FEDERAL MARITIME COMMISSION

DOCKET NO. 1168

APPLICATION FOR FREIGHT FORWARDING LICENSE
LOUIS APPLEBAUM, 8–10 BRIDGE ST., NEW YORK, N.Y.

Decided September 24, 1964

Application of Louis Applebaum for freight forwarding license denied.

A partner in a firm primarily engaged in the business of selling and shipping goods to foreign countries does not qualify as an independent ocean freight forwarder as defined in Public Law 87–254 and cannot be licensed.

S. Robert Putterman for Applicant.

Gerald H. Ullman for New York Foreign Freight Forwarders and Brokers Association, Intervener.

Frank Gormley and *J. Scot Provan*, Hearing Counsel.

Herbert K. Greer, Hearing Examiner.

REPORT

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

This proceeding involves the application of Louis Applebaum for a license to operate as an independent freight forwarder under the provisions of section 44 of the Shipping Act, 1916 (46 U.S.C. 841(b)). In an initial decision the hearing examiner concluded that because the applicant was a partner in a firm primarily engaged in the business of selling and shipping goods to foreign countries, he could not qualify as an independent freight forwarder within the meaning of section 1 of the Shipping Act, 1916 (46 U.S.C. 801). The proceeding is before us upon applicant's exceptions to the initial decision.

Applicant's exceptions are directed to the examiner's findings and conclusions regarding constitutionality of the statute and the nature of applicant's so-called grandfather rights. In essence they constitute nothing more than a reargument of the issues and contentions resolved by the examiner in his initial decision.

A careful consideration of the record leads us to the conclusion that the examiner's disposition of these issues was well founded and proper except to the extent that the examiner's decision could be read as conditioning the so-called "grandfather rights" upon an applicant's status as an "independent ocean freight forwarder" prior to the passage of Public Law 87–254. Under such a construction, all persons engaged in the business of freight forwarding prior to the passage of Public Law 87–254 would thereafter continue to operate only at their peril should they not qualify under the new legislation. We think it clear that Congress intended no such result and that all forwarders regardless of their status as "independents" were entitled to continue operations until otherwise ordered by the Commission if they complied with the other provisions of section 44(b).

Accordingly, and to the extent that it is not inconsistent with the foregoing, we adopt the initial decision (a copy of which is attached hereto and made a part hereof) as our own.

Attachment.

FEDERAL MARITIME COMMISSION

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Frank Gormley and *J. Scot Provan*, Hearing Counsel.

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

Louis Applebaum (applicant) filed an application for a license as an independent freight forwarder pursuant to section 44 of the Shipping Act, 1916 (Public Law 87–254, 46 U.S.C. 841 (b)). The Federal Maritime Commission (Commission) having considered the application, advised applicant that it intended to deny his application because as owner of a firm engaged in the export of housewares, hardware, plumbing and furniture, he could not qualify as a person eligible for licensing within the statutory definition of "independent freight forwarder." Applicant requested an opportunity to show that denial of his license would not be warranted and this proceeding was instituted to afford him that opportunity.

THE FACTS

1. Applicant is, and has been for approximately 30 years, engaged in the general exporting business, selling to customers in foreign countries, mainly in the Caribbean area, and dispatching shipments of goods which he owns or in which he has an interest.

[1] This decision became the decision of the Commission on Sept. 24, 1964 and an order was issued denying the application. (Rules 13(d) and 13(h), Rules of Practice and Procedure, 46 CFR 502.224, 502.228.)

2. The exporting business is conducted under the trade name of Mercury Sales and Export Co. (Mercury), a partnership owned by applicant and his wife; his wife does not actively participate in the business.

3. In the conduct of his exporting business, applicant gravitated into forwarding activities because of customer complaints that forwarding fees were excessive. On January 13, 1954, Certificate of Registration No. 1689, was issued to him by the Federal Maritime Board, predecessor to the Commission.

4. The main office of Mercury is located at 8–10 Bridge Street, New York City. Applicant operates a freight forwarding business at the same location under the name of Louis Applebaum, utilizing Mercury personnel, recording his business activities on Mercury books, and using the same banks and books of account.

5. Applicant does not collect a forwarding fee from purchasers of his products but renders this service as a means of establishing good will; however, with respect to freight forwarding services which he performs on other cargo, he does collect a "reasonable" fee. Brokerage on shipments handled by applicant is collected by him from carriers on both types of shipments.

6. Mercury's export business grosses approximately $500,000 per annum, 50 percent of which applicant attributes to the good will generated by the forwarding services rendered by him to his customers. Inability to dispatch shipments for his customers would, in applicant's estimation, result in a net loss of $15,000 to $18,000 per annum.

7. Applicant's gross income from brokerage is approximately $2,500 per annum and gross income from forwarding is approximately $1,500 per annum.

Discussion

Applicant takes the position that the intent and purpose of the Shipping Act, 1916, is to allow a person who is fully competent, qualified, honest, fit, willing and able, to operate as a freight forwarder although his basic occupation is that of shipping, as long as the combined operation is in furtherance of the development of foreign commerce. To support this premise, he argues that Public Law 87–254, amending the Shipping Act, is unconstitutional.

This is not the proper forum for determination of the constitutionality of the statute. The Commission is an administrative agency and is without authority, inherent or express, to consider the constitutionality of a statute under which it operates. It derives its authority from Congress and must act in accordance with congressional

direction. Davis, Administrative Law Treatise, page 74; *Panitz* v. *District of Columbia*, 112 F. 2d 39 (1940).[2]

The Commission, being bound by the direction of Congress, will apply the statute in accordance with its terms. Public Law 87–254, in pertinent part, provides:

"An 'independent ocean freight forwarder' is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest."

"SEC. 44 (a) No person shall engage in carrying on the business of forwarding as defined in this Act unless such person holds a license issued by the Federal Maritime Commission to engage in such business: *Provided, however*, That a person whose primary business is the sale of merchandise may dispatch shipments of such merchandise without a license."

"(b) A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant is, or will be, an independent ocean freight forwarder as defined in this Act and is fit, willing, and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules and regulations of the Commission issued thereunder, and that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936; otherwise such application shall be denied. Any independent ocean freight forwarder who, on the effective date of this Act, is carrying on the business of forwarding under a registration number issued by the Commission may continue such business for a period of one hundred and twenty days thereafter without a license, and if application for such license is made within such period, such forwarder may, under such regulations as the Commission shall prescribe, continue such business until otherwise ordered by the Commission."

The basic issue for decision is whether applicant comes within the prohibitions stated in the definition of independent ocean freight forwarders. In relating the facts adduced to the definition, there is no doubt that applicant is not, and does not intend to become, an independent forwarder. His principal occupation is selling and shipping to foreign countries and there is no ambiguity in the statutory prohibition against issuing a license to "a shipper or consignee or a seller or purchaser of shipments to foreign countries." Applicant does not seriously contend that he is eligible to be licensed in the absence of a determination that the statute is unconstitutional. Apparently, he considers this proceeding mainly as a prerequisite to submitting the question of constitutionality to the courts.

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[2] See also the following agency decisions:
In re Becker (Becker Fruit & Produce Co.), 7 Ad L (2d) 151.
Blanton Co., 6 Ad L (2d) 736.
Curtis C. Wilson, 5 Ad L (2d) 247.
In the Matter of Moog Industries, Inc., 5 Ad L (2d) 138.
In re Edward R. Byer, et al., 4 Ad L (2d) 729.
In re Great Western Distributors, Inc., et al., 1 Ad L (2d) 592.
Air Transport Associates, Inc.—Enf. Proc., 1 Ad L (2d) 537.

The Commission is precluded from issuing a license unless it affirmatively finds "that the applicant is, or will be, an independent ocean freight forwarder as defined in this Act." Under the facts here presented, such a finding cannot be made. The statute makes clear that Congress intended to eliminate any connection between shippers and forwarders. If the wording of the statute permitted any doubt, it would be resolved by reference to the Legislative History of Public Law 87-254:[3]

"This would make it clear that *all* shippers, consignees, sellers, purchasers, and carriers of ocean export cargoes are to be prohibited from obtaining a license regardless of whether these groups forward only their own cargoes or the cargoes of others." [Emphasis supplied.]

Applicant may, of course, dispatch shipments of the merchandise he sells without a license because his primary business is the sale of merchandise although the nature of his primary business prevents obtaining a license.

In addition to questioning the constitutionality of the statute, applicant has raised the question of whether denial of a license would be a constitutional application of the statute in view of the fact that he had been a "grandfather" forwarding agent and is entitled to "grandfather" rights which permit him to continue his forwarding activities. He relies on that portion of section 44(b) (above fully set forth) which permits "Any independent ocean freight forwarder who, on the effective date of this Act, is carrying on the business of forwarding under a registration number issued by the Commission" to continue to so operate for 120 days, and if his application for a license is filed within that period, to continue to operate "until otherwise ordered by the Commission." This provision does not authorize nor permit the Commission to issue a license to every forwarder who is the holder of a certificate. It does not recognize operating rights as being vested by virtue of the issuance of a certificate but merely permits *independent* ocean freight forwarders to continue their operation for a limited period of time during which application for a license must be presented together with evidence to prove qualification in accordance with the statutory requirements. This provision is not, in the true sense, a "grandfather clause." *Republic Carloading and Distributing Co., Inc., Freight Forwarder Application*, 250 I.C.C. 670 (1943). Moreover, the clause referred to grants permission to temporarily continue in business only to independent ocean freight forwarders. Inasmuch as applicant does not qualify as an independent forwarder under the statutory definition, he could not rely on the benefits limited to that category. *Gregg Cartage Co.* v. *U.S.*, 316 U.S.

[3] H. Rpt. 2333, 85 Cong., 2d sess. pp. 8-9.

75 (1942). The question of whether he has been operating illegally since the effective date of Public Law 87–254 has not been presented for decision. There is no question that applicant, as a partner in Mercury, owns or has an interest in Mercury shipments.

CONCLUSION

Applicant is a shipper and seller of shipments to foreign countries and is not eligible to be licensed as an independent freight forwarder under the provisions of Public Law 87–254.

An appropriate order denying the application will be entered.

(Signed) HERBERT K. GREER,
Presiding Examiner.

JUNE 24, 1964.

FEDERAL MARITIME COMMISSION

No. 1168

APPLICATION FOR FREIGHT FORWARDING LICENSE
LOUIS APPLEBAUM

AMENDED ORDER

The Commission having fully considered the above matter and having on September 24, 1964, made and entered of record a report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the application for a license of Louis Applebaum is hereby denied, pursuant to Section 44(b), Shipping Act, 1916, and Rule 510.8 of General Order 4.

It is further ordered, That this order shall be effective as of December 31, 1964.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 881

GENERAL INCREASES IN ALASKAN RATES AND CHARGES

ORDER DISCONTINUING PROCEEDING AS TO RESPONDENT, ALASKA STEAMSHIP CO. AND DISMISSING PETITIONS FOR RECONSIDERATION

Order served October 16, 1964

On July 13, 1964, the Commission considered the petitions for reconsideration, briefs, and the transcript of oral argument held before the Commission. Present were John Harllee, *Chairman*, James V. Day, *Vice Chairman*, Ashton C. Barrett and John S. Patterson, *Commissioners*, being all the members of the Commission.* Chairman Harllee and Vice Chairman Day voted to reverse the prior decision of the Commission, for the reasons stated in their separate opinion attached hereto, and Commissioners Barrett and Patterson voted to affirm the prior decision for the reasons stated in their separate opinion also attached.

Reorganization Plan No. 7 of 1961 requires the affirmative votes of three Commissioners then in office to transact any business of the Commission, and as the proposal to reconsider the Report and Order previously entered and to set aside the increased rates under investigation has failed to obtain the necessary three votes,

It is ordered, That this proceeding be discontinued as to the respondent Alaska Steamship Co. and that the petitions filed by General Services Administration and the State of Alaska to reconsider the prior Report and Order and to set aside the increased rates under investigation be, and they are hereby, dismissed.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

**Commissioner* George H. Hearn was not a member of the Commission at the time.

FEDERAL MARITIME COMMISSION

No. 881

GENERAL INCREASES IN ALASKAN RATES AND CHARGES

October 16, 1964

John Harllee, *Chairman*, and James V. Day, *Vice Chairman:*

In our decision dated April 30, 1963 (7 F.M.C. 563), we found that increased rates and charges of Alaska Steamship Co. were just and reasonable. In so doing, we overruled the Presiding Examiner who had disapproved these rates and charges insofar as they operated in the future. On July 19, 1963, the State of Alaska and the Administrator of General Services, intervenors in the proceeding who have opposed the rate increases, filed petitions for reconsideration of our decision in accordance with the provisions of Rule 16(b) of the Commission's Rules of Practice and Procedure, 46 CFR § 502.262. Petitioners generally contend that certain errors in our decision render that decision unsupportable as a matter of law and urge us to disapprove the increased rates and charges. On April 21, 1964, we ordered that the proceeding be reopened for the purpose of receiving briefs on the errors alleged in the petitions. Briefs were filed by intervenors, Hearing Counsel, and respondents. Oral arguments were heard on June 16, 1964.

The basis for our earlier decision was the acceptance of respondent Alaska Steamship Co's. estimate that it would carry 472,392 tons of cargo for the year 1960. On the basis of this traffic, we found that respondent would realize a rate of return of 9.07%. Such a return, we believed to be reasonable. The Examiner rejected respondent's 1960 projections and had found a more reliable estimate to be 511,000 tons. We acknowledged that the Examiner may have been correct (7 F.M.C. 573). However, we did not accept his projection as the better estimate because we felt that certain facts in the record showed the year 1960 to be better than average. We are now convinced that the record does not lead us to this conclusion and that the Examiner's estimate should be accepted.

There are three findings on which we relied to show that 1960 was not a representative year. These were: (1) An unprecedentedly large salmon pack in Bristol Bay in 1960; (2) a large movement of MSTS cargo during the summer and fall of 1960 following withdrawal of three naval ships from service in the Alaskan trade; (3) a surmise that additional income stemming from the large pack would generate increased northbound traffic. We have reviewed the record and are convinced that these findings of fact should be reversed. Our discussion with respect to each follows:

1. The Bristol Bay salmon pack:

The first finding on which we based our earlier opinion regarding the year 1960 was that the salmon pack in Bristol Bay would be exceptionally large in 1960. However true this might be, it is offset by many considerations. Respondent Alaska Steam serves virtually every area of Alaska. Bristol Bay is only one area out of many which provide respondent with salmon traffic. Any meaningful evaluation of respondent's operations pertaining to this cargo must consider that the carrier also carries salmon from vast areas in western, central, and southeastern Alaska. Evidence of record shows, for example, that despite the good fortune in Bristol Bay, the salmon run in southeastern Alaska was the lowest since records have been kept, and that the other salmon areas served by respondent showed increases which were not noteworthy. Indeed, considering the total salmon pack for all Alaska, respondent's witness estimated as of July 27, 1960, that 24,953 additional tons were available for carriage by Alaska Steam in 1960 over 1959. At 30 cases per revenue ton, this represents an estimated increase of 748,590 cases over 1959. The record shows that the 1959 total catch was the lowest since records were first kept in 1905, totaling 1,600,886 cases. If the 748,590 additional cases in 1960 are added to the 1959 total, then the 1960 total catch, aside from small amounts possibly available to other carriers, would amount to 2,349,476 cases. This, however, is hardly a memorable figure. The record shows that the average catch for the period 1905–59 is 2,885,965 cases. By respondent's own estimate, therefore, the total salmon catch for 1960 was probably below average.[1]

The record shows that the western Alaska salmon area, which includes Bristol Bay, the Yukon River, and North Peninsula, produced as of July 24, 1960, 1,011,677 cases of salmon. Although this exceeded the average catch for the previous 10 years, it is by no means un-

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[1] The record provides an alternative method to evaluate the 1960 total catch and likewise shows the year to be below average. As of July 17, 1960, the total Alaskan catch was 1,460,653 cases. On July 19, 1959, the catch was 851,136. The 1960 catch was thus running 1.716 times over that of the previous year. The total 1959 catch turned out to be 1,600,886. The complete 1960 totals would therefore be 2,747,120 cases (1.716× 1,600,886. Again, this is below the average for the years 1905–59, inclusive.

precedented. In western Alaska, the annual salmon pack exceeded 1,000,000 cases on 10 occasions between 1933 and 1948. In Bristol Bay alone, the salmon catch exceeded 1,000,000 cases in 1943, 1947, and 1948.[2] Respondent itself did not believe that the million-case catch would significantly augment its carryings. Although its traffic witness predicted an increase of 24,943 tons in the movement of canned salmon overall, he offset this by estimated declines in military traffic and commercial cargo northbound. Despite the size of the Bristol Bay catch, therefore, he estimated a net increase of 11,392 tons, a mere 2.5% over the previous year.

Regardless of what support the record contains for our prior decision as to the significance of the 1960 Bristol Bay salmon pack, upon our review of the record we now believe the factors hereinabove discussed lead to the conclusion that the total salmon catch would not serve to make 1960 an exceptional year.

2. MSTS cargo movement:

The second finding we made with respect to 1960 being an exceptional year was the supposed fact that a large movement of MSTS cargo during 1960 resulted after the Navy had withdrawn three ships from service in the Alaska trade (7 F.M.C. at 574). We have reviewed the record and find reference therein to the withdrawal of one naval vessel, the U.S.N.S. *Harris County*, which occurred sometime after June 20, 1960. Alaska Steam's witness testified that with the naval vessel withdrawn, Alaska Steam carried all of the privately owned vehicles of military personnel and their families, that its MSTS tonnage for the first 5 months of 1960 increased, and that it appeared that increased tonnage was going to continue. The witness further testified, however, that he knew the naval ship was expected to be returned to the trade probably late in September and predicted that with her return and with her carrying all she could load he believed that his original forecast should be amended to indicate that Alaska Steam would carry in 1960 approximately the same tonnage as in 1959. The record does not refute this prediction. Hence, we view this testimony, disregarding respondent's statements about the withdrawal of several naval ships inadvertently incorporated in our prior decision, as sufficient support for our now concluding that military cargoes temporarily diverted to Alaska Steam would be minimal and the effect on respondent's overall 1960 operations insignificant.

3. Unusual northbound movement to Bristol Bay:

The third basis for our earlier decision with respect to the estimated 1960 operations of Alaska Steam is the surmise that an exceptionally

[2] In 1943, 1947, and 1948 the salmon catch out of Bristol Bay numbered 1,275,081; 1,335,031; and 1,236,226 cases, respectively.

large salmon pack out of Bristol Bay would by creating added income generate an increase in northbound cargoes (7 F.M.C. at 574). As we stated, this is merely a surmise.

The record shows that the income of fishermen in the Bristol Bay ranged from $20,000 to $53,000 for 1 month's work; that the large catch was "rather nice news" to Alaska Steam; and that when the catch is bad in the area, those people "don't buy refrigerators or automobiles" which Alaska Steam could hope to carry. There is not enough in the record, however, by which we can determine whether income of such size is unusually large in comparison with previous years, and we are unable to evaluate the other statements without engaging in additional speculation. We conclude on reconsideration that there is insufficient evidence to indicate that an unusually large movement of northbound cargo to Bristol Bay would, in fact, occur as the result of an exceptional catch of salmon in that region during 1960.

We believe that the foregoing findings amply demonstrate 1960 not to be an exceptional year. Significantly, Alaska Steam's traffic witness, after considering the Bristol Bay catch and MSTS cargo, adhered to a prediction of 472,392 tons. This amount is a mere 11,000 tons over the previous year's actual tonnages, and is considerably below the average tonnages for the 5-year period, 1955–59.[3]

Aside from the consideration of the foregoing factors, however, there is other evidence of record to support the Examiner's 1960 projection. Respondent maintains that 511,000 tons is too optimistic. However, the record shows an increasing trend of northbound carryings. Total tonnage carried for the first 7 months of 1960 reflected an increase of 12.6% over an equivalent period in 1959. Salmon, which is the principal southbound cargo of respondent had been unusually low in 1959 insofar as Bristol Bay was concerned, but this does not represent a trend, and the catch rebounded to healthy levels in 1960. A final factor which supports the reasonableness of the Examiner's estimate is the improvement of respondent's service. The record discloses that Alaska Steam substantially increased its voyages in 1960. Additional service to the rail belt area was initiated in May 1959, more particularly with respect to containerization. Service to southeastern Alaska was increased as well. Respondent hoped to attract additional cargo by means of these changes, yet its pessimistic 1960 projection apparently ignored this consideration. We believe that the record supports the Examiner's conclusions with respect to his 1960 projection.

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[3] The average for the period 1955–59 is 490,462 tons based on the following actual operating results: 1955, 514,301; 1956, 532,214; 1957, 481,411; 1958, 482,202; 1959, 461,000.

CHARITABLE CONTRIBUTIONS

In our earlier decision, we allowed as an operating expense deposits in the Skinner Trust (7 F.M.C. at 576). The Trust was shown to be a depositary of charitable donations and recipients therefrom are all worthy objects of charitable contributions. The Examiner had disallowed such contributions, stating:

> While the contributions shown above by Alaska Steam, and similar contributions by its affiliates, are for a laudable purpose, they cannot be deemed to be operating expenses chargeable to the Alaskan trade, since to do so would impose upon the shipping public a double burden of meeting not only their own civic responsibilities but those of the contributors to Skinner Foundation Trust as well. The donations must therefore be disallowed as operating expense (Initial Decision, p. 19).

Intervenors and Hearing Counsel urge us to adopt the Examiner's position in this regard. Upon reconsideration, we feel that he was correct, and we concur with his reasoning. Charitable donations, however worthwhile, are not expenses relating to the cost of furnishing transportation. Moreover, not only are ratepayers charged a double burden as the Examiner stated but the very amount of the burden lies completely within the discretion of carrier management. An abundant although not unanimous body of authority in the courts holds that these donations are not legitimate expenses chargeable against ratepayers. See *Carey* v. *Corporation Commission*, 33 P. 2d 788, 794 (Okla. 1934); *C & P Telephone Co. of Maryland* v. *Maryland Public Service Commission*, 187 A. 2d 475 (Md. 1963); *Cleveland & Akron* v. *Hope Natural Gas Co.*, 44 P.U.R. (n.s.) 1, 29 (F.P.C., 1942); but see also *Public Service Co. of New Hampshire* v. *State*, 153 A. 2d 801 (1959).

In *The People Gas Light & Coke Co.*, 19 P.U.R. (n.s.) 177, 274 (Ill. 1937) it was stated:

> It has long been held that donations made by a public utility, no matter how worthy the charity to which the donation is made, are not a proper charge against the ratepayer and that a Commission should make no allowance for same in operating expenses.

We are convinced that the Examiner's decision in this area is sound and comports with legal authority.

CONCLUSIONS

On reconsideration we find that the Examiner's disapproval of the increased rates of respondent Alaska Steamship Co. was correct. We have reviewed the record and reverse our earlier finding that the year 1960 was to be an exceptional one overall. Evidence of record indi-

cates rather the contrary and tends to corroborate the Examiner's findings.

On the basis of the Examiner's findings with respect to 1960, we adopt his conclusion that the increased rates would provide an excessive rate of return to respondent. We furthermore find that such rates were excessive from the date of their inception; i.e., January 10, 1960, and were not lawful during the pendency of this proceeding as stated by the Examiner. The Examiner, we believe, had given interim approval on the basis of an erroneous interpretation of law. The case of *Arizona Grocery* v. *Atchison Ry.*, 284 U.S. 370 (1932) on which he had relied merely held that a carrier respondent is entitled to rely on rates approved in the past by a regulatory agency and could not be subsequently penalized for such reliance. In the instant case, however, we had never given such approval prior to initiation of the proceeding and are consequently free to disapprove the subject rates from their inception.

Commissioners Ashton C. Barrett and John S. Patterson, supplementing Commission's Report of April 30, 1963:

A. *The issues before us:*

On May 6, 1963, the Commission served its report and order finding that increased rates of Alaska Steamship Co. (Alaska Steam) for the transportation of property between Seattle, Wash., and ports in Alaska were just and reasonable. Since that date, on July 19, 1963, the Administrator of the General Services Administration (GSA) and the State of Alaska (State) have filed petitions for reconsideration of our report and order. We held further oral argument on the petitions on June 17, 1964. The following assignments of alleged error were offered as justification for the petitions:

1. Disregard of the public interest in deciding this docket by not giving any consideration to the problems of consumers and shippers in Alaska and the inhibiting effects of high water freight rates on the State's economy.

2. The finding that 472,392 tons was a reasonable projection of traffic to be carried in the future, and that the Examiner's projection of 511,000 tons was not acceptable. The Commission also failed to consider an increasing trend of northbound traffic.

3. Consideration of extra-record material improperly placed before the Commission by Alaska Steam.

4. The estimate of Alaska Steam's 1960 revenues as $17,673,521.

5. The failure properly to weigh the effect of added voyages by Alaska Steam.

6. The failure to find that Alaska Steam's rates are unreasonably high as shown by diversion to other carriers.

7. The failure to make findings regarding evidence submitted by GSA demonstrating unreasonableness of individual rates and rate relationship in the Alaskan trade.

8. The provision, on the basis of the record, of a rate of return of 9.07% for Alaska Steam.

9. The failure to consider the contentions of the State with respect to the Examiner's initial decision.

10. The remand to an examiner of that part of the proceeding which related to the rates of Puget Sound Alaska Van Lines (PSAVL), Garrison Fast Freight, division of Consolidated Freightways, Inc., and Alaska Freight Lines.

11. It was also claimed that error was made when the Commission agreed with respondents to not suspend the proposed increase if respondents agreed to refund charges above those determined to be just and reasonable.

B. *What we did:*

1. Held further oral argument on the petitions on June 17, 1964.

2. Reviewed the unanimous report and order of the Commission served on May 6, 1963, which found that increased rates of Alaska Steamship Co. were just and reasonable, for the purpose of determining if any errors or language ambiguity existed in this report that prompted the petitioners' finding of "alleged errors."

3. Searched the record before us to determine if the alleged errors claimed by the petitioners were justified concerning the unanimous report by the Commissioners decided April 30, 1963, and served on May 6, 1963.

4. Received, read, and studied all briefs that were filed by Hearing Counsel, respondents, and intervenors.

C. *Our decisions:*

As a result of the oral argument held on June 17, 1964, coupled with our review of the Commission's unanimous decision given in its report and order served May 6, 1963, and our thorough search of the entire record before us, we concluded that:

1. No new facts have been presented.

2. The existing evidence of record fully sustains the conclusions reached in our first report that the rates of Alaska Steamship Co. are just, reasonable, and lawful.

3. No extra-record material was relied upon to influence the ultimate decision, and no error was committed in reaching our conclusions.

4. Without reference to or consideration of any extra-record material, there is in the record as cited in our report sufficient evidence to lawfully justify the ultimate conclusions reached concerning the 11 alleged errors offered by the petitioners.

5. A report supplementing and confirming our earlier conclusions would be made, based on the entire record before us, in order to clarify any language or basis for our reasoning alleged to have been ambiguous.

The only possible new fact since the time of the record on which our report was based was a reference by the General Services Administration in oral argument (Tr., p. 11) to the earthquake and ensuing disaster earlier in 1964 as affecting the needs of the people of Alaska in obtaining a level of freight rates to assist them in the reconstruction job. We would wish to be considered as in full sympathy with the needs of Alaskans in this regard. Our decision herein in no wise detracts from our desire to help. Much as one might be moved by compassion to make adjustments in freight rates to minimize the severe costs Alaskans must bear in recovering from this natural disaster, Congress has given us no authority to go back and adjust past rates based on conditions existing from 1960 onward to accommodate unfortunate events such as an Act of God occurring in 1964, nor may the respondent, a private carrier, be made to bear the burden of costs that must be made either from public funds or from insurance payments or from private resources.

To the extent these events have relevance to future rates after 1964, a new proceeding is an appropriate remedy.

D. *Our report:*

The purpose of this report is to supplement and confirm our earlier reasoning and decisions, based on the evidence of record before us and to cite specific references in the record supporting our conclusions.

The following is our response to the several assignments of error, together with references in parentheses to the portions of the record which sustain our findings:

1. *Public interest.* As long as the standard for measuring justness and reasonableness of rates in a business-managed enterprise such as Alaska Steam is based on the assumption that transportation service will be sold at freight rates at least approximately related to the cost of rendition of the service to shippers, there is very little scope for a welfare standard based on the shipper's ability to pay, as is implied in the State's contention that we consider the overall cost of living in Alaska, the inhibiting effect of the high level of water freight rates on the growth of the Alaskan economy, and the impeding effect of high costs on the development of natural resources.

We are cognizant of and sympathetic with the fact that the State of Alaska, because of its distance from the mainland of the United States and its geographic location, is dependent upon water transportation for importing its basic needs covering almost all types of merchandise. In full recognition of this fact, we know how very important it is for

us to thoroughly evaluate any requests for an increase in rates by any carrier serving Alaska and to search the evidence of record so as to be certain that any rate we approve is just and fair. Even though we are cognizant of this fact and of its influence on the broader economic problems of the State, we have no authority through our control over the rates of Alaska Steam to change radically the economic problems of the State except insofar as we find the rates just, reasonable, and lawful.

In recognition of our responsibility to protect the public and in the public interest, we fully weighed each of the contentions as advanced and argued by the State of Alaska, and based on the facts and argument as presented we reasoned and concluded that unless these factors could be shown to be relevant measures having some practical application in determining reasonableness of rates under a cost standard, no useful purpose would be served by further prolonging discussion of them. We disclaim authority to consider such matters because we have no power to compel service at a loss nor the power to compel a waiver of charges to less prosperous shippers, no matter how worthy of public assistance. Any such action would, additionally, involve a discriminatory burden on other shippers. These problems are larger than our authority to deal with them and must be considered by legislatures rather than the Commission.

2. *Tonnage projections.* The complaint is made that the Commission had no basis for reducing the Examiner's tonnage projections, that "the projection of the Hearing Examiner should not have been manipulated."

A basic objective of ratemaking is to estimate future conditions affecting rates.

Rates for the future must be based on predicted tonnages of cargo to be carried, and the predictions must be reasonably related to past performance modified by reasonably foreseeable factors influencing future expectations. The tonnage to be carried controls the amount of revenue to be expected and in turn controls the return to be derived therefrom after subtracting anticipated expenses chargeable to shippers. Hence, the importance of a reasonable estimate.

The carrier has the burden of furnishing the facts necessary to estimate its future carryings and to provide reasonably supportable estimates establishing the reasonableness of its rates. We thought respondent had done this. Fault was found with Alaska Steam's estimate of 472,392 tons which we adopted. Petitioner states the evidence does not form a proper basis for such a finding, but by the same token neither does the evidence support any contrary finding. There are only disputes over the reliability of Alaska Steam's figures. An averaging of tonnages carried from 1955 through a projected

year 1960 as shown in the record produces 490,462 tons. This is close to that supplied by the expert testimony of the carrier's witness. Our report dealt with certain relevant nonstatistical factors which were thought to have a depressing effect on future carryings, and to overcome the Examiner's belief that an admitted declining trend between 1955 and 1959 had come to an end and was being reversed to go back up to 511,000 tons, which would be well above tonnages carried during the last 3 years (481,411 tons in 1957, 482,202 tons in 1958, and 461,000 tons in 1959) and nearer the 514,301 tons carried in 1955 and 532,214 tons carried in 1956 (7 FMB 563, 572). Even these figures represented declined from earlier years as shown by other docket records involving respondent (Docket No. 828, 5 FMB 486, 490). In 1949, 690,626 revenue tons were carried. There was a peak year in 1951 (715,049 revenue tons), caused by the Korean war, but generally there has been a declining trend in Alaska Steam's traffic over the years since then. The declining trend seems to have leveled off and northbound carryings have increased, but competition northbound has also increased. We did not think a reversal of any magnitude would occur, and consequently the Examiner's assumption of a drastic reversal based on 1960 alone would not be a proper basis for fixing rates over the next few years. We thought facts showing a diversion of traffic in recent years would, if anything, influence a continuing downward trend. The Examiner's projection was based solely on what he foresaw as coming up for 1960 as a result of (*a*) the salmon pack for that year and (*b*) trends in northbound traffic. We conceded the possibility his estimate might be good for 1960. We believed the figures to be used in projecting future rates should be based on an average year. We thought no one had supplied any better figures than Alaska Steam's. The most that was done was to pick flaws in other estimates without supplying any better ones, nor were any facts showing a likelihood of increased traffic provided. The State has only insisted we use the Examiner's higher figures and denies our right to adjust them downward on the ground that we used improper data to prove 1960 was an above-normal year. Petitioners insist on the use of their estimates of 1960 actualities as a basis of decision instead of our average tonnage figure as a reasonable level for several years in the future. We don't think we should be bound to use what 1960 might show when estimated as accurately as possible. Rates would tend to fluctuate with changes in each year's net revenue results and would have to be adjusted every year if the result of only 1 year's operations, as estimated by the Examiner, is used in the test of the reasonableness of rates. This method would not be sensible ratemaking.

Other factors are presented as showing the invalidity of our conclusions about the long-term trend of Alaska Steam's business and the

validity of 1960 alone as a test year for fixing future rate levels. These are the influence of increased northbound carryings, the declining trend of cargo-handling costs, and the effect of improved service. Undoubtedly such factors would be influential, but in this area of conjecture they did not seem conclusive or at least influential enough to overcome Alaska Steam's proofs and estimates of increased costs and the slower rate of tonnage increases caused by adverse influences on traffic. For example, it was shown that the tonnage of traffic to, from, and within Alaska carried by self-propelled dry cargo ships, which Alaska Steam uses, has declined from a 22% share in 1951 to 7% in 1958. Between 1951 and 1958 barge tonnage increased 125% compared with a dry cargo tonnage decline of 53% (Exhibits 74, 75, 76—Chart II; Tr., pp. 45–46, 2882).

There were also serious infirmities in the Examiner's tonnage calculations which were not discussed in the first report, but are now pertinent. First, the 12.6% tonnage increase used for the last 5 months of 1960 was incorrect, because all of the projected tonnage increase was not commercial cargo with which this rate proceeding was concerned, but was also military, mail, government, and Garrison Lines cargo. Commercial cargo increased only about 9½% and is 69% of the total cargo. Military Sea Transportation Service (MSTS) cargo went up 22% and is 16½% of the total. The Examiner's method of taking an average of several unrelated percentages to get 12.6% did not produce a correct result.

The insistence that we use the Examiner's erroneously computed figures is rejected. We know of no law or precedent restricting our authority in rate proceedings to the use of an examiner's findings, nor preventing us from adjusting his figures as a result of our judgment of the record.

The major thrust of the objections to our decision seems to be a determination that the results of 1960 are conclusive as to the reasonableness of respondent's rates. Both respondent Alaska Steam and the objecting intervenors insisted on this premise. As a consequence, Alaska Steam's efforts were devoted largely, during the hearing at least, to diminishing the effect of increases, to depressing the 1960 net income results, and to twisting an estimated average figure into an estimated actuality, while intervenors sought to inflate the 1960 tonnages and net income results. We took a third course and made an honest effort to base the rates on what could be discerned of longer term trends. We took Alaska Steam's forecast of 1960 actualities and used it as an estimate for an average year, because it was in line with past experience.

