3) to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime, or (4) to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers, or (5) to arbitrators appointed pursuant to this agreement.

4. The provision required to be included in all "Arbitration" clauses approved by the Commission in its report at page 37 of its report which reads:

nothing herein shall deprive the Federal Maritime Commission of its jurisdiction.

5. The "Amendments" and "Applicability of the Shipping Act" clauses discussed by the Commission in its report at pages 37–38.

Respondents desiring to make any or all of these changes in their contracts may do so without further permission from the Commission: *Provided, however*, That full copies of the contract form as so amended must be filed with the Commission within 30 days following such amendments.

It is further ordered, That requests for the deletion of contract provisions not herein granted are denied.

By order of the Federal Maritime Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1134

INVESTIGATION OF PRACTICES IN THE GREAT LAKES/JAPAN TRADE—IINO KAIUN KAISHA, LTD., AND MITSUI STEAMSHIP CO., INC.

Respondents, parties to F.M.C. Agreement 8670, who determined not to serve Duluth on inbound traffic, delivering cargo of Duluth shipper at Milwaukee even though the same vessels called at Duluth later to pick up outbound cargo, found not to have violated section 15 or 16 First.

Agreement 8670 found to be the complete agreement between the parties on this subject.

Charles F. Warren and *John P. Meade* for respondents.

Walter F. Mondale, Attorney General, State of Minnesota, *Jack L. Chestnut*, Special Assistant Attorney General, and *Gene W. Halverson* for the State of Minnesota and the Seaway Port Authority of Duluth.

Frank Gormley, *Donald J. Brunner*, and *H. B. Mutter*, Hearing Counsel.

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

The two respondents, Iino Kaiun Kaisha, Ltd. (Iino), and Mitsui Steamship Co., Ltd. (Mitsui), are common carriers by water in the foreign commerce of the United States and, in the conduct of the activities involved in this proceeding, are subject to the provisions of the Shipping Act, 1916 (46 U.S.C. 801, et seq.). The two carriers file tariffs jointly and are permitted to discuss and agree upon rates and tariffs in the inbound trade from Japan to ports on the Great Lakes under F.M.C. Agreement No. 8670 and in the outbound trade from Great Lakes ports to Japan under F.M.C. Agreement No. 8595. The Commission received information that respondents refuse to deliver inbound cargo to Duluth, Minn., but instead discharge cargo destined for Duluth at Milwaukee, Wis., even though they subsequently call at Duluth with the same vessels to load outbound cargo.

[1] This decision became the decision of the Commission on July 28, 1964. See Rules 13(d) and 13(h), Rules of Practice and Procedure, 46 CFR 502.224, 502.228.

The Commission ordered this investigation pursuant to sections 15 and 22 of the Shipping Act (46 U.S.C. 814 and 821) to determine (1) whether Mitsui and Iino have effectuated an agreement not to serve Duluth on inbound traffic in violation of section 15, (2) whether Agreement No. 8670 is the complete agreement of the parties thereto as required by section 15, (3) whether Agreement No. 8670 should be canceled pursuant to section 15 because Iino and Mitsui are effectuating that agreement in a manner which is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or which is detrimental to the commerce of the United States or contrary to the public interest, by not quoting rates inbound to Duluth and by not serving Duluth for inbound traffic, and (4) whether the refusal of Mitsui and Iino to serve Duluth on inbound traffic subjects any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in violation of section 16 First. The pertinent portions of sections 15 and 16 First are set out in the attached Appendix.

The State of Minnesota and the Seaway Port Authority intervened and took active parts in the proceeding. Other interveners, the International Association of Great Lakes Ports and The Niagara Frontier Port Authority, did not appear at the hearing nor file briefs. With the consent as well as the encouragement of the Presiding Examiner, the need for the taking of oral testimony was dispensed with by the parties who appeared at the hearing agreeing to a stipulation of the facts. The facts so stipulated are clear and quite adequate for the purpose of reaching a decision on the above issues. The agreed facts follow, including data taken from some of the exhibits attached to the stipulation of facts.

THE FACTS

1. Iino Kaiun Kaisha, Ltd. (Iino), and Mitsui Steamship Co., Ltd. (Mitsui), are authorized to discuss and agree upon rates and practices in commerce from Japan to the Great Lakes of the United States pursuant to the terms of F.M.C. Agreement No. 8670, as amended.[2]

2. Acting pursuant to the above Agreement, Iino and Mitsui have filed with the Commission a joint tariff entitled "Iino Kaiun Kaisha, Ltd./Mitsui Steamship Co., Ltd., Joint Tariff No. 1." The said Joint Tariff quotes rates from certain Japanese ports to certain Great Lakes ports, as more specifically named therein.

3. In the said joint tariff, no rates are published from Japanese ports to the port of Duluth, Minn. This is because these lines do not

[2] Respondents have advised the Commission that on Apr. 1, 1964, Mitsui Steamship Co., Ltd., became Mitsui O.S.K. Lines, Ltd., and Iino Kaiun Kaisha, Ltd., ceased common carrier operations when it was merged with Kawasaki Kisen Kaisha, Ltd.

offer a service from Japan to this port, although the matter of serving it has been a subject of discussion between them.

4. Iino and Mitsui are also authorized to discuss and agree upon rates and practices in commerce from the Great Lakes of the United States to Japan pursuant to the terms of F.M.C. Agreement No. 8595, as amended.

5. Acting pursuant to the above agreement, Iino and Mitsui have filed with the Commission a joint tariff entitled "Iino Kaiun Kaisha, Ltd./Mitsui Steamship Co., Ltd., Joint Tariff No. 1." The said joint tariff quotes rates from certain Great Lakes ports, including Duluth, to certain Japanese ports, as more specifically named therein.

6. During 1963, the American importer of machine tools and machine tool parts, Equipment Investors, Inc., 1309 Clover Drive, Minneapolis, Minn., complained to Mitsui over its failure to serve the port of Duluth, Minn., on direct shipments from Japan, and to publish a tariff covering same. Specifically, this company objected to Mitsui vessels discharging their cargo at Milwaukee though the same vessels may have called subsequently at Duluth for loading pursuant to the said joint tariff filed under authority of Agreement No. 8598. During 1963, Mitsui booked eighty-nine (89) tons of machine tool parts which Equipment Investors, Inc., had purchased from Japanese sources. The said eighty-nine (89) tons constitutes Equipment's total offerings to Mitsui during 1963. This cargo was booked and shipped from Japan to Milwaukee under bills of lading consigned to Norman G. Jensen and calling for discharge at Milwaukee.

In advance of the departure of their sailings from Japan, neither Iino nor Mitsui has actually known whether its vessels would be calling at Duluth for loading pursuant to Agreement No. 8595. Respondents begin their "Eastern Canada & Great Lakes Liner Service" at Hong Kong, load at Japanese ports, then proceed to eastern Canadian ports for beginning of discharge. Loading at Hong Kong and Japanese ports takes approximately 2 weeks, while the ocean voyage takes approximately 1 month. Discharging at eastern Canadian ports and Great Lake ports takes approximately 3 weeks. The entire eastbound leg of respondents' voyages takes approximately 60 days.

For their westbound leg, important base cargo is dried milk for use in the Japanese Government sponsored Lunch Program for Japanese school children. Duluth is one of the loading ports for this milk; however, specific designation of the loading port is not made until approximately 2 weeks prior to loading. Illustrative of this situation is the M.S. *Muneshima Maru* Voyage No. 14, which commenced loading at Hong Kong on March 24, loaded at various Japanese ports and departed Yokohama on April 10; commenced dis-

charging at Halifax on May 5, and on May 9 a radiogram was dispatched to the Captain informing him of the required unscheduled loading of milk at Duluth. This illustration is typical of all eight voyages which called at Duluth.

7. During 1962 and 1963 the following inquiries were made regarding such a service:

A. In March of 1962, the Seaway Port Authority of Duluth inquired of Iino whether it was interested in the carriage of 1,000 tons of wire and pipe from Japan to Duluth. By letter dated March 21, 1962, Iino replied:

> * * * due to the tight scheduling of vessels and the time required for extension of service to Duluth and return is at this time prohibitive. Should the picture of Iino Lines change relative to direct call at this port, we will be pleased to advise you accordingly.

B. In December of 1962, the American firm, Rochester Iron & Metal Co. of Rochester, N.Y., requested Mitsui to advise it with respect to its first calling at Duluth, this firm having contracted to supply an undisclosed quantity of stainless steel sheets to that general locality. In January of 1963, Mitsui replied:

> * * * that present plans for 1963 do not include our vessels calling at the port of Duluth.

C. In June of 1963, the American firm, J. J. Fitzpatrick Lumber Co., Inc., of Madison, Wis., inquired whether Iino served Duluth in connection with the possibility of a purchase of Philippine mahogany from the Far East. Iino advised this firm that it did not offer a service to Duluth. However, inquiry was made as to the possible amount of tonnage that might be involved. No reply was received.

Except for the complaint of Equipment Investors, Inc., and the three inquiries set forth in this paragraph, no other American commercial interests are known to have inquired of either Iino or Mitsui about their respective managerial decisions not to serve this port under trading conditions existing at the times relevant to the inquiry herein.