The State argues further that we are bound to use the Examiner's 1960 projections because some factors used to show its nonaverage

characteristics were based on facts outside the record. The argument does not prove enough, however, since even without these facts we did not consider ourselves bound solely by the 1960 estimates of actual results, but bound only to consider such estimates with other record data as a guide to what might reasonably be estimated as tonnages to be carried over a future period based on an adjustment of 1960 figures. Our report expressly referred to "the reasonably expectable level of future carryings * * *" It is also considered that without the extra-record facts the eight proven factors in our report substantiate conclusions as to a slower increase in the trends in respondent's carryings.

3. *Extra-record information.* On reexamining the record, some information not produced in hearing and subjected to cross-examination was presented. The information was written in as a part of respondent's brief on exceptions to the Examiner's decision. It could only be excluded by requiring a rewrite of Alaska Steam's brief on exceptions. The information was disregarded instead. Alaska Steam also put in a lot of extra-record data containing untested tonnage and financial figures and self-serving statements of fact, by means of an alternative petition to reopen the proceedings and of two supplemental affidavits. Counsel for the State objected strenuously to the tactics of Alaska Steam. The State rightly cautioned that Alaska Steam's action could only "poison the Commission's thinking." Disregard of this material prevented any influence on us to the point where it changed our thinking or the result. The facts claimed to be prejudicial as not having any record basis are:

First, the exceptionally large salmon pack carryings from the Bristol Bay area in the late summer of 1960, disclosed after the record was closed.

Respondent's exceptions refer to "* * * the unprecedented run of salmon in the Bristol Bay area" and to "* * * the large southbound movement of canned salmon due to the exceptional catch in the Bristol Bay area * * *" as having been "anticipated and provided for." We thought these statements were substantiated by testimony that "Both state and industry representatives predict for the year 1960 a run well above the year 1959" (Tr., p. 2063). Further, the transcript reads:

Q. This was as of June—

A. [Interrupting.] I am speaking of June 20, the day I prepared this forecast about which you asked me.

Q. June 20, 1960, that was your prediction?

A. Yes, June 20. The estimates on the pack as of that time varied widely. We believe as of June 20 we could look for a southeastern Alaska pack somewhere around 25 or 30 percent above that of 1959 or roughly an increase of 180,000 cases, which would convert to some 6,000 additional revenue tons, there being 30 cases to a revenue ton of salmon. Of which, based on our recent experience, Alaska Steamship Co. could hope to carry some 77 percent of the pack,

which would increase our tonnage in salmon by some 4,600 revenue tons 1960 over 1959, which was our expectation as of June 20.

Q. Of this year.

A. Of this year, yes, sir.

Other testimony substantiating a high forecast of Alaska Steam is as follows:

A. The run at Bristol Bay is finished. The pack as reported here, and I can give you the pack which I just got this morning for July 24, 1960. Western Alaska in which they show the complete pack, this includes the Yukon River, North Peninsula and Bristol Bay, and they have done it, they cracked a million cases, 1,011,677. That's rather nice news. I hadn't read that figure before. I had said in the forecast that I prepared that reforecast just under 1 million cases of salmon, which would give an increase this year over last year of 539,012 cases, which converts to 17,967 revenue tons, which figure I have shown on Exhibit 40. Now, I forecast just under a million, they say just over a million by 11,677 cases. I will stand by my forecast in view of the 12,000 cases that are on the government-owned steamer, *North Star*, which leaves the potential available to us, disregarding any fish that may move on cannery tenders, just under a million cases. I think I did pretty well.

That summarizes—

Q. Thanks to the *North Star*. Very well. Now, does that figure, Mr. Rose, of 17,967 revenue tons also appear on Exhibit 40 under "Bristol Bay salmon industry"?

A. Yes, sir, it does.

Q. Then, summarizing very briefly your July 27 forecast, under the recap of "all routes" and "all cargo," the first general column as in Exhibit 39, you show an increase in the first 5 months of 1,753 revenue tons?

A. Yes, sir.

Q. Then, the next column you have a forecast increase the last 7 months of 9,641 revenue tons?

A. Yes, sir.

Q. Or a total increase of revenue tons 1960 over 1959 of how many tons?

A. Eleven thousand three hundred ninety-four.

Q. Added to the tonnage for 1959 of 461,000. you then forecast a total revenue tonnage for the year 1960 of 472,394, is that correct?

A. That would be correct, yes sir (Tr. pp. 2173–2175).

This testimony is substantiated by statistics showing "Weekly Red Salmon Packs on Bristol Bay" going back to 1940 and covering up through the fourth week which is about the end of July. Total cases exceeded 1 million in 1943 (1,275,081 cases), 1947 (1,335,031 cases), and 1948 (1,236,226 cases), whereas most other years ran only a little over 300,000 cases to about 550,000 cases (figures compiled from U.S. Fish and Wildlife Service preliminary statistics—*Pacific Fisherman*, January 1960, p. 59, Exhibit 6).

The parties at this stage were trying to prove Alaska Steam's estimates for 1960 were too low, as indeed they were, but the premise of respondents and intervenors at that time was that 1960, estimated as accurately as possible, was to be the guiding year. We refused to

accept this premise, believing that a hypothetical average year was proper and could be estimated on the basis of past experience and future trends as shown by 1960 experience as adjusted to reflect both presently known and anticipated future influences. We thought Alaska Steam had developed adequate estimates of average conditions. Petitioners do not say these statements are not so, but only that they could not have been made using the record before us. Petitioner points out that "Alaska Steam has * * * placed before the Commission its unsubstantiated extra-record claim that the 1960 pack at Bristol Bay was good." Petitioner seems to concede what actually happened, but is arguing that because it happened the Commission must have relied on the later information showing the prediction to be a fact. We cannot accept this restriction to preclude saying what we did. Record support from exhibits supports a showing 1960 was nontypical. The *Pacific Fisherman* for January 1960 stated: "After lean and variable years, Bristol Bay in 1960 faces the *possibility* of a rich Red salmon run. *If* it comes, the salmon industry will be pressed to cope with it, and the Alaska State Department of Fisheries will enter upon its first year of full authority face-to-face with a staggering problem in administration, conservation and wise-use-without-waste" (Exhibit 6, *Pacific Fisherman*, p. 53). Further: "The State of Alaska is in control of its fisheries for the first time in this year 1960, which thus becomes the basic milestone in the future history of the resource. Moreover, the possibility that Bristol Bay may have a rich Red salmon run comparable with the greatest in the past of Alaska's fisheries adds further dash to an immediate future already full of zest (Id., p. 59).

We think there is enough in the testimony to justify what was said in item 1 on page 573 of our Report in 7 F.M.C. 563. The quoted testimony was a forecast for the entire 12-month period for the purpose of showing that the total tonnages for Alaska Steam in 1960 would be less than the State contended and would be in line with respondent's projection. Whatever the purpose of the forecast, the evidence of the "nice news" that western Alaska has "done it, they have cracked a million cases, 1,011,677" plus the other testimony supports a conclusion of an "exceptionally large salmon pack," in the Bristol Bay area, although it was small in southeastern Alaska (Tr., p. 2173).

The Commission might have reopened the record to verify the information, but such a choice was made unwise by the fact that the Examiner took 11 months to hear the case (from January 7, 1960) and then refused to reopen the record at the time of the closing of the hearing on December 6, 1960, on the ground of a need for an expeditious decision. He followed this action by a delay of 16 months in

issuing his initial decision served on April 3, 1962. We felt the need for a prompt decision was even more necessary.

Second, the Navy withdrew three ships during the summer and fall of 1960 from service in the Alaskan trade.

This statement is traced to a statement in the exceptions that the "Navy withdrew the U.S.N.S. *Harris County*, the U.S.N.S. *Funston*, and the U.S.N.S. *O'Hara* from service in the Alaskan trade," causing "an unusually large movement of MSTS cargo" which "is not likely to recur." A review of the record fails to disclose the source of this information, which must be regarded as untested. The hearing transcript record showed that the U.S.N.S. *Harris County* was withdrawn, as of August 2, 1960, from the Whittier-Seattle route and was "on an extended voyage in Arctic waters." As a result of the transfer, Alaska Steam was already carrying "all of the private owned vehicles * * * of military personnel * * * between Whittier and Seattle * * * and our MSTS tonnage for the first 5 months has increased rather than decreased, and it appears that increased tonnage is going to continue." At that time it was expected the *Harris County* would return, but this at least showed a temporary, nonrecurring increase in respondent's 1960 tonnages (Tr., p. 2164).

Other extra-record corroborating information that may be subject to official notice is that the "MSTS endeavor in the Seattle area was reduced from a Sub Area Command to an MSTS Office as of 1 January 1960, and the *Funston* and the *O'Hara* were retired to the National Defense Reserve Fleet" and the *Harris County* was diverted to "dumping ammunition" (Letter of May 11, 1962, from Military Sea Transportation Service Office, Pier 91 at Seattle, to Alaska Steam, as contained in an extra-record sworn affidavit).

Even with a complete disregard of the information about the movements of three small naval vessels, there is ample evidence in the record to support the decision reached. There has been no substantial prejudice caused by the presence of this evidence. We do not condone the practice of insinuating evidence in briefs on exceptions, but, since it has been done, we see no point in using such a minor, unprejudicial error as a basis of a reversal, as requested.

Third, the "surmise" that if the salmon pack was as large as it might be, the added local income would create a demand for merchandise to be shipped northbound, which would also increase 1960 carryings.

This statement was based on respondent's Brief on Exceptions in the record which stated "no one had anticipated the tremendous buying splurge which was indulged in by the residents of the Bristol Bay area at the end of the season" (p. 64). The point is made that it would be impossible to make this surmise on the available evidence

and, because it parallels too closely the allegedly "poisonous" information supplied by Alaska Steam, a court would consider it an improper conclusion. In effect we are to be precluded from the conjecture if it turns out to be substantiated later, even though the properly admitted testimony might still support the conjecture. As proof of the latter possibility, we note that long before the allegedly poisonous information was in, at the time of briefs to the examiner based on the record closed in December 1960, hearing counsel was able to state in his reply brief, for example: "that 1960 had an abundant movement of salmon * * * and this incremental traffic not only brings in increased direct revenue, but also contributes to the general prosperity of Alaska and thereby indirectly generates other additional freight revenue" (Reply Brief, p. 7). The statement proves that at least perception of a relationship between "general prosperity" including the prosperity of a fishing community and its purchase of goods carried northbound as a form of additionally generated freight revenue is reasonably possible on the legitimate record. A witness also made a reverse conjecture, involving this same relationship where purchasing power is depressed, in the following testimony which came after testimony as to a poor salmon season in the southwestern part of the State: "Last year (1959) Bristol Bay was declared a disaster area. When those people don't have any money, they don't buy refrigerators or automobiles which we hope we can carry" (Tr., p. 2176). The converse that when there is prosperity northbound that goods are bought is equally plausible and may be made the subject of a more specific surmise based on the 1960 Bristol Bay prosperity-generated increase in purchasing power, then foreshadowed by testimony wherein a witness, after saying that fishing had practically finished in Bristol Bay, stated:

However, I learned from telephone conversation with our Bristol Bay representative yesterday, conversation with our Mr. Renbarger, that although fish are still showing in the Bay, by that I mean you can look out and see them jumping, they [sic] were only two fishing boats out of the Nushagak side actually fishing. That would have been as of Saturday night. The reason he gave us is that these men have already made, the high fishermen this year has reported to have made $53,000 in about 1 month's work.

Q. One fisherman

A. Yes. And the low is going to be somewhere around $20,000, except for those individuals who only fish a day or two, not regular. The men are not interested in further fishing effort this season (Tr., p. 2173).

This is part of what was described as "rather nice news" about the high yield in Bristol Bay then foreshadowed for the rest of 1960. On the premise that 1960 might be used as the test year for tonnages, the Alaska Steam witness was trying to depress his figures, but respondent's motives for downgrading news of high tonnages aside, the wit-

ness' testimony provided facts which (1) showed that 1960 would not be a normal year, and (2) justified our action in adjusting or disregarding 1960 actual results as seen by the Examiner to achieve what we considered to be a result more in line with a longer term trend.

At the time conclusions were reached, the Commission was dealing with prophecy, not experience, with a forecast, not a survey. There is no need now to reject experience, particularly where it proves the validity of the forecast, as petitioners insist on, in the name of a rule confining a decision to the record.

All things considered, the accurately projected result for 1960, as seen by the Examiner's "better-than-average" projection and demanded by the State, was not regarded as a serviceable guide to future conditions for ratemaking purposes, but the tonnages in line with past experience were regarded as more serviceable guides in the light of the testimony.

In conclusion, we find, with reference to extra-record claims:

a. that some extra-record information was introduced by Alaska Steam;

b. that our findings were supported without reference to such information; and

c. with the exception of information about the movements of three small naval vessels, that only findings supported by the record were used in reaching our conclusions.

4. *Revenue estimates for 1960.* Our revenue estimates were based on the tonnage estimates. No change was made in Alaska Steam's revenue estimates, which were also based on such tonnages, and certain additional revenues and expenses, added or subtracted by the Examiner, were rejected to restore Alaska Steam's estimates. The respondent sustained its burden of proof in this part of the rate proceeding.

The Examiner's results were found to be distorted by some of his computations. The Examiner stated that at 1959 rates the additional income accruing to Alaska Steam from his projected tonnage increases from additional traffic, after allowance for cargo handling expense, would be $691,712. According to the Examiner, average income in 1959 on commercial and military cargo was $32.19 per ton, and cargo handling expenses in the first 5 months of 1960 averaged $14.27 per ton, leaving a net revenue of $17.92 per ton as the basis for his calculation (I.D., p. 30, f.n. 12). He then added the 1960 income projected by Alaska Steam as attributable to the rate increase on commercial traffic and found his projected net income before and after taxes (I.D., p. 31). The cargo handling expense, however, was predominantly applicable (the Examiner considered it impossible to make an allocation of handling costs to commercial cargo on this

record) to commercial cargo because military cargo is handled on a free in-and-out (f.i.o.) basis, which means that the armed forces, instead of the carrier, pay for all loading and unloading. This proceeding is concerned only with rates on commercial cargo. The Examiner, in using average figures applicable to both commercial and military traffic, may have distorted the net revenue from commercial cargo by not deducting enough of the applicable cargo handling expenses. While theoretically such a method might have produced an equitable result, the uncertainties inherent in such a method led to the rejection of his method in favor of our own estimates.

Any excessive net revenue derived from his computations, plus his estimated increased tonnages for 1960, inflated the net revenue figures used to show the Examiner's excessive rate of return.

These tonnage and revenue distortions are added reasons for not relying on the Examiner's estimates and for our belief that Alaska Steam had done a better job in sustaining its burden of proof.

The claim of error in the petition for reopening is that the 1960 revenue estimates did not project the revenue increase of 12% over 1959 shown for the first 5 months of 1960 into the last 7 months, but only projected a 2.5% increase for the full year. This is another reflection of the basic difference of regarding 1960 figures determined as accurately as possible, which petitioners insist on, instead of regarding a rough estimate of 1960 as only a hypothetical average year for rate purposes with adjustments in visible actual results to reflect known adverse and nonstatistical influences.

5. *Added voyages by Alaska Steam.* The weight given added voyages by Alaska Steam was to consider that they increased expenses, without for the immediate future increasing revenues because cargo tonnages showed no great increase. Petitioner questions the increase as a management decision without justifying evidence. We know of no authority for the proposition that all management decisions affecting future rates have to be justified by evidence. Necessarily, such decisions are based on judgment and future hopes. Perhaps history will show that Alaska Steam was wrong and the petitioner right in deciding that one of two sailings a week in van container service competitive with barge lines "is an uneconomical operation." At this stage it could not be proven wrong either, and respondent was allowed latitude for the exercise of its business judgment.

6. *Effect on rates of diversion of traffic to other carriers.* It is claimed that evidence of diversion of traffic to other carriers should have been used to show rates are too high. The possibility that continuing increases in the cost of transportation will cause a decline in tonnages carried, an increase in unit cost, and a decline in net revenues is a real one, but we were not satisfied that it is a valid criteria for

finding rates unreasonable where the Commission is not authorized to compel service by the carrier. These factors should certainly be of serious concern to owners and managers. Reduced rates may well help respondent's business, but we know of no authority permitting us to find rates unreasonable because a different ratemaking policy would be better from someone else's point of view. Alaska Steam is entitled to a fair return on the facts as we estimate them. If respondent is determined not to lower its rates to where less than a fair return is available, in the hope of future gain, we cannot change its policy by saying lower rates and a lower return is required by law.

7. *Rate relationship issues.* The failure to make findings regarding evidence submitted by GSA demonstrating unreasonableness of rates and rate relationships in the Alaskan trade is not error because of the lack of relevance to a general rate increase proceeding.

Facts were submitted showing Alaska Steam's commodity rates were considerably higher than the corresponding class rates covering the same commodities. Under Alaska Steam's Tariff Rule No. 80 commodity rates supersede the otherwise applicable class rates. The proposed increases made preexisting discrepancies between commodity and class rates even more extreme. For example, the proportional LCL (less than carload lot) commodity rate on filing cabinets was increased from $6.56 to $7.22 per 100 lbs. or 66 cents while the class rate was $2.84 and after the increase, $3.12 per 100 lbs. or 28 cents. The increase on the former was more than double the increase on the latter. The widened differences ranged from 2 cents to 85 cents per 100 lbs. The class rate increases are and remain lower than the commodity rate increases. An uneven application of the rate increase was shown. For example, a local commodity rate of $2.98 per 100 lbs. to Seward was compared with a $3.00 per 100 lbs to Juneau before increase. The two were almost the same, although Juneau is nearer Seattle than Seward, but the proportional rate to Seward is even lower at $2.07. (The proportional rate provides for a division of through water and rail rates.) The local rates to Juneau and Seward were increased 30 cents, but the increase received by Alaska Steam from the proportional to Seward was only 21 cents (Exhibit 57). The local port traffic received the greater increase, and the traffic moving under the proportional rate to inland points was preferred by a lower increase of 9 cents per 100 lbs. The local traffic to Seward would be small in comparison with proportional traffic, so southeastern Alaska is getting a heavier share of the revenue burden as a result of the increases. The foregoing is a summary of the basic facts GSA wanted us to consider in passing on the lawfulness of the increased rates. The claim is made that such a system of rates does not lend itself fairly to general increases in rates. Other facts showed

substantial rate distortions have unquestionably occurred, but these will be the subject of other proceedings. General rate increases to provide an overall fair return to a carrier are not invalidated by such distortions which appear to have occurred over the years and are not necessarily the result of a system. The variations should be challenged on the basis of unreasonableness of individual rates.

In our first report it was considered unnecessary to make findings demonstrating the unreasonableness of individual rates and rate relationships in the Alaskan trade because of lack of relevance of such findings in a general ratemaking proceeding. This is a general rate proceeding in which all rates are increased. The burden of the increase is shifted to all users of transportation service rather than on the shippers of the individual commodities whose rates might be adjusted based on facts pertaining thereto. No specific facts about rates for specific commodities were produced as a basis for conclusions as to lawfulness of separate rates. Absent such facts, it was sought to show that commodity rates which were higher than class rates were abnormalities requiring special justification. Normally, commodity rates are considered as exceptions to class rates and for this reason lower. These rules, however, are more applicable to rail transportation than to ocean transportation.

There are no commodity classification systems designed for ocean transportation rates. When a carrier wants to use a classification system, it adopts one designed for rail traffic, and Alaska Steam adopted the Western Freight Classification. In rail traffic, primary consideration is given to the weight and value of commodities, and less consideration is given to the volume or measurement of the commodity. The economics of ocean transportation require that more emphasis be given to the volume and measurement because space in ships' holds is limited. Until a realistic commodity rate is needed and established, class rates are used where there is historically little or no traffic. When a commodity rate is needed, a rate is negotiated and subsequently put in the tariff as a commodity rate. Accordingly, there is no essential relation that is reasonable or unreasonable between class and commodity rates in this proceeding which might be used to test the reasonableness or unreasonableness of a general increase.

8. *Rate of return.* The provision of a rate of return of 9.07% for Alaska Steam was based on a comparison of the resulting rate of return shown by this record with the rate of return for other ocean carriers. Our conclusion was based on the best available evidence caused largely by the intervenors' failure to introduce their own testimony and studies as to a proper rate of return for the respondent, and instead confining their attack to picking flaws in respondent's presentation. More was required than this, so the Commission of necessity

relied on the available expert witness' opinion and on the fact that what was allowed was close to what was allowed other carriers. GSA states that if the rate of return of 9.07% can be reduced "based on the higher revenue projection, disallowance of certain expense items, and other accounting adjustments as urged herein, the great importance of such a reduction to the State of Alaska and its residents" as well as this protestant, warrants the additional effort involved. But this effort has already been made, and a new effort at this time would only be a retrial of the case rather than passing on new issues and new facts.

9. *Alaska's contentions with respect to Examiner's Decision.* Other contentions were made by the State with respect to the Examiner's decision and not expressly passed on by the Commission. The State says failure to consider or mention these contentions in its "carefully prepared Exceptions and Reply" was error. No authority is cited for this proposition. To the extent the Commission "failed to mention" a contention, it was believed to be unnecessary or unrelated to the results.

10. *Remand of other carrier proceedings.* The remand of the proceedings involving respondents Puget Sound Alaska Van Lines (PSAVL), Garrison Fast Freight Division (Garrison), and Alaska Freight Lines, Inc. (Alaska Freight), was made because these carriers had supplied insufficient information to permit a decision. The State equates insufficiency with a failure to meet the statutory burden of proof as though the carriers had presented all they could and still failed to justify their rates. This was not the case. The record showed that these respondents relied on Alaska Steam being found to be the dominant carrier and being the carrier whose rates would govern all other forms of water transportation. We held Alaska Steam was not dominant in the trade on the routes these carriers served. In fairness, the other respondent carriers should be afforded an opportunity to justify their rates on a more complete record relating to their specialized services. We gave them the opportunity to make such a record before passing on their rates.

11. *Agreement to refund unlawful charges.* It is stated that error was made when the Commission, in response to letters by the respondents agreeing to refund charges above those determined to be just and reasonable, did not suspend the proposed increases. The power to suspend or not under Section 3 of the Intercoastal Shipping Act, 1933, is entirely discretionary with the Commission, and no consultation with State is required in spite of its interest in any suspension action. There can be no error under such circumstances. Whether or not any collections are a "trust", as suggested, or a "debt" to shippers or collectible only in a reparation proceeding if the rates are ordered reduced

is now immaterial in view of our ultimate conclusions as to the justness and reasonableness of the rates.

E. *Conclusion:*

Apart from the assignments of error, no few facts whatever, not existing at the time the record herein was developed, have been presented as justification for a revised decision. It is concluded for the reasons given herein that the eleven assignments of error, as summarized, are without merit and that the record citation and excerpts herein fully support the findings made, without reference to any extra-record information improperly placed before us by respondent Alaska Steam. The report and order issued by the Commission on April 30, 1963, and served May 6, 1963, is fully supported by evidence, findings, and reasons.

For the foregoing reasons, the petitions for reopening of Docket No. 881, and reconsideration of the Commission's report and order therein should be denied. This report shall comprise a supplement substantiating the conclusions reached by the above-named Commissioners insofar as they voted for the Commission's report of April 30, 1963.

FEDERAL MARITIME COMMISSION

No. 1078

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE
EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

No. 1080

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN
EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

Decided October 30, 1964

Respondent conferences permitted to use exclusive patronage (dual rate) contract in the form appended to this Report.

Elkan Turk, Jr., and *William Logan, Jr.*, for respondents.
George F. Galland for respondent, States Marine Lines, Inc.
Robert J. Blackwell and *Howard A. Levy*, Hearing Counsel.
C. W. Robinson, Hearing Examiner.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* James V. Day, *Vice Chairman;* Ashton C. Barrett, George H. Hearn, *Commissioners*):

In these consolidated proceedings two inbound steamship conferences from Japan seek (1) permission to institute contract/noncontract exclusive patronage systems (dual rates) in their respective trades and (2) approval of their proposed contracts under section 14b of the Shipping Act (75 Stat. 762; 46 U.S.C. 813a).

After the issuance of the order setting these matters down for investigation, hearings were held, briefs were filed with the presiding examiner, and an initial decision was issued on March 2, 1964. Exceptions and replies thereto followed the initial decision and oral argument was held on August 10, 1964.

No shipper or other interested party intervened in these proceedings.

Each of the respondent conferences is engaged in the inbound

trades to the United States from the Far East, principally Japan. In No. 1078, respondent is the Japan-Atlantic and Gulf Freight Conference (JAGFC) and respondent in No. 1080 is the Trans-Pacific Freight Conference of Japan (TFCJ). Each of these conferences has long been established and each employed a dual rate system before World War II.

After the war when commerical trading between Japan and the United States was resumed, the conferences again became operative. They did not, however, effectuate dual rate systems. Isbrandtsen, Co., Inc. (Isbrandtsen), an independent carrier, not a member of these conferences, then entered the trade in competition with the conferences. Isbrandtsen maintained a rate level generally 10 percent under the conferences' rates, and succeeded in capturing a substantial portion of the market.

To meet this competition JAGFC announced its intention to reinstate its dual rate system. That announcement was withdrawn due to legal ramifications present at the time. Ultimately, the conference filed a justification statement with the Federal Maritime Board pursuant to General Order 76, whereby a proposed dual rate system would become effective on January 23, 1953.

On January 22, 1953, the effectuation of the system was temporarily stayed and later the conference was enjoined from operating with dual rates until it had the prior approval of the Board after a hearing. *Isbrandtsen* v. *United States*, 211 F. 2d 51 (1954). The Board subsequently approved the system by orders served December 21, 1955, and January 1956, but those orders were reversed, *Isbrandtsen* v. *United States*, 239 F. 2d 933 (1956), and the reversal was affirmed in *Federal Maritime Board* v. *Isbrandtsen*, 356 U.S. 481 (1958).

Just prior to this protracted litigation, the companion conference, TPWC, issued its notice of intent to reinstate the system but withdrew it when General Order 76 was promulgated. In late 1953 it filed its statement pursuant to that general order, a hearing was ordered by the Board, and in view of the first *Isbrandtsen* decision the effectuation of the system was stayed pending the outcome of the hearing. The Board, after hearing, denied the use of the system in December 1955, *Contract Rates—Trans Pacific Freight Conf. of Japan*, 4 FMB 744 (1955).

Apart from these frustrated attempts to meet Isbrandtsen's competition by a system of dual rates, both conferences, on March 12, 1953, declared their rates on several selected major commodities "open." Rates in each trade dropped precipitously, and were not "closed" until the spring of 1958. In each trade conference carryings practically doubled between 1955 and 1957, and this fact prompted the closing of

the rates. For all practical purposes the rates have remained closed since that time, although they are not at as high a level as they were when opened in 1953.

Isbrandtsen remains in the trade as an independent, but it maintains a rate level not significantly different from the conferences' levels. Other nonconference carriers in the trades occasionally reach a level 30 percent lower than the conferences. Even during the course of these proceedings, the conferences have adjusted some of their commodity rates downward in an effort to meet outside competition.

The record established that nonconference competition to the Atlantic and gulf from Japan increased from 1 to 6 carriers and from 25 to 91 sailings from 1959 through November 1962. Similarly, in the companion trade to the Pacific Coast, nonconference competition increased from 1 carrier to 16 between 1959 and 1962 and nonconference sailings increased from 25 to 54 from 1959 through 1961.

In addition to the foregoing, the record shows (1) shippers and consignees favor the system, (2) conference services are superior in quality and frequency of service to nonconference services and (3) the failure of respondents to use the system could result in the opening of the rates and a rate war. A rate war would be inimical to the interests of shippers and consignees as well as to carriers.

There is nothing in this record to show that the system, or the contracts, as modified herein, would be (1) detrimental to our commerce, (2) contrary to the public interest, or (3) unjustly discriminatory and unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors.

Under the act, if the system is not objectionable the contracts [1] may be employed if (1) they are available to all shippers and consignees on equal terms and conditions [2] and (2) they provide "lower rates to a shipper or consignee who agrees to give all or a fixed portion of his patronage"[3] to the carriers, and (3) expressly contain clauses covering eight specific matters and "contain such other provisions not inconsistent herein as the Commission shall require or permit."

The bulk of the evidentiary record and briefs were concerned with the various contract provisions, and the exceptions and replies were devoted exclusively to contractual matters.

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[1] The form of contract in each of these cases, save for the insignificant details, is identical.

[2] Clause 7 clearly satisfies this requirement.

[3] Clause 2(a) meets this requirement. While these contracts do not afford the signatory shipper the option of being bound with respect to "all" or a "fixed portion" of his shipments, the contracts in this regard comport with our decision in *The Dual Rate Cases* served Mar. 27, 1964.

The Commission has recently issued its report in *The Dual Rate Cases* (March 27, 1964), wherein the matters raised here were carefully considered. Exceptions and replies here were filed after the issuance of that decision.

In sum, the conferences contend that the record in these cases requires a result different, in many respects, from the result in the *Dual Rate Cases.* Hearing counsel contend that respondents' exceptions constitute a "collateral attack" on *The Dual Rate Cases* and urge the reaffirmation of that decision here.

Despite the respondents' contentions, we believe our decision in *The Dual Rate Cases* is dispositive of the issues here. We cannot find circumstances so different from those presented in the earlier case that our conclusions and reasoning there would be inappropriate here. Nevertheless, we want to address ourselves to the principal matters raised by respondents.

The first of these is the "affiliates" clause. As is the bent of all conferences on the affiliates issue, respondents want *all* affiliates of the signatory shipper to be bound by the contract, not merely those over whom the signatory merchant regularly exercises working control in relation to shipping matters.

It was abundantly clear at the oral argument, that respondents desire the all inclusive affiliates clause as an aid to their policing of the contract. As we pointed out in the *Dual Rate Cases*, "no words in any agreement can assure that the parties will not breach their contract" and that the affiliates clause there—and here—approved "includes a specific provision regarding various subterfuges." In short, the easing of carrier sales effort and the aiding in strict observance of the contract offered by an all inclusive clause, is far outweighed by the legitimate business interests of autonomous subsidiaries or affiliates.

With respect to the conclusive presumption vis-a-vis the prima facie presumption in the legal right clause, we reiterate our statement in Docket No. 1079, *The Persian Gulf Dual Rate* case, decided August 31, 1964:

> 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.*

Respondents arguments regarding the merchant's option of furnishing pertinent data to the conference or permitting the conference to inspect such data at the merchant's place of business in respect to

routing of a particular shipment questioned by the conference are not novel. A flat requirement that the merchant supply documents at the conference office, could, we perceive, result in harassment of the merchant. The option, resting with the merchant, of requiring on-the-spot inspection will serve as a brake upon the possibility of groundless fishing expeditions by the conferences.

Apart from the foregoing there has been nothing presented here which would dissuade us from the view that dual rate contracts, so far as possible should be uniform:

> It is the expectation of the committee that a standard form of contract to be utilized by all conferences will be approved * * * with such riders as may be required to suit the needs of a particular trade. This will greatly simplify the problem of shippers * * * with respect to interpretation and application of differing provisions (H. Rept. No. 498, 87th Cong., 1st sess., p. 9, 1961).

The full text of the contract form, as modified and approved, is attached hereto.

Commissioner Patterson, concurring and dissenting:

The application of the Japan-Atlantic and Gulf Freight Conference and the Trans-Pacific Freight Conference of Japan (herein called "applicants"), two conferences of common carriers in foreign commerce, for permission to use an exclusive patronage, dual rate contract titled a "Merchant's Agreement" has been adjudicated in accordance with the requirements of section 14b of the Shipping Act, 1916, as amended.

Based on an examination of the proposed standard form of contract between the applicants and shippers for shipments on their members' vessels, and of the facts pertaining to the particular trade described in the record herein, it is found:

1. The Merchant's Agreement will be available to all shippers and consignees on equal terms and conditions.

2. The Merchant's Agreement provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to the conferences.

3. The contract rate system proposed by the applicants, 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.*

*It is noted that the above finding is not responsive to the order of investigation which states the Commission will pass on whether the applicants' dual rate system will also be unjustly discriminatory as between carriers. Such an undertaking goes beyond what sec. 14b requires. States Marine Lines, Inc., asked that we resolve this issue as to it, but on May 22, 1964, advised the Commission that the exceptions of States Marine to the initial decision which failed to pass on the issue were withdrawn. It is considered the omission is no longer of practical concern to any of the parties.

4. The Merchant's Agreement contains the express provisions prescribed by items (1) through (8) of section 14b.

5. The Merchant's 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 Agreement.

For the reasons stated in my concurring and dissenting opinion in *The Dual Rate Cases*, dated March 30, 1964, I dissent from the majority's action in prescribing modifications in the Merchant's Agreement without the essential preliminary finding of deficiencies in the applicants' contract. The finding is not to be implied nor is it supplied by a disclosure of deficiencies in the record as expressed in such statements as: "there is nothing in this record to show" the contracts would be detrimental, etc., or "we cannot find" the circumstances different than those shown in the record in Docket No. 1111, or "there has been nothing presented" which would "dissuade us from the view that dual rate contracts, so far as possible, should be uniform."

I would permit the use of the contracts on the basis of the supporting record herein pertaining to two inbound trade routes.

Eight modifications by the Examiner were adopted, and three additional modifications were made by the majority for the purpose of conforming the applicants' contract with the decision in *The Dual Rate Cases* in Docket No. 1111 (March 27, 1964).

The majority refers to its report in *The Dual Rate Cases* as dispositive of the issues in regard to the modified provisions. Such a reference, however, ignores a record herein containing evidence of conditions in trades from Japan to the United States, of the testimony of Japanese merchants, and of the testimony of American importers from Japan, and adjudicates on the record made in the earlier proceeding rather than on the basis of the record in Dockets Nos. 1078 and 1080. The latter dockets contain the record concerning trade between Japan and the U.S.A. and evidence the only proceedings in which respondents participated. Respondents did not participate in developing the record in *The Dual Rate Cases*, and the record therein is not conclusive as to these respondents. Respondents' rights are being violated by a decision not based on the present record, but on another record being used to determine their privileges.

I further disassociate myself from the statements regarding the efforts of the conference "to meet outside competition" and the record of increases in "nonconference competition" insofar as they imply that the contract is a necessary competitive measure justifying approval of a dual rate contract system in these trades. The other three factors

referred to by the majority on page 3, 4th paragraph, have my concurrence. Competition is a factor on almost any ocean trade route, but it was not shown to be the dominating or controlling factor for initiating the exclusive patronage contract in these trades at this time. Applicants' contract and dual rate system are not being introduced as a necessary competitive measure.

APPENDIX

APPROVED AGREEMENT FORM—DOCKETS NOS. 1078 AND 1080

AGREEMENT NO. ______

(NAME OF CONFERENCE)

MERCHANT'S AGREEMENT

Memorandum of Agreement entered into at ________________________ this ______ day of ____________ 19__, by and between ________________________, having (its) (his) principal place of business at ______________________ (hereinafter called the "Merchant"), and the carriers who are parties to the U.S. Federal Maritime Commission Agreement No. ______, as amended, providing for the (name of conference) (hereinafter called the "Conference" or the "Carriers"), and which Agreement has been duly filed with the Ministry of Transportation of the Japanese Government.

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 Japan, Korea, and Okinawa to (Pacific Coast ports of California, Oregon, Washington, Canada, and the ports of Hawaii and Alaska) or (U.S. Gulf ports and Atlantic Coast ports of North America) (hereinafter called the "Trade"); and the Conference further agrees that, subject to the availability of 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 shall 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.

(b) 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 (Art. 2(b) optional).

(c) 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.

(d) 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.

3. (a) 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.

(b) 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.

(c) 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.

(d) 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.