8. Iino and Mitsui have not served Duluth from Japan because, in the managerial discretion of each, neither considers that this trade would be operationally practicable under trading conditions existing at the times relevant to the inquiry herein. However, in response to the requests described in paragraph 6 hereof, these companies have discussed the feasibility of inaugurating a service to this port. If and when such a service should prove practicable and economical in the opinion of each company, it is contemplated that an agreement will be reached to extend the scope of their joint tariff presently on file to include this port.

9. During 1962 Mitsui had seven (7) sailings from Japan to the Great Lakes pursuant to Agreement No. 8670, and seven (7) sailings

from the Great Lakes to Japan pursuant to Agreement No. 8595. None of its vessels, however, called at Duluth. Effective September 4, 1962, Iino and Mitsui amended their joint tariff filed pursuant to Agreement No. 8595 to include Duluth and several other Great Lakes ports.

During 1963 Mitsui also had seven (7) sailings from Japan to the Great Lakes and seven (7) sailings from the Great Lakes to Japan. Of the latter, five (5) vessels called at Duluth for loading pursuant to the joint tariff filed under Agreement No. 8595 and two (2) did not.

10. During 1962 Iino had ten (10) sailings from Japan to the Great Lakes pursuant to the joint tariff filed under Agreement No. 8670 and ten (10) sailings from the Great Lakes to Japan pursuant to the joint tariff filed under Agreement No. 8595. None of its vessels, however, called at Duluth during that season.

During 1963 Iino had ten (10) sailings from Japan to the Great Lakes and ten (10) sailings from the Great Lakes to Japan. Of the latter, three (3) vessels called at Duluth for loading pursuant to the joint tariff filed under Agreement No. 8595 and seven (7) did not.

11. In addition to their dried milk carryings during 1963, Iino vessels booked out of Duluth 265 L/Ts of soybean oil (which was shipped to Hong Kong), while Mitsui vessels booked 87 bales of woolen shirt cuttings and 435 bags of edible milk powder. Iino and Mitsui accepted all cargo tendered them in the case of each such calling.

DISCUSSION AND CONCLUSIONS

The question, essentially, is whether the Commission can or should apply sanctions against respondent carriers who are associated together under a section 15 agreement and whose vessels transport cargo outbound from a port but who refuse to serve the port inbound.

The Commission and its predecessor agencies have held, most recently in *Harbor Commission, City of San Diego* v. *Matson Navigation Company*, 7 F.M.C. 394 (1962), that the Commission does not possess the power to require that common carrier service to a port be inaugurated by a particular carrier, nor to prevent indefinitely a common carrier by water from abandoning service. In that case the Commission did not attempt to define the extent of its authority under section 16 First of the Shipping Act, 1916, to require common carrier service to a port in order to prevent undue or unreasonable prejudice to that port or preference to another port. It found that the estimated volume of cargo in the trade between San Diego and Hawaii was quite small as compared to the volume of cargo offered at the competing port of Los Angeles. The Commission therefore found no reason to interfere with Matson's managerial decision not to serve San Diego based upon Matson's judgment of the economics of serving the port.

The State of Minnesota and the Seaway Port Authority of Duluth, interveners, and Hearing Counsel concede that Iino and Mitsui have not violated the Shipping Act by their decision not to serve Duluth inbound from Japanese ports. They cite the *Matson* case as the fundamental basis for their conclusions. The Examiner has concluded, first, that the decision of respondents not to serve Duluth inbound should not be condemned under section 16 First. In view of the relatively small amount of inbound cargo offered and the fact that these carriers were not even aware that their vessels would call at Duluth until long after their inbound itineraries were fixed and the vessels had sailed, it can not be concluded that this decision resulted in undue or unreasonable prejudice to the port within the meaning of that section. The fact is that the decision, like the carrier's decision not to serve San Diego in the *Matson* case, reflected the business judgment of the respondents that the service in question would be operationally impractical. There is no suggestion of a design to prefer Milwaukee or prejudice Duluth.

The rule of the *Matson* case does not necessarily govern the issues raised by section 15, of course, because only one carrier was involved there. The decision in the instant case not to include inbound calls to Duluth in their joint tariff was made after discussions between the two respondents under the protection of F.M.C. Agreement No. 8670. Thus an additional element is presented here because the existence of such an approved agreement, which permits cooperative tariff arrangements between the two members, would eliminate to some degree normal competitive consideration that might otherwise lead one or both of the carriers to render the desired service to Duluth, particularly if the cargo offerings were to increase substantially in the future. While interveners discuss this aspect of the case and conclude that the Commission could and would withdraw its approval of the Agreement if it were found to contribute to such a result, they concede that in the existing circumstances the respondents have not violated the standards of section 15.

As far as this record shows, each of the carriers would have taken the same action, independently, as they took jointly if no Agreement had been in existence. Therefore it can not be concluded that the Commission-approved Agreement was in whole or in part the basis for the carriers' action or that the carriers' effectuated an agreement not to serve Duluth on inbound traffic in violation of section 15. The record would not support a conclusion that Agreement No. 8670 should be canceled because it is being effectuated in a manner that violates the standards of that section.

On the remaining issue—whether Agreement 8670 is the complete agreement of the parties on the subject matter involved here—Hear-

ing Counsel assert that there is no evidence that it is not the complete agreement and intervener concurs in this view. The record contains no evidence to the contrary. It is found and concluded that Agreement 8670 is the complete agreement between respondents.

For the foregoing reasons the four issues are decided in favor of respondents. An order will be entered discontinuing the proceeding.

(Signed) E. ROBERT SEAVER,
Presiding Examiner.

JUNE 30, 1964.

APPENDIX

Pertinent portions of the Shipping Act, 1916:

Section 16. * * *

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

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

Section 15.

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. The term "agreement" in this section includes understandings, conferences, and other arrangements.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 365

THE AUSTRIAN TRADE DELEGATE

v.

UNIVERSAL TERMINAL & STEVEDORING CORP.

Decided August 13, 1964

REPORT

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

This is an application by Universal Terminal & Stevedoring Corp. (Universal) to collect the sum of $3,000.00 as full payment for accrued pier demurrage charges amounting to $8,807.13 from the Austrian Trade Delegate (Austrade).

In September, 1963, the Austrian Government through Austrade, shipped certain material to New York to be used in the construction of the Austrian Pavilion at the New York World's Fair. When the cargo arrived, the work at the Austrian Pavilion had not progressed to the point where the cargo could be utilized in the construction. Furthermore, there was no space available on the fair grounds where the material could be stored. As a result, the cargo remained on the pier and accumulated pier demurrage charges, as set out in the carrier's tariff, Meyer Line Westbound Tariff No. 2, F.M.C.: No. 1, original page 16. The demurrage charges aggregated $8,807.13.

Application of "first period" rates to this cargo for the period of time it remained on the pier after the expiration of the "free time" period would result in demurrage charges of $3,042.04. Universal requests under the circumstances to pay $3,000.00, an approximate equivalent to a "first period" rate.

In an Initial Decision issued May 18, 1964, the Examiner granted this application relying heavily on a new and different interpretation of both the Commission's demurrage rule, United States Maritime Commission order issued October 19, 1948 and *American President Lines, Ltd.* v. *Federal Maritime Board*, SRR 20,269, 317 F.2d 887, (CADC 1962). The Commission is of the opinion that the rule

should not be expanded so as to encompass the situation present in this case. Nor does *American President Lines*, *supra*, compel any such expansion.

However, the cargo upon which the charges have been levied was destined for the New York World's Fair, an essentially noncommercial endeavor from the standpoint of foreign governments. The cargo in question is owned by the Government of Austria. Moreover, it does not appear that other consignees were prejudiced in the matter of storage space because of the delay of Austrade in picking up its cargo. We hereby grant applicant's request to accept from the Austrian Trade Delegate the sum of $3,000.00 as full payment of accrued pier demurrage in the amount of $8,807.13.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1157

UNITED STATES OF AMERICA, BY GENERAL SERVICES ADMINISTRATION

v.

AMERICAN EXPORT LINES, INC., AMERICAN EXPORT AND ISBRANDTSEN LINES, CENTRAL GULF LINES, INC., STATES MARINE LINES, INC., CONCORDIA LINE, CRESCENT LINE, LTD., FERN-VILLE LINES, FRENCH LINE, FRESCO LINE, HANSA LINES, HELLENIC LINES, HOEGH LINES, ISTHMIAN LINES, INC., ITALIA-SOCIETA PER AZIONI DI NAVIGAZIONE OF GENOA, LEVANT LINES, MALAYA INDONESIA LINE, NATIONAL HELLENCI AMERICAN LINE, S.A., ORIENT MID-EAST LINES, STEVENSON LINES, TORM LINES, ZIM ISRAEL NAVIGATION CO., LTD.

Sale and shipment by General Services Administration to Turkish and Moroccan importers pursuant to program for disposal of stockpiled crude natural rubber declared excess to the Nation's needs is commerce of the United States although the proceeds of sale were used in furtherance of the activities of the Agency for International Development.

Complainant not having shown that respondents' rate on crude natural rubber in bales from New York to Turkey and Morocco is so unreasonably high as to be detrimental to the commerce of the United States, unjustly discriminatory or unduly prejudicial is not entitled to reparation and a cease and desist order is not required. Complaint dismissed.

J. E. Moody, General Counsel, *Morris Levinson*, Assistant General Counsel, *William R. Pierce*, Chief Counsel, and *Paul J. Fitzpatrick*, Attorney, for complainant.

Burton H. White and *Elliott B. Nixon*, for respondents.

INITIAL DECISION OF HERBERT K. GREER, PRESIDING EXAMINER[1]

The United States, by General Services Administration (complainant) seeks reparation from respondents American Export Lines, Inc., Central Gulf Steamship Company, Prudential Lines, Inc., and States-Marine Isthmian Agency, Inc., all members of the North Atlantic Mediterranean Freight Conference (Conference), in connection with shipments of natural rubber from New York to Turkey and Morocco.

[1] This decision became the decision of the Commission on Aug. 31, 1964. See rules

Complainant alleges that the rates charged and collected were unduly or unreasonably preferential, prejudicial or disadvantageous in violation of Section 16, Shipping Act, 1916 (the Act), unjustly discriminatory or preferential in violation of section 17 of the Act, unjust and unreasonable in violation of section 18(a) of the Act, and detrimental to the commerce of the United States in violation of section 18(b) (5) of the Act. Reparation in the amount of $87,583.11 is claimed on shipments carried prior to August 3, 1963, together with such amount as may be determined to be due on shipments made subsequent to that date. Complainant further seeks an order requiring all respondents, members of the conference, to cease and desist from their alleged violations of the Act and that they be required to establish, put in force, and apply in the future, such rates as the Commission may determine to be lawful.

THE FACTS

1. The United States, pursuant to the Strategic and Critical Materials Stock Piling Act, accumulated stores of natural rubber. That Act authorized the disposal of material which deteriorates or becomes obsolescent, and prior to the shipments here involved Congress enlarged the disposal authority to include natural rubber which is in excess to the Government's needs although not deteriorated or obsolescent.

2. A program was established which involved several agencies of the United States, the general purpose of which was to dispose of excess natural rubber in such a manner as to minimize dollar expenditures and gold outflow incidental to the activities of the Agency for International Development (AID). Under the procedure established:

> "The actual rubber purchases will be made by private importers under licenses issued by the host country. In this case, however, instead of paying the supplier for the rubber, the importer pays his government therefor in local currency. The currency is set up as counter-part funds by the host country, for use in carrying out local assistance programs, as approved by the Mission. AID will reimburse GSA for the rubber upon completion of the shipment * * *"

3. The sale price for natural rubber was established by agreement between AID and General Services Administration (GSA) at the world market price (Singapore Price) laid down at the foreign port of import.

4. The rate for shipment of natural rubber from New York to Mediterranean ports was the subject of negotiations between complainant and the conference prior to the first shipment to Istanbul and Morocco. At the beginning of the negotiations, the conference rate on crude rubber in bales was $69.50 W/M, the same rate applicable on general cargo, and the rate on synthetic was $24.00 per long ton (LT). Com-

plainant invited the conference's attention to a letter addressed to all contract shippers proposing a rate on natural rubber of $28.50 per 50 cubic feet, and requested that such rate be established. The conference agreed to submit the proposal to its members and at a meeting held September 13, 1962 in which conference members familiar with shipment of natural rubber participated, the rate was reduced from $69.50 W/M to $36.00 W/M (long ton or 40 cubic feet), effective only from September 18 through December 31, 1962.

5. Although complainant shipped natural rubber in bales to Turkey and Morocco at the $36.00 rate, increased October 14, 1963 to $39.19 W/M (long ton or 40 cubic feet), it continued negotiating with the Conference, contending that the shipping characteristics of natural and synthetic rubber were identical and that the rate of $24.00 per 2,240 pounds applicable to synthetic rubber in bales should be made applicable to natural rubber in bales.

6. In establishing the $24.00 rate on synthetic rubber, the conference considered the argument of rubber companies in the New York area that competition with Canadian producers was keen and that something should be done about the then established rate if the American shipper was to compete in foreign markets. The gulf rate had been established at $24.00 per weight ton. The conference adopted that rate to keep producers in the U.S. North Atlantic area competitive with other United States and Canadian producers.

7. In establishing the $36.00 W/M rate on natural rubber, the conference investigated the rates in other trades and found that the rate from Malaya to the U.S. Pacific coast and from the U.S. Pacific coast to Korea was $45.50 per ton; that the North Atlantic/Baltic Conference had an $80.00 per ton rate on natural rubber and a $28.00 per ton rate on synthetic; that the North Atlantic/United Kingdom Conference had a rate of $65.25 for natural rubber and a $25.25 rate on synthetic (ton), that the Canadian/Mediterranean Conference had a rate on natural rubber of $69.50 per ton as compared to a rate on synthetic which varied as to ports from $29.00 to $33.75; and that other conferences or shippers had not specified a rate on natural rubber but applied the general cargo rate.

8. Certain carriers from U.S. Pacific coast ports to ports in the southern Asia area do not distinguish between natural and synthetic rubber, applying the same rate to both, the rates varying from $43.50 to $62.50 per short ton (2,000 pounds); certain carriers from U.S. Atlantic and gulf ports to ports in the southern Asia area apply the same rate to natural and synthetic rubber, the rates varying from $62.75 to $64.75 per short ton; certain carriers from U.S. ports to Mexico, nearby islands, and South American ports apply the same rate to natural and synthetic rubber, the rates varying from $29.12 per long ton ($1.30 per

100 pounds) to Puerto Rico, to $45.00 per long ton to South American ports.

9. At the time the Conference established the $36.00 W/M (long ton or 40 cubic feet) rate on natural rubber, New York to Istanbul, the rate from Singapore to Istanbul was $28.50 per 50 cubic feet. Stevedoring costs in the New York/Istanbul trade exceed such costs in the Singapore/Istanbul trade by approximately $14.50 per ton.

10. Natural and synthetic rubber are similar in composition, use, and density.

11. In ocean shipping, the transportation characteristics of natural rubber differ from those of synthetic rubber. Synthetic rubber is received in bags of good quality and of a size which may be handled by one man while natural rubber is received in large bales of irregular shape; synthetic rubber may be palletized efficiently while natural rubber must be handled by means of a large rope net and a "cherry picker"; natural rubber requires more handling than synthetic which when palletized (40 bags per pallet) is moved by means of fork lift tractor to storage and the pallet stacked one on top of the other; natural rubber is stored in piles and on space which must be carefully cleaned as the bales are not wrapped, and the bales protected from dampness (or rain) by a tarp or dunnage paper; synthetic rubber is loaded on board vessels while still palletized and stowed in "brick wall" fashion while natural rubber requires additional handling, may not be as efficiently stowed, and requires more dunnage and the use of talc; synthetic rubber may be used for filler cargo; the stowage ratio is 60 cubic feet for synthetic as compared to 100 cubic feet for natural; because synthetic rubber is packaged, the claims average less than 1 percent of the freight cost while claims against natural rubber shipments have averaged 10 percent of the freight costs.

12. Complainant is the only exporter of natural rubber from the United States; several firms export synthetic rubber.

13. In authorizing the disposal of excess natural rubber, Congress considered that the program would be carried out with due regard to the protection of the United States against avoidable loss, and, the protection of producers, processors, and consumers against avoidable disruption of their usual markets, and consistent with the U.S. foreign policy. The economics of the disposal plan was viewed from the standpoint that the average cost per pound of natural rubber was somewhat lower than the current market price and the estimated sales price, that the cost of keeping the rubber (warehousing etc.) was $3.20 per ton per year, and that the United States would recover between $25 and $30 million by reason of the increased value of the natural rubber in the stockpile and also save $4 million a year in costs which

would otherwise be incurred by reason of the need for warehousing and rotation.

14. GSA, incidental to its assigned duties in the program, made 46 shipments of natural rubber during the period October 29, 1962, to January 6, 1964, via American-flag vessels, members of the Conference, summarized as follows:

	Bales	*Pounds*	*Cubic feet*	*Charges*
American Export Lines:				
(A)	10,840	2,639,507	61,851	$55,664.90
(B)	2,986	727,189	17,746	17,396.72
Subtotal	13,826	3,366,696	79,597	73,062.62
Central Gulf Steamship Corp.:				
(A)	5,267	1,298,567	35,316	31,784.40
(B)	0	0	0	0
Subtotal	5,267	1,298,567	35,316	31,784.40
Prudential Lines, Inc.:				
(A)	27,161	6,737,629	150,949	135,854.10
(B)	6,063	1,494,938	37,579	35,755.98
Subtotal	33,224	8,232,567	188,528	171,610.08
States Marine-Isthmian Agency, Inc.:				
(A)	1,057	264,031	4,952	4,456.80
(B)	0	0	0	0
Subtotal	1,057	264,031	4,952	4,456.80
Totals:				
(A)	44,325	10,939,734	253,068	227,761.20
(B)	9,049	2,222,127	55,325	53,152.70
Grand totals	53,374	13,161,861 (5876 long tons)	308,393 (7710 measurement tons)	280,913.90

Averages:

Weight per bale ... pounds	246.6
Cubic feet per bale	5.77
Bales per long ton	9.08
Bales per M/T	6.93
Cubic feet per L/T	52.39

(A) = At $36 rate W/M prior to Oct. 14, 1963.
(B) = At $39.19 rate W/M subsequent to Oct. 14, 1963.