(e) 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.

(f) 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 Sec. 20 of the Shipping Act, 1916).*

(g) 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

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*Optional, but if not used, the following language shall 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."

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 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.

4. 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 shipload lots; (2) 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; and (3) shipments of cargoes for which no contract rate is provided.

5. 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.

6. 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 Carrier's 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 5 hereof.

7. The rates applicable to shipments made under this Agreement shall be the contract rates lawfully in effect at the time of shipment as set forth in the tariff or tariffs of the Conference, and on file with the Federal Maritime Commission. Contract rates on every commodity or class of commodities shall be lower than the ordinary rates set forth in the Carriers' tariff by a fixed percentage of fifteen (15) per centum of the noncontract or ordinary rates. The rates may be rounded out to the nearest multiple of five (5) cents (not including additional handling or accessorial charges) which will not result in the difference between the rates exceeding fifteen (15) per centum of the ordinary rates.

8. (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,** The rates of the 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 ________________________ 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 *) 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-noncontract rates in their tariff.

9. (a) The Merchant may terminate this Agreement at any time without penalty upon the expiration of ninety (90) calendar days following written notice to the Conference of intent to so terminate: *Provided, however,* That the

*Optional.

Merchant may terminate this agreement upon less than said ninety (90) days' notice pursuant to Article 8(a) hereof.

(b) The Conference may terminate this Agreement at any time without penalty upon the expiration of ninety (90) calendar days following written notice to the Merchant. Termination by the Conference may be in whole or with respect to any commodity: *Provided, however,* That Agreements with similarly situated Merchants are also so terminated.

(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.

10. (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 has 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 of such shipment computed at carriers' contract rates in effect at the time of 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 thirty (30) days after receipt of notice by registered mail from the Conference that they are due and payable, the Carriers shall suspend the Merchant's rights and obligations under the contract until he pays such damages. If within thirty (30) days after receipt of such notice the Merchant notifies the Conference by registered mail that he disputes the claim, the Conference shall within thirty (30) days hereafter 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 thirty (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 ten (10) days after the event.

11. (a) This Agreement is not and shall not be construed to be a contract of carriage with the Carriers or any one of them. Shipments under this Agreement are subject to all the terms and 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.

(b) (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).

12. Receipt and carriage of dangerous, hazardous, or obnoxious commodities shall be subject to the special facilities and requirements of the individual Carrier.

13. 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 himself 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 thereupon cease to 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 fifteen (15) calendar 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 or liability for damages any outstanding forward booking with such withdrawing Carrier.

14. All disputes arising in connection with this Agreement shall be submitted to arbitration by any party and any dispute so submitted to arbitration shall be finally settled under the Commercial Arbitration Rules of the Japan Commercial Arbitration Association. At the time a party makes a demand for arbitration to the Japan Commercial Arbitration Association it shall also submit the name of its arbitrator, and the other party shall have fourteen (14) calendar days thereafter to name its arbitrator and file same with the Japan Commercial Arbitration Association. The Japan Commercial Arbitration Association shall, within fourteen (14) calendar days thereafter, or within such other period as the parties may agree, name the third arbitrator, who shall act as chairman. *Any sum required to be paid* by an award of the arbitrators *shall be paid within thirty (30) calendar days* after a copy of the award has been mailed by the arbitrators to the parties. Judgment upon the arbitration award may be rendered in any court having jurisdiction thereof or application may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be. *In the event an action for judgment of execution* is brought in a court of competent jurisdiction on the arbitration award or on the judgment rendered thereon, the parties waive all rights to object thereto insofar as permissible under the laws of the place where the enforcement action is instituted. (*Provided, however,* Nothing herein shall deprive the Federal Maritime Commission of its jurisdiction).* The place of arbitration referred to in this paragraph shall be Tokyo, Japan, unless otherwise mutually agreed upon by parties concerned. The foregoing provisions regarding arbitrations shall apply unless the parties mutually agree to have any dispute settled pursuant to the rules of any other arbitration society and at any other place, or in any other manner.

If the intention with which any party hereto did or omitted, or caused or permitted to be done or omitted, any act or thing shall be an issue in any arbitration proceedings hereunder, such party shall have failed, refused, or omitted to furnish to any other party or to the arbitrators any information, document, or data, required to be furnished by it in accordance with this agreement, the arbitrators may draw from such failure, refusal, or omission, the inference that the information, documents or data contain facts adverse to the position of the party who so failed, refused or omitted.

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

*Optional.

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 fifteen (15) days' written notice to the Merchant, who may notify the Carriers in writing not less than ten (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 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 United States Federal Maritime Commission and filing with the Ministry of Transportation of the Japanese Government.) (Article optional.)

For and on behalf of the members of the Conference

Merchant (Full corporate, company, or individual name)

By ---------------------------------
(Title)

(Address of merchant)

By ---------------------------------
Chairman or secretary pro-tem.
(List of Carriers)

FEDERAL MARITIME COMMISSION

No. 1078

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

No. 1080

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACT

ORDER

Full investigation in these proceedings 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) contracts of the Japan-Atlantic and Gulf Freight Conference and Trans-Pacific Freight Conference of Japan submitted to the Commission should be approved with modifications made by the Commission:

Now, therefore, it is ordered, That the aforesaid contracts of the Japan-Atlantic and Gulf Freight Conference and the Trans-Pacific Freight Conference of Japan, as modified and set out in Appendix A to the aforesaid report, are permitted for use by the said Conferences.

It is further ordered, That the Japan-Atlantic and Gulf Freight Conference and the Trans-Pacific Freight Conference of Japan shall file with the Commission a copy of the full terms of the contract they offer to shippers and or consignees within 30 days from the day that the contract is first offered.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1192

Application for Freight Forwarding License—Wm. V. Cady, 17 Battery Place, New York 4, New York

Application for freight forwarding license denied.

Employee of a firm primarily engaged in the business of selling and shipping goods to foreign countries does not qualify as an independent ocean freight forwarder as defined in Public Law 87–254 and cannot be licensed, notwithstanding present intention to restrict his operations as forwarder to transactions in which his employer is neither seller nor shipper.

Ralph H. Chew for applicant and for Intervener, A. E. Chew & Co., Inc.

Gerald H. Ullman for intervener, New York Foreign Freight Forwarders and Brokers Association, Inc.

Robert J. Blackwell and *Thomas Christensen*, Hearing Counsel.

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

On January 12, 1962, respondent Wm. V. Cady filed with the Federal Maritime Commission his application for a license to engage in the business of forwarding, pursuant to section 44 of the Shipping Act, 1916, as amended. By letter of its managing director dated June 18, 1964, the Commission notified Cady that since he appeared to be a full-time employee of A. E. Chew & Co., Inc., a shipper to foreign countries, he was not within the statutory definition of an "independent ocean freight forwarder;" and that the application would therefore be denied unless he requested an opportunity to show at a hearing that denial was unwarranted, or submitted for Commission approval a plan to terminate his affiliation with A. E. Chew & Co., Inc. Cady requested a hearing, and this proceeding was thereupon instituted by order of the Commission served July 24, 1964, naming the applicant as respondent.

[1] This decision became the decision of the Commission on Dec. 23, 1964, and an order was issued denying the application. (Rules 13(d) and 13(h), Rules of Practice and Procedure, 46 CFR 502.224, 502.228.)

The Shipping Act, 1916, was amended by Public Law 87-254, effective September 19, 1961, to provide for licensing independent ocean freight forwarders. Section 44(b) of said Act as so amended (hereinafter the Act) directs the Commission to issue a forwarder's license to any qualified applicant found to meet certain conditions, among them that he be an "independent ocean freight forwarder" as defined. The Commission does not question Cady's ability and fitness to carry on the business of forwarding; the sole question is whether he is, or will be, an "independent ocean freight forwarder" as defined in section 1 of the Act:

> "An 'independent ocean freight forwarder' is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest."

The New York Foreign Freight Forwarders and Brokers Association, Inc. (hereinafter the "Forwarders Association") was permitted to intervene and submitted a brief following its appearance by counsel at the hearing. A. E. Chew & Co., Inc. also appeared at the hearing by Ralph Chew (who described himself as "Mr. Cady's employer"), and was permitted to intervene. Mr. Chew, who has been admitted to practice as an attorney in the State of New York but works in a sales capacity for A. E. Chew & Co., Inc., submitted a brief "as employer and friend of William V. Cady", which is in effect respondent's brief.

As indicated above, the applicant is, and proposes to remain, in the employ of A. E. Chew & Co., Inc. Chew & Co., in its business as export representative or "foreign sales manager" for a number of firms, is a shipper or seller to foreign countries as agent for such firms or as principal; however, applicant's activity as a freight forwarder is and allegedly will be confined to shipments with which his employer is not concerned as seller or shipper, consignee or purchaser, or as agent of any such person, and in which it has no proprietary or other beneficial interest. His employer permits him to carry on such "personal" business from its office without deduction from his salary or charge for any use of office space or facilities, principally the firm's telephone.[2]

Hearing Counsel and the Forwarders Association, in their briefs filed after hearing, contend that applicant Cady is "controlled" by a shipper and seller of export shipments and therefore does not qualify as an "independent ocean freight forwarder" under the definition, and hence cannot be licensed. Respondent's brief in effect contends that Cady remains an independent forwarder under the statute as long as he

[2] In the reply brief filed on behalf of respondent, it is asserted that since the hearing Cady has been paying "rent, telephone and secretarial services." A finding to that effect is not permissible on the record; however, as hereinafter set forth, it is concluded that the matter of reimbursement is not determinative of the application.

does not act as a forwarder with respect to any shipments in which Chew & Co., his employer, is concerned or has any interest; and contends that the statute was not intended to apply to persons in Cady's position.

Findings of Fact

The applicant Cady has been employed by A. E. Chew & Co., Inc., for about 45 years—all or practically all his working life; he was born August 28, 1903. Chew & Co.'s business is essentially the solicitation and administration of export sales of food products of American manufacturers or producers. It operates through personnel located in this country or abroad or traveling, about 15 employees altogether. It works under various arrangements as to compensation. In some cases it receives a retainer, but more often is paid a commission on sales. In some cases, as with the State of Maine, it buys the goods and resells them for its own account. This latter arrangement was adopted because the State of Maine cannot legally take credit risks, and therefore Chew & Co. buys for cash and resells for its own account. There are also other situations, not described in the record, in which Chew & Co. "for particular reasons that are rather complicated" acts as exporter, buying the goods and reselling them abroad. Chew & Co. has dual-rate contracts with various conferences—contracts which entitle it, as a shipper, to reduced rates in return for its exclusive patronage. Otherwise Chew & Co. does not take title to the goods it sells, and its principal's name appears as shipper on the bill of lading with the further exception of consolidated shipments for several principals, where Chew & Co. appears as shipper. Chew & Co. is variously referred to as an exclusive export representative, foreign or export sales manager, manufacturer's representative, export sales company, shipper, and seller. Under whatever name, its primary business is the sale of food products abroad for various producers thereof, either as agent or as a sort of franchised dealer trading for its own account. It acts for about 17 such concerns at the present time.

Prior to 1962, Chew & Co. acted as freight forwarder with respect to all such merchandise. Cady was in charge of this function, with the title of export traffic manager, running his own department with several employees. Chew & Co. billed its principals for freight forwarding fees, but Cady personally retained the so-called brokerage which was received from carriers in connection with such shipments. Cady was paid a salary of around $7,000 or $8,000 per year, the exact amount of which he couldn't recall, although he testified that it has been "at a standstill". In addition he received an annual bonus, of the order of $700 or $800 per year, the amount of which was roughly related to the profit of his department but was entirely discretionary with Chew &

Co. Chew & Co. knew how much brokerage he received from carriers.

Cady's department handled 2,000 or more shipments per year. In 1961 Cady received $10,500, apparently including salary and bonuses from Chew & Co., and about $1,500 in brokerage from carriers.[3] In 1962 he received close to $4,000 in brokerage from carriers.

In 1950 Cady applied in his own name, under General Order 72 of the Federal Maritime Board, for a certificate of registration as a freight forwarder, and was assigned Freight Forwarder Registration No. 1102. His application did not reveal any connection with A. E. Chew & Co., Inc. The application form was perhaps not as explicit as it might have been, but complete candor would have suggested that his employment be revealed in answer to question 6: "Is registrant a subsidiary or affiliate of any other business?"—or question 7: "Does registrant control, or is he engaged, directly or indirectly, in any business other than forwarding?" Both questions were answered "No"; however, in 1958 Cady stated that he received a salary from Chew & Co. (which he described as "exclusive export representatives" of the shippers he served) in a letter to the Commission's predecessor, in response to an order pursuant to section 21 of the Shipping Act, 1916.

After he received his certificate of registration (and possibly before that time, although the record does not indicate), Cady had his own letterhead, and an invoice form which he used to bill carriers for brokerage. At that time, as at all times material to this proceeding, he had no office or telephone separate from those of Chew & Co., although until about a year ago, when the building was remodeled, his name appeared in the building directory and upon a door to the quarters occupied by Chew & Co. These listings did not describe him as a freight forwarder, nor was he so listed in the Manhattan telephone directory. The telephone number shown on his letterhead was paid for by and listed in the name of Chew & Co. He is listed as a freight forwarder in the 1964 New York metropolitan area issue of the Journal of Commerce Transportation Telephone Tickler, a free listing.

In or about 1962 Chew & Co. began to use "outside" forwarders—registered forwarders other than Cady—to handle forwarding services in connection with its business. (Such forwarders were referred to as "outside" forwarders throughout the hearing; in fact Cady, in a letter to the Commission dated December 11, 1962, had said concerning his arrangement with Chew & Co.: "We charge our overseas customers the going rate for forwarding fees just as we would do if an outside forwarder handled our shipments, or I were an independent forwarder".) It was found necessary either to do that or reorganize its

[3] This would be less than $1.00 per shipment. In 1957, according to Cady's reply to a Federal Maritime Board questionnaire, he received $1,291 on approximately 2,000 shipments (about 65 cents each) and nothing on 300 additional shipments (exhs. 10, 11).

traffic department, and Chew & Co. believed that the "new law" (Public Law 87–254, the licensing amendment, which had become effective September 19, 1961) required it to stop acting as a forwarder. Eventually (the evidence is conflicting as to just when) Chew & Co. turned over to outside forwarders the freight forwarding function with respect to all its transactions, including those in which it acted as exporter for its own account as well as those on which it received commissions or other compensation. Cady remained as export traffic manager, but his duties were correspondingly reduced. At present his duties for Chew & Co. consist principally of checking shipping documents in connection with Chew & Co.'s accounts, including papers prepared by outside freight forwarders used by the firm. His salary has not been reduced, but his bonus has or may be reduced or eliminated.

Cady has continued to handle, as a freight forwarder, certain shipments with which Chew & Co. has no concern either as exporter or selling agent. His principal customer has been Underwood & Co. Chew & Co. acts as exclusive export sales manager for Underwood & Co. with respect to certain finished food products manufactured in the United States and sold in foreign countries; however, shipments of such goods are not handled by Cady but by outside freight forwarders, as described above. Cady acts as freight forwarder for Underwood & Co. only with respect to raw material, containers and machinery which its ships to Venezuela, where Underwood & Co., or a subsidiary thereof, operates a factory. Chew & Co. as such has nothing to do with such shipments, and in fact has no arrangement with Underwood & Co. concerning Venezuela. Originally Underwood & Co. used another freight forwarder for the Venezuela shipments, but after it had had some trouble with the forwarder it turned the business over to Cady. The business was solicited for Cady by or at the suggestion of Ralph Chew. Cady has handled a few other shipments similarly disassociated from the regular business of Chew & Co., including some shipments for an account which Chew & Co. had lost due to corporate changes. Cady has been able to get freight forwarding business from that company, but Chew & Co. has never got the export sales account back.

Until June 1964, Cady turned over to Chew & Co. (or Chew & Co. collected—the mechanics are not clear) the freight forwarding fees received from this "personal" business, although Cady continued to retain any brokerage received from carriers. Chew & Co. takes the position that it has returned some part of the freight forwarding fees to Cady in the form of an annual bonus, while permitting Cady to use its office facilities to carry on the business. Since July 1964, the separation of this business from that of Chew & Co. has been carried

farther. Cady has set up a separate bank account and his own books (apparently the transactions, except for brokerage paid by carriers, went through Chew & Co.'s books prior to that time) and now retains all forwarding fees as well as brokerage. Chew & Co. considers Cady a part-time employee, permitting him to carry on his freight forwarding operations from his desk in the offices of Chew & Co. Apparently he uses no other facilities of his employer except the telephone.

It is this rather meager freight forwarding business, considered personal to Cady and now disassociated from the business of his employer to the extent described above, for which Cady desires a license. His employer is anxious to have him licensed so that he may continue to carry on such business, purportedly for no other reason than Cady's own welfare. Ralph Chew testified that since the changes in the company's operations following the enactment of Public Law 87–254 eliminated Cady's function to an extent, he has tried to help Cady build up his little independent freight forwarding business; and that while this effort has not been too successful, the business is very important to Cady. Under Chew & Co.'s present method of operating, Cady's value to his employer has been reduced. At his age the possibility of finding more remunerative employment elsewhere is unlikely for a person of his experience and background. For similar reasons he is in no position to relinquish his salaried job to go into business entirely on his own. Whether or not he might be able to operate profitably a one-man, independent forwarding operation if he were assured some of Chew & Co.'s business, was not discussed. Neither was the possibility of his attending, as an employee of Chew & Co., to shipments of such merchandise as Chew & Co. may legally dispatch without a license (but without the collection of any compensation from carriers) as a "person whose primary business is the sale of merchandise", under section 44(a) of the Act. He is covered under his employer's retirement plan, although the nature of the plan (including the extent of benefits and any vesting provisions) was not described.

Discussion and Conclusions

"This licensing statute, like other licensing statutes, should be approached with a liberal attitude to the end that permits may be granted to qualified applicants. *Application for Freight Forwarding License—Dixie Forwarding Co., Inc.*, 8 F.M.C. 109, 112; and report on reconsideration, 8 F.M.C. 167. Nevertheless, if the applicant is not fairly within the definition of "independent ocean freight forwarder" set forth in Section 1 of the Act, there is no room for the exercise of liberality.

Cady's status under the definition depends on whether or not, within the meaning and intent of the statute, he is and will be controlled by a seller of, or person having a beneficial interest in, shipments to foreign countries, by reason of his employment by A. E. Chew & Co., Inc.

One of the principal purposes of Public Law 87–254 was to authorize payment of so-called brokerage by ocean carriers to freight forwarders, but only under such circumstances as not to result in any benefit to a shipper such as to constitute a rebate. To prevent the possibility of such indirect rebating, the definition of an "independent ocean freight forwarder" was established and conformity therewith made a condition to the granting of a license; and carriers were permitted to compensate only licensed forwarders. The definition was intended to exclude indirect as well as direct interests, including so-called "dummy forwarders"—concerns organized for the sole purpose of collecting compensation from carriers which would find its way back in whole or in part to the shipper. The language concerning shipper control was evidently taken from paragraph 244–13 of General Order 72 (covering the registration of freight forwarders) issued by the Commission's predecessor in 1950, where the existence of such control was expressly stated as one of the situations in which payment by a carrier to a forwarder would constitute a rebate:

> "* * * Registration shall not entitle a forwarder to collect brokerage from a common carrier by water in cases where payment thereof would constitute a rebate—i.e., where the forwarder is a shipper or consignee or is the seller or purchaser of the shipment, or has any beneficial interest therein or where the forwarder directly or indirectly controls or is controlled by the shipper or consignee, or by any person having a beneficial interest in the shipment. A forwarder shall not share any part of the brokerage received from a common carrier by water with a shipper or consignee."

As Hearing Counsel contend (and neither Cady nor Chew & Co. denies), Chew & Co. is a seller and shipper of shipments to foreign countries, as those terms are used in the definition of an "independent ocean freight forwarder". Its primary business is the sale of merchandise, for its own account as well as for the account of others. As to those shipments which it dispatches as exporter with title to the goods, it is the seller in the most technical sense. It is also a shipper in the regular course of its business, to such an extent that it has entered into dual rate (exclusive patronage) contracts with numerous steamship conferences.

The applicant Cady is an employee of Chew & Co., in the usual master-servant relation and not as an independent contractor, controlled by his employer in the details and method, as well as the result, of services rendered for his employer. Chew & Co. has actually exercised control over Cady with respect to his carrying on the business of

forwarding as a registrant, as recently as June 1964. Until that time, Chew & Co. received and retained the freight forwarder's fees earned by Cady in his allegedly independent, personal forwarding business, and he operated, and continues to operate, in the office of his employer during his regular hours of work. While he remains an employee of Chew & Co., Cady, as the agent and servant of his employer, will remain subject to his employer's will as it may change from time to time. *Restatement, Second, Agency Sec. 33.*

While theoretically an agent and employee may properly refuse to do a particular act because it is beyond what he has contracted to do, the fact of Cady's dependence on his job with Chew & Co. (which is emphasized in respondent's brief and is in common to a greater or less degree with the position of every employee) leaves no doubt as to the affirmative as well as the negative control which Chew & Co., a seller and shipper, has and will have over Cady's activities, regardless of any present agreement or understanding. Cf. *American Steel Foundries Co.* v. *Tri-City Council*, 257 U.S. 184, 209.

Thus it is unimportant that his employer now permits Cady to retain brokerage and forwarders fees. Under the circumstances, the relation would not be changed substantially if Cady were in fact a part-time employee, as his employer now claims to consider him. Actually Cady remains a full-time employee, notwithstanding that he is permitted, at present, to carry on his "personal" business during his regular working hours. Likewise, it is immaterial whether or not Cady reimburses his employer for the use of its facilities; in fact reimbursement might well constitute a method of transmitting a rebate in violation of the Act.

On its face, the master and servant [4] relation between a shipper and licensed forwarder is inconsistent with the purpose of the Act that forwarders eligible to receive compensation from carriers be neither shippers nor sellers nor controlled by either. The present situation is no exception. The complete history of applicant's operations indicates that it grew out of a dummy forwarder setup employed by Chew & Co. and Cady since 1950. From that time until 1962, if not thereafter, Cady's forwarding activities were separate from his employer's affairs only in that Cady had a letterhead and an invoice form bearing his name, the latter used only to bill carriers for "brokerage"; his employer billed and retained all forwarding fees. Cady's customers were Chew & Co.'s customers, the transactions were recorded in Chew & Co.'s books, Chew & Co. provided all physical facilities (the "tools and instrumentalities") and Cady was its "export manager". It is unbelievable that Chew & Co., in fixing Cady's remuneration (includ-

[4] "Employee" is the modern term for "servant"; in general the words are synonymous. *Restatement, Second, Agency Sec. 220g.*

ing the discretionary bonus), did not take into consideration the brokerage he received from carriers; or that Cady did not recognize such brokerage as flowing from his employment with Chew & Co. and to be added to his salary and bonus. The registration in Cady's name presented just such a false facade as Public Law 87–254 was designed to eliminate.

To license Cady while he remains an employee of Chew & Co. would continue the same structure, susceptible at any time of use in flagrant violation of the purpose of the statute. The present intentions of Cady and his employer are immaterial, since the statute makes licensing depend upon the existence of control and not upon its exercise or nonexercise. Public Law 87–254 does not allow licensing upon condition that the forwarder refrain from collecting compensation from carriers with respect to shipments made by the forwarder or someone controlled by or controlling him. That was roughly the plan of General Order 72 in connection with the registration of forwarders. It is significant that Congress did not follow such an arrangement in Public Law 87–254—presumably because, as the legislative history shows, the prohibition in General Order 72 was frequently evaded through the use of dummy forwarders and the like.

Applicant Cady is and will be, while his present employment continues, controlled by a shipper and seller of shipments to foreign countries, and therefore not an "independent ocean freight forwarder", under the definition contained in section 1 of the Act.

Findings and conclusions proposed by the parties have been incorporated herein to the extent that they are found to be material and supported by the record, and are otherwise denied.

Upon the record herein, it is concluded that the Commission cannot find that the respondent, Wm. V. Cady is, or will be, an independent freight forwarder as defined in section 1 of the Shipping Act, 1916, as amended. Accordingly an order will be entered denying respondent's application, pursuant to section 44(b) of said Act.

(Signed) WALTER T. SOUTHWORTH,
Presiding Examiner.

DECEMBER 2, 1964.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 377

LUDWIG MUELLER CO., INC.

v.

PERALTA SHIPPING CORPORATION, AGENTS OF TORM LINES

SPECIAL DOCKET NO. 378

LYKES BROS. STEAMSHIP CO., INC., APPLICATION TO REFUND PART FREIGHT CHARGES COLLECTED ON SHIPMENT VIA SS "NANCY LYKES" FROM LEHAVRE, FRANCE, TO GALVESTON, TEX.

Decided January 13, 1965

Permision to grant refunds denied.

Kenneth G. Frazer for Ludwig Mueller Co., Inc.

K. W. Schmolze for Peralta Shipping Corp.

Walter T. Southworth, hearing examiner in No. 377.

Edward S. Bagley for Lykes Steamship Co., Inc.

P. D. Hugon for Mory, S. A.

Paul D. Page, hearing examiner in No. 378.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* George H. Hearn, John S. Patterson, *Commissioners*)

On August 19 we entered our notice of determination to review the initial decision in No. 377 and on August 21 we entered a similar notice with respect to No. 378.

These cases arise, as have many since the enactment of the Bonner Act [1] on October 3, 1961, and under long established rule 6(b) of the

[1] Public Law 87-346, 87th Cong. (75 Stat. 762), which *inter alia,* added sec. 18(b) to the Shipping Act (the Act), 46 U.S.C. 817(b).

Commission's rules of practice and procedure which reads:

(b) *Voluntary payment of reparation.* Carriers or other persons subject to the shipping acts may file applications for the voluntary payment of reparation or for permission to waive collection of undercharges, even though no complaint has been filed pursuant to rule 5(b). All such applications shall be made in accordance with the form prescribed in appendix II(5) herein, shall describe in detail the transaction out of which the claim for reparation arose, and shall be filed within the 2-year statutory period referred to in rule 5(c). [This provides procedurally for the filing of formal complaints under section 22 of the Act.] Such applications will be considered the equivalent of a complaint and answer thereto admitting the facts complained of. If allowed, an order for payment will be issued by the Board.

In both of these cases, as in other special docket proceedings, respondents initiated the action and they were prosecuted as "friendly suits." In neither was there a "contest" and the parties seek our quasi-judicial approval of a "settlement" authorizing a refund, in No. 377 of some $840 and in No. 378 of some $61.

We have chosen these two cases for careful review in an effort to spell out clearly Commission policy with respect to special docket proceedings. In each, to be sure, the equities pointing to relief are weighty. If we are clothed with the authority to grant the relief requested, these two cases merit that relief.

The pertinent facts in No. 377, briefly, are these. Complainant Ludwig Mueller, Inc. (Mueller), as sales agent for a Bulgarian seller, arranged for the reexportation of some 73,000 pounds of paprika from New York to Algiers. The movement to Algiers was accomplished by a vessel of the Torm Lines whose agent in the United States is Peralta Shipping Corp. (Peralta), the respondent here. There is no outbound movement of paprika from New York, and only the incidence of entry denial, most likely, would ever give rise to that product's exportation from the Atlantic coast.[2] Since paprika is not exported from the Atlantic coast, Torm Lines' eastbound tariffs from New York do not contain a commodity tariff item covering paprika. When the reexportation was made, therefore, the appropriate tariff classification for this commodity was $76.50 "weight or measurement" N.O.S.[3]

As the record shows, complainant did not question the weight or measurement feature of this tariff item but assumed that it would be rated on a "weight" basis since Torm's inbound (westbound) tariff from Morocco rates paprika on a weight basis. Furthermore, the shipper's assumption in this regard was fortified by the fact that eastbound rates to both Hamburg and Istanbul to which ports other portions of this original shipment of paprika were reexported were rated on a weight basis. Accordingly, at the time of shipment Mueller did

[2] The Food and Drug Administration refused entry into the United States of this paprika.
[3] Not otherwise specified.

not consider the possibility that the "measurement" basis would be applied to the shipment and assumed that the rate of $36 [4]—not $76.50—would obtain. When the measurement rather than the weight basis was applied, Mueller complained to Peralta and paid the freight bill under protest. This application ensued.

Complainant argues that through the inadvertent failure of the carrier to file a proper rate on this commodity that it has been assessed an unreasonably high rate which runs counter to common sense in that the failure of the Commission to grant the relief requested would result in a penalty to the shipper and an unconscionable windfall to the carrier.

Although Mueller had actual knowledge of the "weight or measurement" feature of the tariff item but relied on practices in other trades in assuming that the "measurement" basis would not be applied, the examiner, following our earlier decisions and stating that the "shipper has no reason to expect freight to be charged at a rate nearly two and one-half times what he knew had just been paid to move the same item a much greater distance," granted the refund, noting that to do otherwise would produce an oppressive, unjust and absurd result, and that the protection which the Act affords to shippers would be negated by a literal interpretation of the Act.

No. 378 involves a shipment of household thermometers from Le Havre to Galveston in 1964. On August 15, 1962, and thereafter, Lykes maintained a tariff rate indicating a $50 rate for household thermometers. Mory, S.A. (Mory), on occasion, shipped via Lykes household thermometers at the $50 rate. On January 9, 1964, Lykes amended its tariff effective January 15 and incorporated in that new tariff certain rate increases of approximately 10 percent. By "an erroneous transportation of the descriptive language" the commodity involved, "through a typographical error," was combined with the description of industrial and dairy thermometers. The rate on household thermometers was omitted and the applicable tariff became $103 rather than $55 w/m which would have resulted had the proposed increase of 10 percent been set out in the new tariff which became effective on January 15, 1964. The examiner found that Lykes' omission of the commodity classification constituted a "clerical error," and relying upon earlier Commission pronouncements in special docket proceedings, granted the relief "in spite of the provisions of section 18(b)(3)," citing the *Swedish American Line* case: [5]

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,

[4] Torm's inbound rate on paprika from Morocco calculated on a weight basis.

[5] Docket No 371, decided June 12, 1964. 8 FMC 142, 143

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.

For reasons set forth below we disagree with both of these initial decisions. After a painstaking review, we are of the opinion, with respect to special docket proceedings in our *foreign* commerce, that the dissent in the *Swedish American Line* case, *supra*, reached the correct result. Neither "inadvertent clerical error"—the asserted ground in No. 378—nor the fact that the shipper had "no reason to expect freight to be charged at a rate nearly two and one-half times what he knew he had just paid to move the same item a much greater distance"—one of the indicia used in No. 377—is sufficient to overcome the clear obligation imposed by section 18(b) (3) which reads:

No common carrier by water in foreign commerce * * * shall 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 tariffs on file with the Commission and duly published and in effect at the time; * * * [Emphasis added.]

In No. 377, the applicable rate on the commodity was $76.50 "weight or measurement." It was "on file with the Commission" when the shipment was made. It was then "duly published" and it was "in effect." Likewise, in No. 378, oversight or not, the published, in effect, Commission-filed tariff for the commodity in question was $103.50 w/m—not $55, $50 or any other amount. Moreover, an unintentional failure to file a particular rate,[6] a bona fide rate mistake,[7] a hardship visited upon an innocent shipper by inadvertence of a carrier,[8] or a stenographic omission [9] are not sufficient reasons for departing from the requirements of section 18(b) (3).

We are aware that our decision in these two cases will result in some hardship, but we adopt the position that strict adherence to filed tariffs is mandatory. Moreover, we believe that strict construction of the statute will result in more careful tariff administration and management by carriers and conferences, and the obviation of possible undue or unfair preferences or advantages and discriminations.[10]

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[6] *Y. Higa Enterprises v. Pac. Far East Line, Inc.*, 7 F.M.C. 62 (1962).

[7] *Martini & Rossi et al. v Lykes Bros. S.S. Co.*, 7 F.M.C 453 (1962)

[8] *Uddo & Taormina Corp et al v. Concordia Line*, 7 F.M.C. 473 (1962).

[9] *Lykes Bros. S.S Co.—Refund of Freight Charges*, 7 F.M.C. 602 (1963).

[10] Special docket decisions with respect to tariff and freight discrepancies in our foreign commerce, following the enactment of sec. 18(b), evince a policy to extend assistance and understanding to carriers and their employees in making the transition from the earlier tariff filing practices in our foreign trade to the new strict filing requirements. It is almost 3 years since sec. 18(b) was enacted and it should be expected that carriers are now thoroughly familiar with tariff filing requirements Such applications, which are addressed to some undefined wellspring of equity in the Commission rather than to any basis in law, have shown no sign of abating.

Judicial authority of long standing supports our view that no deviation may be made from the rates on file. As early as 1915, the Supreme Court, in *Louisville & N.R.R. Co.* v. *Maxwell*, 237 U.S. 94, was called upon to interpret section 6 of the Interstate Commerce Act—not unlike our section 18(b)(3)—which then read in part:

Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, * * * except such as are specified in such tariffs.

Justice Hughes, speaking for the majority, wrote:

Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

The *Maxwell* pronouncement has been followed recently in *Silent Sioux Corp.* v. *Chicago & North Western Ry. Co.*, 262 F. 2d 474 (1959):

* * * the principle is firmly established that the rate of the carrier as duly filed is the only lawful charge.

and in *Johnson Machine Works, Inc.* v. *Chicago B&Q R. Co.*, 297 F. 2d 793 (1962):

It is well established when the shipper designates the routing, the rate set out in the published tariff covering such route is the only lawful charge that can be properly made.

While it is true that the *Maxwell*, *Silent Sioux*, and *Johnson* cases (and the many that follow them) relate to the Interstate Commerce Act provision requiring the exaction by carriers of the filed tariff rate, that provision is similar to our section 18(b)(3). And we would be remiss, indeed, if we continued to construe the requirements of section 18(b)(3) in a manner contrary to the long established judicial interpretation of section 6 of the Interstate Commerce Act. *U.S. Nav. Co.* v. *Cunard SS Co.*, 284 U.S. 474 (1932).[11]

In light of the rules recited in the *Maxwell* case,[12] unless there is some other statutory basis for relief in these cases—and we can find none—the construction we have placed on section 18(b)(3) of the Act is dispositive of special docket applications grounded on rate or tariff deviations in our *foreign* trades.

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[11] "* * * The settled construction in respect of the earlier Act must be applied to the later one, unless, in particular instances, there be something peculiar in the question under consideration, or dissimilarity in the terms of the Act relating thereto, requiring a different conclusion." 284 U.S. 474 at 481.

[12] "(T)he rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted under any pretext." 237 U.S. 94, 97.

It may be asked, at this point, what is the function of our special docket procedure and when may it be used. It is a procedure whereby there is approved a refund from a carrier to a shipper of the difference between a rate that the carrier admits and the Commission finds to be unreasonable (and therefore unlawful), and *a rate which the Commission adjudges to be reasonable.*

It becomes immediately apparent, therefore, that only in those cases where the Commission is empowered to direct the enforcement of a reasonable rate is our special docket technique applicable, i.e., those cases within the purview of section 18(a) of the Act and the provisions of Intercoastal Shipping Act, 1933. Such cases, of course, relate solely to the Commission's jurisdiction over common carriers in the so-called noncontiguous domestic trades. Section 18(a) requires such carriers to establish and observe "reasonable rates" and provides:

> Whenever the board finds that any rate * * * demanded, charged, collected, or observed by such carriers is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable rate * * * .