POSITIONS OF THE PARTIES

Complainant points out that the essence of the excess rubber disposal program is the furtherance and protection of the overall national interest and that the beneficiaries are the citizens in general, including respondent American-flag carriers. It reasons that as the United States is forced to pay an excessively high rate for ocean shipments, the interests of the Nation have suffered in that other activities in the national interest are deprived of the funds expended for the excess over a just and reasonable rate.

In discussing the background of the rate on natural rubber, complainant refers to a conference letter of April 17, 1961, addressed to contract shippers, wherein the shippers are informed that the Conference members are prepared to adopt a rate of $28 per 50 cubic feet through May 31, 1961, on a particular shipment of 2,000 tons of crude rubber in bales from U.S. North Atlantic ports to Istanbul, Turkey,

the offer being conditioned on acceptance before May 1, 1961. Complainant notes that when, on August 30, 1962, it requested that the current rate on crude rubber from Singapore to Istanbul ($28.50 per 50 cubic feet) be activated on its shipments from New York to Istanbul, the Conference changed its attitude. This change is related to the fact that its request was made on behalf of the Government rather than a private shipper. The inescapable inference is that complainant contends the Conference established the $36 W/M rate with a view of overcharging the Government by not according it the same treatment it would have given private shippers.[2]

Aside from any inference of improper motive, complainant seeks to prove the unreasonable, unjust, disadvantageous, and discriminatory nature of the rate by comparison with rates and practices in other trades and with the rate for synthetic rubber in the New York/Istanbul trade. It computes the New York/Istanbul rate of $36 W/M (40 cubic feet or long ton) as the equivalent of $45 per 50 cubic feet and, as the rubber shipped averaged 52.39 cubic feet per long ton, the actual charge to complainant was equivalent to $47.09 per long ton. This figure is compared to the $24 per long ton rate on synthetic rubber in the same trade, a two-to-one disparity on commodities alleged to be so much alike in composition, purpose and use, value, density, as to be virtually identical. Complainant concedes there may be differences in packaging and handling the two commodities but that such factor alone cannot, in good and sound reason, justify the 2-to-1 ratio.

Further comparison is made between the $45 per cubic feet rate (computed as above) on natural rubber in the New York/Istanbul trade and the $28.50 per 50 cubic feet rate on the same commodity in the Singapore/Istanbul trade. Complainant contends that the meeting of a rate from another source of supply is a practice so well established that refusal by respondents to follow that practice requires justification which does not appear in this proceeding; further, that the two trades constitute like traffic and the comparison discloses a gross disparity which forces a serious disadvantage upon the Government in meeting world market competition.

To support its claim for reparation, complainant calls attention to the testimony that it incurred an overall loss of about 4½ cents per pound in selling to AID-recipient countries as compared to the price which it would have received from domestic sales.

Respondents consider the shipments of natural rubber under the disposal plan, which involves AID, as noncommercial and thus not commerce of the United States as that term is used in section 18(b)(5)

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[2] See discussion of this practice, p. 280, H. Rept. 1419, 87th Cong. 2d sess.

of the Act. They contend that the difference in the rates on natural and synthetic rubber is justified because of different transportation characteristics and that the difference in domestic-to-foreign rates and foreign-to-foreign rates is due to the lesser costs involved in the latter. Respondents conclude that complainant has not been subjected to undue or unreasonable prejudice or disadvantage or unjust discrimination, and that no recoverable loss has been suffered. In the absence of a violation of the Act, no basis is seen for reparation under section 22, nor is there a basis for a cease and desist order.

Respondents attack complainant's comparison of rates on several grounds. They point out the record is devoid of testimony that the difference between the conference rates on natural and synthetic rubber gave synthetic rubber shippers an advantage in the trade with Turkey by enabling them to undersell the Government; further, had the natural rubber been offered by a private shipper on a purely commercial basis, it would not have moved because the price on natural rubber exceeds the price of synthetic by more than $45 per long ton. Moreover, the rate on synthetic was established to meet competitive conditions encountered by U.S. exporters and has no comparative value in relation to the natural rubber rate which was not sold on a purely commercial basis.

Respondents' contentions include that as the Commission had not declared the natural rubber rate unreasonably high prior to the shipments, there has been no violation of section 18(b)(5); that such section does not authorize the Commission to establish rates; and other points not necessary for discussion in this decision.

Discussion of the Issues

Commerce of the United States

Respondents relate complainant's shipments to aid and defense programs and argue that as the shipments are unrelated to any commercial program, they are not included in the term "commerce of the United States" as used in section 18(b)(5) of the Act. Two recent decisions are cited in support of this position: *Department of State, Agency for International Development, etc.* v. *Lykes Bros. Steamship Co., Inc.*, special docket 374, initial decision adopted by the Commission on June 16, 1964, and, *Pacific Seafarers, Inc.* v. *Atlantic & Gulf American-Flag Berth Operators, et al.*, docket 1104, initial decision served May 7, 1964. These cases are not conclusive of the problem here presented. Neither involved the shipment of cargo sold by the United States to a foreign customer. It was held in special docket 374 that the shipment of one used automobile apparently connected in some way with a Government agency, was not a commercial ship-

ment. Docket 1104 was concerned with a trade which consisted exclusively of foreign interport shipments of local origin and found such shipments not to be commerce of the United States, not because they were financed by AID, but in spite of that fact.

Complainant contends that in the absence of a statutory definition. the common meaning of "commerce" must be applied to section 18(b)(5) and that as the shipments here involved related to sales which were a part of a national program in dealing with another nation, they were commercial.

The term "commerce of the United States" has been broadly defined by the Supreme Court and although the cases hereinafter cited do not bear on the precise question here presented, the judicial definitions furnish persuasive guidance.

"Buying and selling and exchanging commodities is the essence of all commerce." *U.S.* v. *Holliday*, 70 U.S. 407 (1865).

"Commerce with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign governments. It means trade, and it means intercourse. It means commercial intercourse between nations, and parts of nations, in all its branches. It involves navigation as the principal means by which foreign intercourse is effected." *Harrison et al.* v. *Mayor of N.Y. et al.*, 92 U.S. 259 (1875).

"The words of the Constitution comprehend every species of commercial intercourse between the United States and foreign nations." *Board of Trustees* v. *U.S.*, 289 U.S. 48 (1932).

It is found that the United States sold crude natural rubber to foreign purchasers for a consideration and shipped the commodity sold from United States ports to foreign ports. It is concluded that regardless of whether the United States accepted payment in cash or diverted the proceeds of the sale to an aid program, the transactions were commercial in nature and within the category of foreign commerce of the United States.

Section 18(b)(5) and the rate on natural rubber

A finding that the shipments involve commerce of the United States leads to the question of whether respondents have violated section 18(b)(5) of the Act which provides:

(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

Complainant rests its entire case on *Maple Island Farm, Inc.* v. *Chicago B.&O. Ry. Co.*, 280 I.C.C. 353, 356, which holds that the best test of reasonableness is a comparison with other rates in like traffic. Respondents' rate on crude natural rubber in bales is compared with rates and practices in other trades, and on a similar commodity, to support the allegation that it is unreasonable.

Like traffic, complainant argues, is the Singapore/Istanbul trade in natural rubber wherein the rate is $28.50 per 50 cubic feet as compared with a rate equivalent to $45 per 50 cubic feet over the shorter route from New York to Istanbul. Respondents consider the comparison of foreign-to-foreign rates with domestic-to-foreign rates as misleading in the absence of a showing that the traffic conditions in the compared trades, such as the methods, conditions, and costs of operation, and other conditions surrounding the traffic are similar. This principle has been established in *Rates of Inter-Island Steam Navigation Co., Ltd.*, 2 U.S.M.C. 253, 256 (1940). Although the burden is on complainant to show that the trades compared are similar, and in the absence of proof of similarity there is no burden on respondents to justify the rate disparity, respondents nevertheless went forward with evidence that stevedoring costs in the New York/Istanbul trade are approximately $14.50 per ton more than in the Singapore/Istanbul trade and that overhead costs are greater in New York than in Singapore. The additional costs account for a substantial portion of the rate differential and the comparison loses its effectiveness.

Complainant, further pursuing its concept of comparisons, presented evidence that in many trades, the carriers do not distinguish between natural and synthetic rubber, charging the same rate for both commodities. However, the record also discloses that certain carriers do make the distinction and charge a higher rate for carriage of natural rubber. The only conclusion to be drawn is that practices vary and, as above discussed, in the absence of a showing that traffic conditions and carrier costs of operation in the trades compared are similar, the comparisons are of little value in supporting complainant's contention that respondents' natural rubber rate is unreasonable because different from the rate on synthetic. (See also *Puerto Rican Rates*, 2 U.S.M.C. 117, 119.) It is noted that in the trades where no distinction is made, the rate applied to both commodities is either higher or compares favorably with respondents' rate on natural rubber, however, this fact is of little assistance in evaluating respondents' rate as comparative trade conditions and costs are not available.

Complainant also offers a comparison between the rates imposed by respondents on natural and synthetic rubber in the New York/Istanbul trade. While admitting differences in handling and packaging the two commodities, complainant finds no justification for the 2-to-1 disparity in the rates. Its witnesses support this contention, basing their opinion on the similarity of the commodities in composition, purpose and use, value, density, and other comparative factors. Although these witnesses are without doubt, experts in their field, their opinions lose persuasiveness because of their admitted unfamiliarity with ocean

carrier costs and methods of operation and in arriving at an opinion, they did not consider the differences in handling and stowing the two commodities as presented by respondents' witnesses. Respondents did not rebut the testimony as to the similarity in composition and use of the two commodities and complainant did not, persuasively at least, rebut the testimony relating to the difference in ocean transportation characteristics. These differences appear in the findings of fact heretofore made and need not be repeated. They may not be lightly brushed aside although they would have lost their impact had complainant developed from respondents' witnesses, or otherwise, cost figures to show that the carriers' additional costs in handling natural rubber did not justify a more than $20 per 50 feet rate differential. The record does, however, disclose factors which indicate that the cost of handling and carrying natural rubber substantially exceeds those costs as applicable to synthetic. The natural claims factor is 10 percent of the freight as against 1 percent of the freight for synthetic. The stowage ratio for natural rubber is 100 as compared to 60 for synthetic.

To summarize, complainant having alleged that the rate on natural rubber is unreasonably high in violation of section 18(b)(5) of the Act, has the burden to prove unreasonableness. *Bonnell Elec. Mfg. Co.* v. *Pacific Steamship Co.*, 1 U.S.S.B. 143, 144 (1928); *Atlas Waste Mfg. Co.* v. *N.Y.P.R.S.S. Co. et al.*, 1 U.S.S.B. 195, 197 (1930). The evidence adduced to meet this burden is the similar composition and use characteristics of natural and synthetic rubber; that other carriers apply the same rates to both commodities; that a foreign-to-foreign rate on natural rubber is substantially lower than respondents' rate, as is its rate on synthetic rubber in the same trade. A 2-to-1 disparity in rates for similar commodities in comparable trades, if properly shown, would raise a rational inference of unreasonableness. Although there is a question as to the probative value of complainant's comparisons due to the manner in which they were presented, respondents went forward to produce evidence sufficient to persuade that the reasonableness of their rate was as probable as its unreasonableness. It was shown that costs in domestic-to-foreign commerce exceed like costs in foreign-to-foreign commerce and that there is a substantial difference in the shipping characteristics of natural and synthetic rubber in the New York/Istanbul trade. While of limited probative value, evidence adduced by both parties tends to show that respondents' rate on natural rubber compares favorably with the rates in other trades. Respondents have cast doubt on any inference which may have been raised by complainant's evidence and complainant did not produce evidence sufficient to erase that doubt. Any inference which might remain is, at

best, founded on conjecture or speculation and is not sufficient to support complainant's allegations. The burden of proof remains with complainant throughout and it has not produced evidence sufficient to persuade that respondents' rate is unreasonable. *Dipson Theatres* v. *Buffalo Theatres*, 86 F. Supp. 716 (1949) cert. denied, 342 U.S. 926; *Adair* v. *Reorganization Inv. Co.*, 125 F. 2d 901, 905 (1942); *Commercial Molasses Corporation* v. *New York Barge Corporation*, 314 U.S. 104, 111 (1941); *United States* v. *Illinois Central R.R.*, 263 U.S. 515, 524 (1924); *Wigmore on Evidence*, 2d Ed. 8 2485.

Section 18(b)(5) directs the Commission to disapprove a rate found to be so unreasonably high as to be detrimental to the commerce of the United States. As the rate has not been shown to be unreasonably high, there is no basis for disapproval and the question of detriment to U.S. commerce becomes moot. No violation of this section having been established, there is no basis for a cease and desist order or for reparation unless it may be found in a violation of another section of the Act.

Sections 16, 17, and 18(a) [3] *of the Act and the rate on natural rubber.*

Complainant alleged violations of these sections but may have abandoned its contentions in regard thereto as they are not discussed in its brief. However, as the allegations have not been withdrawn and are discussed at length in respondents' brief, they will not be overlooked. In view of the fact that complainant rests its case solely on comparisons which have been considered above, further discussion borders on the academic although there may be a recognizable distinction between detriment to the commerce of the United States as a general matter under section 18(b)(5) and detriment, prejudice, and disadvantage as between individual interests under sections 16 and 17.[4]

Section 16 First, of the Act declares it unlawful:

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

Section 17 provides:

That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States compared with their foreign competitors.

[3] Section 18(a) is concerned only with interstate commerce and does not apply to this proceeding.

[4] See *N.Y.* v. *U.S.*, 331 U.S. 284, 345 (1946) and *U.S.* v. *Illinois Central R.R. Co.*, supra, to the effect that two rates may be within the zone of reasonableness and yet result in discrimination.

If commodity rates are compared, to establish a violation of these sections, there must be a showing of the character and intensity of the competition; that the difference in rates has operated to shipper's disadvantage in marketing the commodity; the deferring of one person to another or the prefering of one person to another; and unequal treatment between competing shippers or ports. *Johnson Picket Rope Co.* v. *Dollar S.S. Lines et al.*, 1 U.S.S.B.B. 585, 587 (1936); *Huber Mfg. Co.* v. *Stoomvaart Maatschappij "Nederland"*, 4 F.M.B. 343, 347 (1953).

Complainant has failed to establish that it has been hindered in marketing natural rubber by reason of the rate. On the contrary, complainant's witnesses testified that no difficulty was experienced in finding customers. If any particular shipper obtained an advantage over complainant by reason of respondents' rate, that fact does not appear in the record. It is established that complainant pays a higher rate than U.S. exporters of synthetic rubber but that fact alone does not warrant a conclusion that respondents granted a preference or imposed a disadvantage within the prohibitions of section 16. A necessary requirement is for proof that an effective competitive relationship exists between complaintant and U.S. exporters of synthetic rubber. *West Indies Fruit Co., et al.* v. *Flota Mercante*, 7 F.M.C. 66, 69 (1962). The commodities may be competitive, however, Congress directed that the excess natural rubber program would be carried out with due regard to the protection of producers, processors, and consumers against avoidable disruption of their usual markets. *House Report 1260, 86th Congress, 2d Session.* Complainant can not enter into an effective competition as it has been limited in selling, and has sold, on the basis that "the quantities actually released from time to time may vary considerably in order to avoid undue disruption of markets."

A rate differential is not unreasonable and there is no unjust discrimination or undue preference in the absence of proof that the differential is not justified by the costs of the services rendered, by their values, or by other transportation conditions. *United States* v. *Illinois Central R.R. Co.*, supra.

Ultimate Findings and Conclusions

Complainant has failed to establish that respondents' rate on crude natural rubber in bales between New York and Turkey or Morocco is so unreasonably high as to be detrimental to the commerce of the United States in violation of section 18(b)(5) of the Act, that respondents' have subjected complainant to undue or unreasonable disadvantage or prejudice in violation of section 16 of the Act, or de-

manded, charged, or collected a rate which is unjustly discriminatory between shippers in violation of section 17 of the Act.

In the absence of a violation of the Act, there is no basis for reparation or a cease and desist order.

An order dismissing the complaint will be entered.

(Signed) HERBERT K. GREER,
Presiding Examiner.

July 30, 1964

FEDERAL MARITIME COMMISSION

No. 1079

THE PERSIAN GULF OUTWARD FREIGHT CONFERENCE EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

Decided August 31, 1964

Respondent conference permitted to use an exclusive patronage (dual rate) contract in the form appended to this Report.

Elmer C. Maddy, for respondent.

Dickson R. Loos and *George M. Baroody*, for Arabian American Oil Company.

Jerome H. Heckman, for Dow Chemical Company and Dow Chemical International, S.A.

J. Scot Provan, Hearing Counsel.

E. Robert Seaver, Hearing Examiner.

REPORT

BY THE COMMISSION: (John Harllee, *Chairman*; Ashton C. Barrett and James V. Day, *Commissioners*)

This is a proceeding under section 14b of the Shipping Act, 1916 (75 Stat. 762; 46 U.S.C. 813a), for the approval of a dual rate contract to be used by the respondent conference. The hearing examiner issued a decision in which he approved the proposed contract form with certain modifications. The matter is before us on exceptions to that decision filed by all parties.

The entire subject of dual rate contracts was extensively treated in our recent report in *The Dual Rate Cases* (issued March 27, 1964). In that report we approved with modifications all dual rate contracts then in use under the terms of section 3 of Public Law 87–346 (75 Stat. 762). Respondents here have made no showing of circumstances peculiar to their trade which would make inapplicable our reasoning and conclusions in *The Dual Rate Cases*. We refer to that report and find it unnecessary to restate our previous findings and conclusions here. There are, however, several matters raised by the exceptions to the Examiner's decision which bear some reemphasis.