Section 4 of the 1933 Act specifies:

> Whenever the Commission finds that any rate * * * demanded, charged, or collected or observed by any carrier subject to the provisions of this Act is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum, or minimum, or maximum and minimum rate. * * *

This power of the Commission is not to be found in any provision of law respecting tariff or rate jurisdiction in our *foreign* commerce. To be sure, section 18(b)(5) provides:

> The Commission shall disapprove any rate or charge filed by a Common Carrier by water in the foreign commerce of the United States or conferences 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.

But strikingly absent from the authority conferred upon us over rates in the foreign trades is any power to set a "reasonable" rate. The extent of our reach, in such cases, is to "disapprove." This lack of authority is fatal to special docket applications in the *foreign* trades, for special dockets—like all complaint cases seeking reparation—require the fixing by the Commission, of *damages*, and the impotency to set or prescribe a "reasonable" rate forecloses our ability to arrive at the measure of damages, which, in unreasonable rate incidents, is the difference between the "reasonable" and the "unreasonable":

> * * * (t)he plaintiffs have paid cash out of the pocket that should not have been required of them, and there is no question as to the amount of the proximate loss. *Southern Pac. Co.* v. *Darnell-Taenzer Co.*, 245 U.S. 531 (1918).

Our reported special docket cases prior to *Y. Higa, supra*, reflect the view that the award of reparation stemming from an overcharge—

unlike an action establishing an unlawful discrimination or prejudice[13]—must be bottomed upon the ability (1) to find a rate "unreasonable" and (2) to state what the reasonable rate would be. In *Oxenberg Bros. Inc.* v. *United States*, 3 F.M.B. 583 (1951), it was found that a particular rate was "clearly unreasonable and, therefore, unlawful in violation of section 18" and "unlawful to the extent that it exceeded $10 per 2,000 pounds."

In sum, the special docket procedure, as a vehicle for avoiding the consequences of tariffs filed in accordance with section 18(b)(3) of the Act is no longer appropriate. Rule 6(b) therefore, cannot be used as authority to override the clear meaning of a statutory mandate.

What the parties have attempted here, and have attempted in other proceedings, could have been accomplished within the framework of the Bonner Act. While it is true that new and initial rates, and changes in rates which result in increases, must be filed to become effective not earlier than 30 days after they are filed, under section 18(b)(2), special permission may be granted whereby such rates may become effective almost immediately. Indeed, the great majority of special permission applications filed pursuant to section 18(b)(2) have shown sufficient "good cause" to warrant the grant of the requested permission. Further, where a carrier proposes to *reduce* a rate, the only requirement that must be met is that it be filed and made public. And to facilitate the filing of changes in tariffs the Commission, more than a year ago, established a policy whereby it would receive such changes by telegram or cable, even after the close of business at 5 p.m. on Fridays.

What we have said here, of course, does not extinguish or restrict the right of any person to file a complaint under section 22 of the Act alleging a violation thereof and inserting a claim for reparation for harm caused by such violation.

An order dismissing these applications will be entered.

VICE CHAIRMAN DAY AND COMMISSIONER BARRETT DISSENTING:

We would uphold the decisions of the examiners in the two cases here before us which granted the parties' applications for permission to refund portions of freight charges previously collected. Portions which amount to less than $900 in one case and less than $70 in the other.

We would grant the applications because we believe that a reasonable interpretation of section 18(b)(3) would not forclose the exercise of our administrative discretion to provide the relief which justice and equity demand.

[13] Specific pecuniary loss resulting from the discrimination must be proved. *Waterman* v. *Stockholms*, 3 F.M.B. 248 (1950), *West Indies Fruit Co. et al.* v. *Flota Mercante*, 7 F.M.C. 66 (1962).

In the Mueller case (special docket 377) the *shipper* assumed that the cargo of paprika would be charged on a weight basis in the light of his knowledge of rates applicable in trades where the subject commodity normally moved and had no reason to expect freight to be charged on a measurement basis and at a rate nearly 2½ times what he knew had just been paid to move the same item a much greater distance. The *carrier* would have adjusted its tariff to avoid such a measurement basis charge if the situation had been called to its attention beforehand. The *shipment* was made under unique circumstances in a trade where the commodity had never moved and could not reasonably be expected to move.

Thus, we have, in effect, an innocent shipper acting in reliance (upon facts it knew), inadvertence by the carrier (it was unaware of the situation presented), and a unique operation where granting the requested adjustment in the charge cannot discriminate against other shippers.

In the *Lykes* case (special docket 378) the *shipper* had previously shipped thermometers over the same route via the same carrier at about half the rate he was charged for the subject shipment. The *carrier* would have corrected its tariff if it had noticed its clerical error that specified the excessive charge. The *shipment* was the only one over the route tendered for carriage to Lykes prior to the time the carrier did, in fact, correct the aforesaid error in its tariff.

Thus, we have again here, in effect, an innocent shipper acting in reliance, inadvertence by the carrier, and a unique operation where granting the requested adjustment in the charge cannot result in discrimination against other shippers.

Granting the applications in these cases would be consistent with our prior decisions. See *Swedish American Line, Application to Refund*, 8 F.M.C. 142 (Special docket 371, decided 1964); *Midwest Export & Import Co., et al.* v. *Hartman & Co., Agents*, 8 F.M.C. 87 (special docket 366, decided 1964); *Lykes Bros. Steamship Co.—Application to Refund*, 7 F.M.C. 602 (1963). Accord, *Aichmann & Huber* v. *Bloomfield Steamship Co.*, 7 F.M.C. 811 (Special docket 290, decided 1964); *Nydia Foods Corps* v. *Java Pacific Line, General Agents*, 7 F.M.C. 808 (special docket 313, decided 1964); *Uddo & Taormina Corp.* v. *Concordia Line*, 7 F.M.C. 473 (1963); *Martini & Rossi, et al.* v. *Lykes Bros. Steamship Co.*, 7 F.M.C. 453 (1962); *Higa Enterprises, Ltd.* v. *Pacific Far East Line, Inc.*, 7 F.M.C. 62 (1962).

We recognize no circumstance now arising that should make invalid today what we have held valid before. Our statutory section 18(b)(3), requiring carriers to charge all shippers the rates listed in their tariffs, was designed to avoid discrimination between shippers which

would result from charging one shipper one rate and another shipper another. The key issue in our special docket decisions has thus been whether discrimination was possible under the facts of the case. The wording of section 18(b)(3) does not constitute an inflexible requirement where discrimination is not, within reason, possible.[14]

To deny refund applications because of the literal wording of a statute produces oppressive, unjust, and even absurd results. Thus, in these present cases, the majority employs a statute to force shippers to pay rates which neither carrier nor shipper support and which will not be charged others. The majority employs a statute not to achieve that statute's antidiscrimination objective (for no discrimination could here be involved in the rate relief requested) but to freeze solid an inequitable result intended by none and regretted by all.

"We cannot impute to Congress an intent to produce an absurd result." *Yankee Network* v. *Federal Communications Commission*, 107 F. 2d 212, 219 (D.C. Cir. 1939). "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor the intention of its makers," *Holy Trinity Church* v. *United States*, 143 U.S. 457 (1892), and "all laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter." *United States* v. *Kirby*, 74 U.S. 482, 486 (1868).[15]

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[14] See *Chesapeake & O. Ry. Co.* v. *Burton,* 62 F. 2d 110, 112 (4th Cir., 1932).

[15] We are more persuaded by the above reasoning than by those opinions construing the Interstate Commerce Act which the majority favors; to wit: *Louis. & Nash. R.R.* v. *Maxwell,* 237 U.S. 94, 97–99 (1915) wherein the Court said that ignorance or misquotation of rates is no excuse for departure from tariff rates and that while such a rule was strict it embodied Congressional policy to prevent unjust discrimination. *Silent Sioux Corp.* v. *Chicago & North Western Ry. Co.,* 262 F. 2d 474, 476 (8th Cir., 1959) in which the Court held that "one of the prime reasons for the enactment under consideration is to prevent discrimination which in our view, would result from either a higher or lower misquotation of the lawful rate." *Johnson Machine Works, Inc.* v. *Chicago, B. & Q. R. Co.,* 297 F. 2d 793, 798 (8th Cir., 1962) where the Court remarked that "The cases denying a shipper relief in instances of misquotation of rates are based largely on the policy of avoiding discriminatory rates and the fear that the device of misquotation could readily be used for the purpose of affording one shipper an advantage over another." The Court distinguished the particular case before it, however, in adding that "the opportunity for discrimination in the situation presented by the * * * misrouting in this case is not apparent." In each of the special dockets here before us we expressly find that the particular shipment is a unique instance and that no discrimination can result from permitting use of the rate contemplated. Further, we do not believe that our so granting special docket applications, on a case-by-case basis, would open the door to any cognizable discriminatory trend or practice. In the above regard we would finally note *U.S. Nav. Co.* v. *Cunard S.S. Co.,* 284 U.S. 474, 481 (1932) where in comparing the early Interstate Commerce Act to our own Shipping Act the Court said "construction in respect of the earlier act must be applied to the later one, *unless, in particular instances, there be something peculiar in the question under consideration* * * *." [Emphasis added.]

In light of the foregoing we would make these observations. The antidiscrimination objective of our statute is clear. We are charged with administering the statute to achieve this particular objective. Such charge also entails (where we find that the statute's objective is not threatened) the discretion and authority to avoid unintended results in administering the statute and to grant relief in proper cases.[16]

Here then we do not construe section 18(b) (3) as barring us, where we here find no possibility of discrimination, from exercising our discretion to provide just and equitable relief for the parties before us.[17]

[16] See also *Martini & Rossi et al.* v. *Lykes Bros. S.S. Co., Inc.*, 7 F.M.C. 453 (1962).

[17] Employment of our rule 6(b) in these cases provides carriers with a ready means of making refunds with express Commission approval and we support the use of this procedural vehicle.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 377

LUDWIG MUELLER CO., INC.

v.

PERALTA SHIPPING CORPORATION AGENTS OF TORM LINES

SPECIAL DOCKET NO. 378

LYKES BROS. STEAMSHIP CO., INC., APPLICATION TO REFUND PART FREIGHT CHARGES COLLECTED ON SHIPMENT VIA SS "NANCY LYKES" FROM LEHAVRE, FRANCE, TO GALVESTON, TEX.

ORDER

In the absence of exceptions to the initial decisions in these proceedings, the Commission served notice of its intention to review the decisions.

The Commission having reviewed the decisions and, on the date hereof, having made and entered of record a report containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the applications of Peralta Shipping Corp. and Lykes Bros. Steamship Co., Inc., to refund certain freight charges are denied.

By the Commission.

(Signed) Thomas Lisi,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1117

PACIFIC COAST EUROPEAN CONFERENCE PROCEDURES FOR HEARING AND CONSIDERING SHIPPERS' REQUESTS AND COMPLAINTS

ORDER DISCONTINUING PROCEEDING

Decided January 14, 1965

This investigation was instituted for the purpose of determining whether the Pacific Coast European Conference (and its member lines) had violated section 15 of the Shipping Act, 1916, by failing or refusing to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints, and/or whether the Conference agreement (F.M.C. No. 5200) should be disapproved because of such failure. Section 15 of the Act directs the Commission to disapprove a Conference agreement if it finds, after notice and hearing, that there has been a failure or refusal to adopt and maintain such procedures.

In furtherance of the investigation, hearing counsel on June 25, 1963, moved under the Commission's Rule 12(k) for the discovery and production of documents in the Conference's possession, consisting of any correspondence which it received from shippers between June 30, 1962, and June 30, 1963, complaining about rates, rules, or practices, or requesting the Conference to change or reconsider any rule, rate, regulation, or decision; the Conference's responses thereto; and any Conference circulars, memoranda or other documents relating to its procedures for hearing and considering shippers' requests and complaints.

The Conference opposed this motion, arguing *inter alia* that Rule 12(k) was unauthorized. On July 22, 1963, the examiner overruled the Conference's objections and directed production of the documents. The Conference next moved to dismiss the investigation on the ground

that the Commission's order failed to accuse it of violating any provision of the Act. After reply in opposition by hearing counsel, the Commission denied this motion and issued an amended order of investigation.

Meanwhile the Conference sought and was granted postponement of the date for its compliance with the discovery order, because it was challenging the validity of Rule 12(k) in a pending suit. The Conference therefore did not comply with the discovery order. Since Rule 12(k) was later held to be unauthorized,[1] the Conference has never complied with that order nor otherwise furnished the information sought.

A hearing was held in San Francisco on October 22–23, 1963, but because the Conference had refused access to its files, the record developed at this hearing was meager. It consisted of an affidavit by the Conference chairman, which he read into the record and on which he was examined, outlining the Conference's procedure for handling shippers' requests and complaints, and five letters which hearing counsel received during August 1963 from certain of the Conference's shippers. Thereafter, hearing counsel filed the motion to discontinue the proceeding which is before us for disposition.

In this motion hearing counsel express the opinion, based on the aforesaid record, that the Conference has adopted and is maintaining adequate shipper request procedures. They further point out that the Commission has instituted a general rulemaking proceeding dealing with shippers' requests and complaints (Docket 1156), thus indicating an intention to proceed by rule of universal application. They accordingly suggest that no purpose would be served by continuing the instant docket.

On the limited information presently available we cannot agree that the Conference has adopted and is maintaining reasonable procedures for promptly and fairly considering shippers' requests and complaints. As hearing counsel recognized at the outset, the requirements of section 15 are not satisfied by a mere statement of procedure for handling requests and complaints, such as the Conference offered here. The U.S. Court of Appeals for the D.C. Circuit recently so held in suits by this Conference and others attacking orders under section 21 of the Shipping Act which demand the production of documents showing the actual handling and disposition of shippers' requests and complaints.[2]

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[1] *Federal Maritime Commission* v. *Anglo-Canadian Shipping Co., et al.,* 335 F. 2d 255 (9th Cir., 1964).

[2] *Far East Conference, et al.* v. *Federal Maritime Commission,* 337 F. 2d 146 (D.C. Cir., 1964) ; *Pacific Westbound Conference, et al.* v. *Federal Maritime Commission,* No. 18592 et al., per curiam order (D.C. Cir., Dec. 2, 1964).

However, in light of the court's action affirming the section 21 orders, as well as the pendency of the proposed shippers' request rules dealing generally with the subject, there appears to be no need for continuing the instant docket. Hearing counsel's motion is therefore allowed and,

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

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1172

PETER BRATTI ASSOCIATES, INC.

v.

PRUDENTIAL LINES, INC. AND WEST COAST OF ITALY SICILIAN AND ADRIATIC PORTS/NORTH ATLANTIC RANGE CONFERENCE (W.I.N.A.C.) ET AL.[1]

No. 1173

PETER BRATTI ASSOCIATES, INC.

v.

HELLENIC LINES, LTD. AND WEST COAST OF ITALY SICILIAN AND ADRIATIC PORTS/NORTH ATLANTIC RANGE CONFERENCE (W.I.N.A.C.) ET AL.[1]

Respondents' tariff found to be ambiguous as to the proper rate on tile and marble slabs from Italy to the United States. Reparation awarded.

Donald J. Capuano for complainant.
Elliott B. Nixon for respondents.

INITIAL DECISION OF HERBERT K. GREER, EXAMINER [2]

Complainant seeks to recover alleged overcharges in connection with two shipments of marble made by it from Leghorn, Italy, to Baltimore, Md., via respondents Hellenic Lines, Ltd. (Hellenic), and Prudential Lines, Inc. (Prudential), both members of respondent West Coast of Italy Sicilian and Adriatic Ports/North Atlantic Range

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[1] American Export & Isbrandtsen Lines; American President Lines, Ltd.; Compagnie de Navigation Fraissinet et Cyprien Fabre; Concordia Line; Giacomo Costa Fu Andrea-Genova; Dampskibsselskabet Torm A/S; Hansa Line; Hellenic Lines, Ltd.; "Italia" Societa per Azioni di Navigazione; Jugoslavenska Linijska Plovidba; Mitsui Steamship Co., Ltd.; A. P. Moller-Maersk Line; National Hellenic American Line; Villain & Fassio e Compagnia Internazionale di Genova Societa Riunite di Navigazione; Zim Israel Navigation Co. Ltd.

[2] This decision became the decision of the Commission on January 18, 1965, and an order was issued granting the reparations.

Conference (conference or W.I.N.A.C.). The two complaints were consolidated for hearing and decision because of similarity of parties and issues.

It is alleged that in conforming to a conference decision, Hellenic and Prudential violated section 16, First, of the Shipping Act, 1916 (the Act), by imposing unjust and unreasonable charges; that the conference tariff containing the charges assessed was ambiguous and vague and the charges were based upon conditions not set forth therein, in violation of section 18 of the Act. Complainant seeks an order directing respondents to cease and desist from such violations and to put into force and effect and to apply in the future such other rates and charges as may be determined to be lawful. Reparation is sought.

Findings of Fact

1. Complainant, a New York corporation, was at all material times engaged in the construction business, specializing in the installation of tile, terrazzo and marble.

2. Respondents Hellenic and Prudential are engaged in the foreign commerce of the United States.

3. Complainant submitted an offer to perform the marble work on a project known as No. 1 Charles Center, Baltimore, Md. (project). The offer was considered high by the project authorities and after discussions, complainant's president and a representative of the project went to Italy to determine whether the use of marble produced in that country would lower the cost.

4. During the trip, the project representative selected the marble to be used and complainant made arrangements for its fabrication in the sizes and shapes called for by the architect's specifications.

5. Complainant's president, after making inquiry as to reputable freight forwarders, contacted Arno and Pesci, Italian freight forwarders, and requested them to determine the cost of shipping the marble to Baltimore. He was informed that ocean rates on finished travertine, polished or unpolished, was $37.50 a ton, and that the rate on floor tile was $23 a ton. No direct inquiry was made by complainant of the carriers.

6. Complainant did not retain Arno and Pesci prior to the first shipment here in controversy, but did retain the Italian firm of Stimart, freight forwarders, to handle that shipment. On May 30, 1962, Hellenic issued an order bill of lading, notify complainant, at the rate of $37 per ton (2,400 pounds) on cargo described as follows:

1 case marble samples, kg. 50.
109 crates sawn travertine slabs, kg. 92.000.
1 case marble samples, kg. 50.

7. When the Hellenic shipment arrived in Baltimore, an employee of complainant pointed out to his president that the rate was not in accordance with an office memorandum prepared by the president, which memorandum showed that floor tiles should be transported at the $23 rate. The employee investigated and reported that the tariff was ambiguous. Needing the tile for the construction job, complainant paid the $37 rate but protested to Hellenic that the carrier had improperly classified the marble. Had the shipment been carried at the $23 rate, charges thereon would have been $1,289.40 less than those paid by complainant.

8. Complainant discharged Stimart and retained Arno and Pesci as freight forwarder. This firm handled the second shipment in controversy, which moved via Prudential under an order bill of lading dated October 24, 1962, notify complainant, at the $23 rate, the cargo being described as follows:

34 cases travertine tiles, kilos 42,000.

9. When the second shipment arrived in Baltimore, an inspection was made by Atlantic Cargo Inspection Co. at the request of the conference. The inspectors applied the rule, on advice of the conference, that any piece of marble over 60 x 60 centimeters square was to be classified as a slab. This resulted in a finding that the cargo had been misclassified and a penalty was assessed but later withdrawn. Acting under protest, complainant paid the $37 rate in lieu of the $23 rate. The charges amounted to $588 more than would have been payable at the $23 rate.

10. The marble in both shipments exceeded 60 x 60 centimeters in area and ranged in thickness from 3½ inches to ⅞ inch. It was used by complainant for interior and exterior flooring at the project. The Prudential shipment included 111 pieces 3½ inches thick ranging in area from 3 feet 11 inches x 1 foot to 7 feet 10 inches x 1 foot 1 inch; 36 pieces 2½ inches thick ranging in area from 3 feet 11 inches x 1 foot 8 inches to 6 feet 6 inches x 1 foot 8 inches; 213 pieces ⅞-inch thick ranging in area from 3 feet 11 inches x 1 foot 11 inches to 4 feet 1 inch x 1 foot 1 inch. The Hellenic shipment also contained pieces ranging from ⅞ inch to 3½ inches in thickness and varying in area from 3 feet 11 inches x 1 foot 11 inches to 6 feet 7 inches x 1 foot 5 inches, the majority of the pieces being the smaller sizes. This shipment included two crates of marble 11 feet 9 inches x 2 feet 2 inches in area to be used for benches to be placed on the plaza floor of the project, and two crates of marble 7 feet 11 inches x 1 foot 5 inches to be used for stair treads. The other marble was to be used for flooring.

11. At the time of the two shipments the conference had on file with the Commission the following tariffs, which provided, in pertinent part:

W.I.N.A.C. Tariff No. 13, page 33.

Marble, granite, travertine, limestone blocks, rough, quarried, sawn not further finished

* * * * * * *

Slabs, polished
Rough, sawn, in crates or cases
As marble works, all kinds

* * * * * * *

Tiles—See Tiles, all kinds.

* * * * * * *

Works, all kinds:
Up to $750 (value per W/T) — $37 w/m

W.I.N.A.C. Tariff No. 13, page 54.

Tiles, all kinds . . . packed in cases, cartons, or crates — 23 w/m

12. There were other shipments by complainant of marble from Italy on which both the $23 and the $37 rate had been applied. No controversy arose over those shipments, however, as complainant believed that he had paid the $23 rate for marble to be used as flooring and the $37 rate on marble to be used for other purposes.

13. During negotiations for a refund the carriers were of the opinion that the $23 rate should have been applied to both shipments, but the conference refused to permit a refund, taking the position that the $37 rate had properly been applied.

14. There is a contrariety of opinion in the marble trade as to the difference between a slab and a tile. Four Italian firms state that it is customary to refer to marble used for floors as tile, regardless of size, and that they frequently receive and fill orders from United States purchasers for tiles which exceed 60 x 60 centimeters in area. The University of Rome Institute of Science considers the maximum dimension of a tile to be 60 x 40 centimeters. The Italian Railway and other Italian marble firms express various opinions as to the area of a tile ranging from 40 x 40 centimeters to 3 feet x 3 feet. A United States importer of marble considers that all marble used for floors is not properly classified as tile, and that any piece in excess of 20 inches x 20 inches x three-fourths inches should be classified as a slab. Witnesses engaged in the marble business in the United States testified that all flooring is properly classified as tile.

15. The W.I.N.A.C. tariff, as applicable to marble, was amended subsequent to the shipments here involved, but no standards are provided which would permit a shipper to determine the rate applicable to a tile as distinguished from a slab.

DISCUSSION

The parties rely on the well-established rule that terms used in a tariff should be interpreted as they are generally understood in the trade. Complainant contends that the generally accepted definition of a tile includes any piece of marble used for floors. Respondents contend that any piece of marble over 60 x 60 centimeters is understood commercially to be a slab. The tariff under consideration makes no distinction as to size or use but applies a higher rate to slabs than to tiles. As hereinabove found, there is a wide variety of opinion in the trade; furthermore, subsequent to the shipments here involved, the respondent carriers disagreed with conference officials as to the proper classification of the marble. The conflicting interpretation points up a definite ambiguity in the tariff.

When the interpretation of a tariff is the issue, any ambiguity of the tariff provisions which in reasonableness permit misunderstanding and doubt by shippers must be resolved against the carrier, the party preparing the document. *Gelfand Mfg. Co.* v. *Bull S. S. Line, Inc.*, 1 U.S.S.B. 169, 171 (1930); *Rubber Development Corp.* v. *Booth S. S. Co.*, 2 U.S.M.C. 747 (1945). Thus, although there is support for the interpretation advocated by both parties, complainant's interpretation must prevail. However, neither a shipper nor a carrier may rely on a strained or unnatural construction of an ambiguous tariff. But Arno and Pesci did not apply an unreasonable interpretation in advising complainant that flooring was classified as tile. As previously stated, many persons in the trade understood and accepted that classification. There is no evidence of a difference in handling and towing crates containing slabs and crates containing tile. The value of the pieces was comparatively uniform and the quality was substantially the same.

Respondents argue that complainant was not misled and that inquiry as to rates was not made of any conference carrier or of the forwarder who handled the first controversial shipment. Although it is true that a shipper, if he has doubt as to the proper tariff designation of his commodity, has the duty to make diligent inquiry (*Markt & Hammacher Co.—Misclassification of Glassware*, 5 F.M.B. 509, 511 (1958)), complainant here was not in doubt nor was the question of the applicable rates ignored. Inquiry was made of a reputable Italian forwarder, who advised that the rate on floor tiles was $23 a ton. When complainant became aware of the contrary classification on the first shipment, he made prompt inquiry.

Section 18(b)(1) of the Act requires that carriers in foreign commerce shall file tariffs showing all rates and charges and that:

> Such tariffs shall contain the classification of the freight in force, and shall also state separately * * * any rules which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates or charges * * *

Respondents imposed the higher rate by applying an arbitrary size limitation on tile of 60 x 60 centimeters. This unpublished limitation established, in effect at least, a rule which affected the determination of the rates set forth in the tariff. The inspectors retained by the conference based their report on the rule. Demanding and collecting a greater compensation than specified in the tariff on file with the Commission is a violation of section 18(b) (3) of the Act. If respondents intended to except from the general classification of tiles any piece having an area over 60 x 60 centimeters it was their responsibility to set forth the exception in the tariff. *Gelfand Mfg. Co.* v. *Bull S. S. Line, Inc.*, *supra.* The tariff contained no reasonable method of distinguishing a tile from a slab. See *National Cable and Metal Co.* v. *American-Hawaiian S. S. Co.*, 2 U.S.M.C. 470, 473 (1941).

Four crates of marble included in the shipment via Hellenic contained pieces for purposes other than flooring. The record does not contain evidence of the weight of the individual containers.

Ultimate Conclusions

Respondents' tariff applicable to marble was ambiguous at the time of complainant's shipments.

Respondents unlawfully applied an unpublished classification to the shipments involved, thereby overcharging complainant and complainant is entitled to reparation from Prudential in the amount of $588. As to Hellenic, however, the amount of reparation cannot be ascertained from the record which does not disclose the weight or measurement of the four crates which contained marble to be used for purposes other than flooring. Complainant shall prepare and forward a statement in accordance with the provisions of rule 15(b) of the Commission's rules of practice and procedure.

The carriers having been willing to apply the lower rate, but having been prevented from doing so by the conference, interest will not be awarded on the reparation.

The conference shall amend their tariff to conform to the findings herein and to remove the ambiguity relating to the classification of tile and a slab.

An appropriate order shall be entered.

(Signed) Herbert K. Greer,
Presiding Examiner.

December 22, 1964.

FEDERAL MARITIME COMMISSION

No. 1103

Agreement No 9025: Middle Atlantic Ports Dockage Agreement

Decided January 22, 1965

Agreement No. 9025 between terminal operators to establish dockage charge in relation to vessels engaged in interstate and foreign commerce approved pursuant to section 15, Shipping Act, 1916.

Robert R. Artz, *Rene J. Gunning*, *William P. Quinn*, *John S. Shannon*, *Preston C. Shannon*. and *Charles C. Rettberg*, *Jr.* for respondents Reading Co., the Pennsylvania Railroad Co., Canton Railroad Co., the Baltimore & Ohio Railroad Co., Western Maryland Railway Co., the Chesapeake & Ohio Railway Co., Lamberts Point Docks, Inc., Elizabeth River Terminals, Inc., Imperial Tobacco Co. (of Great Britain and Ireland) Ltd., Whitehall Terminal Corp., and Rukert Terminals Corp.

E. R. Bunch for protestant Hampton Roads Maritime Association.

Charles R. Seal for intervener Virginia State Ports Authority.

Robert J. Blackwell and *Wm. Jarrel Smith*, *Jr.*, hearing counsel.

Benjamin A. Theeman, hearing examiner.

Report by the Commission

(John Harllee, *Chairman;* James V. Day, *Vice Chairman;* Ashton C. Barrett, John S. Patterson, and George H. Hearn, *Commissioners*):

The Commission instituted these proceedings under sections 15 and 22 of the Shipping Act, 1916, to determine if Agreement No. 9025: Middle Atlantic Ports Dockage Agreement should be approved, disapproved, or modified.

The signers of Agreement No. 9025 (the "proponents") are admittedly engaged in the business of furnishing general cargo terminal facilities in connection with common carriers by water at the ports of Philadelphia, Baltimore, and Hampton Roads. Accordingly each

is an "other person" subject to the Act within the purview of section 1. They are designated as respondents herein and take a united position requesting approval.

Protests against approval of Agreement 9025 have been filed by Hampton Roads Maritime Association (Hampton Roads) an association of steamship companies and agents, freight forwarders, terminal operators and other maritime interests associated directly with the port activities of Hampton Roads; and by Steamship Trade Association of Baltimore, Inc. (Steamship). Subsequently the Commission granted Steamship's request to withdraw its protest.

Virginia State Ports Authority (Virginia) was granted permission to intervene in opposition to approval of Agreement 9025. Virginia is an agency of the Commonwealth of Virginia, with the general function of promoting the commerce and protecting the interests of the ports of Virginia.

Hearing counsel appeared, supporting approval of Agreement 9025 with certain modifications.

All of the above parties submitted affidavits of fact and memoranda of law to the examiner. No oral hearing was held.

Agreement 9025 provides that the parties thereto may agree "to establish and maintain just and reasonable rates, charges, classifications, rules, regulations, and practices for and with respect to the dockage of vessels engaged in the transportation of interstate and foreign waterborne general cargo traffic" at terminals in the ports of Philadelphia, Baltimore, and Hampton Roads. The agreement does not establish dockage rates or charges but provides that they may be established, assessed and collected in accordance with future agreements entered into by the parties. It further provides that no changes in the dockage tariffs shall be made without prior notice to the other parties and then only after 30 days' notice to the public, unless good cause exists for a change upon shorter notice. The parties retain the right of individual action with respect to the establishment and assessment of dockage charges; i.e., any party to Agreement 9025 may elect to establish a rate, charge, rule, regulation, or practice independently, and without the assent of the other parties. Any responsible general cargo terminal operator at ports covered by the agreement may become a party to Agreement 9025 except for just and reasonable cause. Any party may withdraw from the agreement upon notice in writing to the other parties.

In an initial decision, the examiner approved Agreement 9025 in substance, provided it is modified in the following respects:

1. By adding a provision for self-policing by the parties of the obligations under the agreement;

2. By including procedures for dealing with shipper requests and complaints;

3. By adding a provision, in accord with the stated intention of the parties, for prompt filing with the Commission of all tariffs, rates, rules, and regulations, etc., reached pursuant to the agreement. (The parties had indicated to the examiner their intention to file this information); and

4. By adding a provision requiring that a statement of the reason for changing a tariff upon less than 30 days' notice to the public shall be filed promptly with the Commission whenever any such change is made.

Agreement 9025 has been amended by the parties to include all of the above provisions.

In addition, the examiner's decision stated that when common rates and charges are arrived at pursuant to the agreement:

There is no question that the subsequent agreement arriving at or establishing rates, charges, regulations, or practices must first be filed with and approved by the Commission.

Exceptions to the examiner's decision have been filed by Hampton Roads, by the proponents, and by hearing counsel.[1]

Hampton Roads excepts on the following grounds:

(1) That the approval of the agreement by the examiner (subject to the modifications discussed above) is inconsistent with his finding that rates entered into pursuant to the agreement must be filed with and approved by the Commission;

(2) That the agreement would destroy competition between Hampton Roads and the other parties to the agreement and would therefore be unjustly discriminatory and unfair as between ports;

(3) That approval would result in a decrease in the number of ships calling at Hampton Roads, and would thus operate to the detriment of the commerce of the United States;

(4) That approval of the agreement would be contrary to the public interest because of an adverse economic effect on the maritime industry of Hampton Roads; and

(5) That the ports of Hampton Roads are primarily controlled by railroad interests. These railroad interests already impose port charges on shippers of 7 cents per 100 pounds. To approve this agreement would be to permit these railroads to impose a double charge.

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[1] Hearing counsel has excepted to the examiner's conclusion that a ratemaking agreement between terminals should require self-policing provisions; and procedures for handling shippers' requests and complaints. Since the parties to Agreement 9025 have already submitted these provisions voluntarily, we need not decide at this time whether or not they should be required in agreements of this type.

A reply to the exceptions of Hampton Roads was filed by the parties to Agreement 9025.

Hampton Roads' first exception can best be disposed of by considering the sole exception filed by the proponents of Agreement 9025. These parties except to the examiner's conclusion that despite our approval of Agreement 9025, which would permit them to discuss and agree upon rates, charges, and practices for their terminal facilities, nevertheless the fruits of these discussions—any rate, charge, or practice agreed upon by proponents—must be filed with, and approved by, the Commission before it is put into effect. We believe the examiner erred in this conclusion. Section 15 of the Act expressly provides that:

> Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; *except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof* (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, *shall be permitted to take effect without prior approval* upon compliance with the publication and filing requirements of section 817(b) [Shipping Act, 1916, Sec. 18(b)] of this title with the provisions of any regulations the Commission may adopt. [Emphasis added.]

Since the provisions of section 18(b) referred to above require the filing of tariffs only by carriers or conference of carriers, it might be said that the exception to the filing requirements under section 15 refers only to the rates, charges, etc., of approved conferences of common carriers. However, we see no reason to apply a stricter standard and additional requirements for a conference of terminal operators than the statute provides for a conference of common carriers. In this connection see *Empire State Highway Transportation Association* v. *Federal Maritime Board*, 291 F. 2d 336 (D.C. Cir. 1961), where the court of appeals held that certain tariff revisions arrived at by a conference of terminal operators, pursuant to an agreement approved under section 15 by our predecessor the Federal Maritime Board, need not be approved by the Board before becoming effective.

The substance of Hampton Roads' third and fourth exceptions is that the imposition of dockage charges would be detrimental to the interests of Hampton Roads as a port, and therefore to the economy of the entire Hampton Roads area.

The two principal docking areas at Hampton Roads are Norfolk and Newport News. These two areas are separated by approximately 8 miles of water, and no rail connection or free intraport interchange exists between them. Thus, a substantial number of vessels serving Hampton Roads ports must incur the additional expense of calling at two (and, sometimes, three or four) docking areas at Hampton Roads. Moreover, the vessels serving Hampton Roads often discharge small cargoes of under 150 tons.

Hampton Roads contends that the burdens of serving that area, coupled with the relatively small cargoes destined for their ports, have already caused a considerable amount of cargo to be diverted from Hampton Roads to other competing ports on the Atlantic coast. Hampton Roads believes that the imposition of dockage charges would add to the burdens already borne by carriers serving the Hampton Roads area, and would cause still further diversion of cargo from Hampton Roads ports.

The thrust of Hampton Roads argument, therefore, goes to the question of whether or not dockage charges should be imposed at all at Hampton Roads, rather than to the issue of whether or not the parties to Agreement 9025 should be permitted to agree on these charges. But even were we to disapprove Agreement 9025 the terminal operators of Hampton Roads would still retain the right to establish reasonable dockage charges on a unilateral basis, and conversely approval of the agreement would still allow the individual operators to exercise their right of independent action and decline to impose any dockage charges.

The real issue before us, therefore, is whether or not the parties to Agreement 9025 should be permitted to discuss and agree upon such charges, a practice which Hampton Roads condemns in its second exception as destructive of competition. We find nothing in the record to indicate that Agreement 9025 would contravene the standards of section 15 of the Act.[2]

Agreement 9025 provides only that the parties may discuss and agree upon rates and practices in the future, and such an agreement on dockage charges may well have the salutory effect envisioned by the act of creating uniform and stable rates, charges, classifications, rules, and regulations among the competing ports. Moreover, the right of independent action reserved by the parties provides a safety valve to insure that the interests of each port area will be protected.