The principal exception to the Examiner's decision was advanced by both intervenors and by hearing counsel. Those parties argued that the Commission should modify the contract to permit less than full shipper commitment, because the exclusive patronage aspect of the contract was detrimental to the commerce of the United States and contrary to the public interest. Neither the intervenors nor hearing counsel, however, provided any rationale for such a finding, and the exception is overruled. Hearing counsel would have the Commission approve a fixed percentage, yet no suggestion was made as to what percentage would be appropriate. In the absence of proposed findings or a basis on which to construct such findings, we find the exception untenable. Here, as in *The Dual Rate Cases* we are approving a contract which requires the merchant to promise the conference *all* his patronage, subject, of course, to the conditions and exclusions required to be contained in all contracts.

The respondent conference excepted to the Examiner's approval of the legal right clause (clause *2*(*e*)) which raises only a *prima facie* presumption that the shipper has the legal right when his name appears on the bill of lading or when he participates in the arrangements for selection of a carrier. As we said in our previous opinion,

> Many of the proposed contracts contain language which would raise a conclusive presumption that the signatory merchant had the legal right to select the carrier if his name appeared on certain shipping documents or if he otherwise participated in the ocean routing or the selection of the ocean carrier. While we agree that these circumstances may suggest that the merchant has the legal right to select the carrier, the statute does not appear to permit such circumstances, and nothing more, to prove conclusively legal right to select the carrier. In short, the statute does not appear to permit a presumption here which would preclude the proof of the true situation. (*The Dual Rate Cases*, mimeo rept. p. 18)

The legal right clause which we have approved contains a *prima facie*, and not a conclusive, presumption.

Arabian American Oil Co., one of the intervenors, excepted to the Examiner's approval of two clauses involving reporting requirements and the furnishing of documents. These two clauses were articles 2(c) and 2(d) in the contract as approved by the examiner. We have approved substantially similar clauses, as articles 2(g) and 2(h). Article 2(g) allows the merchant the option of furnishing documents to the conference or allowing inspection of the documents on the premises of the merchant. This clause was approved by the panel of examiners in docket No. 1111 and was affirmed by us in our prior decision in *The Dual Rate Cases*. As we have previously said, the clause strikes a fair balance between carrier and merchant interests. We have likewise included as article 2(h) the "notice of shipment"

clause formulated by the panel of examiners in our docket No. 1111 and which we approved for all other dual rate contracts.

The exceptions of both Dow Chemical and Arabian American Oil Co. on the issue of exclusions from contract coverage have been dealt with in article 3. This article excludes from contract coverage "shipments on vessels owned by the merchant or chartered solely by the merchant where the term of the charter is for 6 months or longer, and the chartered vessels are used exclusively for the carriage of the merchant's commodities." Our previous reasoning is again applicable here: "By limiting this [exclusion] to charters for periods of some duration, the conferences are accorded reasonable protection from spot raiding of cargoes and merchants accorded the right to engage in bona fide proprietary carriage under reasonable conditions." (*The Dual Rate Cases*, mimeo rept., p. 35.) In conformance with our Order on Reconsideration in North Atlantic Westbound Freight Association—Exclusive Patronage (Dual Rate) Contract, docket No. 1059 (served Aug. 3, 1964), the exclusion has been worded so as to make it clear that chartered vessels are limited to the carriage of the merchant's owned cargo.

Respondents excepted to the Examiner's change in the "prompt release" period of clause 4 from 15 to 10 days. In making this change the examiner stated:

> The shipper witnesses testified that the 15-day period would not permit shippers to fill the orders of customers in the time required by the customers on some occasions. Of greater importance is the fact that this conference is composed of only a minority of carriers in this trade and therefore the occasions upon which they will be unable to accommodate the contract shippers may arise more frequently than in other trades. While this is not certain to happen, the shippers should be protected from the possibility of it. In order to meet the shipper objections to joining a dual rate system offered by such a minority conference, the release clause must necessarily be more favorable to shippers in order to be reasonable within the meaning of the statute. (Initial decision, pp. 5–6)

We find the examiner's reasoning in this regard to be sound, and we affirm his modification of the 15-day period to one of 10 days.

We have approved a clause on open rates which is identical with the clause approved in *The Dual Rate Cases* and which was originally formulated by the Examiners in docket No. 1111. The clause as approved provides flexibility to the conference, which is particularly important in the instant case, and protects the merchants by requiring notice to the merchant of a return of a commodity to the contract rate system. The clause, in effect, strikes a balance between both interests.

As regards the conference's exception to the breach of contract clause approved by the examiner, we have affirmed the examiner's clause. This clause was formulated by the panel of examiners in docket No. 1111, and it is, as they said in their initial decision, just

and equitable and "imposes no unfair burden on shipper or conference, and should be acceptable to both." (Initial decision, docket No. 1111, p. 88.)

Both respondent conference and hearing counsel excepted to the inclusion of the language "which does not lie within the jurisdiction of the Federal Maritime Commission" in the arbitration clause. We are not approving the examiner's clause and, instead, are approving for optional use by the conference the following statement to be added to the arbitration clause: "Nothing herein shall deprive the Federal Maritime Commission of its jurisdiction." In this connection and in consonance with our recent "Order Granting the Deletion of Certain Clauses" in *The Dual Rate Cases* (served July 31, 1964), we are also approving for optional use by the conference certain other language which has been bracketed in the appendix attached hereto. The affected articles are Nos. 2(g), 7(a), 7(c), 13, 14, and 16. If the option to delete the bracketed language in article 2(g) is exercised, the following substitute language will be required:

"and there shall be no disclosure of such information without the consent of the merchant except that nothing herein shall be construed to prevent the giving of such information (1) in response to any legal process issued under the authority of any court, or (2) to any officer or agent of any government in the exercise of his powers, or (3) to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime, or (4) to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers, or (5) to arbitrators appointed pursuant to this agreement."

In any event, if any or all of these options are exercised by the conference, full copies of the contract form as so amended must be filed with the Commission within 30 days following such amendments.

We have set out as an appendix hereto the full text of the contract as modified and approved.

COMMISSIONER PATTERSON, CONCURRING AND DISSENTING:

The application of the Persian Gulf Outward Freight Conference, a conference of common carriers in foreign commerce, for permission to use a "Merchant's Rate Agreement" has been adjudicated in accordance with the precedural requirements of section 14b of the Shipping Act, 1916, as amended.

Based on an examination of the proposed standard form of contract between the Conference and shippers for shipments on its members' vessels, and of the facts pertaining to the particular trade described in the record herein, it is found:

1. The Merchant's Rate Agreement will be available to all shippers and consignees on equal terms and conditions.

2. The Merchant's Rate Agreement provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to the conference.

3. The contract rate system proposed by the conference, including the form of contract, will not be detrimental to the commerce of the United States, nor contrary to the public interest, nor unjustly discriminatory or unfair as between shippers, exporters, importers or ports, or as between exporters from the United States and their foreign competitors.

4. The Merchant's Rate Agreement contains the express provisions prescribed by items (1) through (8) of section 14b.

5. The Merchant's Rate Agreement contains other provisions which are not inconsistent with the aforesaid prescribed provisions and which the Commission should require or permit.

Accordingly, I concur that we should permit the use of the Merchant's Rate Agreement to the extent indicated in my concurring and dissenting opinion in *The Dual Rate Cases*, dated March 30, 1964.

For the reasons stated in my opinion of March 30, 1964, I dissent from the majority's action in prescribing modifications in the Merchant's Rate Agreement.

It is the better policy and in line with congressional intent in enacting section 14b that we permit differences in circumstances prevailing in trading routes all over the world to be accommodated as far as possible in diverse contract provisions. There may be merit in striving to draft the best possible contract provisions and then to condition our permission on the use of our contract provisions; however, such an effort is not consistent with the statutory plan. The law does not require the Commission voluntarily to endeavor to conceive the best possible provisions nor to take up the burden of achieving an ideal solution to all contract drafting problems.

It is also beyond the duty or authority of the Commission to prescribe modifications without finding the applicant's particular provisions do not meet the requirements of section 14b. The mandate of section 14b is that the Commission shall permit the use of a contract if the contract is found to comply with the first three conditions noted above and to contain the eight express provisions and such other provisions as do not conflict with section 14b. The applicant's Merchant's Rate Agreement has been compared with the law and found to conform. An order should be issued granting the conference permission to use the proposed dual rate system and contract as proposed in the application from and after the date of the Commission's order.

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FEDERAL MARITIME COMMISSION

No. 1079

THE PERSIAN GULF OUTWARD FREIGHT CONFERENCE EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

ORDER

Full investigation in this proceeding having been had and the Commission on this day having made and entered of record a report stating its findings and conclusions thereon, which report is hereby referred to and made a part hereof, and having found that the Exclusive Patronage (Dual Rate) contract of the Persian Gulf Outward Freight Conference submitted to the Commission should be approved with modifications made by the Commission:

Now, therefore, It is ordered, That the aforesaid contract of the Persian Gulf Outward Freight Conference, as modified and set out in appendix A to the aforesaid report, is permitted for use by the said Conference.