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[2] Section 15 compels us to disapprove any agreement upon a finding that it is:

* * * 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 * * *.

Since Agreement 9025 does not itself impose any charges, it is impossible on this record to assess its effect on carriers, ports, and the commerce of the United States with any real degree of accuracy. The Commission's power over section 15 agreements, however, consists not only of initial approval, but of continuing supervision; and if at some time in the future, rates, charges, classifications, rules, or regulations are established pursuant to the agreement which violate the fair and reasonable standards of the Act the Commission may protect the public interest by withdrawing its approval of the basic agreement itself, or by requiring its modification. *Empire State Highway Transportation Association* v. *Federal Maritime Board*, *supra.*

As to Hampton Roads' fifth exception, we find in Agreement 9025 no attempt to impose a double charge for terminal facilities. The charges now imposed by the Hampton Roads terminal operators (largely railroads) are charges imposed on railroad shippers. They were approved by the Interstate Commerce Commission in *Increased Freight Rates*, 1958 (Ex Parte 212), 304 I.C.C. 289 (1958), and were imposed because the railroads performed many services on waterborne traffic that would normally be performed by shippers on overland domestic traffic. These include such services as loading, unloading, bracing, and blocking of freight. The Commerce Commission in the *Increased Freight Rates* case, *supra*, stated at page 352:

> We find, on the whole, that respondents provide more facilities and perform more services in the ports for waterborne traffic than they do for domestic traffic.

Thus, the railroads in imposing the port charges sought to pass on the additional terminal cost of handling waterborne traffic to the users of such service, rather than burden all of its patrons, including shippers whose cargoes do not require the use of port facilities. The imposition of the charges contemplated by Agreement 9025 would not appear to result in a "double charge" since they would be dockage charges imposed on the vessel and not freight handling charges imposed on rail patrons.[3]

Based on the foregoing, we find that Agreement 9025 has not been shown to be unjustly discriminatory or unfair; operate to the detriment of the commerce of the United States; be contrary to the public interest; or in violation of the Act. It is approved.

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

[3] The Commission assumes that the term "dockage charge" is used in Agreement 9025 in its traditional sense to mean that charge assessed against a vessel for berthing at a wharf, pier, bulkhead, structure or bank, or for mooring to a vessel so berthed.

FEDERAL MARITIME COMMISSION

No. 1059

NORTH ATLANTIC WESTBOUND FREIGHT ASSOCIATION—DUAL-RATE CONTRACT

Decided January 29, 1965

ORDER ON RECONSIDERATION [1]

On March 27, 1964, the Commission issued its order in this proceeding approving for use by the North Atlantic Westbound Freight Association a dual-rate contract form which was also approved by the Commission for other conferences engaged in the dual-rate proceedings. See *The Dual Rate Cases*, 8 F.M.C. 16 (1964). The approved contract form was appended to the Commission's report as appendix 16B. Thereafter, on November 24, 1964, attorneys for the North Atlantic Westbound Freight Association filed with the Commission a proposed draft of a dual-rate contract form which had been negotiated "in terms acceptable to British Shippers' Council and the North Atlantic Shippers' Association." Notice of this filing was given in the November 28, 1964, issue of the Federal Register (29 F.R. 15932) and interested parties were invited to comment thereon and request a hearing should the same be desired.

Three parties filed protests to the draft contract but none requested a hearing. They are U.S. Borax & Chemical Corp., the National Industrial Traffic League, and the Dow Chemical Corp. Neither U.S. Borax nor Dow Chemical ship in the trade covered by this proposed dual-rate contract. The National Industrial Traffic League represents "substantial importers and hence users of inbound conferences." (Comments of the League, p. 1.) We think it worthy of note that the principal parties involved, the British shippers and the association, have agreed as to the terms of the contract and ask only that the Com-

[1] See order decided Apr. 1, 1965, denying petition for reconsideration.

mission give its approval to this agreement, thereby officially sanctioning free and collective negotiation.

As stated in the notice of filing, the proposed contract form differs in three principal respects from the form of the Commission-approved, dual-rate contract appended to the March 27, 1964, report:

(1) The clause relating to exclusions does not specifically exclude chemical products, as provided by statute, and does not make any reference to petroleum products which the Commission excluded from contract coverage. In addition, the Commission provided for the exclusion of proprietary cargo when carried in owned or chartered (for a period of 6 months or longer) vessels. The association's draft, which excludes all "bulk cargoes without mark or count" (article 1(d)), satisfies the statutory requirements of section 14b(8) of the Shipping Act. Our attention has been invited to no past usage of chartered or owned vessels by contract signatories, and the interested shippers in the trade, through their chosen representatives, have stated that they do not desire a charter exclusion. Therefore, the Commission can see no objection to the deletion of such exclusion by the association's draft.

(2) The wording of the natural routing clause in the association's draft differs from the wording of the Commission's approved form of contract. However, the association's draft contains a more exact description of a "natural route" in that it specifically provides that the service provided by the carriers from ports in Great Britain, Northern Ireland, and Eire shall be deemed the natural routes. In view of the fact that this more specific definition is acceptable to the principal contract shippers and it fully satisfies the statutory requirements, it will be permitted by the Commission.

(3) The association's draft deletes paragraph C of the Commission's *force majeure* clause, which related to conditions not under the control of the carrier, but which did not stem from war, warlike operations, or hostilities. Essentially, this provision was for the benefit of the carriers in that it allowed rate increases on less than 90 days' notice for such circumstances. If the carriers are willing to forego this additional privilege accorded them by the Commission's decision, the Commission has no objection to its deletion.

The association's draft incorporates other minor changes which the Commission will permit in view of the fact that the interested shippers agree to them. Thus, any objections to these changes by the three protestants are hereby rejected.

Therefore, *it is ordered*, That the terms and conditions of the form of the dual-rate contract attached hereto [2] shall be used by the North Atlantic Westbound Freight Association to the exclusion of any other terms and provisions for the purpose of according merchants, shippers, and consignees contract rates.

By the Commission (JOHN HARLLEE, *Chairman*, JAMES V. DAY, *Vice Chairman*, GEORGE H. HEARN, *Commissioner*).

Commissioners Barrett and Patterson are not in agreement with the Order of the Majority, and their reasons for disagreement follow.

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[2] The form of the dual-rate contract attached to the Commission's order is omitted due to its length.

REASONS FOR DISAGREEMENT WITH ORDER ON RECONSIDERATION, Docket No. 1059

NORTH ATLANTIC WESTBOUND FREIGHT ASSOCIATION—DUAL-RATE CONTRACT

Commissioners Ashton C. Barrett and John S. Patterson dissenting:

Based on the record before us in this proceeding, we conclude there is no justification for the denial of a hearing to consider (a) certain serious issues involving government processes; (b) questions as to the nature of agency decisions raised by the protesters; and (c) questions raised by us as to the procedure followed in this case.

As regards our conclusion as stated above, the supporting reasons are as follows:

We dissent from the issue of an order permitting the use of a proposed "general shipper contract" in response to the application of the North Atlantic Westbound Freight Association (association), a conference of common carriers by water in foreign commerce, without a hearing followed by an adjudication on the protests thereto submitted by a national organization of shippers and by two shippers, because in the past it has been the practice to hear and answer serious protests and more time is needed for this purpose. This practice, coupled with the absence of unusual and compelling reasons and arguments, dictates review and adjudication of an exclusive patronage dual-rate contract such as the proposed "general shipper contract" when it deviates from the contract authorized in docket No. 1059 in *The Dual Rate Cases* (8 F.M.C. 16) report issued March 27, 1964 (petition for reconsideration denied, served August 3, 1964).

The majority has said on the requirement of uniform, prescribed contract provisions that the requirement was based on (a) the "expectation" of the House Committee on Merchant Marine and Fisheries (H. Rept. No. 498, 87th Cong., 1st sess., p. 9, 1961); (b) the "sentiment" of the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives ("Report of the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives Pursuant to H. Res. 56," 87th Cong., 2d sess., p. 390, 1962); and (c) the "consideration" that construction of the statute rather than the facts of a particular trade is involved (*The Dual Rate Cases*).

In its decision in docket Nos. 1078 and 1080, the majority reaffirmed its "conclusions and reasoning" in *The Dual Rate Cases* that absent a showing of circumstances peculiar to their trade which would make inapplicable the former reasoning and conclusions, such decision would prevail (pp. 1 and 5, report, docket Nos. 1078 and 1080). Other

references to the requirement that all contracts are required to contain standard provisions are on pages 14, 16, 19, 23, 25, 28, 31, 38, and 41 of the majority report in *The Dual Rate Cases.* As a result of these announced principles, shipper interests are believed to have come to regard themselves as having a vested interest in the continuation without change in the required provisions, absent changed conditions.

At this time we are faced with certain higher issues than those separating the majority and the minority in *The Dual Rate Cases* relative to the form of the contract pursuant to section 14b of the Shipping Act, 1916, or the procedures for adjudicating disapproval pursuant to the Administrative Procedure Act. The two transcending issues now before the Commission and requiring a hearing before resolution are:

1. The Commission, in the words of a protester, "should maintain the integrity of its decision in the dual-rate cases by denying this petition for radical changes therefrom"; otherwise, in the words of hearing counsel, replying to an earlier petition for reconsideration, the "granting of petitions of this nature encourage attempts to seek reopening and relitigation of questions that have already been exhaustively argued and resolved." Vacillation on questions of principle can be a matter of serious consequence to the entire Commission, because it will invite a flood of changes which will erode the entire decision and orders, and cast doubt on the finality of all future orders.

2. There should be finality to adjudication. The use of the association's contract in docket No. 1059 was not permitted, and instead the Commission ordered that the association's agreements "are hereby approved in the form attached to this order" and that "the terms of the agreement attached hereto shall be used * * * to the exclusion of any other terms and provisions * * *". Attached was a redrafted contract prescribed by the Commission, different in significant respects from the one before us now. Finality in this adjudication was accomplished on August 3, 1964, when we denied a petition for reconsideration. In our opinion, docket No. 1059 is closed and is beyond "reconsideration." We agree with hearing counsel "that the dual-rate cases should remain closed," unless a showing of circumstances peculiar to the trade which would make inapplicable the earlier reasoning and conclusions is shown. None has been shown to the public. It is not considered that acceptability of terms to the British Shippers' Council and the North Atlantic Shippers' Association is such a circumstance.

Finally, with regard to the procedure followed in this case, the following observations which we consider cogent are in order. They are:

(a) The inadequacy of the communications from the association submitted to the Commission for consideration and processing as an application for permission to use an exclusive patronage contract.

(b) The lack of information to the public and all interested parties as regards all reasons considered by the applicants to be compelling and unusual which would warrant the deviation sought from the

contract approved and authorized by the Commission on March 27, 1964, in docket No. 1059.

(c) The fact that the only written communication placing the proposed contract before the Commission, which reads as follows, relates to a new contract the applicants wish approved and does not constitute a petition to reopen docket No. 1059.

Re North Atlantic Westbound Freight
Association—General Shipper Contract.

FEDERAL MARITIME COMMISSION, NOVEMBER 24, 1964.
1321 H Street NW.,
Washington 25, D.C.

GENTLEMEN: I refer to my letter of September 1, 1964. I am now instructed by the North Atlantic Westbound Freight Association that the association has reached agreement with the British Shippers Council and the North Atlantic Shippers Council about the form of a dual-rate contract which the two shippers' councils are prepared to recommend to their members for adoption as from March 1, 1965. A copy of the draft form of contract is enclosed with this letter.

Sincerely,

KIRLIN, CAMPBELL & KEATING,
By RONALD A. CAPONE
Attorneys for North Atlantic Westbound Freight Association.

RAC: by
Enclosure.

The letter was received by a member of the staff and stamped received in the Office of the Secretary on November 24, 1964. It was metamorphosed into a petition, and a "Notice of Petition Filed for Approval" dated November 25, 1964, was published in the Federal Register on Saturday, November 28, 1964, over the signature of the Secretary (29 F.R. 15932), referring to the letter as a petition filed for approval pursuant to section 14b of the Shipping Act, 1916, and the contract into a contract filed for approval.

These actions have been construed by the majority as compliance with the provisions of section 14b, stating "* * * on application the Federal Maritime Commission * * * shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract * * *" followed by a description of the contracts of the type now before us. We disagree.

Even assuming no shift in policy, the applicants have not provided the public with any new facts or reasons why the three principal changes in the previously permitted contract form are needed or are superior at this time. A hearing would produce the relevant information, especially in the absence of it being communicated in a form by which the public could be informed. To our knowledge, neither the British nor American shippers, nor any parts of the public have been given the opportunity to obtain the necessary explanations and

justifications. To say the least, the applicants should come forward with the needed information. We consider a hearing necessary for this purpose, especially since we hold that the communications from the applicants represent a request for the approval of a new contract which they deem more appropriate than the contract already approved by the Commission. To date, thorough consideration of the issues involved in the significant shift of policy that has occurred in relation to achieving compliance with these provisions in the light of such vital information has not allowed public participation, as a result of the procedures followed.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1059

NORTH ATLANTIC WESTBOUND FREIGHT ASSOCIATION—DUAL RATE CONTRACT

Decided April 1, 1965

ORDER DENYING RECONSIDERATION

The Commission entered an order in this proceeding, January 29, 1965. That order approved for the use of the North Atlantic Westbound Freight Association a form of dual-rate contract submitted pursuant to section 14b of the Shipping Act, 1916, for use by the association. The Commission's order of that date emphasized that the draft contract had received the approval of the British shippers involved which represent the overwhelming majority of the shippers in this inbound trade, and the protestants to the form of contract were not shippers in the trade, and consequently, not affected by this contract. Further, none of the protestants requested a hearing.

On March 1, 1965, Protestant, U.S. Borax & Chemical Corp., filed a petition for reconsideration of that order. On March 5th, the North Atlantic Westbound Freight Association filed its reply to the instant petition, requesting that the petition be denied.

The instant petition has not brought to our attention any "matter claimed to have been erroneously decided" as required by rule 16(b) of our rules of practice and procedure.

The Commission wishes to reiterate that its approval of the form of contract submitted by the North Atlantic Westbound Freight Association was based on the peculiar facts of that trade, and such approval in no wise detracts from the principle of uniformity enunciated in the Commission's decision in *The Dual Rate Cases*, 8 F.M.C. 16 (1964). In that decision the Commission indicated that some variations in contract forms would be allowed where peculiar or special circumstances in a given trade warrant a variation. Our decision here should not signal the filing of petitions for contract modifications in other trades which are not based on substantial reasons therefor.

Now, therefore, *It is ordered*, That the petition of U.S. Borax & Chemical Corp., for reconsideration of the Commission's order entered in docket No. 1059 on January 29, 1965, be, and it hereby is, denied.

Commissioners Ashton C. Barrett and John S. Patterson dissenting:

Based on the petitions before us in this proceeding, we conclude there is not sufficient justification for the denial of a reconsideration of the decision and order served January 29, 1965, as indicated in our dissent therein and for the following reasons:

1. In spite of the disclaimer of departure from the report and order in *The Dual Rate Cases* requiring uniformity in contracts and allowing variations based on peculiar or special circumstances in a given trade, no such circumstances have been adequately shown, so there is actually a departure, and the basis or reasons therefor ought to be explained to the public.

2. Absent such an explanation, the order herein cannot avoid signaling the filing of petitions for contract modifications in other trades which are not based on substantial reasons.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1155

IMPOSITION OF SURCHARGE ON CARGO TO MANILA, REPUBLIC OF THE PHILIPPINES

Decided February 3, 1965

Except as to newsprint out of Searsport, Maine, surcharges imposed by respondents on cargo from the United States to Manila, found not to be in violation of sections 15, 16, 17 or 18(b) (5) of the Shipping Act, 1916.

Respondents Maersk Line and Pacific Star Line, by imposing a surcharge on newsprint at Searsport, Maine, while they do not apply a surcharge at nearby Canadian ports, have prejudiced and discriminated against shippers of newsprint at the Port of Searsport as well as the port itself.

Edward D. Ransom and *Robert F. Fisher* for Pacific Westbound Conference and member lines, respondents.

Elkan Turk, Jr. for Far East Conference and member lines, respondents.

George F. Galland for respondent Compagnie Maritime des Chargeurs Reunis.

Thomas R. Matias and *Robert J. Blackwell*, hearing counsel.

A. L. Jordan, presiding examiner.

REPORT

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

The Commission instituted this proceeding on its own motion to investigate the lawfulness of surcharges on cargo moving from ports in the United States to Manila, Republic of the Philippines. The purpose of the proceeding is to determine whether the surcharges are contrary to sections 15, 16, 17, and 18(b) (5) of the Shipping Act, 1916.

The Commission named as respondents the Pacific Westbound Conference and its members, the Far East Conference and its members, Hawaii Orient Rate Agreement and members, Pacific Star Line, Compagnie Maritime des Chargeurs Reunis, and Pacific Navigation System, Inc.

The Pacific Westbound Conference provides service to Manila from the Pacific coast of the United States and Canada. The Far East Conference serves Manila from U.S. Atlantic and gulf ports, but this range of service does not include Canadian Atlantic ports. Maersk Line, however, a Far East Conference member, serves Canada as an independent, and Isthmian Lines, also a Far East Conference member, lifts Manila-bound cargo at Halifax, Nova Scotia. Pacific Star serves ports on the Atlantic coast of the United States and Canada as an independent, and Compagnie Maritime des Chargeurs Reunis provides independent service from U.S. Atlantic and gulf ports. The service of Pacific Navigation is not described in the record.

The Far East Conference on July 25, 1963, and the Pacific Westbound Conference on July 29, 1963, filed with the Commission surcharges of $10 per ton, as freighted, on cargoes destined for discharge at Manila, to be effective October 28, 1963. At about this same time the other respondents imposed surcharges of $10 per ton on cargo destined for discharge at Manila.

The Far East Conference, the Pacific Westbound Conference, and Pacific Navigation reduced their surcharges from $10 to $5 per ton, effective December 26, 1963; Hawaii/Orient reduced its $10 surcharge to $5, effective December 28, 1963; Pacific Star changed its surcharge from $10 to 10 percent per ton, effective December 12, 1963; and Chargeurs also changed its $10 surcharge to 10 percent, with a maximum of $10 per payable ton, effective December 9, 1963. These charges are in effect at present.

The surcharges were imposed at the port of Manila as a result of a strike and related labor difficulties which began during mid-1963. The strike primarily affected the port Arrastre Service at Manila. The Arrastre Service, in the Philippines, has the authority "to acquire, take over, operate and superintend such plants and facilities as may be necessary for the receiving, handling, custody and delivery of articles, and the convenience and comfort of passengers and the handling of baggage. * * *" The Arrastre assumes responsibility for the handling of cargo on the Manila piers. Cargo is delivered directly into the hands of the Arrastre who assume responsibility for movement on the pier, sorting, storing, and the ultimate delivery of the cargo to the consignee. The ship's responsibility ends at its tackle.

The Arrastre has a history of both private and public ownership. Since 1962 it has functioned under the Bureau of Customs, but a plan has been formulated recently to return it to private enterprise.

During the middle of 1963, the port of Manila was practically closed by a strike primarily affecting the port Arrastre. The strike was accompanied by disorder and violence with a long-term disruptive effect on the port. The Arrastre strike of 1963 was precipitated by

uncertainty of status of the Arrastre labor contract with the strike's intensity being later heightened by the jurisdictional issue between two labor factions. In May of 1963, longshoremen furnished by the contracting union struck. The Arrastre employed nonunion labor subsequent to the outbreak of the strike which appears to have precipitated an outbreak of violence resulting in the damage and destruction of hilos and other pier equipment. This, in turn, contributed to cargo accumulation and slow discharge of vessels. The strike continued through the summer, and in October the port was virtually closed down in an effort to control sit-in strikes. The strike terminated late in October, but some unrest continued due to the labor jurisdictional issue. Similarly, pier congestion continued because of the lack of adequate pier equipment and lessened labor efficiency.

In considering the imposition of the surcharge the respondent conferences considered both the amount and applicability of the charges. The Pacific Westbound Conference originally proposed a surcharge of 25 percent of the basic freight rate and, pursuant to the terms of agreement No. 8200 between the two conferences, sought concurrence from the Far East Conference. The Far East Conference refused concurrence on the ground that a percentage, when applied in a like amount by both conferences, would tend to upset the historical differential in basic rates which exist between the two conferences. Finally, the conferences agreed upon the $10 per ton figure.

Conferences in foreign-to-foreign trades also imposed surcharges on Manila-bound cargo. The Australian Conference imposed a 25-percent surcharge, effective July 22, 1963; the Far Eastern Freight Conference of London, and the Bay Bengal-Philippine Conference, imposed surcharges of 25 percent, effective August 1, 1963; the Malaya-China-Japan Conference, effective August 10, 1963, and the Hong Kong-Philippines Conference, effective August 23, 1963, imposed surcharges of 25 percent; and the Japan-Philippines Conference imposed a surcharge of $2, effective December 1, 1963. The Australian Conference 25-percent surcharge was not in effect at the time of the hearing. The Far Eastern Freight Conference of London's 25-percent surcharge was reduced to 10 percent effective December 30, 1963.

In the weeks following the effective date of the surcharges, there was improvement in conditions at Manila. Delay due to congestion lessened and vessel turnaround time improved. While this improvement by the close of 1963 did not find a return to "pre-strike normalcy," respondents reduced their surcharges in December. In the late months of 1963, Philippine authorities attempted to clear congestion in Manila. Army trucks were used to clear cargo backlogs, bonded warehouses were employed for the storage of cargo not ordinarily put in bond, and some equipment was borrowed. Nevertheless, due to

both the intensity of the Arrastre strike, and to the disturbing effect of the strike's yet unsettled causes, the port of Manila is currently (time of hearing) operating at less than a normal level of efficiency. This fact has resulted in the curtailment of service at that port on the part of some operators and in frequent abnormal delays for vessels calling there in recent months. Respondents are in no way a party to or themselves the cause of the present conditions in Manila and the result is to place upon them an additional element of cost for the performance of their Manila services.

Respondents have offered two cost justifications regarding the level of the surcharges. One concerns the time or rate of vessel discharge, and the other, total time spent in port. The time or rate of discharge approach is keyed to the "tons per gang hour" concept. This is the number of tons handled by each gang per hour that it is working, and is computed by dividing the total number of hours worked by each gang into the number of tons discharged. While the rate of vessel discharge will vary extensively depending on the commodities involved, general cargo is being discharged at Manila at approximately half the rate that could be expected during a period of normalcy.[1]

The other statistical approach offered by respondents deals with the total time spent in the port of Manila for vessels arriving there in the several months before the hearing. In this connection respondents have shown that an unusually long amount of time is required for service in Manila.

The conferences set the initial surcharge of $10 per ton at a level to compensate the carriers for out-of-pocket expenses incurred at Manila. Expenses among conference members, of course, vary; the selection of one level of reimbursement logically required a formula of average expense. Such a formula was used by the Far East Conference, being arrived at in the following manner: the daily cost for the operation of a conference vessel ranges from $1,500 to $3,600 with the average daily cost being $2,500. Four days' delay was considered the average at the time, making the cost for the average vessel $10,000. This cost was passed on to cargo on the basis of the June 1963 conference carryings. During June, 28 conference vessels carried 29,000 tons of cargo to Manila, averaging approximately 1,000 tons per vessel. The average cost vessel, carrying the average tonnage of cargo, being delayed for an average period of time resulted in the determination that $10 for each ton of cargo compensated costs.

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[1] According to American President Line's experiences during 1960–1961, cargo moved at the rate of 8 or 9 tons; during the strike period of 1963 at 1 to 3 tons; and in November and December 1963 at 5 tons per gang hours. Pacific Far East Line agreed that before the strike the 12-ton rate was normal for discharging general cargo at Manila. The experiences of Chargeurs as to vessel discharge time varies from those of APL but the pattern is similar.

The Pacific Westbound Conference used a similar formula showing that its average vessel carried roughly 800 tons to Manila; that it suffered roughly four days' delay over normal; that the average daily vessel cost was between $2,000 and $2,400, a figure representing a compromise between low-cost vessels and American ships whose costs ran $3,600 to $4,800 per day; and that taking the lower average figure of $2,000 per day, daily costs would be returned by a figure of $10 per ton.

The reduction of the conference surcharges in December to $5 per ton was not based upon a specific revaluation of costs but represented a 50 percent reduction on the basis of some port improvement.

Discussion

The presiding examiner found that the surcharges were not contrary to the applicable provisions of the Shipping Act. He found that the surcharges were additional charges for service at Manila which reasonably approximated the additional cost of providing the service. Furthermore, he found that the form and the impact of the surcharges were not prejudicial to shipping interests in the United States. The examiner concluded that the imposition of the surcharges was not violative of sections 15, 16, 17, and 18(b)(5) of the Shipping Act.

Hearing counsel excepts on the ground that the form of the surcharge—the fixed dollar amount as opposed to a percentage form—is unlawful since it is prejudicial to shippers of low-valued, low-rated commodities. Hearing counsel also excepts on the grounds that the application of the surcharge by Maersk Line and Pacific Star Line at Searsport, Maine, while no surcharge is applied at nearby Canadian ports is contrary to the provisions of sections 16, first and 17 of the Shipping Act.

Hearing counsel did not except to the examiner's finding that on the record the surcharges were justified because of port congestion or that the overall revenue derived from the surcharges was a reasonable approximation of the cost incurred in calling at Manila. Neither did hearing counsel except to the examiner's finding that there was no showing on this record that the different surcharges in different trades resulted in prejudice to American exporters. We adopt those findings to which no exception has been taken.

The basic purpose behind surcharges such as those in issue here is to reimburse the carriers for additional costs temporarily incurred by the performance of their service, and which costs the carriers are not recovering through their basic freight rates. It is not disputed that the overall revenue derived from a surcharge of $10 per ton reasonably approximates the additional extraordinary cost for calling at Manila. The only question raised then is whether it is proper for shippers to

be assessed on a tonnage basis rather than on a percentage of the freight rate. We feel that the surcharge, based upon a specific dollar amount per ton (weight or cube, as freighted) is a perfectly proper method of recouping the loss due to delay and congestion.

Nevertheless, hearing counsel argues that the form of the surcharge is prejudicial to low-rated commodities and preferential to high-rated commodities. The argument has only superficial appeal, for it is premised upon the claim that the fixed dollar surcharge places an undue share of the cost of the delay on low-value, low-rated commodities. The record is quite to the contrary. The cost of the delay, which is admittedly recouped by the surcharge, is equally apportioned between all cargo. But hearing counsel submits that the surcharge is imposed without regard to "competitive quality, value, freight rate, handling or transportation characteristics." Therefore, they contend that low-rated commodities pay the cost of delay disproportionately high to its basic characteristics. But the argument overlooks the fact that the charge is constructed on the most basic characteristic of cargo weight or cube. In fact, many accessorial charges, including handling and wharfage, are levied on a per ton basis without regard to freight rate, value, etc. Although freight rates may reflect value of the commodity, the rate at least equally reflects stowage factors. Considering that one type of cargo creates no more nor less delay than another, we think the fixed-dollar-per-ton charge is fair.

Furthermore, the fixed-dollar-per-ton surcharge does not violate section 16, first, of the Act, because the requisite competitive relationship is not shown between high- and low-rated cargo. There can be no undue or unreasonable preference or advantage to one and no undue or unreasonable prejudice to another "person, locality, or description of traffic" absent a real competitive relationship between the one advantaged and the one disadvantaged. *West Indies Fruit Co.* v. *Flota Mercante*, 7 F.M.C. 66 (1962), *Boston Wool Trade Association* v. *M. & M.T. Co.*, 1 U.S.S.B. 24, 30 (1921). In order to demonstrate unjust discrimination and undue prejudice, the evidence must "disclose an existing and effective competitive relation between the prejudiced and preferred shipper, localities, or commodities. * * *" *Phila. Ocean Traffic Bureau* v. *Export S. S. Corp.*, 1 U.S.S.B. 538, 541 (1936). Our holding in *West Indies*, is controlling here:

> Prejudice to one shipper to be unjust must ordinarily be such that it constitutes a source of positive advantage to another. *Port of Philadelphia Ocean Traffic Bureau* v. *The Export S. S. Corp., et al.*, 1 U.S.S.B. 101 (1926). The competitive relationship is necessary not only to show the extent to which the complaining shipper was damaged by the alleged preference, prejudice or discrimination; its establishment is also necessary to prove the violation itself. *American Peanut Corp.* v. *M. & M.T. Co., supra; Boston Wool Trade Assn.* v. *M. & M.T. Co., supra.* (7 F.M.B. 66, 71–2.)

Likewise, the form of the surcharge is not contrary to section 17. The record does not show that American exporters have been discriminated against in favor of foreign exporters or that the surcharge, in general, is unjustly discriminatory between shippers and ports. Consequently, we reject hearing counsel's argument that respondents have violated sections 16 and 17 by discriminating against low-rated in favor of high-rated commodities.

Hearing counsel's exception to the examiner's failure to find that the Maersk Line and Pacific Star Line violated section 17 by imposing the surcharge at Searsport, Maine, is, in part, well taken.

The Great Northern Paper Company is an exporter of paper and newsprint, competing with Canadian mills for the Philippine market. It has traditionally shipped its products from Searsport, Maine, where the surcharge is applicable. Canadian competitors, shipping from eastern Canada, pay no surcharge in the Philippine trade. Newsprint is a low-rated commodity with a small margin of profit. During the first 9 months of 1963, Great Northern shipped about 700 tons of newsprint a month but none was shipped in November and December. Since Great Northern can avoid the surcharge by utilizing Canadian ports and thus maintain a competitive position in the Philippines, it has embarked on a program of diverting newsprint from Searsport, Maine, and has now begun to export from the Canadian port of St. John. This diversion to Canada is not without some expense to Great Northern, and it deplores the inability of Searsport to handle this cargo. Great Northern's business is so competitive in the Philippines that it has not been able to pass on the entire surcharge to its customers, and it lost sales totaling about 1,400 tons of paper in November and December 1963 that were made by Eastern Canadian mills.

These facts establish that Pacific Star Line and Maersk Line, by assessing a surcharge on newsprint at Searsport, Maine, while not at Canadian Atlantic ports, have unjustly discriminated against Great Northern and the port of Searsport while advantaging Canadian shippers of newsprint and the port of St. John. We find that a sufficient competitive relationship exists between the shippers and ports concerned; we find that Great Northern and the port of Searsport have suffered pecuniary harm by the imposition of the surcharge and the resultant diversion of traffic, and we find that the transportation conditions are similar from St. John and Searsport. Pacific Star and Maersk, therefore, have demanded, charged, and collected a charge which is unreasonable. We find this conduct to be contrary to the provisions of section 17, which 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 as

compared with their foreign competitors." *West Indies Fruit Co.* v. *Flota Mercante, supra.; Grays Harbor Pulp & Paper Co.* v. *A. F. Klaveness & Co., A/S* 2 U.S.M.C. 366, 369 (1940). We will order these carriers to cease and desist from this unreasonable practice by removing the inequality of treatment between shippers and ports by appropriate tariff amendments.

Ultimate Conclusions

1. Respondents are justified in imposing a surcharge on cargo unloaded at the port of Manila because of the extraordinary delay occasioned by labor difficulties and port congestion.

2. Respondents' surcharges, except as noted below, reasonably approximate the additional cost of serving the port of Manila and are, therefore, not in violation of sections 15, 16, 17, and 18(b)(5) of the Shipping Act, 1916.

3. Respondents' surcharges, imposed on a fixed-dollar-per-ton basis or on a percentage of the freight rate basis, are not unjust or unreasonable in violation of sections 16, first or 17 of the Shipping Act, 1916.

4. Respondents, Maersk Line and Pacific Star Line, by imposing a surcharge on newsprint at Searsport, Maine, while they do not apply a surcharge at St. John, New Brunswick, Canada, have demanded, charged, and collected a charge which is unjustly discriminatory between shippers and ports and unjustly prejudicial to exporters of the United States as compared with their foreign competitors contrary to section 17 of the Shipping Act, 1916.

An appropriate order will be issued.

FEDERAL MARITIME COMMISSION

No. 1155

IMPOSITION OF SURCHARGE ON CARGO TO MANILA, REPUBLIC OF THE PHILIPPINES

ORDER

This proceeding having been initiated by the Federal Maritime Commission pursuant to rule 5(g) of its rules of practice and procedure, and the Commission having fully considered the matter and having this day made and entered of record a report containing its findings and conclusions, which report is hereby referred to and made a part hereof;

It is ordered, That respondents Maersk Line and Pacific Star Line cease and desist from assessing on newsprint moving from Searsport, Maine, to Manila, Republic of the Philippines, a surcharge which is prejudicial and discriminatory to exporters of newsprint from the United States and to the Port of Searsport, Maine;

It is further ordered, That respondents Maersk Line and Pacific Star Line shall notify the Commission within 15 days of the date of this order the manner in which they shall eliminate such prejudice and discrimination.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1145

REDUCTION IN FREIGHT RATES ON AUTOMOBILES—NORTH ATLANTIC COAST PORTS TO PUERTO RICO

DOCKET NO. 1167

REDUCED RATES ON AUTOMOBILES—ATLANTIC COAST PORTS TO PUERTO RICO

Decided February 4, 1965

Reduced rate of respondents on automobiles from North Atlantic coast ports, gulf ports, and South Atlantic coast ports to ports in Puerto Rico found to be unjustly and unreasonably low under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, as amended, and minimum just and reasonable rate determined.

Alan F. Wohlstetter for respondent Motorships of Puerto Rico, Inc.
Robert N. Kharasch for respondent American Union Transport, Inc.
Carl H. Wheeler for respondents Waterman Steamship Corp. of Puerto Rico and Sea-Land Service, Inc., Puerto Rican Division.
Paul J. Coughlin for respondent Seatrain Lines, Inc.
Gerald A. Malia for respondent Containerships, Inc.
Edward T. Cornell and *C. Gordon Anderson* for respondent TMT Trailer Ferry, Inc. (C. Gordon Anderson, trustee).
John Mason and *Charles Colgan* for respondent South Atlantic & Caribbean Line, Inc.
John T. Rigby and *James W. Symington* for intervener the Commonwealth of Puerto Rico.
Donald J. Brunner, *William Jarrel Smith*, *Frank Gormley*, and *Robert J. Blackwell* as hearing counsel.
Charles E. Morgan, hearing examiner.

REPORT

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

These proceedings were instituted to determine the lawfulness under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933,

of proposed reduced rates and related charges on automobiles of all of the carriers in the trades from North Atlantic, South Atlantic, and gulf coast ports of the United States to ports in Puerto Rico. Separate hearings were held before the same examiner who issued an initial decision in each of the proceedings. Exceptions and replies were filed upon which we have heard oral argument. Because the issues in large part overlap, the two proceedings are consolidated for decision.

The trades under investigation in these proceedings have historically been characterized by severe competition, the greatest competition existing between those carriers operating out of the same areas.

Five carriers, American Union Transport, Inc. (AUT), Sea-Land Service, Inc., Puerto Rican Division (Sea-Land), Containerships, Inc. (Containerships), Seatrain Lines, Inc. (Seatrain), and Motorships of Puerto Rico, Inc. (Motorships), operate out of North Atlantic ports. All had a 35-cent automobile rate plus a 2-cent arrimo charge at the time of service of the relevant initial decision, except AUT which had a rate of 32 cents plus 2 cents arrimo.

Containerships had also proposed an additional allowance of 12.5 percent, suspended by Commission order, on its 35-cent rate to shippers whose automobiles are carried on deck for the convenience of the carrier with the consent of the shipper.

Prior to these proceedings all of these carriers had operated at a 38-cent rate plus 2-cent arrimo for approximately 4 years.

Two carriers, TMT Trailer Ferry, Inc., C. Gordon Anderson, trustee (TMT) and South Atlantic & Caribbean Line, Inc. (SACL), presently operate from Florida ports to Puerto Rico, TMT at a 31-cent rate and the latter, taking into consideration its absorbed charges, at a 32-cent rate. The South Atlantic carriers do not publish a separate arrimo charge. Prior to these proceedings, TMT had maintained a 34-cent rate and SACL a rate of approximately 33.5 cents.

Waterman Steamship Corp. of Puerto Rico (Waterman), which operates from Gulf ports to Puerto Rico, was made a respondent but did not participate in these proceedings. Its current rate is 38 cents plus 2 cents arrimo.

Seatrain's southbound carryings of automobiles out of North Atlantic ports have been minimal and are not a major factor in the trade. Seatrain's rate policy is to maintain the same rate on autos as is maintained by Sea-Land.

Alcoa Steamship Company, Inc. originally was a respondent in No. 1145, but was dismissed from that proceeding after it withdrew its proposed reduced rate of 35 cents. It handled about 800 to 850 cars in a previous noncalendar year period.

The total annual automobile carrying capacity of the carriers in the Puerto Rican trade substantially exceeds the available automobile

traffic. The examiner's rough calculation of the carriers' capacity is as follows:

Carrier	Autos per voyage	No. voyages	Autos per year
AUT	200	50	10,000
Sea-Land	400	35	14,000
Motorships	250	30	7,500
Containerships	80	25	2,000
SACL	100	50	5,000
TMT	100	76	7,600
Alcoa	?	?	800
Seatrain	?	?	?
Waterman	?	?	?
Total			46,900

The examiner, in his initial decision in docket 1145, declared the proposed 35-cent rate out of the North Atlantic ports to be "unjustly and unreasonably low and unlawful." The examiner concluded, based upon data relating to its past operations and projections relating to its future carryings based upon commitments obtained from automobile dealers, that "respondent Motorships probably could operate profitably at the 35-cent rate" provided its projections were correct. However, because of his additional findings that the proposed reduction would "bring about and aggravate the automobile rate war, and likely would cause rates on the basic commodities essential to Puerto Rico's economy to be raised," he set a minimum rate level of 37 cents from North Atlantic ports "effective for a period of two years, at the expiration of which time, the carriers will be left free to petition for adjustment of such minimum rate on the basis of the then volume of automobiles moving in the trade and other pertinent factors, including the economic health of the common carriers in the Puerto Rican trade * * * and the progress of the overall Puerto Rican economy, and how these factors relate to the ocean transportation rates."

In his initial decision in docket 1167, the examiner set as a proper standard for rates in the trade "minimum rates neither too high, so as to penalize the automobile shippers, nor too low, so as to force a number of carriers out of the trade, and thereby not only hurt the Puerto Rico automobile economy, but also other segments of the economy of the Commonwealth." He had found that "the trade is greatly over-tonnaged" and "that automobile carrying capacity far exceeds prosepctive automobile volume." He further found that "so far as this record shows, on the basis of normal accounting procedures no carrier of automobiles in this trade except TMT earned any profit on

automobiles in 1963, or if any carrier other than TMT earned a profit it was a relatively small one." He therefore determined that, since most carriers are losing money at present levels, the rate should be higher than 35 cents. He concluded and found, estimating "some yearly increase in automobile volume," a rate lower than 38 cents, which had been in effect in the North Atlantic trade prior to these proceedings, may be justified.

The examiner then set 37 cents as the just and reasonable minimum level for the North Atlantic respondent carriers in these proceedings, plus a 2-cent arrimo charge per cubic foot, or an all-inclusive 39-cent charge.

Secondly, because of the tradition of maintaining the same rates from the North Atlantic and the gulf to Puerto Rico and the failure of the gulf coast carrier to participate in the proceedings, the examiner set the same minimum rates for automobile carriage from gulf ports to Puerto Rico as from North Atlantic ports.

Thirdly, the examiner, in the light of his findings that for a "long time past" a differential had existed between the North Atlantic carriers and the South Atlantic carriers without any appreciable diversion of new cars from the North Atlantic areas, preserved the differential but set it at 4 cents rather than the previous 7 cents to encourage the movement of used cars out of the New York area. The examiner also set a 1-cent differential of the rates of TMT under those of SACL which competes with TMT for the carriage of used cars. In other words, the minimum rates set for TMT and SACL were respectively 35 cents and 36 cents, inclusive of arrimo charges.

The examiner also disallowed the proposed 12.5-percent allowance of Containerships for on-deck carriage of automobiles as "an unduly disturbing factor in a trade already beset by a rate war" and "a competitively predatory device unjustified by the circumstances" in the trade.

We agree with the findings and conclusions of the examiner in these proceedings, and adopt them as our own with the exeception of the setting of a time period for the minimum rates.

The minimum rate from North Atlantic ports to Puerto Rico

None of the parties, other than Motorships, AUT, and hearing counsel, excepts to the ruling of the examiner fixing the North Atlantic and gulf rates at 37 cents plus arrimo.

Motorships contends that the examiner's finding that a 35-cent rate would "bring about and aggravate the automobile rate war" is not supported by the record here under consideration, and maintains that its 35-cent rate must be approved as the examiner found it to be compensatory.

AUT contends that the examiner erred in failing to find its proposed rate of 32 cents lawful, but does not object to a minimum rate if fixed uniformly for all North Atlantic carriers.

Hearing counsel maintain that the examiner should have established a 35-cent rate as the lawful minimum for the North Atlantic carriers.

The examiner found that Motorships, because of its commitments obtained from automobile dealers, could probably operate profitably at a 35-cent rate. However, he also found that most carriers made little profit at a 38-cent rate and were losing money at the 35-cent rate. The record shows that the 35-cent rates of the North Atlantic carriers other than Motorships were filed by them to maintain a competitive position, i.e., they were the product of a rate-war and were not such rates as would have existed normally in the trade.

In determining the propriety of a rate, the Commission must consider more than whether or not it is compensatory to the carrier. Rates which may be compensatory to some of the carriers may indeed not be compensatory to all of them. It is precisely to prevent this forcing of rates to unremunerative levels that the Commission has in the past set minimum rate levels, even though the rates of all carriers in the relevant trade had not been shown to be noncompensatory.

Intercoastal Rate Structure, 2 U.S.M.C. 285, 301–303 (1940).

However, even if it could be conclusively shown that all carriers in the North Atlantic-Puerto Rican trade could operate profitably at the proposed 35-cent automobile rate, we would be compelled because of our concern for the general public interest to disapprove the 35-cent rate. It is axiomatic in common carrier regulation that some commodities may, in the public interest, be required to bear more than their full share of allocated costs, *B. & O. R.R.* v. *United States*, 345 U.S. 146 (1953), and the Commission has recognized the applicability of this principle to its own determinations. *Increased Rates on Sugar, 1962*, 7 F.M.C. 404, 412–413 (1962). The Court of Appeals for the District of Columbia Circuit, in reviewing our decision *General Increases in Rates—Pacific/Atlantic-Guam Trade*, 7 F.M.C. 423 (1962), in *Guam* v. *FMC*, 329 F. 2d 251, 254 (1964), commented that "it frequently happens that, when general revenues and expenses are computed on an overall basis, applicable to the entire business of a carrier, some items, if separated, appear as carried at noncompensatory rates. This result ensues from the compelling obligation of the carrier to render public service, and it has been approved."

The record in this proceeding shows the necessity for higher rates on automobiles than would arise from purely competitive conditions because of the overall needs of the economy of Puerto Rico.

Puerto Rico has a population of some 2.4 million people and a per capita income of $717, which is one-fourth the average per capita

income of the United States as a whole and only one-half that of the poorest of the several States. Because of its limited resources, it must depend upon ocean carriers travelling between it and the continental United States for movement of over one-half of the goods it consumes and exports.

The Commonwealth is at present engaged in a program of economic improvement through industrial development known as "Operation Bootstrap," which has already resulted in the establishment in Puerto Rico of almost 1000 industrial plants. However, despite the success of the program to date, unemployment continues to average approximately 12 percent.

Puerto Rico is dependent upon the United States, not only for basic consumer goods, but also for the raw, intermediate, and finished products required in connection with "Operation Bootstrap." In order to keep the cost of living within the limited means of its people and to insure the growth of "Operation Bootstrap," Puerto Rico must have ocean rates maintained at the lowest reasonable levels.

The Government of the Commonwealth from time to time has requested the ocean carriers serving between the United States and Puerto Rico to maintain rates on certain commodities at levels which may not be fully compensatory to the carriers. Such requests are made (1) in instances where an increased transportation rate (such as the rate on tinplate, southbound), would tend to inhibit the growth or continuation of industries in Puerto Rico, (2) in instances where an increased transportation rate (such as the rates on beans, potatoes, and onions, southbound), would result in higher consumer costs for basic foodstuffs, and (3) in instances where an increased transportation rate (such as the rate on coconuts, northbound), seriously would inhibit exports from Puerto Rico. The Commonwealth has been mindful that additional cost burdens would be cast upon other cargo moving in the trade, and believes that such ratemaking practices are necessary for the overall growth and health of the economy of Puerto Rico.

In the present proceeding, the Commonwealth strongly urged that the revenues which the carriers receive in this trade for the movement of automobiles should be such as to not only cover the cost of the movement of the automobiles, but sufficient also to support some share of the costs of the movement of the basic commodities, such as tinplate, beans, potatoes, onions, and coconuts.

The 38-cent rate on automobiles which has been in effect since 1959, has not impeded the movement of automobiles from New York to Puerto Rico. From the United States as a whole, the yearly movement of new cars to Puerto Rico has increased from roughly 8,000 in 1959, to 15,000 in 1962. This growth in the Puerto Rican automobile market is attributable to the growth in the economy of Puerto Rico.

The continued growth and health of the automobile industry in Puerto Rico depends largely upon the continued growth and health of the overall economy of Puerto Rico.

As the examiner found in docket 1167, some decrease in the 38-cent rate is justified by the increase in carryings which the record shows may reasonably be expected. The 37-cent rate will allow the automobile shippers to share in the benefits of this increase in carriage. At the same time, however, it will be high enough to allow a sufficient number of carriers to remain in the trade adequately to maintain the transportation of basic foodstuffs and products for "Operation Bootstrap" at a level which will not endanger the health of the overall Puerto Rican economy.

Conversely, the 35-cent rate is unjust and unreasonable because, as shown above, it is noncompensatory to a majority of the carriers and operates in a manner adverse to the overall economy of Puerto Rico.

We therefore, pursuant to the authority vested in us by section 4 of the Intercoastal Shipping Act, 1933, prescribe a rate of 37 cents a cubic foot, plus an additional charge for arrimo of 2 cents a cubic foot, as a just and reasonable minimum level for the North Atlantic carriers. In lieu of the above, the carriers may publish an all-inclusive rate of 39 cents a cubic foot.

The minimum rate from gulf ports to Puerto Rico

Waterman, the carrier from gulf ports, was made a respondent, but chose not to participate in these proceedings. Because of the nonparticipation of the gulf carrier and the fact that automobile rates from the gulf to Puerto Rico have traditionally been the same as those from North Atlantic coast ports, we determine that the minimum rate for all carriers operating from ports in the Gulf of Mexico should be the same as the minimum rate for carriers operating from the North Atlantic.

The minimum rates for the carriers from South Atlantic ports to Puerto Rico

TMT contends that the examiner erred in failing to find that SACL's minimum rates out of South Atlantic ports should be set at the same level as those of the North Atlantic carriers in light of SACL's statement that fluctuations in the North Atlantic carriers' rates on automobiles would not materially affect its carryings. It further maintains that it is entitled to a 31-cent rate less arrimo, thus establishing a 6-cent differential of its rates under those of SACL, arguing that the examiner failed to give adequate weight to all of the relevant competitive factors.

SACL contends that the examiner erred in granting differentials, but that if a differential is to be set below the rates of the North

Atlantic carriers, it should be set at the same level for SACL and TMT.

Hearing counsel and several North Atlantic carriers indicate in their exceptions that they feel that the examiner erred in setting differentials.

TMT and SACL, the carriers from South Atlantic ports to Puerto Rico, are in severe competition with each other for the carriage of used cars. SACL is unable, because of its on-deck mode of carriage, to compete with TMT for the carriage of new cars, whose dealers require that they be sheltered from the weather.

The amount of competition between the North Atlantic and South Atlantic carriers, however, is considerably less. The record does not show that there exists, or is likely to exist in the foreseeable future, any substantial diversion of new cars from the North Atlantic carriers to TMT. Almost all of the new automobiles of General Motors, Ford, and Chrysler move out of North Atlantic ports, and almost all of the new automobiles of American Motors move out of Florida. Although there was one test shipment of five General Motors cars from Atlanta, Ga., and the possibility of a shift in production of about 1,000 to 1,500 Chevrolets of a standard model from its Tarrytown, N.Y., facility to its factory in Atlanta, Ga., was considered, the testimony of the witness from General Motors clearly shows that nothing definite was decided as to a shift of production of Chevrolets to the Atlanta factory. General Motors' witness in fact admitted that he had not investigated the feasibility of such a shift, and the record fails to indicate that the shift is likely to take place or that new General Motors cars will travel on other than North Atlantic carriers. The record further fails to indicate any diversion of new Fords or Chryslers from the North Atlantic.

On the other hand, new Rambler distributors in Puerto Rico have testified that the difference in ocean freight rates determines that shipment will be made from Florida, and that in the absence of such difference, the North Atlantic carriers would be used.

The history of the automobile rates in the United States-Puerto Rico trade shows that a differential of TMT rates under the rates of the carriers operating out of the North Atlantic has been in effect for a number of years with no significant change in the port area from which new cars of General Motors, Ford, and Chrysler are shipped. Furthermore, some differential would appear necessary to preserve TMT's position as a carrier of the new cars which are required by the Puerto Rican dealers.

The examiner properly concluded, however, that the 7-cent differential which had been in effect in the trade was too great. In spite of

SACL's statement to the contrary, real competition does exist between the North and South Atlantic carriers with reference to the movement of used cars.

Evidence of record indicates that certain Puerto Rican used car dealers, when they were unable to secure the used cars they desired in Florida, have come to the New York area, but have not usually moved cars from that area because of the higher North Atlantic ocean rates. However, at the time when the differential was proposed to be cut from 7 cents to 4 cents (that is, when TMT's rate was 34 cents including almost 1 cent of insurance, and when Sea-Land proposed a rate of 35 cents plus 2-cent arrimo, not including insurance), Sea-Land was able to obtain commitments from the dealers for the movement of used cars out of New York to Puerto Rico. Thus, it appears that a 7-cent differential may have prevented the movement of some number of used cars from the New York area; on the other hand, a 4-cent differential would have allowed the movement of more used cars out of the New York area to Puerto Rico.

Admittedly the present rates of the South Atalntic carriers do not appear to be noncompensatory, although the carriers have operated under them for such a brief period that no definite conclusions as to their compensatoriness may be made. We do conclude, however, that they are unjust and unreasonable. To allow them to remain in effect would thwart our determination of the necessity of requiring the automobile carriers, in the public interest, to bear more than their full share of allocated costs. Further, it would be unfair to the North Atlantic and gulf carriers who have been required here to support the low-rated commodities.

A differential of approximately 4 cents would thus appear adequate to preserve the competitive relationship which naturally exists between the North and South Atlantic trades while at the same time benefiting the overall economy of Puerto Rico.

We agree with the examiner that TMT is entitled to 1-cent differential below the rate of SACL.

In our docket No. 1090, *General Investigation Into Common Carrier Freight Rates and Practices In The Florida/Puerto Rico Trade*, F.M.C. docket No. 1090 (Jan. 23, 1964), we were "unable to find that TMT's slower transit time is a disadvantage."

In these proceedings, however, the situation was different. A representative of TMT indicated that TMT's slower service made it difficult for it to attract cargo, and auto dealers indicated that TMT's lower rates were in part the reason why they shipped on its vessels. At a time when SACL and TMT had approximately the same rate (the second quarter of 1963), and SACL carried new cars, over 50 percent

of the new car tonnage TMT was scheduled to handle was diverted to SACL.

The record indicates that from February 14, 1964, to March 13, 1964, during which period TMT had in effect a rate in excess of 3 cents per cubic foot lower than SACL, SACL continued to operate at substantial vessel capacity.

The examiner, weighing the above considerations together with the fact that the number of vessels of TMT might increase, determined that the differential could be somewhat smaller and still allow adequate protection to TMT. He therefore established a 35-cent rate for TMT (including arrimo and insurance), as opposed to a 36-cent rate for SACL (including arrimo and insurance).

In conclusion, we adopt the examiner's findings that the minimum rates of TMT and SACL, operating from Florida ports, respectively, should be 35 cents and 36 cents both not subject to any additional charges for arrimo.

Containerships' allowance for ondeck carriage

The examiner properly disallowed Containerships' 12.5-percent allowance for automobiles carried on deck, as to permit such a device would be to give an unfair advantage to one carrier over the others who do not utilize such a device in the attraction of cargo. More significantly than that, however, it would defeat the whole purpose of fixing a minimum rate in this proceeding by permitting one carrier to contribute less than the amount which would flow from the minimum rate to the welfare of the overall Puerto Rican economy.

No time period for minimum rates established

All respondents will be required to submit to the Commission within 15 days amended tariff schedules in accord with our decision. We will not, however, impose a time period during which these minimum rates must remain in effect. The number of docketed proceedings involving the Puerto Rican trade is sufficient to inform us of the impracticability of attempting to freeze rates for a specific period in so dynamic a trade.

An appropriate order will be entered.

COMMISSIONER HEARN, DISSENTING

I disagree with the conclusions reached by the majority.

In my opinion, the record shows that:

(1) the 35 cent rate plus a two cent arrimo charge for North Atlantic carriers is just and reasonable and therefore lawful;

(2) the 12.5 percent allowance proposed by Containerships for the movement of "ondeck" used cars is just and reasonable and therefore lawful;

(3) the 32 cent rate proposed by SACL is just and reasonable and therefore lawful;
(4) the 31 cent rate proposed by TMT is just and reasonable and therefore lawful: and
(5) TMT is not entitled to a differential vis a vis SACL.

The record clearly establishes that the volume of automobiles moving in this trade is steadily and substantially increasing. Offerings more than doubled from 13,018 in 1959 to 27,446 in 1963. The record reflects the introduction of innovations and refinements in the handling of automobiles by carriers during this period. For example, the usage of Peck and Hale gear and vessel conversions to specially accommodate automobiles have resulted in increased efficiency and lower transportation costs. In my opinion, automobile shippers should be permitted to share, substantially, in these cost savings resulting directly from these innovations.

With respect to the rates proposed by Motorships, the record is clear that the 35-cent rate is quite profitable. The majority's action, in my view, will tend to stultify incentives and provide an unwarranted protection for the inefficient and high cost carriage of automobiles in this trade.

It is not my conviction that a rate lower than 35 cents would be unlawful. Although at issue here is the 35-cent rate, which I believe to be a lawful one, I am not prepared to say that a 34-cent or even a 33-cent rate for automobiles from the North Atlantic would be unjust or unreasonable. Rates other than 35 cents, however, are not in issue. Nevertheless, there is a definite need for the economical movement of low revenue bearing commodities to Puerto Rico. I am also aware of the possibility of a rate war with respect to high revenue bearing commodities to the detriment of the movement of other necessaries which would prejudice the efforts of the Commonwealth in its "Operation Bootstrap." Moreover, the Commission has at its disposal ample authority to insure that these regulated carriers of general cargo will not prejudice the movement of other commodities to the advantage of higher revenue bearing commodities. Consequently, I would look with disdain at an automobile rate of 32 cents (plus 2 cents arrimo) proposed by any North Atlantic carrier in the foreseeable future on the basis of this record.

As to the 12.5 percent allowance proposed by Containerships for the "ondeck" carriage of automobiles, it is clear that the service offered is considerably less valuable than below deck storage. New car shippers, for example, find "ondeck" transit unacceptable to them. I am not at all convinced that this less desirable and less costly service should not be available to used car shippers who wish to utilize it at the 12.5 percent discount. The failure to approve this, in my opinion,

will inhibit the movement of up to 2,800 used cars per year at attractive, yet remunerative, rates.

I subscribe to the long established custom, enunciated by the majority, that rates from gulf ports to Puerto Rico should be on parity with rates from the North Atlantic to Puerto Rico. Consequently, I would also approve a 35-cent rate from the gulf.

Turning now to the South Atlantic carriers, TMT and SACL, I support the continuation of lower rates than from the North Atlantic, based upon lower operating costs and shorter steaming time. And although I believe the record supports the legality of a 31-cent rate for TMT and a 32-cent rate for SACL, I would not order a 1-cent differential in favor of TMT. The slower and less costly barge service offered by TMT is not a factor that warrants protection from lawful competition through a built-in rate differential. The disparity between TMT's and SACL's transit time from Miami to Puerto Rico is the result of TMT's own managerial judgement. Shippers in this trade should not be denied a choice, if a superior service is offered by a competitor, through the device of a rate decision that assures guaranteed protection from price competition. Accordingly, I find that while the record establishes the legality of a 31-cent rate for TMT, that rate should also be available to SACL if it desires to adopt it.

In conclusion, I reiterate my fear that the decision of the majority will tend to eliminate the incentive for carriers to compete through the introduction of cost saving devices and will result in a distinct disservice to automobile shippers and ultimately the consumer in Puerto Rico. While the general public interest certainly is a factor which must affect our policy, the precise question presented here is the lawfulness of the rates in issue as measured by the standards set forth in the Intercoastal Shipping Act of 1933. The standard to be applied here is whether these proposed rates are just and reasonable. I believe that the 35-cent rate plus the 2-cent arrimo for North Atlantic and gulf carriers, the 31-cent rate for TMT and the 31-cent rate for SACL, should it desire to adopt it, are just and reasonable rates and should be offered to the shipping public.

COMMISSIONER JOHN S. PATTERSON DISSENTING:

I concur with Commissioner Hearn in disagreement with the conclusions reached by the majority and agree with his five points as to what the record shows.

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

1. In establishing rates in the Puerto Rican trade, the majority has treated all the present carriers in the Puerto Rican trade as a whole

and has established a uniform level (floor) of rates for automobiles, without a full record of operating costs for each carrier. Consequently, there is not enough evidence in this record to provide a basis for any findings supporting such decision, (a) that any rate other than 37 cents per cubic foot plus 2 cents arrimo for the North Atlantic and Gulf of Mexico carriers and 35 cents per cubic foot for TMT and 36 cents per cubic foot for SACL without any arrimo is unjust, unreasonable, or unlawful for all respondents herein, or (b) that Containerships should be denied an allowance of 12½ percent for autos carried on deck.

2. Until an adequate record is provided, we should find, (a) respondents have sustained their burden of proof, and (b) the rates, established by the respondents' own decisions, based on existing market influences and the record herein, are just, reasonable, and lawful.

3. The compensatory standard applied by the majority does not apply to the situation disclosed by this record where there are several competing carriers operating without franchise and using a variety of new transportation methods.

4. The effect of the proposed rates on the "overall economy of Puerto Rico" has not been established by the record, and the conclusion that each proposed rate "operates" in a manner that is "adverse" to the economy was not proven. There is no legislative authority for any welfare standard. The Commission would be on shifting sands if it were to give undue weight to public welfare. To allow considerations of public policy and welfare to influence a rate case is wholly inconsistent with the pronouncement that the reasonableness of rates on particular items or articles is to be determined by their transportation characteristics.

5. The majority decision represents bad policy because the restraints placed on competition inhibit the search for market-formulated rates in furtherance of a policy that we should all do all we can to strengthen the thrust of this Nation's competitiveness, its competitiveness on the sea lanes of the world's oceans. Heavier reliance should be placed on competition in the maritime world in particular. Such policies apply to our oceangoing interstate commerce in general as well as in the context of this case where there are eight competing carriers. At least three different techniques of transportation are being used and cost-saving methods of transportation are being devised which are still undergoing a testing in the market for the transportation of automobiles. Competition has yet to prove the superiority of any of these techniques or the financial results therefrom, and the competition which might supply the proof has been stifled by the majority decision to impose a floor on rates sufficient to assure profits to the least competitive carrier at the expense of the public and to the detriment of

the efficient carrier. Who is to say the method ultimately devised to transport automobiles to Puerto Rico may not be used to transport automobiles in foreign commerce under more competitive conditions than now exist?

As regards my conclusions as stated above, the reasons in support of them and my dissent are advanced as follows.

The majority has ordered in docket No. 1145 that respondents Sea-Land Service, Inc., Puerto Rican Division (Sea Land), Motorships of Puerto Rico, Inc. (Motorships), and Seatrain Lines, Inc. (Seatrain); and in docket No. 1167 that respondents American Union Transport, Inc. (AUT), Sea Land, Containerships, Inc. (Containerships), Seatrain, TMT Trailer Ferry, Inc. (TMT), and South Atlantic & Caribbean Line, Inc. (SACL) shall increase their rates for transporting automobiles and other wheeled vehicles to Puerto Rico. The rates of Waterman Steamship Corp. of Puerto Rico (Waterman) are reduced. Rates are ordered revised to a minimum of 37 cents per cubic foot plus a charge for arrimo (short for "arrival money" not otherwise defined herein) of 2 cents per cubic foot or an all-inclusive rate of 39 cents per cubic foot from ports in the North Atlantic and Gulf of Mexico, and to a minimum of 35 cents per cubic foot by TMT and 36 cents per cubic foot by SACL from certain Florida ports. Containerships is forbidden to allow 12½ percent discount for automobiles carried exposed on deck.

The majority bases its order on its conclusion that respondents' rates filed pursuant to section 18(a) of the Shipping Act, 1916 (Act), and section 2 of the Intercoastal Shipping Act, 1933 (Intercoastal Act), are unjust and unreasonable or unlawful, stemming from the two findings that each rate "is noncompensatory to a majority of the carriers and operates in a manner adverse to the overall economy of Puerto Rico." The minority believes the record will not support either of these findings and that there are sufficient reasons of record and policy to sustain the proposed rates as just, reasonable, and lawful.

A finding that the existing rate "is noncompensatory to a majority of the carriers" should not control justness or reasonableness. Justness and reasonableness should be tested by the customary assumptions of a free enterprise market where, as here, no one is compelled to provide service, there are several competing carriers, and there is no monopoly. The customary assumptions in such a situation are that no one is assured compensation and pricing decisions are made in response to each participant's experienced costs and expectations of future earnings. Compensatoriness is a standard applicable to public rate regulation of private monopoly or near-monopoly enterprises. In other enterprises, economic forces will locate the level of rates better than a government order having as its own assumption a theory that

a fixed minimum rate will achieve a level of vehicle carryings that provide revenues meeting all expenses and a profit for all respondents Such an assumption is not supported by the economic lessons of either the testimony or exhibits in the record.

The assumptions of the open market need no such record support.

Arguments having theories and assumptions as premises, however, are apt to be inconclusive. Therefore, one may put such premises aside, and accept, for the sake of argument, compensatoriness as the touchstone of reasonableness. We then find that what is reasonable for one carrier is not reasonable for another. This record has shown the existence of very recent (within the last 5 years) technical innovations in transportation. The rates in this record for two of the carriers are their first rates. The practical effect of a high rate may be that the specialized carrier is no longer competitive and, as a result, not compensated. TMT, a specialized carrier, provided slower service, but may no longer be compensated even with a 1 cent differential; and Containerships, without its 12½ percent "ondeck" discount, may be likewise noncompensated. The geographical differential may cause SACL to become noncompetitive and hence uncompensated. The record offers no assurance that the estimated 46,900 vehicle market will be neatly redistributed to provide a compensatory level of carryings to everyone. The only assurance is, to the contrary, derived from the arithmetic that if one carrier increases his carryings the others are diminished, assuming a fixed supply at the time. A rate level predicated on an increase in vehicles carried by one cannot apply to the others. The increased rate now ordered can only increase vehicles carried by the highest class service to the diminution of the lowest class service. The latter's costs depend on volume, and unit costs will increase as volume diminishes. So too will his compensation diminish as his unit costs go up and his revenues down. The majority, without record support, has thus embarked respondents on a pursuit of illusory objectives.

The competitive relationships which will determine whether the distribution of the available supply of vehicles will be compensatory have yet to be tested or to achieve equilibrium in view of the newness of the transport methods being used, as well as of the service offered. Competitive relationships affecting compensatoriness are everywhere, not just between the North and South Atlantic ports, which the majority considers significant, or between automobiles and food and clothing used by Puerto Ricans. The competitive relationships that determine compensation exist between ports, between areas, between services, efficiency, salesmanship, etc., and between methods of transportation. The exploratory activity causing the conflicting relation-

ships disclosed by this record, where we do not have an old established trade employing the same types of ships, must be allowed to continue until some equilibrium is achieved. It is too soon to discuss "unremunerative levels." At such time as competitive balance is present and after a better classification of costs and a better assignment of dollar values thereto is developed, the Commission may not find respondents' rates unreasonable or unjust.

The second part of the majority's case is that the lower rate "operates in a manner adverse to the overall economy of Puerto Rico."

The unstated argument seems to be that any increase in price tends to curtail consumption. There is no proof such a theory works out in practice, but it is accepted here. An increase in rates on automobiles, the argument would go, may decrease purchase of automobiles, while an increase in rates on food and essentials of living may curtail consumption of the latter, and it is socially better to diminish consumption of the former than of the latter. The proceeds from the socially undesirable service should finance the uneconomic social objectives. For example, the majority states with reference to the Florida carriers that to allow the lower rates "to remain in effect would thwart our determination of the necessity of requiring the automobile carriers, in the public interest, to bear more than their full share of allocated costs." Having stated in the initiating order that the proposed rates "may have a detrimental effect on the rate structure," the majority has found this to be the case. The idea of detriment caused by failure to bear a "full share" must be based on the notion of a socially desirable share, which no one can really know about. The majority is taking its stand without reference to the economic lessons of the testimony or exhibits. Sometimes the economic and social effects of certain rates may be recognized, but the Commission is on insecure shifting sand if it modifies rates otherwise reasonable out of deference to these consequences. Whatever merit there is in such a theory of regulation, it is not applicable here.

Theories aside, the necessary factual base has not been established. There is no testimony in the record on the point, nor was it proven that any carrier of general cargo would increase rates on any other commodity as a result of approval of its rate. To the contrary, two witnesses stated no decision had been made on the subject (Tr. 440–441, 476). There are no exhibits establishing the need. The exhibits were confined to a general description of Puerto Rico's economy and problems as an island. Nothing therein justified making freight rates on any one commodity subsidize low rates on another. This argument remains unproven.

The issues herein must be based on the present record. The adjudicator must examine the results and discuss the record and take account

of the real world of carrying automobiles to Puerto Rico by a diverse group of carriers using newly developed methods.

The history of these proceedings is set forth in appendix A.

The Commission's responsibility with regard to these changes in rates is defined in section 18(a) of the Act and section 3 of the Intercoastal Act. Essentially, this responsibility is to decide whether proposed rates are just, reasonable, and lawful, as the terms have been defined by the courts and by our precedents.

Therefore, before the Commission is authorized to determine, prescribe, and order enforced as a just and reasonable minimum rate, we must find that each respondent's proposed rate is unjust or unreasonable.

The last paragraph of section 3 of the Intercoastal Act provides that at any hearing "the burden of proof to show that the rate * * * is just and reasonable shall be upon the carrier or carriers." The carriers complied by filling out and submitting as exhibits a schedule 3002 "Vessel Operating Statement" (a Maritime Administration form of accounts), except Sea-Land, which furnished a "Profit and Loss Statement" for the year ended December 28, 1963.

Respondents furnished other fiscal information and estimates of what they expected to accomplish with their proposed rates, including a showing of profit as well as testimony by their officers, and took the position they had thereby discharged the statutory burden of showing justness, reasonableness, and lawfulness. They succeeded.

Respondents' operating statements, whatever their infirmities for comparison or other purposes, showed profits and losses as follows for the periods covered by their statements:

AUT	$844, 913. 00	
Containerships	72, 577. 63	
Motorships	(117, 498. 68)	(loss)
SACL	156, 550. 00	
Sea Land	149, 544. 00	
Seatrain	481, 302. 00	(not from auto carriage)
TMT	403, 126. 51	
Waterman	No figures furnished	

The infirmities in the fiscal record supporting these figures are discussed below, but they represent the basis for these entrepreneurs' own pricing decisions and claims to profits based on their past decisions. For the future, using respondent's own expectations, all claim profitable operations. AUT claimed that by lowering its rate, AUT could obtain sufficient additional carryings to offset the loss of revenue from the rate reduction, with a gross auto revenue increase at 32 cents per cubic foot of $140,188.14 (Ex. 4, p. 1) and an annual increase net auto

revenue on the 32 cents per cubic foot basis of $14,672.16 (Ex. 4, p. 2 as explained in Ex. 10, p. 2, item IV).

Containerships' proposed findings, based on actual experience in 1963, using a 35 cents per cubic foot rate with a 12½ percent "on deck" allowance, show profits of $54,069.19 (3,000 units) and $334,596.34 (5,860 units) (Findings 99 and 100, Brief, pp. 40–41) and claimed its rates were compensatory, just, and reasonable. Containerships effects certain economies by a joint venture arrangement in which certain expenses only, such as actual time of loading, direct stevedoring, and administrative and general expenses, are charged to the venture.

Motorships states its reduction to a 35-cent rate is fully compensatory and "is justified as a reasonable action on a request of automobile shippers."

SACL proves its 32-cent rate per cubic foot, including wharfage at Miami and San Juan and handling at Miami, is just and reasonable and produces a profit of $26.21 per automobile (Ex. 14, p. 1, Findings 25, 28, and 29), and at 80-percent capacity returns a profit of $2.52 per automobile (Ex. 14, p. 1, Tr. 766, 767, Proposed Finding 61).

Sea-Land claims that by reducing the headroom in its compartments there is a resultant saving in loss of space and broken stowage (Tr. 348, Ex. 19). Sea-Land's exhibit covering nine voyages commencing September 29, 1963, and ending January 4, 1964 (Ex. 39 and Tr. 595), showed a profit of $32,981. Its earlier profit and loss statements showed a profit, but were claimed to be deficient because of the inclusion of certain charter revenue from Military Sea Transportation Service (MSTS). Sea-Land makes no claim as to what it might earn at a 35 cents per cubic foot rate.

Seatrain shows no separate financial results from automobile transportation, because it is not primarily engaged in this business, having carried only 96 privately-owned cars for owners (Ex. 29), using empty space between seamobiles or railcars (Ex. 30, p. 5).

TMT's exhibits show past profits, but no claim is made with regard to future profits.

Waterman submits no arguments about its prospects.

The respondents' assertions and proofs, absent clear disproof by intervenors or hearing counsel, substantiate a finding that they have discharged the statutory burden of proof requirements.

The record contained fiscal information and descriptions of operations showing that except for AUT, Seatrain, and Waterman, all started service relatively recently, using new handling and securing techniques and a variety of types of ships.

The fiscal and operating information in this record makes a reversal of respondents' proofs impossible.