It is further ordered, That the Persian Gulf Outward Freight Conference shall file with the Commission a copy of the full terms of the contract it offers to shippers and or consignees within 30 days from the day that the contract is first offered.

By the Commission,

FRANCIS C. HURNEY,
Special Assistant to the Secretary.

APPENDIX A

APPROVED AGREEMENT FORM—DOCKET NO. 1079

Agreement No.______

THE PERSIAN GULF OUTWARD FREIGHT CONFERENCE

Eleven Broadway, New York 4, N.Y.

Merchant's Rate Agreement

MEMORANDUM of Agreement entered into at this day of 19 , by and between (hereinafter called the Merchant) a (corporation), (partnership) having (its), (his) principal place of business at and the Carriers who are parties to Federal Maritime Commission Agreement No. 7700, as amended, providing for the Persian Gulf Outward Freight Conference (hereinafter called the "Conference" or the "Carriers").

For their mutual benefit in the stabilization of rates, services, and practices and for the development of international maritime commerce in the trade defined in Article 1 of this Agreement, the parties hereby agree as follows:

1. The Conference undertakes, throughout the period of this Agreement, to maintain common carrier service which shall, so far as concerns the frequency of sailings and the carrying capacity of the vessels of the Carriers be adequate to meet all the reasonable requirements of the Merchant for the movement of goods in the trade from U.S. Atlantic and Gulf ports to ports in the Persian Gulf and adjacent waters in the range west of Karachi and northeast of Aden (but excluding both Aden and Karachi) (hereinafter called the "trade"); and the Carriers further agree that, subject to the availability of unbooked suitable space in the vessels of the Carriers at the time when the Merchant applies therefor, said vessels shall transport the goods of the Merchant in the trade upon the terms and conditions herein set forth. Ports from and to which service is offered by the Carriers shall be set forth in the Conference tariff.

2. (a) The Merchant undertakes to ship or cause to be shipped all of its ocean shipments moving in the trade on vessels of the Carriers unless otherwise provided in this Agreement.

The term "Merchant" shall include the party signing this Agreement as shipper and any of his parent, subsidiary, or other related companies or entities who may engage in the shipment of commodities in the trade covered by this Agreement and over whom he regularly exercises direction and working control (as distinguished from the possession of the power to exercise such direction and control) in relation to shipping matters, whether the shipments are made by or in the name of the "Merchant", any such related company or entity, or an agent or shipping representative acting on their behalf. The names of such related companies and entities, all of whom shall have the unrestricted benefits of this Agreement and be fully bound thereby, are listed at the end of this Agreement. The party signing this Agreement as "Merchant" warrants and represents that the list is true and complete, that he will promptly notify the Carriers in writing of any future changes in the list, and that he has authority to enter into this Agreement on behalf of the said related companies and entities so listed.

In agreeing to confine the carriage of its shipments to the vessels of the Carriers the Merchant promises and declares that it is his intent to do so without

evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or persons, firms or entities affiliated with or related to the Merchant.

The Carriers agree that they will not provide contract rates to anyone not bound by a Merchant's Rate Agreement with the Carriers. The Merchant agrees that he will not obtain contract rates for any person not entitled to them, including related companies not bound by this Agreement, by making shipments under this Agreement on behalf of any such person.

(b) If the Merchant has the legal right at the time of shipment to select a carrier for the shipment of any goods subject to this Agreement, whether by the expressed or implied terms of an agreement for the purchase, sale or transfer of such goods, shipment for his own account, operation of law, or otherwise, the Merchant shall select one or more of the Carriers.

(c) If Merchant's vendor or vendee has the legal right to select the carrier and fails to exercise that right or otherwise permits Merchant to select the carrier, Merchant shall be deemed to have the legal right to select the carrier.

(d) It shall be deemed a breach of this Agreement, if before the time of shipment, the Merchant, with the intent of avoiding his obligation hereunder, divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier not a party hereto.

(e) For the purposes of this Article, the Merchant shall be deemed prima facie to have the legal right at the time of shipment to select the carrier for any shipment:

(1) with respect to which the Merchant arranged or participated in the arrangements for ocean shipment, or selected or participated in the selection of the ocean carrier, or

(2) with respect to which the Merchant's name appears on the bill of lading or export declaration as shipper or consignee.

(f) Nothing contained in this Agreement shall require the Merchant to refuse to purchase, sell or transfer any goods on terms which vest the legal right to select the carrier in any other person.

(g) In order that the conference may investigate the facts as to any shipment of the Merchant that has moved, or that the Merchant or the conference believes has moved, via a nonconference carrier, and upon written request clearly so specifying, the Merchant, at his option, (1) will furnish to the conference chairman, secretary, or other duly authorized conference representative or attorney, such information or copies of such documents which relate thereto and are in his possession or reasonably available to him, or (2) allow the foregoing persons to examine such documents on the premises of the Merchant where they are regularly kept. Pricing data and similar information may be deleted from the documents at the option of the merchant [and there shall be no disclosure of any information in violation of section 20 of the Shipping Act, 1916].[1]

(h) Within ten (10) days after the event in any transaction in which the Merchant is a party and the legal right to select the carrier is vested in a person other than the Merchant, and if he has knowledge that the shipment has been made via a nonconference carrier, the Merchant shall notify the conference in writing of this fact, giving the names of the merchant and his customer, the commodity involved and the quantity thereof, and the name of the nonconference carrier; *Provided, however,* That where the activities of Merchants are

[1] Optional, but see the foregoing Commission report for required substitute language.

so extensive in area or the nature or volume of his sales makes it impracticable to give notice within ten (10) days, the Merchant shall give notice as promptly as possible after the event.

3. This Agreement excludes: (1) cargo of the Merchant which is loaded and carried in bulk without mark or count except liquid bulk cargoes (other than chemicals and petroleum products) in less than full ship load lots; (2) shipments on vessels owned by the Merchant or chartered solely by the Merchant where the term of the charter is for six months or longer, and the chartered vessels are used exclusively for the carriage of the merchant's commodities; and (3) shipments of cargoes for which no contract rate is provided.

4. The Merchant shall have the option of selecting any of the vessels operated by any of the Carriers. The Merchant agrees to request space with the carrier he desires as early as practicable and not less than five (5) days before the earliest date he wishes to have the cargo loaded aboard the vessel. The Merchant shall not be obligated to select a Conference carrier or carriers for any shipment which the Carriers cannot suitably accommodate within a ten (10) calendar day period requested by the Merchant for loading: *Provided, however,* that the Merchant shall first promptly notify the Conference of such unavailability of space and if within two (2) business days after receipt of such notice, the Conference shall not have advised the Merchant that his entire shipment can be suitably accommodated by a vessel or vessels (if the merchant by contract is obligated to make the shipment on a single vessel, suitable space shall be provided on a single vessel) of the Carriers within said ten (10) calendar day period, the Merchant shall be free with respect to such shipment to secure space elsewhere within a reasonable time.

5. This Agreement does not require the Merchant to divert shipments of goods from natural transportation routes not served by conference vessels where direct carriage is available. *Provided, however,* that where the Carriers provide service between any two ports within the scope of this contract which constitute a natural transportation route between the origin and destination of such shipment, the Merchant shall be obligated to select the carriers' service. A natural transportation route is a traffic path reasonably warranted by economic criteria such as costs, time, available facilities, the nature of the shipment and any other economic criteria appropriate in the circumstances. Whenever Merchant intends to assert his rights under this article, to use a carrier who is not a party hereto, and the port through which Merchant intends to ship or receive his goods is within the scope of this Agreement, Merchant shall first so notify the conference in accordance with the provisions of Article 4 hereof.

6. The rates applicable to shipments made under this Agreement shall be the contract rates in effect at the time of shipment as set forth in the tariff published by the Carriers and on file with the Federal Maritime Commission. Contract rates on every commodity or class of commodities shall be lower than the non-contract rates set forth in the Carriers' tariff by a fixed percentage of fifteen (15) per centum of the non-contract rates. In order that both the contract and non-contract rates may be stated in multiples of tweny-five (25) cents per revenue ton (or other customary shipping unit such as M.B.F. or per individual unit) or five (5) cents per hundred pounds or per cubic foot, the rates may be rounded out to the nearest twenty-five (25) cents per revenue ton or unit or five (5) cents per hundred pounds or cubic foot, as the case may be (not including additional handling or accessorial charges), which will not result in the difference between the rates exceeding fifteen (15) per cent of the non-contract rates.

7. (a) [The Carriers shall make no change in rates, charges, classifications, rules or regulations, which results in an increase or decrease in cost to the Merchant, except as provided by Section 18(b)(2) of the Shipping Act, 1916, and the Rules of the Federal Maritime Commission: *Provided, however,*][2] the rates of freight under this agreement are subject to increase from time to time and the Carriers, insofar as such increases are under the control of the Carriers, will give notice thereof not less than ninety (90) calendar days in advance of the increases by publishing them ninety (90) calendar days in advance in the Persian Gulf Outward Freight Conference Tariff. Should circumstances necessitate increasing the rates by notice as aforesaid and should such increased rates be not acceptable to the Merchant, the Merchant may tender notice of termination of this Agreement to become effective as of the effective date of the proposed increase by giving written notice of such intention to the Conference within thirty (30) calendar days after the date of notice, as aforesaid, of the proposed increase: *Further provided, however*, that the Carriers may, within thirty (30) calendar days subsequent to the expiration of the aforesaid thirty (30) calendar day period, notify the Merchant in writing that they elect to continue this Agreement under the existing effective rates and in the event the Carriers give such notice, this Agreement shall remain in full force and effect as if the proposed increase had never been made and the Merchant's notice of termination had never been given.

(b) The Conference shall offer to the Merchant a subscription to its tariffs at a reasonably compensatory price, however, the Merchant shall be bound by all notices accomplished as aforesaid without regard to whether it subscribes to the Conference tariff. Tariffs shall be open to the Merchant's inspection at the Conference offices and at each of the offices of the Carriers during regular business hours.

(c) The rates initially applicable under this Agreement shall be deemed to have become effective with their original effective date [through filing with the Federal Maritime Commission][2] rather than to have become effective with the signing of this Agreement and notices of proposed rate increases which are outstanding at the time this contract becomes effective shall run from the date of publication in the tariff rather than from the date of this Agreement.

(d) The Merchant and the Carriers recognize that mutual benefits are derived from freedom on the part of the Carriers to open rates, where conditions in the Trade require such action, without thereby terminating the dual-rate system as applicable to the commodity involved; therefore, it is agreed that the Conference, to meet the demands of the Merchants and of the Trade may suspend the application of the contract as to any commodity through the opening of the rate on such commodity (including opening subject to maximum or minimum rates) provided that none of the Carriers during a period of ninety (90) days after the date when the opening of such rate becomes effective shall quote a rate in excess of the Conference contract rate applicable to such commodity on the effective date of the opening of the rate and provided further that the rate shall not thereafter be closed and the commodity returned to the application of the contract system on less than ninety (90) days' notice by the Carriers through the filing of contract-non-contract rates in their tariff.

8. (a) The Merchant may terminate this Agreement at any time without penalty upon the expiration of ninety (90) days following written notice to the Conference of intent to so terminate: *Provided, however*, that the Merchant

[2] Optional.

may terminate this Agreement upon less than said ninety (90) days' notice pursuant to Article 7(a) hereof.

(b) The Conference may terminate this Agreement at any time without penalty upon the expiration of ninety (90) days following written notice to the Merchant of intent to terminate the Conference Contract Rate System.

(c) Termination as provided in this Article shall not abrogate any obligation of any party or parties to any other party or parties hereto which shall have accrued prior to termination.

9. (a) In the event of breach of this Agreement by either party, the damages recoverable shall be the actual damages determined after breach in accordance with the principles of contract law: *Provided, however*, that where the Merchant has made or permitted a shipment on a vessel of a carrier not a party hereto in violation of this Agreement, and whereas actual damages resulting from such a violation would be uncertain in amount and not readily calculable, the parties hereby agree that a fair measure of damages in such circumstances shall be an amount equal to the freight charges in effect at the time of such shipment computed at the Carriers' contract rates on the particular shipment, less the estimated cost of loading and unloading which would have been incurred had the shipment been made on a vessel of a Carrier party hereto. Such amount, and no more, shall be recoverable as liquidated damages.

(b) Upon the failure of the Merchant to pay or dispute his liability to pay liquidated damages as herein specified for breach of the contract within 30 days after receipt of notice by registered mail from the Conference that they are due and payable the Conference shall suspend the Merchant's rights and obligations under the contract until he pays such damages. If, within 30 days after receipt of such notice the Merchant notifies the Conference by registered mail that he disputes the claim, the Conference shall within 30 days thereafter proceed in accordance with Article 14, to adjudicate its claim for damages, and if it does not do so, said claim shall be forever barred. If the adjudication is in the Conference's favor, and the damages are not paid within 30 days after the adjudication becomes final, the Conference shall suspend the Merchant's rights and obligations under the contract until he pays the damages. No suspension shall abrogate any cause of action which shall have arisen prior to the suspension. Payment of damages shall automatically terminate suspension. The Conference shall notify the Federal Maritime Commission of each suspension and of each termination of suspension, within 10 days after the event.

10. This Agreement and any shipments made thereunder are subject to all terms, provisions, conditions and exceptions of the then current conference tariff on file with the Federal Maritime Commission and of the permits, dock receipts, bills of lading and other shipping documents regularly in use by the individual Carriers and to all laws and regulations of the appropriate authorities.

11. Receipt and carriage of dangerous, hazardous or obnoxious commodities shall be subject to the special facilities and requirements of the individual Carrier.

12. The Conference shall promptly notify Merchant of changes in the Conference membership, and any additional carriers which become members of said Conference shall thereupon become parties to this Agreement, and the Merchant shall thereupon have the right to avail itself of their services under the terms of this Agreement. Any Carrier, party to this Agreement, which for any reason ceases to be a member of the Conference shall not be a party to or participate in this Agreement and the Merchant shall not be entitled to ship over said Carrier under this Agreement after such Carrier ceases to be a member of the Conference or after having thirty (30) days' written notice of the termination

of such Carrier's membership whichever is later. The Merchant may, at any time after notice that a Carrier has ceased to be a member of the Conference, cancel without penalty any forward booking with such withdrawing Carrier which was outstanding at the time such Carrier ceased to be a member.

[13. This Agreement shall be carried out in accordance with the provisions of the Shipping Act, 1916, and the rules of the Federal Maritime Commission promulgated pursuant to said Act.] (Article optional)

14. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be promptly submitted to arbitration at New York, N.Y., before an arbitration committee consisting of three (3) persons, one to be appointed by the Carriers, one by the Merchant or Merchants who shall be parties to the dispute, and one by the two so chosen or if they cannot agree, the third arbitrator shall be named by the American Arbitration Association. All of the arbitrators shall be commercial men. Either party may call for such arbitration by mailing to the other a written notice, specifying the name and address of the arbitrator chosen by it and a brief description of the controversy or claim to be arbitrated. If the other party shall not by a reply mailed within thirty (30) calendar days of the mailing of the first party's notice, appoint its arbitrator, then the second arbitrator shall be appointed by the American Arbitration Association. Each of the parties shall make available to such arbitration committee all information and data requested by it in connection with the subject matter of the controversy or claim. The decision in writing of two or more members of said committee of three, acting jointly throughout the arbitration, shall be binding on the respective parties, and any award shall be paid within thirty (30) calendar days after a copy of the decision has been mailed by the arbitrators to the party held liable, failing which judgment upon the award may be entered in any court having jurisdiction. [*Provided, however*, nothing herein shall deprive the Federal Maritime Commission of its jurisdiction.] [2] In any arbitration proceeding, including enforcement of any award, service of any and every notice and other paper may be made outside of the State of New York by registered mail, telegraph or cable with the same force as if made personally within said State. In each case of such service, reasonable time shall be allowed for response to the notice or other paper served.

15. (a) In the event of war, hostilities, warlike operations, embargoes, blockades, regulations of any governmental authority pertaining thereto, or any other official interferences with commercial intercourse arising from the above conditions, which affect the operations of any of the Carriers in the trade covered by this Agreement, the Carriers may suspend the effectiveness of this Agreement with respect to the operations affected, and shall notify the Merchant of such suspension. Upon cessation of any cause or causes of suspension set forth in this article and invoked by the Carriers, said Carriers shall forthwith reassume their rights and obligations hereunder and notify the Merchant on fifteen (15) days' written notice that the suspension is terminated.

(b) In the event of any of the conditions enumerated in Article 15(a), the Carriers may increase any rate or rates affected thereby, in order to meet such conditions, in lieu of suspension. Such increase or increases shall be on not less than 15 days' written notice to the Merchant, who may notify the Carriers in writing not less than 10 days' before increases are to become effective of its intention to suspend this Agreement insofar as such increase or increases is or are concerned, and in such event the Agreement shall be suspended as of the

[2] Optional.

effective date of such increase or increases, unless the Carriers shall give written notice that such increase or increases have been rescinded and cancelled.

(c) In the event of any extraordinary conditions not enumerated in Article 15(a), which conditions may unduly impede, obstruct, or delay the obligations of the Carriers, the Carriers may increase any rate or rates affected thereby in order to meet such conditions; provided, however, that nothing in this article shall be construed to limit the provisions of Section 18(b) of the Shipping Act, 1916, in regard to the notice provisions of rate changes. The Merchant may, not less than 10 days' before increases are to become effective, notify the Carriers that this agreement shall be suspended insofar as the increases are concerned, as of the effective date of the increases, unless the Carriers shall give notice that such increase or increases have been rescinded and cancelled.

[16. This Agreement may be amended from time to time subject always to the permission of the Federal Maritime Commission.] (Article optional)

For and on behalf of the Members of the Persian Gulf Outward Freight Conference

By ____________________

Secretary

____

Merchant

By ____________________

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(Address of Merchant)

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