The operating statements furnished did not all cover the same periods, nor include the same sources of revenue or descriptions of expense.

AUT, Containerships, Motorships, SACL, Seatrain, and TMT furnished operating statements using a uniform classification of accounts pursuant to a Maritime Administration form, Sea-Land furnished a profit and loss statement with its own account classifications (these were generally but not exactly similar to the Maritime Administration form), and Waterman furnished no report.

The AUT and SACL statements covered the period from September 31, 1962, to December 31, 1963; the Containerships statement period was from October 12, 1963, to December 31, 1963; the Motorships statement was from October 1, 1962, to September 30, 1963; the Sea-Land statement was for the year ended December 28, 1963; the Seatrain statement was from May 14, 1963, to December 31, 1963; and the TMT statement was from January 1, 1963, to December 31, 1963. The experience of three respondents was too recent to permit records for the full period requested.

AUT revenues include amounts for both general cargo (inbound and outbound) and automobiles and for foreign and MSTS revenues (Ex. 1). Containerships showed revenues from wheeled vehicles alone plus an amount received for time charter of the ship on inward voyages over double the amounts received from vehicles (Ex. 27). Motorships revenues are exclusively from vehicle transportation. SACL includes amounts for inbound voyages. Sea-Land revenues are almost entirely derived from other than automobile transportation. Seatrain furnished total revenue figures with no separation between outward, intermediate, and inward figures. An analysis of their scope is not possible. TMT revenues included charter and inward cargo revenues.

No uniform rule for allocating either revenues or expenses between the cargo covered by the rates under investigation and other cargo producing revenue or causing expense in the figures herein has been developed. For example, Sea-Land allocates ship expenses on "the vessel voyage concept", i.e., on a per diem basis (Tr. 376), terminal expenses on a weight basis; administrative expenses are assigned directly (Tr. 381). AUT allocates administrative expenses to follow the expense administered. Containerships charged a $75 a day management fee to its Puerto Rico operations. SACL allocated by "agreement" its fixed management expenses (Tr. 159), but used a revenue pro rate in allocating fixed vessel expenses (Tr. 744). Cross-examination disclosed diverse understandings about amounts to be put opposite various account classifications (e.g., Tr. 409).

AUT did not include as expenses amounts paid to an affiliated managing agent (the actual expenses were shown separately and an allocation provided).

Containerships expenses included nonrecurring expenses for equipment not used with vehicles, and included an amount for distribution to time charterer. Motorships included general administrative expense and depreciation charges. Sea-Land included depreciation and administrative and general expenses. Seatrain's expenses were practically all applicable to other types of carriage. TMT included both vessel and trailer depreciation figures. Those that excluded depreciation, interest, and general administrative expenses provided separate statements of the effect of deductions therefor.

Where separate computations considering depreciation, interest, and general administrative expenses were shown, a loss was shown in some cases.

No uniformity necessary to valid comparisons to be used in reversing respondents' decisions was provided by this record. Inadequate as these reports are, they were not controverted by better figures.

In no case was a balance sheet of assets and liabilities devoted to the trade furnished, nor any depreciation or other reserve figures or policies relative to accumulations, shown. No uniform rules governing allocations of the part of the business devoted to transporting automobiles in relation to other cargo were put in the record for use in adjudicating fair results among the respondents.

The absence of a balance sheet and an allocation of accounts to the vehicular trade involved herein, alone, might be adjudged fatal to any rational means of fixing rates of each respondent. This deficiency was increased because available figures are made more difficult to interpret and compare for lack of agreement on what account classifications covered or what the statements should include, and for failure to cover the same periods of time.

The diverse methods of operation followed and types of ships used created further impediments to rational adjudication. A description of the diverse operating methods is in the appendix hereto marked B.

The diversity of operating methods reflects the fact that the ships have been converted recently and the methods of handling cargo are new. The operators are gaining experience which alters expenses as time goes on. Evidence of continuing experience is shown by Motorships, which found earlier experience unreliable; (a) its operation has become more efficient and earlier expenses have been eliminated (Tr. 251–252); (b) claims expense diminished (Tr. 255); (c) vehicle handling was overstated (Tr. 256, 257); (d) overhead expense included too much insurance (Tr. 259, 260, and Ex. 4, App. 14); (e) there was a reduction on stevedoring expense in New York (Tr. 272,

Ex. 10); and (f) a duplicate cargo survey could be eliminated (Tr. 402–403).

The diversity of fiscal information added to the changing financial results the various operating methods create, and the recency thereof under competitive conditions render the task of declaring existing rates unjust or unreasonable virtually impossible, let alone the task of deciding on a just and reasonable Government-prescribed rate.

The foregoing represents existing conditions and past results.

Whatever rate is prescribed must operate in the future. How the future will reward any single respondent absent a monopoly depends on an ability to persuade shippers to choose his service. Other considerations being equal, the choice will depend entirely on the rate. If other things were equal, a uniform rate that satisfied all respondents might make some sense. Other considerations are not equal, on this record, and it is impossible to fix a uniform rate as a result. Shippers' choices which take unequal conditions into account should not be precluded. A rate arrived at under conditions of competition will be preferable to a rate fixed by administrative decision where an evaluation of the varying conditions is necessary to make a reasonable choice.

What each respondent can accomplish in the market depends, as a witness stated, "on how many cars a carrier can attract" (Tr. 91). This elementary lesson is fundamental to the entire proceeding. The unit cost of carrying automobiles depends on the number carried. The revenues depend on the number of automobiles carried, and so do earnings, and both are needed to achieve the compensatory status sought by the majority. The number of automobiles carried depends on the rate in relation to the service offered. We cannot change the respondents' rates, in view of their proofs, and we have no control over service decisions. Consequently, our power to influence compensatoriness is limited, assuming it is a relevant factor as the majority states. The statute requires a finding of justness and reasonableness on the basis of available proofs.

The available proofs, coupled with a belief that the product of past competition produces market forces where everyone claims to be compensated for a variety of services at his chosen prices, eliminate a need for absolute standards of reasonableness or justness and might be used to sustain present rates.

My conclusions about the record are based on fact, but my belief as to the role of the market in establishing a standard of justness and reasonableness is based on policy.

Policy alone will not support a conclusion of justness and reasonableness, but in the Puerto Rico trade the number of carriers and the variety of choices offered shippers have created competitive conditions

which permit a degree of relaxation of control through fixed standards and resort to policy. Normally, regulation is a substitute for competition where no competitive conditions exist and public control has to be substituted. Public control exists in the form of the Act and the Intercoastal Act which may not be disregarded, of course, but where competition is so effective as it is here there is less need to enforce exacting evidentiary requirements to the test of statutory guides before reaching conclusions as to justness and reasonableness in order to protect consumers of transportation services.

Protection of the consumer being achieved, it would seem to be a pursuit of unrelated public policy objectives inimical to the existence of competition to establish a minimum rate in the name of the overall economy of Puerto Rico. That this objective exists in regard to competition is shown by the arguments of Puerto Rico to the effect that automobiles help achieve lower rates for other commodities, particularly food, for those unable to buy automobiles. There is absolutely nothing in this record to show either, as we have already noted, or that it would be desirable to make the carriers perform what might be an unprofitable social service if an analysis of costs shows this to be the case. In this proceeding, to the contrary, five of the eight carriers did not carry general cargo to any degree, but were special-purpose carriers so the necessary proofs could not be supplied in any event. The emotional appeal of the argument alone makes the adjudicator's task hard enough, but it is even more difficult because of the unexpected results that come from the alteration of competitive positions caused by the pursuit. We should, therefore, not take on, without compelling reasons, the task of adjudicating results in opposition to market forces where they exist as here.

Whatever protection of shippers as consumers is achieved, by finding justness and reasonableness in rates determined by the market, may even be lost by the pursuit of unrelated objectives sought in the adjudicated minimum rate because both shippers of automobiles and the respondent carriers who may have a cheaper service to offer have been deprived the protection of an open market. This deprivation on both sides is one of the unexpected results shown by this record. This record shows the use of specialized ships carrying nothing but wheeled vehicles. Motorships and Containerships are already experiencing the results of innovation by forward shipper commitments. Any need for a rate to support low food rates, assuming the existence of proof of need, or to assure compensation, does not exist as to the respondents offering no general cargo service with specialized ships, yet the specialized operators must charge shippers a higher rate which the majority adjudicates to achieve the unrelated objective rather than one based on the costs and experience. The higher rate may inhibit

full utilization of technical innovation, because shipper choice based on rates alone has been eliminated and the specialized carrier has no more to offer, or less to offer where he is slower, than the combined cargo carrier. Food may yet be the unexpected beneficiary of these developments if general cargo carriers increase their efforts to replace lost automobile cargoes.

This record falls so far short of supporting a finding of a need for what is, in effect, a cost guarantee rate for the least efficient, to the penalty of the innovator and the efficient, as well as of the shipper paying the higher rate, that competitive regulation added to the shortcomings of the exhibits and testimony of record ought to compel a finding of justness and reasonableness of the respondents' proposed rates. The complete absence of contradictory evidence should in no event be used to support, first, a finding of unjustness and unreasonableness and, second, a prescription of a minimum rate.

Finally, we have been asked to condemn the practice of obtaining forward commitments based on a rate to be established. This was shown to be a traditional trade practice. There is no ground for condemnation of anything we have studied in this record.

To sum up

The difference between the majority's and my minority rates per cubic foot for transporting wheeled vehicles to Puerto Rico from the mainland is shown as follows:

Carriers	Majority	JSP minority
AUT	37 cents plus 2 cents arrimo	35 cents.
Containerships	37 cents plus 2 cents arrimo (no discount)	35 cents (12% ondeck discount).
Motorships	37 cents plus 2 cents arrimo	35 cents.
Sea-Land	37 cents plus 2 cents arrimo	35 cents.
Seatrain	37 cents plus 2 cents arrimo	35 cents.
SACL	36 cents.*	32 cents.*
TMT	35 cents	31 cents.
Waterman	37 cents plus 2 cents arrimo	35 cents.

*Including handling and wharfage charges.

The referenced "Operation Bootstrap," a program of improving economic status of Puerto Ricans, has been referred to as justifying the minimum rate in spite of the absence of authority for a welfare standard. If such a standard is not validly applicable as I contend, the most secure ground on which to stand in regulating rates is primarily disapproval of any rate that is not just and reasonable. The converse, finding rates just and reasonable where disapproval is not

warranted, is the best assurance of guarding and advancing the economy of Puerto Rico or any area. The majority has elected to put a floor under rates for transporting automobiles in the name of protecting the economy, but since automobiles keep the economy moving to some extent, and it takes four tires to keep the wheels of the automobile moving, one could hold that in the future a floor under automobile tire rates may also be necessary for consistency with the majority's regulatory philosophy. There is no end to this process, which I would reject, particularly where the record is so inadequate.

Ultimate Conclusion

For these several reasons, I dissent from the majority's conclusions and do conclude respondents' rates are all just, reasonable, and lawful.

FEDERAL MARITIME COMMISSION

DOCKET No. 1145

REDUCTION IN FREIGHT RATES ON AUTOMOBILES—
NORTH ATLANTIC COAST PORTS TO PUERTO RICO

DOCKET No. 1167

REDUCED RATES ON AUTOMOBILES—
ATLANTIC COAST PORTS TO PUERTO RICO

ORDER

This proceeding having been instituted by the Commission to determine the lawfulness under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, of proposed reduced rates and related charges on automobiles of all of the carriers in the trades from North Atlantic, South Atlantic, and gulf coast ports of the United States to ports in Puerto Rico, and the Commission having this date made and entered its report stating its findings and conclusions, which report is made a part hereof by reference, and having found said proposed rates and charges to be unjust and unreasonable:

Therefore, it is ordered, That:

1. A rate of 37 cents a cubic foot, plus an additional charge for arrimo of 2 cents a cubic foot, be established as the just and reasonable minimum level for the North Atlantic carriers, respondents in both proceedings (docket No. 1145 and docket No. 1167). In lieu of the above, these carriers may publish an all-inclusive rate of 39 cents a cubic foot.
2. The minimum rate for respondents operating from ports in the Gulf of Mexico shall be the same as the minimum rate for respondents operating from the North Atlantic.
3. The minimum rates of TMT and SACL operating from Florida ports shall be 35 cents for TMT and 36 cents for SACL. These rates shall not be subject to any additional charges for arrimo.

4. Containerships' proposed allowance of 12½ percent to shippers of automobiles when such automobiles are carried on deck be disallowed.
5. Respondents promptly file with the Commission revised schedules of rates and charges in accord with our findings and conclusions herein, said schedules of rates and charges to be effective within 15 days from the date of service of this order.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

APPENDIX A

History of Proceedings

1. Alcoa Steamship Company, Inc., (Alcoa) and the other three respondents in docket No. 1145 filed to be effective September 15, 1963, a reduced rate of 35 cents per cubic foot on certain types of "Vehicles, Self-Propelled" shipped from North Atlantic coast ports. The effective date was suspended to January 14, 1964, and an investigation ordered September 12, 1963. Motorships filed first on July 31, 1963; Sea-Land on August 7, 1963; Seatrain on August 12, 1963; and Alcoa on August 16, 1963; to become effective September 15, except Alcoa with a September 16 effective date. Subsequently, all respondents except Motorships requested and were granted permission to cancel the 35-cent rate. Alcoa canceled its reduction and moved to be dismissed from the proceeding. The Alcoa motion was granted November 26, 1963. Motorships was ordered on January 7, 1964, to furnish information about its operations, and this order was rescinded on February 27, 1964.

2. AUT, Sea-Land, Containerships, and Seatrain, respondents in docket No. 1167, filed, to be effective January 16, 1964, a reduced rate of 35 cents per cubic foot on certain types of "Vehicles, Self-Propelled" shipped from Atlantic Coast ports. The effective date was suspended until May 15, 1964, and an investigation ordered January 7, 1964. No purpose was stated as such, but the order recited reason "to believe that the said reduced rate * * * may have a detrimental effect on the rate structure * * * and result in rates * * * which would be unjust, unreasonable or otherwise unlawful in violation" of the Act or the Intercoastal Act.

3. TMT filed, to be effective February 14, 1964, a reduced rate of 31 cents per cubic foot (down from 34 cents per cubic foot) on the same types of vehicles when shipped from Jacksonville and Miami, Fla. The proceeding in docket No. 1167 was expanded to include TMT, which was added as a respondent, and an investigation ordered February 13, 1964, but its rate was not suspended.

4. On February 13, 1964, after stating the purpose of the investigation "is to determine if the said rate would have an adverse effect upon the Puerto Rican economy", the suspension was vacated because the 4-month suspension period on Motorships' 35 cents per cubic foot rate expired January 14, 1964. Motorships was the only respondent

who did not cancel the 35-cent rate (see item 1 above). The effect of this action is to authorize the other respondents to meet the Motorships' rate without waiting until the end of their suspension period on May 15, 1964, but the assigned reason was "that the 3 cents per cubic foot differential is resulting in an adverse impact upon certain respondents in docket No. 1167 which threatens the continuation of their full service in the trade and may be harmful to shippers who are not transporting their automobiles via Motorships."

5. SACL filed, to be effective March 15, 1964, a tariff which permitted it to absorb handling and wharfage charges on automobiles shipped from Jacksonville and Miami, Fla. SACL's rate was not stated in the order. The proceeding was expanded to include SACL, which was added as a respondent and an investigation ordered February 27, 1964, but the new rule was not suspended.

6. Containerships filed, to be effective March 15, 1964, a tariff revision allowing a 12½ percent discount to shippers of automobiles when carried on deck for the convenience of the carrier with the consent of the shipper. The change was suspended for the reason that it "might be detrimental to the Puerto Rican trade, disrupt the *status quo* * * * and may result in rates * * * which would be unjust * * *"

7. Waterman filed, to be effective April 6, 1964, a reduction from 38 cents to 35 cents per cubic foot on the same types of vehicles when shipped from gulf coast ports. The proceeding in docket No. 1167 was expanded to include Waterman, which was added as a respondent and an investigation ordered March 10, 1964. Waterman later restored its 38 cents per cubic foot rate.

8. AUT filed, to be effective March 21, 1964, a reduction from 35 cents to 32 cents per cubic foot on the same types of vehicles when shipped from Atlantic coast ports. The reduction was suspended until July 20, 1964, by order on March 10, 1964, for the same reasons noted in item 6 above.

APPENDIX B

Diverse Methods of Operation

It was shown that six carriers use special-purpose ships which transport substantially only wheeled vehicles and one uses general purpose ships which transport general cargo and wheeled vehicles together. Of the special purpose ships, three (Containerships, SACL, and TMT) roll the vehicles on and off (when the top deck is used SACL uses a mobile shore crane) (Tr. 799), and two (Motorships and Sea-Land) lift the vehicles on and off. One (Seatrain) drives vehicles on and parks them between trailers loaded with general cargo. Of the general purpose ships, AUT lifts the vehicles on and off C–1–B type ships and stows them mixed with other cargo (volume in 1963 shown as 3,242,459 cu. ft. of automobiles and 8,848,177 cu. ft. of general cargo).

A variety of ships are used:

1. Containerships uses a motor vessel on which ships are rolled on and off.

2. Motorships uses a C–1–B steamship vessel converted to be an automobile carrier by the installation of automobile decks and specialized lashing gear. It carries a limited amount of cargo on deck, most of which is in trailers. Loading and unloading is effected by the lift-on/lift-off method (ex. 11).

3. Sea-Land uses a former seaplane tender "of the C–3 vintage that was modified and converted" (Tr. 481, 18). It was fireproofed and false decks were installed, together with booms for vehicle handling.

4. Seatrain uses ships which were not specifically identified in the record, but which are specially designed to transport truck trailers and railroad cars.

5. SACL uses "a roll-on/roll-off vessel, having one cargo hold, with access thru the stern" except for cargo on deck (Tr. 799). "She is twin-diesel powered * * * with a gross tonnage of 4,684 tons" (proposed finding of fact No. 6 and Tr. 797–798).

6. TMT uses four Landing Ship Tank (LST) vessels towed by an oceangoing tugboat (Tr. 919). The vessels are loaded by the roll-on/roll-off method with access through the stern. TMT's service is slow and in other respects is less desirable to shippers than that of competitive self-propelled ships.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65–2

AMERICAN & AUSTRALIAN STEAMSHIP LINE, AND PORT & ASSOCIATED LINES, PETITIONERS

v.

BLUE STAR LINE, LIMITED, HAMBURG SUD-AMERIKANISCHE DAMPFSHIFFAHRTS-GESSELLSCHAFT, EGGERT & AMSINCK (COLUMBUS LINE), UNITED STATES LINES CO., AND M. E. ROUGH, RESPONDENTS

Decided February 12, 1965

ORDER

This proceeding comes before the Commission upon an application filed on December 29, 1964, by American & Australian Line and Port & Associated Line, members of the Atlantic and Gulf/Australia-New Zealand Freight Conference, in which petitioners request the Commission to direct the other members of the conference to show cause why the Commission should not issue an order that respondents may not lawfully oppose, impede, or prevent the amendment of the conference tariff to eliminate Canadian rates and to terminate that part of the Merchant Rate Agreement which includes Canada. On January 12, 1965, we issued the requested show cause order and on February 1, 1965, the Commission heard oral argument on the matter.

The conference agreement, No. 6200, covers the trade from the United States to Australia and New Zealand. It does not specifically include Canada. Another agreement, 6200–A, between the conference and the M.A.N.Z. Line which serves Canada, provides for a parity of rates between the conference lines and M.A.N.Z. Line and provides that M.A.N.Z. shall be included in the conference dual rate system insofar as its Canadian operations are concerned. M.A.N.Z.

Line has given written notice to the conference of the cancellation of Agreement 6200–A to be effective February 15, 1965.

Upon termination of 6200–A only the basic conference agreement, which does not cover Canada, will remain. Petitioners, therefore, request that the conference delete the Canadian rates from its tariff and restrict the coverage of the dual rate system to the United States. Petitioners argue that Agreement 6200 authorizes neither publication of Canadian rates nor the inclusion of Canadian shipments within the dual rate system. They contend that upon the expiration of Agreement 6200–A there will be no provision in any section 15 agreement which permits the inclusion of Canada within the framework of Agreement 6200.

In rebuttal, respondents contend that irrespective of the cancellation of Agreement 6200–A the conference members, including petitioners, have entered into an agreement to publish Canadian rates in the conference tariff and to include Canadian shippers in the dual-rate contract system.

Upon considering the arguments and documents before the Commission in this proceeding, we are of the opinion that we will not order the relief requested by petitioners. Since it appears that the rights of respondents and certain shippers may be substantially affected by relief sought, we are unwilling to take the summary action requested on the limited record before us.

Our dismissal of this proceeding is, of course, without prejudice to the right of petitioners here to file a complaint pursuant to section 22 of the Shipping Act, 1916, and rule 5(b) of the Commission's rules of practice and procedure.

This proceeding is hereby dismissed.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1127

OVERSEAS FREIGHT AND TERMINAL CORP. (ALL CARGO LINE)—EXTRA CHARGES DUE TO DELAY IN UNLOADING CAUSED BY LONGSHOREMEN STRIKE

Decided February 12, 1965

Respondent charged shippers extra compensation for services rendered for delay in a voyage, when longshoremen strike prevented unloading, in reliance on clause in bill of lading, attached to tariff, that required cargo to pay proportionately expenses of carrier for services rendered cargo when cargo is retained on board and duration of voyage is extended. Not shown to be in violation of section 18(b) as a charge in excess of that shown in tariff, nor a violation of section 16 or 17 of the Shipping Act, 1916.

Marvin J. Coles, *Stanley O. Sher*, and *Armin U. Kuder*, for respondent.

J. Joseph Noble and *F. Herbert Prem* for intervener, International Packers, Inc.

Frank Gormley and *Norman D. Kline*, hearing counsel.

E. Robert Seaver, hearing examiner.

REPORT

BY THE COMMISSION (JOHN HARLLEE, *Chairman;* JAMES V. DAY, *Vice Chairman;* ASHTON C. BARRETT, GEORGE H. HEARN, JOHN S. PATTERSON, *Commissioners*):

This is an investigation on our own motion to determine whether or not the imposition by All Cargo Line of a 125 percent surcharge on shipments it was prevented from unloading at Mobile, Ala., due to a longshoremen's strike, was in violation of sections 16, 17 or 18(b) of the Shipping Act, 1916. In an initial decision the hearing examiner concluded (1) that the surcharge was not discriminatory under section 16 because it was assessed against all consignees equally; (2) that the surcharge was not in violation of section 17 because that section has never been construed to apply to a common carrier's ocean freight rates; (3) that clause 4 of the bill of lading which was attached to the back of the filed tariff satisfied the filing requirements of section

18(b)(1); (4) that there was no need for any additional filing because the carrier did not increase its rates within the meaning of section 18(b)(2); (5) that the hearing counsel and intervener have not proven that the "surcharge" imposed by the respondent is unlawful under section 18(b)(3); and (6) the reasonableness of the "surcharge" was not an issue in the order of investigation, and the parties offered no evidence to demonstrate that the charge was so unreasonably high as to be detrimental to the commerce of the United States under section 18(b)(5). The proceeding is before us upon hearing counsel's and intervener's exceptions to the initial decision.

Both hearing counsel's and intervener's exceptions are directed to the examiner's findings and conclusions under section 18(b)(3) and state that the section permits only the filing of rates and charges in specific predetermined amounts. Thus, any rule which provides for an unspecified charge contingent upon a future occurrence violates the principle that tariffs must be clear and unambiguous. In essence these exceptions constitute nothing more than a reargument of the issues and contentions resolved by the examiner in his initial decision.

A careful consideration of the record leads us to the conclusion that the examiner's disposition of these issues was well founded and proper. However, nothing in the decision is to be construed as sanctioning the particular apportionment of the carrier's expense arrived at here. As the examiner has noted, this issue was not present in this proceeding.

Accordingly, we adopt the examiner's initial decision as our own and make it a part hereof, and for the reasons stated therein this proceeding is hereby dismissed.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1127

OVERSEAS FREIGHT AND TERMINAL CORP. (ALL CARGO LINE)—EXTRA CHARGES DUE TO DELAY IN UNLOADING CAUSED BY LONGSHOREMEN STRIKE

Respondent charged shippers extra compensation for services rendered for delay in a voyage, when longshoremen strike prevented unloading, in reliance on clause in bill of lading, attached to tariff, that required cargo to pay proportionately expenses of carrier for services rendered cargo when cargo is retained on board and duration of voyage is extended. Not shown to be in violation of section 18(b) as a charge in excess of that shown in tariff, nor a violation of sections 16 or 17 of the Shipping Act, 1916.

Marvin J. Coles, *Stanley O. Sheer*, and *Armin U. Kuder*, for respondent.

J. Joseph Noble and *F. Herbert Prem* for intervener, International Packers, Inc.

Frank Gormley and *Norman D. Kline*, hearing counsel.

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

Background of the proceeding

The Commission's notice of investigation which instituted this proceeding describes the reported circumstances that gave rise to the investigation in this way: "[Respondent], Overseas Freight Terminal Corp. (All Cargo Line), a common carrier by water in foreign commerce of the United States subject to the Shipping Act, 1916, had charged or demanded a 125 percent surcharge on shipments transported aboard the SS *Cap Verde* on a voyage from Rotterdam, Netherlands, to ports in the United States, because the duration of the voyage was increased due to a longshoremen's strike. The carrier's bill of lading, a specimen of which is attached to the tariff and on file with the Commission, provides in paragraph 4 for the assessment of extra compensation for an increase in the duration of the voyage, and

[1] This decision was adopted by the Commission on Feb. 12, 1965.

further provides that the shipper and consignee shall pay proportionate additional freight."

The notice goes on to state that the carrier may have charged a greater or different compensation for the transportation of property than the rates and charges which are specified in its tariff on file with the Commission, in violation of section 18(b), Shipping Act, 1916, and by the imposition of said surcharge the carrier may have unduly preferred or prejudiced shippers in violation of section 16, and may have unjustly discriminated against shippers in violation of section 17. This investigation was ordered pursuant to section 22 of the Shipping Act, 1916, to determine whether respondent in applying the bill of lading clause and assessing the surcharge is in violation of section 16, 17 or 18(b) of the Shipping Act, 1916.

International Packers, Inc., a shipper who had cargo on the *Cap Verde* on the voyage in question and who, like the other shippers, was charged extra compensation for the extended duration of the voyage, has intervened in this proceeding. Hearing counsel, respondent, and intervener, being all of the parties, agreed to a stipulation of the facts to be considered in reaching a decision in this proceeding. The stipulation was negotiated with the approval of the examiner and it has obviated the need for the taking of testimony. The stipulation sets forth facts that are sufficiently clear and complete for the purpose of a decision in this proceeding. The agreed facts, in the words of the stipulation, are as follows.

The facts

Respondent All Cargo Line, is a common carrier by water operated by the Overseas Freight & Terminal Corp. It transports cargo between continental European ports in the range from Hamburg, Germany to Bayonne, France, and also Irish ports and South Atlantic and gulf ports of the United States. Its service to the Gulf is approximately every 4 weeks. Vessels used in this service are time chartered and in most instances fly the flag of West Germany.

Respondent filed its westbound freight tariff No. 1 pursuant to section 18(b) of the Shipping Act, in 1962. A specimen of the carrier's bill of lading was filed with the tariff and is attached hereto as exhibit A.[2] The tariff provisions are expressly made subject to the bill of lading. The following notation appears on the title page of the tariff:

"Transportation under the terms and conditions of this tariff is subject to the terms and conditions of the line's bill of lading and other documents currently in use by the line."

[2] The entire document need not be set out in this decision, therefore all but clause 4 is omitted.

The voyage which ultimately gave rise to this proceeding was westbound voyage No. 6, on the MV *Cap Verde* which arrived in Rotterdam on December 3, 1962. The *Cap Verde* called at Rotterdam, Hamburg and Dublin and departed from the latter port on December 12 bound for Tampa, Mobile, Houston and New Orleans.

A longshoremen's strike commenced in all United States gulf ports on December 23, 1962 at 1700 hours. The *Cap Verde* arrived in Tampa, Fla., at 0910 hours, December 24, 1962. Upon the vessel's arrival at Tampa, Fla., respondent, because of the strike, was unable to discharge its cargo. On December 27 at 1815 hours, the *Cap Verde* sailed for Mobile, Ala., where respondent was hopeful that it might be able to discharge some cargo, but due to the strike, it was unable to do so. The vessel arrived at the Mobile anchorage on December 28 at 1724 hours. It left the anchorage at 0700 hours on January 14 for water and docked at Mobile at 0930 hours on January 14. The remainder of the time during which the strike ensued the vessel waited in the Mobile anchorage. The strike ended on January 26, 1963, at 2400 hours. The vessel discharged its cargo on January 27 at Mobile and then proceeded to Houston, New Orleans and Tampa where it discharged the remainder of its cargo. The itinerary of the vessel for this voyage is as follows:

	Arrived	Time	Sailed	Time	
Rotterdam	12- 3-62	0115	12- 6-62	1515	
Hamburg	12- 7-62	0310	12- 9-62	1010	
Dublin	12-11-62	2355	12-12-62	1910	
Tampa	12-24-62	0910	12-27-62	1815	No cargo worked strike.
Mobile	12-28-62	1724	1-27-63	1815	No cargo worked strike.
Houston	2- 3-63	0435	2- 5-63	1815	
New Orleans	2- 7-63	0120	2- 8-63	1930	
Lake Charles	2- 9-63	2105	2-11-63	1700	
Tampa	2-13-63	1850	2-14-63	2400	

Throughout the strike, respondent believed that the strike would be terminated momentarily. From newspaper reports and other sources of information respondent believed that the Government would not permit such a prolonged strike of this magnitude. Respondent, as shown below, incurred additional expenses in excess of $60,000 during this strike. As the strike wore on, respondent became increasingly concerned with the mounting expense on the vessel.

Respondent is informed that other carriers under provisions similar, if not identical, to section 4 of its bill of lading, discharged nonperishable cargo in Puerto Rico or Mexico which was intended for strike-bound United States ports. Thereafter, the obligations of such carriers were discharged, and the consignees were required to accept

the goods in Puerto Rico or Mexico and arrange for further transportation to the United States at their own expense.

International Packers, intervener, is unable to find any instances where perishable cargo has been discharged at foreign ports when intended for strikebound U.S. ports. Intervener's investigation disclosed there were no suitable warehouses in Puerto Rico or in Mexican ports that were available for acceptance in storage of this perishable product. The circumstances surrounding the handling and discharge of perishable cargo and general cargo are different since the former requires refrigeration.

Respondent had the opportunity to use the *Cap Verde* in the Caribbean trade during the period it was idle due to the strike period. The *Cap Verde* is well suited for this trade because of the substantial refrigerated space in the vessel. The vessel, however, could not be so employed in the refrigerated trades in the Caribbean as its refrigerated compartments contained meat cargoes of International Packers, which was the largest consignee on the voyage.

Respondent attempted to persuade longshoremen in the gulf to unload the meat cargo on the grounds that it might spoil. The longshoremen refused to do so. Respondent, then, on approximately January 10, called its agents in the gulf and in Tampico, Mexico, to arrange to discharge the meat cargo of International Packers, in Tampico, Mexico, thereby freeing the vessel for trading in the Caribbean or other trades which might reduce, or eliminate the losses that were continuously mounting due to the strike. Respondent notified International Packers that it was considering discharging such cargo in Tampico, Mexico, under section 4 of the bill of lading. International Packers told respondent that discharging its cargo in Tampico was unacceptable to it, but that if respondent elected to discharge in Mexico, International Packers had no alternative but to accept. Intervener also informed respondent that it would hold respondent liable for cargo damage due to unavailability of proper refrigeration facilities for storage or transportation. The unacceptable nature of the discharge at Tampico was for the following reasons:

(1) Investigation disclosed that there was no refrigerated warehouse in operation at Tampico capable of taking the meat cargo and maintaining zero degree temperature.

(2) There was no mechanical refrigerated equipment for shipment by rail to the U.S.A., and U.S.A. railroads would not allow their equipment to go to Tampico.

(3) The Mexican Government would not allow U.S. trucking companies into Mexico to pick up the meat cargo at shipside. There were some Mexican trucks that could handle the cargo only as far as the U.S. border, but ship discharge would be prolonged due to shortage

of equipment. International Packers advised respondent that the additional cost to International Packers would be about $30,000 to transport such cargo from Tampico, Mexico to its United States destination. Respondent, although believing that it could discharge the cargo in Tampico, Mexico under paragraph 4 of the bill of lading, did not do so.

The *Cap Verde* was on time charter from a related company at a cost of $1,750 per day. Insofar as relevant here, this figure covers all costs of running the vessel except bunkers. From the arrival of the vessel at Tampa on December 24, 1962, at 0910 hours until the termination of the strike on January 26, 1963, at 2400 hours the vessel lost a total of 33 days 14 hours, and 50 minutes. The expenses incurred during this period as follows:

Charter Hire	$58, 831. 50
Bunkers	1, 465. 60
Total	$60, 297. 10

Respondent has never had another vessel which has arrived at a port subsequent to the commencement of a strike. Parenthetically, it may be noted that the provision in paragraph 4 of respondent's bill of lading is a standard provision which has been in use for long periods of time and which may be found in many common carriers' bills of lading.

Respondent endeavored to compute what is believed would be a reasonable distribution of some, but not all, of the additional expense incurred due to prolongation of the voyage caused by the strike. Respondent arrived at a surcharge of 125 percent of the ocean freights, for the reasons discussed below. Because of the delay in discharging caused by the strike, respondent notified each consignee that a surcharge in the amount of 125 percent of the ocean freight charge was being imposed and that cargo would not be delivered prior to payment by certified check. Accordingly, the following notation was inserted on freight bills.

"Surcharge, due to duration of voyage being increased account strike longshore labor which is to be paid by certified check prior to delivery of this cargo.

In assessing this charge, respondents relied upon paragraph 4 of their ocean bill of lading. Paragraph 4 states in pertinent part:

"For any service rendered to the goods as hereinabove provided, the carrier shall be entitled to extra compensation; and if in following the procedure permitted herein the length or duration of the voyage of the ship is increased the shipper and consignee shall pay proportionate additional freight, all of which shall be a lien on the goods."

All consignees were equally assessed. The total ocean freight charges were $24,037.76 as shown on exhibit B attached. The sur-

charge amounted to $30,047.20. Respondent selected 125 percent to be the surcharge so that the shippers and the consignees, on the one hand, absorbed one-half of the $60,297 loss due to the strike, and respondent absorbed the remaining 50 percent of the loss. Individual shipments were small, the largest being consigned to intervener International Packers Ltd., who were assessed a surcharge of $10,744.39 on total freight charges of $8,595.51. Over half the shipments were under $100. Although most consignees paid the additional charge, some did so under protest. Intervener chose to post a bond in lieu of payment pending the establishment of the validity of the carrier's claim. Some consignees opposed the surcharge on the grounds that it was in contravention of section 3 of the Carriage of Goods by Sea Act of 1936 (46 U.S.C. 1304(3)).

In no prior or subsequent strike has International Packers been asked by an ocean carrier to pay a surcharge of the character demanded by respondent herein, although it has been consignee of cargoes laden on vessels tied up at American ports by reason of longshoremen's strikes.

International Packers is not aware of any instance where a carrier has demanded or collected a surcharge of the character demanded by respondent herein as a consequence of a longshoremen's strike.

No formal complaint for reparations has been filed by any consignee who has paid the surcharge.

The parties agree that any tariffs and bills of lading duly filed with the Federal Maritime Commission may be cited and referred to at any stage during this proceeding.

The bill of lading provisions

For conservation of space, the entire bill of lading, which is attached to the stipulation, is not set out above since clause 4 is the only portion that is relevant. That clause reads, in pertinent part:

In any situation * * * whether existing or anticipated before commencement of or during the voyage, which in the judgment of the carrier or master is likely to give rise to risk of * * * delay * * * or to give rise to delay or difficulty in arriving, discharging at, disembarking at or leaving the port of discharge or the usual or agreed or intended place of discharge or debarkation in such port, the carrier or the master may before, during or after loading or before the commencement of the voyage, require the shipper or other persons entitled thereto to take delivery of the goods at port of shipment and upon failure to do so may discharge and warehouse or otherwise store the goods, or any part thereof, at the risk and expense of the goods * * * or the ship may proceed or return, directly or indirectly to or stop at any such port or place whatsoever as the master or the carrier may consider safe or advisable under the circumstances, and discharge the goods * * * at any such port or place; or the carrier * * * may retain the cargo * * * until the return trip or until such time as the carrier or master, thinks advisable and discharge the goods * * * at any place * * * including the port of shipment: or the carrier or master may discharge and forward the

goods or any part thereof, by any means, rail, water, land or air, * * * at the risk and expense of the goods * * *. For any service rendered to the goods as hereinabove provided, the carrier shall be entitled to extra compensation; and if in following the procedure permitted herein the length or duration of the voyage of the ship is increased the shipper and consignee shall pay proportionate additional freight, all of which shall be a lien on the goods.

Applicable statutes

The pertinent portions of sections 16, 17, and 18(b), of the Shipping Act, 1916, the statutes which under the notice of investigation govern the decision in this proceeding, provide:

(1) SECTION 16

That it shall be unlawful for any common carrier by water * * *

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

(2) SECTION 17

That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers * * *.

(3) SECTION 17 (second paragraph)

Every such carrier * * * 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.

(4) SECTION 18(b)(1)

Every common carrier by water in foreign commerce * * * shall file with the Commission * * * tariffs showing all the rates and charges of such carrier * * * for transportation to and from United States ports and foreign ports * * * on any through route which has been established. Such tariff shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, or charges and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement.

(5) SECTION 18(b)(2)

No change shall be made in rates, charges, classifications, rules or regulations, which result in an increase in cost to the shipper * * * except by the publication, and filing * * * of a new tariff or tariffs which shall become effective not earlier then 30 days after the date of publication and filing thereof with the Commission * * *.

(6) SECTION 18(b)(3)

No common carrier * * * shall charge or demand or collect or receive a greater or less or different compensation for the transportation of prop-

erty 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; * * *.

Reasonableness of the charges

Before turning to the main questions presented, certain related issues can be disposed of. Among other things, the intervener contends that the surcharge of 125 percent of the basic freight is exorbitant and unreasonable under section 18(b)(5). That section provides:

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 or low as to be detrimental to the commerce of the United States.

Respondent urges that the reasonableness of the rate or charge is not an issue in this proceeding and hearing counsel agree. In view of the preamble in the notice of investigation, quoted above, it must be concluded that this issue is not included within the scope of the investigation. In addition, in order for intervener to prevail on this point he would have to establish facts demonstrating that the rate or charge is so unreasonably high as to be detrimental to the commerce of the United States. Such facts are not included in the stipulation to which the intervener agreed.

Issues raised by sections 16 and 17

Intervener does not contend that sections 16 or 17 have been violated. Hearing counsel states that they have not been violated, pointing out that in this case the same charge was assessed against all consignees equally and therefore there can be no contention that section 16 first was violated. He concludes that since in all prior Commission cases bearing upon the regulations and practices covered by section 17 it has been held that the language is directed toward handling property at terminals and not toward rate making functions concerned with ocean line hull movement of property, that section 17 is therefore not applicable. These conclusions are sound and therefore it will be unnecessary to discuss further any issues based on sections 16 and 17.

Contentions of the parties based on section 18, discussion and conclusions

Hearing counsel first contend that the additional charge arising out of the delay due to the strike was made by respondent without the advance 30-day filing as required by section 18(b)(2) and that that section was therefore violated. Recognizing that it was impossible for respondent to file on 30 days advance notice in the circumstances of this case, hearing counsel argue that respondent should at least have taken advantage of the provision in the statute which allows

a carrier to request the Commission for permission to file a change upon less than 30 days notice for good cause. Respondent correctly points out that, even assuming that the bill of lading provision for additional compensation was not already on file, the 30 days advance filing provision of section 18(b) (2) is inapplicable here. The examiner agrees. Once the cargo is loaded, the voyage begun, and the contractual relations of the parties are fixed, no time remains for obtaining special permission for a change in rates on short notice. This section is further inapplicable for the simple reason that respondent did not change its rate or charge. Its tariff provisions were the same as those that had existed for at least 30 days previously. Aside from this, since this decision finds that the tariff was properly filed, section 18(b) (2) need not be considered further.

The issues that are central to this proceeding flow from the provisions of section 18(b) (3) which prohibit the charging of compensation higher than that specified in the tariff filed with the Commission pursuant to section 18(b) (1). Hearing counsel and intervener contend that respondent has not satisfied the tariff filing requirements of the statute by merely attaching the bill of lading to the tariff, and that the surcharge for delay is therefore not provided for in the tariff. They further contend, in effect, that even if this method of filing were deemed to satisfy the filing provisions of the statute, the requirements of section 18 are violated because article 4 of the bill of lading does not set out in sufficiently definite or precise words or figures the charge that is to be made against shippers for unforeseen delay in the voyage such as that encountered in this case.

They rely heavily on three cases decided by predecessors of the Commission in support of the proposition that the tariff itself must contain every provision which would alter or change the rate charged; that shippers cannot be forced to look beyond the tariff itself to determine whether some rate or charge other than that specified in the tariff will be assessed; and that rate changes brought about by provisions in documents other than the tariff have no binding effect on shippers because of the prohibition contained in section 18(b) (3). *Puerto Rican Rates*, 2 U.S.M.C. 117, 131 (1939); *Transportation of Lumber Through the Panama Canal*, 2 U.S.M.C. 143, 145 (1939); *Alaskan Rates*, 2 U.S.M.C. 558, 581 (1941). These cases do support the general principles cited by these parties, but a close analysis of them reveals that they are no longer germane to the facts of this case.

In *Puerto Rican Rates*, the United States Maritime Commission had before it a general investigation of rates on shipments to Puerto Rico. The Commission also took up and considered certain tariff practices of the carriers and found that in their bill of lading the carriers stated

that they did not undertake that the vessels were equipped to transport perishable goods, even though their tariffs named rates for the transportation of refrigerated cargo. The Commission required the elimination of this conflict, and in discussing it the Commission employed language relied upon by hearing counsel and intervener here, as follows:

However, irrespective of this conflict, shippers should not be required to look beyond the tariff for any provision affecting the application of the rates. Whenever a tariff refers to a bill of lading and states that the rates therein published are dependent upon conditions in that bill of lading, such conditions should be published in the tariff. * * * The statute requires the publication in tariffs of and rules or regulations which in anywise change, affect, or determine any part of the aggregate of the rates, fares, charges or the value of the service.

In *Transportation of Lumber Through the Panama Canal*, *supra*, the Commission had under investigation various rules and practices in the intercoastal trade. The carriers there had a tariff rule providing that each shipment should be subject to the terms, conditions, and exceptions of the bill of lading of the carrier in use at the time of such shipment, and that the shippers shall accept the same and be bound thereby. Hearing counsel and intervener rely on the general conclusion expressed by the Commission that "any provisions of the bill of lading which affect the charge for transportation or the value of the service, to be effective, must be incorporated in the tariff."

Alaskan Rates was also a general rate investigation in the course of which the Commision had occasion to discuss the tariff filing practice of the carriers involved there. The tariff provided "the steamer rates named herein are applicable subject * * * to the conditions of the company's shipping receipt, bills of lading, and livestock contracts * * *." The Commission condemned this clause, stating:

When rates are published, dependent upon conditions in the carrier's bill of lading, said conditions should be published in the tariff.

The three above cases were decided under the provisions of the Intercoastal Shipping Act, 1933, 46 U.S.C. 844, which are somewhat similar to section 18 of the 1916 Act governing foreign ocean commerce. Hearing counsel relies on an analogy between these decisions and the situation here in the apparent belief that the bills of lading of the carriers involved in those three cases, like that of All Cargo Line, were attached to the tariffs on file with the Commission. If this had been the case, these precedents would lend support to the argument of hearing counsel and intervener, since the Commission required bills of lading provisions similar to those involved here to be printed in the tariff. However, it must be concluded that in those cases a specimen of the bills of lading of the carriers was not in fact attached to the

tariff and that this is why the Commission required parts of the bill of lading to be printed in the tariff.

It is true that in its present form, section 2 of the 1933 Act, like section 18(b)(1) of the 1916 Act, requires that the terms and conditions of the bill of lading shall be contained in the tariff filed with the Commission. However, a review of the history of section 2 demonstrates that there was no such requirement in the 1933 Act in 1939 and 1941 when the above three cases were decided. See volume 47, Statutes at Large, page 1425. The requirement that the bill of lading be incorporated in the tariff was first added when section 2 was amended by Public Law 85-810 of August 28, 1958. See volume 72 of the Statutes at Large, page 977.

The three decisions themselves demonstrate that the carriers involved in those three cases did not attach or incorporate the bills of lading to or in the tariffs. In *Transportation of Lumber Through the Panama Canal*, the Commission pointed out on page 145 of its decision that "such bills of lading are not reproduced in the tariff." This can only be taken to mean that the bill of lading was not stapled to the back of the tariff, pasted on an internal page of the tariff, or otherwise physically attached in its entirety to the tariff, as was done by the respondent in the instant case. In *Alaskan Rates*, the Commission cites the case of *Transportation of Lumber Through the Panama Canal* at page 581, together with the *Puerto Rico Rates* case, immediately following the above quoted language from the *Alaskan Rates* case. It is evident that the Commission considered the facts of the three cases, decided almost contemporaneously, to be the same in regard to the form of the tariff. It must be concluded that in none of the three instances were the bill of lading available to shippers in any way as part of the tariff.

If any doubt remains as to the meaning of the three Commission decisions relating to the incorporation of bill of lading provisions in tariffs, it is dispelled by the legislative history of Public Law 85-810, supra. As orginally introduced, the bill which became Public Law 85-810 provided that the carrier "may include the terms and conditions of any passenger ticket, bill of lading, contract of affreightment or other document evidencing the transportation agreement." The Congress adopted the recommendation of the Secretary of Commerce that the permissive word "may" be stricken from the bill and the word "shall" be inserted in lieu thereof. In discussing the reason for his recommendation that the inclusion of the bill of lading be a requirement rather than mere permission, the Secretary of Commerce had pointed out that the Maritime Commission had held in *Puerto Rican Rates* and *Alaskan Rates* that provisions of bills of lading affecting rates or the value of the service are not governing unless incorporated

in the carriers published and filed tariff. U.S. Congressional News 1958, page 4093. It is clear that Congress intended that the statutory requirement that the entire bill of lading be attached supersede the rule of the Commission cases requiring certain bill of lading clauses to be included in the tariff.

It cannot be concluded that in addition to attaching the entire bill of lading to the tariff filed with the Commission, the carrier must also reprint in the tariff itself any terms and conditions of the bill of lading that affect the rates, charges or the value of the service. Since section 18(b)(2), enacted 3 years later, similarly requires that the bill of lading be filed with the tariff, it must be concluded that Congress did not intend that, in addition, provisions affecting rates and charges be printed again in the tariff itself. It is therefore concluded that the method employed by respondent, that is, the physical attachment of the bill of lading to the tariff with a provision in the rules and regulations portion of the tariff making the tariff subject to the terms and conditions of the bill of lading, satisfies the requirements of section 18 insofar as tariff makeup and filing requirements are concerned. No question is raised as to the bill of lading being the complete contract between the carrier and each shipper.

The other point raised by hearing counsel based on section 18, although apparently with less conviction, is the contention that even if paragraph 4 of the bill of lading had been physically included or printed in respondents tariff there "is doubt" as to its legality under section 18 because the provision of paragraph 4 is indefinite as to the amount of the charge for the services rendered. They argue that paragraph 4 of the bill of lading does not comply with the requirements announced in decisions of the Commission that tariffs must be specific and plain, citing *Intercoastal Lumber Rate Changes*, 1 U.S.M.C. 656, 658, and eight other cases decided by predecessors of the Commission; that a tariff is unlawful when shippers must obtain information not published in the tariff and must make mathematical calculations to determine the applicable rate; that in instances where charges are to be assessed against shippers of diversion the tariffs must clearly state what special services will be rendered and the specific sum that will be charged therefor; that charges undisclosed in the tariff may not be lawfully charged against the shipper, nor charges that are described in the tariff as being "subject to prior arrangement." Cases are cited for each of these latter propositions.

Hearing counsel point out that the purpose of tariff filing is uniformity in charges and rates, the prevention of and control over discrimination, and maintaining stability in rates, and they state that these objectives could not be achieved if carriers are allowed to utilize "amorphous" provision such as paragraph 4. They question how ship-

pers can ever know, in advance, what their shipping cost will be by consulting this tariff and this bill of lading.

The contentions of the intervener stress the point urged by hearing counsel, discussed above, relating to the physical makeup of the tariff of respondents and he also contends, as hearing counsel does, that the carrier made a unilateral decision, apart from the terms of a filed tariff, that 125 percent of the basic freight was a proper charge to the shipper on account of the delay in the voyage * * * not 10 percent, or 50 percent, or even 200 percent. He argues that the Shipping Act does not permit such an arbitrary decision on the part of the carrier regarding the amount of charges.

Hearing counsel do not agree with the contention of respondent that a carrier has no way of specifying precise additional charges in circumstances such as those involved here, due to the unpredictable nature of the strike and the fact that no advance determination can be made as to what expenses will be incurred as a result of it or how long it will last. They suggest that the tariff might provide that in the event of delay caused by a strike certain additional freight, such as an extra 25, 50, or 75 percent, will be assessed. He implies that a fixed daily rate for such additional charges might be set forth in the tariff. He also mentions the possibility that the carrier could provide for delays in its voyages by insurance or by the inclusion in its overall rate structure of a cushion for such contingencies. These latter two proposals are possibilities, of course, but it is not in keeping with the purposes of the Shipping Act to encourage carriers to increase their rates and charges by such means. The suggestion for establishing a fixed charge for such delays would probably lead to greater evil than an *ad hoc* determination of the costs, after the event, because the actual expenses of the carrier might turn out to be somewhat less than the charges that would have to be assessed under a fixed formula. It would not be appropriate for the carrier to profit by a strike or casualty that results in delay or extension of the voyage. The charge here is not arbitrary, being related directly to the added expenses of the carrier.

In the cases cited by hearing counsel in support of the other general propositions outlined above, the Commission or its predecessors were concerned with tariff provisions applicable to regular, determinable voyage charges. It is apparent that tariff provisions as to such charges can be, as a practical matter, more exact than the clauses in the tariff whose purpose is to provide for the unknown, unforeseeable complexities of ocean transportation. The least that can be said is that neither hearing counsel nor intervener have suggested any solutions to this practical difficulty in tariff practices, and none occur to the examiner, that are so patently superior to the course followed by respond-

ent that it can be held that respondent committed a violation of section 18(b). The cases cited by hearing counsel, involving domestic commerce, as well as the three cases discussed earlier, are of limited applicability here for the additional reason that section 18(a) delegates jurisdiction to the Commission over the "regulations and practices relating * * * to the issuance, form, and substance of * * * bills of lading" of carriers in the offshore domestic commerce that is not delegated by section 18(b) covering the foreign commerce.

Intervener raises the issue that respondent violated section 18(b) (3) by charging a rate greater than that shown in its tariff because the courts would not impose liability on shippers in these circumstances. In reply, respondent cites cases where the admiralty courts have allowed carriers to recover additional compensation for various services rendered or expenses incurred by the carrier, either based on contractual provisions in the bill of lading such as clause 4 or on general principles of admiralty. Respondent compares the case at hand to the recovery of a contribution from cargo in general average, to the recovery of freight even when the cargo was not delivered under the "Freight prepaid, goods or vessel lost or not lost" bill of lading clauses, and to voyage frustrations (due to belligerent action, search by government authorities, strikes, and other uncontrollable forces) preventing normal carriage and delivery of cargo. It urges that by the enactment of section 18(b) Congress did not intend to overturn the ancient admiralty principles that form the basis of recovery in such cases.

Intervener attempts to distinguish these analogies cited by respondent, and hearing counsel urged that to the degree that admiralty doctrines conflict with the Shipping Act the latter governs, citing sections 8 and 9 of the Carriage of Goods by Sea Act, 46 U.S.C. 1308 and 1309, which provide that nothing in COGSA shall affect the rights and obligations of carriers afforded and imposed by the Shipping Act nor be construed to permit discrimination in any way prohibited by the Shipping Act.

The system of regulation under the Shipping Act and other maritime statutes has long existed in harmony with admiralty principles. The Commission does not decide admiralty cases and it will not do so here. The courts have developed the doctrine of primary jurisdiction under which they leave to the Commission and other regulatory agencies the decision of issues under the regulatory statutes. Conflict could arise in a situation such as that presented here only if the Commission sought to require tariffs to be constructed and filed in a form that would make it impossible for accepted admiralty doctrines to be invoked.

Hearing counsel and respondent state, and the examiner agrees, that this is a case of first impression both before the Commission and the

courts. That is to say, no court has held that a charge cannot be assessed under clause 4 for delay due to a strike when the goods are held on board the vessel at the port of delivery. It must be concluded, therefore, that it has not been demonstrated here that the surcharge would not be allowable by the courts and that for this reason it violates section 18(b) (3) as a greater charge than that shown in the tariff.

Turning to the final issue raised by intervener * * * that the language of clause 4 does not, by its terms, authorize the assessment of additional charges because respondent did not perform a "service" for the cargo beyond that required of it as a carrier * * * a court decision discussing this clause in a somewhat similar factual setting can serve as a useful guide. In *Colonialgrossisternes Forening* v. *Moore-McCormack Lines, Inc.*, 178 F. 2d 288 (C.A. 2, 1949), the carrier's vessel left the United States for Norway in March of 1940 and when it arrived it was unable to unload its cargo because of the belligerent activities of the German forces. It retained the plaintiff's cargo on board and finally had to return to the United States without discharging the cargo. The carrier's bill of lading contained a clause 4 like that involved here. The court upheld the action of the carrier in charging the shipper an extra amount equal to one-half the freight for the outward voyage. The ordinary freight had been prepaid. The court stated:

> It is plain that the master was justified in retaining the cargo on board until such time as he thought advisable. Under the concluding sentence of clause 4, the carrier was entiled to a "reasonable extra compensation" for "any services rendered to the goods as hereinabove provided." The question before us is whether keeping the goods on board and returning them to New York in respondents vessel was a "service rendered to the goods" within the meaning of the bill of lading. * * * In retaining the goods and carrying them back to New York, the vessel was obliged to safeguard them in every reasonable way and to act as a prudent bailee in protecting and caring for the merchandise. In the circumstances we can see no reason why a return of the goods to the carrier was not a service within the description of "services rendered to the goods" and just as compensable as would have been payments for forwarding them by some other carrier.

It is no less a service to the goods to retain them on board and ultimately discharge them at the port of destination, as was done by respondent, than to retain them on board and utimately return them to the port of loading, as was done by Moore-McCormack Lines. The cost to the carrier is the same except for the additional cost of fuel. The value to the shipper is greater because the goods are delivered to the desired destination.

The parties do not contend that a strike is not one of the incidents that would bring clause 4 into play. Neither do they contend that since an amount less than the added expenses due to the delay was

apportioned among the shippers section 18(b)(3) was violated by making a charge "different" from that shown in its tariff. While the strictest reading of the notice of investigation might include this technical question as an issue to be decided, it is apparent from a reading of the preamble that the Commission had the protection of shippers in mind when it initiated this proceeding. This would not be achieved by inquiring whether they should be charged a 250 percent surcharge, rather than 125 percent.

Contentions of the parties not discussed herein have been found to be irrelevant or unsupported by the record. The arguments of counsel on the question whether the tariff is applicable until it is rejected or declared unlawful need not be discussed in view of the conclusions reached in this decision.

It is concluded that respondent has not violated sections 16, 17 or 18(b) by making the surcharge. The proceeding will be discontinued.

(Signed) E. ROBERT SEAVER,
Presiding Examiner.

JULY 29, 1964.

APPENDIX

EXHIBIT B

TOTALS

Ports	Ocean freights	Prepaid	Collect
Rotterdam to Tampa	$147.34	$147.34	None
Rotterdam to Mobile	3,081.78	3,081.78	None
Rotterdam to Hamburg	1,662.19	1,662.19	None
Hamburg to Tampa	907 96	907.96	None
Hamburg to Mobile	98.28	93.28	$5.00
Hamburg to Houston	8,633.45	1,308.14	7,325.31
Hamburg to New Orleans	683.36	255.96	427.40
Dublin to Tampa	5,274.24	None	5,274.24
Dublin to Mobile	3,530.37	None	3,530.67
Dublin to Houston	18.49	18.49	None
Grand total	24,037.76	7,475.14	16,562.62

Surcharge (125%): 125%×$24,037.76=$30,047 20.

Source: Manifests and bills of lading.

FEDERAL MARITIME COMMISSION

DOCKET No. 1150

HASMAN & BAXT, INC., VALENCIA BAXT EXPRESS, INC.—MISCLASSIFICATION OF GOODS IN CONTAINERIZED TRAILER VANS IN THE UNITED STATES/PUERTO RICO TRADE

Decided March, 8, 1965

(1) Hasman & Baxt, Inc. found to have violated section 16 of the Shipping Act, 1916, by misclassifying the contents of the trailer van containing leather.
(2) Hasman & Baxt, Inc., and Valencia Baxt Express, Inc., found to have violated section 16 of the Shipping Act, 1916, by false statement of cargo weight of the contents of the trailer van containing leather.
(3) Record held insufficient to support finding that either Hasman & Baxt, Inc., or Valencia Baxt Express, Inc., violated section 16 of the Shipping Act, 1916, with respect to certain shipments of bathtubs and synthetic rayon yarn.

Herbert Burstein, for respondent.
Roger A. McShea III, hearing counsel.
Paul D. Page, Jr., hearing examiner.

REPORT BY THE COMMISSION

(JOHN HARLLEE, *Chairman;* JAMES V. DAY, *Vice Chairman;* GEORGE H. HEARN; JOHN S. PATTERSON, *Commissioners*):

This is an investigation on our own motion to determine whether respondents Hasman & Baxt, Inc. (Hasbaxt), or Valencia Baxt Express, Inc. (Valbaxt), with respect to certain shipments made between January 1, 1960, and October 3, 1963, knowingly and willfully, obtained, or attempted to obtain, transportation by water for property at less than the rates or charges which would be otherwise applicable in violation of section 16 of the Shipping Act, 1916.

The proceeding is before us on exceptions to the initial decision in which the examiner concluded (1) that with respect to a containerized shipment which included bathtubs Hasbaxt had violated section 16 by misclassifying a portion of the shipment; (2) that with respect to a containerized shipment which included certain leather both Hasbaxt and Valbaxt had violated section 16 because of a false statement of

weight; and (3) that the record was insufficient to support a finding that either Hasbaxt or Valbaxt had violated section 16 with respect to certain containerized shipments of yarn. The respondents except to the examiner's findings and conclusions on the bathtubs and leather, and hearing counsel excepts to the examiner's findings and conclusions on the yarn.

FACTS

Hasbaxt is a freight forwarder whose compensation consists of freight forwarder fees. As a forwarder, Hasbaxt tenders Sea-Land [1] approximately 700 container vans a year. These container vans or trailers contain numerous individual shipments which have been consolidated for ocean carriage. Valbaxt is a non-vessel-owning common carrier by water offering a door-to-door service to the public. Thus, it consolidates shipment trailers pursuant to a tariff on file with the Commission, which covers the ocean and inland transportation. This tariff is based on the commodity rates of Sea-Land and includes additional charges to cover the services between vessel and door. On shipments which it consolidates Valbaxt performs the function of a shipper vis-a-vis the ocean carriers operating between the United States and Puerto Rico.

As do other shippers of freight to Puerto Rico, Valbaxt seeks the benefit of the "freight all kinds" rate offered by ocean carriers. Under Sea-Lands' tariff the "freight all kinds" rate is applicable if the trailer contains three or more different commodities and no one shipment of a commodity weighs in excess of 15,000 pounds. Thus, if Valbaxt receives a shipment in excess of 15,000 pounds, its practice is to break-bulk and place the contents in more than one trailer. By paying the "freight all kinds" rate, Valbaxt attempts to recover its operating costs out of the difference between its own tariff charges to its customers and the "frieght all kinds" rate it pays the ocean carrier.

(1) *The bathtubs.*

On April 26, Sea-Land received at Port Newark a sealed trailer van (No. 3150) and certain shipping documents which accompanied it. The record does not show that Hasbaxt ever saw the contents of the van. Hasbaxt, acting as forwarder for the exporter, presented Sea-Land a bill of lading covering the shipment of van 3150 from Port Newark to Puerto Rico aboard Sea-Land's *Azalea City*. The bill of lading showed Hasbaxt as shipper, and described the contents of the van as 40 cases of pipe fittings, 20 cases of enameled sheets, and 25 cartons of plumbing materials (lavatories-bathtubs). The van's actual contents consisted of 85 bathtubs and a number of lavatories and/or

[1] Sea-Land Service Inc., Sea-Land of Puerto Rico Division, a common carrier by water operating between ports in the United States and ports in Puerto Rico.

sinks. The freight payable on the shipment as described in the bill of lading would have been $573.25. Sea-Land subsequently ascertained the actual contents of the van by inspection and prepared a corrected bill of lading, describing the contents as 85 bathtubs. Ocean freight on the shipment as described in Sea-Land's corrected bill of lading was $1,029.60 which Hasbaxt paid.

(2) *The leather.*

In February 1960, Loewengart & Co., shipped 25,152 pounds of leather to Puerto Rico via Valbaxt. Hasbaxt, acting as Valbaxt's forwarder presented to Bull Insular Line, Puerto Rico Service (Bull) a bill of lading covering trailer No. 4028 which Bull transported unopened to Puerto Rico on its SS *Elizabeth.* The bill of lading stated that the trailer contained 6,481 pounds of leather. Valbaxt's waybill 111 [2] shows that the Loewengart shipment of leather moved on the voyage of Bull Line's SS *Elizabeth* which carried the van which the bill of lading said contained only 6,481 pounds. A letter from Valbaxt to Loewengart, dated October 5, 1960, states:

This will confirm conversation held with you that waybill 111 was shipped on the SS *Elizabeth,* voyage 233, dated February 18, 1960, in trailer van 4028.

The freight payable on the shipment as described in the bill of lading and actually paid by Valbaxt was $757.77, being computed at the "freight all kinds" rate.[3] Since the trailer actually contained all the Loewengart leather (approximately 25,000 pounds) the freight payable should have been computed at "commodity" rates, and would have been $1,124, if all other cargo shown on the bill of lading was contained in the trailer.

(3) *The yarn.*

On 18 vans shipped by Valbaxt to Puerto Rico via Bull and on 8 vans shipped by Valbaxt to Puerto Rico via Sea-Land, Hasbaxt presented to Bull and Sea-Land bills of lading showing that the vans in the aggregate contained quantities of rayon yarn substantially in excess of the quantities of rayon yarn shown by certain of Valbaxt waybills to have been intended for shipment on the vessels carrying the vans. Such rayon yarn was one of Bull's lowest rated commodities at the time of the shipments in question.

DISCUSSION AND CONCLUSIONS

(1) *The bathtubs.*

In finding that Hasbaxt had violated section 16 with respect to the shipment of bathtubs the examiner found that "The point for decision

[2] The waybill is a receipt for goods which Valbaxt gives to the exporter when it receives the exporter's cargo.

[3] Under Bull's tariff the "freight all kinds" rate does not apply to a trailer which contains more than 15,000 pounds of any one commodity in which case the respective individual commodity rates apply to the individual cargoes in the van.

is simply if Hasbaxt knowingly and willfully presented [the false bill of lading] to Sea-Land." Thus, the examiner found that it was unnecessary to determine whether Hasbaxt had any actual knowledge of the contents of the trailer in question or that Hasbaxt had prepared the false bill of lading. Such findings are unnecessary, as we understand the examiner's reasoning, because the mere presentation of a bill of lading to the carrier by the forwarder carries with it the implied representation that the bill accurately describes the contents of the trailer even when the trailer is received by the forwarder under seal and regardless of whether the forwarder has any knowledge of the trailer's contents. The examiner grounds his conclusions on "the duty of veracity and care with respect to cargo description" which the forwarder owes the carrier. To avoid the impact of this rule, a forwarder could as countervailing evidence, demonstrate that "it prepared the false bill of lading in reliance upon a description of the cargo furnished by the exporter, and that no such description furnished in the past by the same exporter had been inaccurate." To the examiner such evidence "would almost certainly establish the fact that a forwarder's conduct in presenting a false bill of lading to a carrier was neither careless nor culpable."

The initial decision lays down a rule governing the conduct of forwarders handling containerized shipments under seal. The validity of any such rule is, of course, its reasonableness, and in our view the reasonableness of the rule announced in the initial decision is dependent upon a far broader consideration of the day-to-day operations of forwarders handling containerized shipments than is possible from this record.

The nature and scope of the duties of various persons subject to section 16 have presented continuing problems to both the courts and our predecessors. See for example *Royal Netherlands* v. *FMC*, 304 F. 2d 938 (D.C. Cir. 1962); *Continental Can Co.* v. *United States*, 272 F. 2d 312 (2d Cir. 1959); *Misclassification and Misbilling of Glass Tumblers, etc.*, 6 F.M.B. 155 (1960) and *Hazel Atlas Glass Co.—Misclassification of Glass Tumblers*, 5 F.M.B. 515 (1958).

While it may eventually prove true that the forwarder must be held to an implied representation as to the correctness of the description of the shipments on the bill of lading, such a decision should be made only upon thorough investigation of the terms and conditions surrounding the handling of containerized shipments. Morevover, the investigation should include the question of the nature and scope of the duties and responsibilities of the exporter and the carrier under section 16.

For the foregoing reasons we find the record in this proceeding insufficient to conclude that Hasbaxt violated section 16 with respect to the shipment of bathtubs in question.

(2) *The leather.*

The examiner found that van No. 4028 contained the whole Loewengart shipment of leather (some 25,000 pounds), when the bill of lading stated that the van contained only 6,481 pounds. The examiner's findings are based on the two documents of Valbaxt's referred to above (Valbaxt's waybill 111 (exhibit 11) which shows that the Loewengart shipment moved on Bull's *Elizabeth* and the letter dated October 5, 1960, from Valbaxt to Loewengart (exhibit 12)). The letter states:

This will confirm conversation held with you that waybill 111 was shipped on the SS *Elizabeth*, voyage 233, dated February 18, 1960, in trailer van 4028.

The respondents do not deny that the 25,000 pounds of leather was actually shipped in van No. 4028. They merely assert that there is insufficient evidence to prove that van 4028 contained all of the Loewengart leather. Respondents do not, however, have any explanation of their statement that the shipment for which waybill 111 was issued moved in van No. 4028. Since waybill 111 was issued as a receipt for the full 25,000 pounds of Loewengart leather, the only permissible inference is that the full shipment of 25,000 pounds moved in van No. 4028.

There is a distinction between Hasbaxt's handling of the bathtubs and the leather. The bathtubs were received from the exporter in a van already sealed, while the leather was not already "containerized" and was actually placed in a van or vans by Hasbaxt and Hasbaxt had actual knowledge of the contents of the van in question. Thus, by falsely stating the contents of the trailer as including 6,481 pounds of leather when it in fact included the entire Loewengart shipment of some 25,000 pounds, Valbaxt and Hasbaxt obtained transportation by false statement of weight in violation of section 16, Shipping Act, 1916.

(3) *The rayon yarn.*

The examiner found the record would not support a finding that there had been any falsifying of bills of lading on shipments of yarn. We agree with this conclusion. Hearing counsel excepts on the ground that a comparison of the waybills with the bills of lading demonstrates that on certain "entire sailings, upon which were shipped an undetermined amount of containerized trailer vans, Hasman & Baxt on behalf of Valencia Baxt had not shipped as much yarn as appeared on even one or two bills of lading." The examiner rejected this finding because it is dependent upon the determination that the waybills introduced into evidence by hearing counsel represented all of the yarn presented to Hasbaxt for shipment. The examiner could not say that one or more other exporters had not shipped yarn with Hasbaxt during the period in question, because to do so it would be necessary to examine all the waybills in Hasbaxt's files covering the

period in question, which was not done. Thus, the examiner had to allow for the possibility that other exporters had made up the excess of the bills of lading over the waybills. We agree with the examiner's conclusion that the evidence is insufficient to show a violation of section 16 with respect to the trailers containing the yarn.

COMMISSIONER BARRETT *dissenting in part:*

I would uphold the examiner's finding that respondents violated section 16 of the Act with respect to the shipment of bathtubs and to that extent I disagree with the majority. As to the other shipments in issue, I agree with the findings and conclusions of the majority.

The proceeding is discontinued.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1158

IN THE MATTER OF AGREEMENT NO. 134–21

GULF/MEDITERRANEAN PORTS CONFERENCE

Decided March 15, 1965

Proposed amendment to Conference Agreement No. 134 whereby there will be exempted from conference jurisdiction full shiploads of one commodity shipped by one shipper, under charter conditions, found not in violation of sections 14 fourth and 16th first of Shipping Act, 1916.

Said amendment approved under section 15 of Shipping Act, 1916, and proceeding discontinued.

Frank Gormley, and *Howard A. Levy*, Hearing Counsel.
Edward S. Bagley for respondents.
T. R. Stetson for intervener, United States Borax & Chemical Corp.

REPORT

BY THE COMMISSION: (JOHN HARLLEE, *Chairman;* JAMES V. DAY, *Vice Chairman;* ASHTON C. BARRETT, GEORGE H. HEARN, *Commissioners*):

This proceeding is before us upon the exceptions of Hearing Counsel to the initial decision. In that decision the examiner found that approval of the proposed amendment to Agreement No. 134, the basic agreement of the Gulf/Mediterranean Ports Conference would not be violative of sections 14 fourth and 16 first or contrary to the standards of section 15 of the Shipping Act, 1916. The proposed amendment, Agreement No. 134–21, would exempt from conference jurisdiction full shiploads of one commodity shipped by one shipper, under charter conditions.

Hearing Counsel objects to the examiner's conclusion that the amendment should be approved because there is no need for the amendment and "the possibility of contrariness to the statute, coupled with the

lack of need," dictate its disapproval. The examiner's decision clearly sets forth circumstances and reasons which prompted the proposed amendment, reasons which were sufficiently urgent to prompt the withdrawal of one member from the Conference in the face of the initial opposition of the other member to the proposed amendment. They are in our view, as in the examiner's, sufficient.

Were possible contrariness to the statute alone sufficient reason for disapproval of an agreement under section 15, it would be hard to conceive of an approvable agreement. For as we said in Agreement 8492—*T. F. Kollmar, Inc.* and *Wagner Tug Boat Co.*, 7 F.M.C. 511 (1963):

> We should not disapprove the agreement on the bare possibility that [the parties to it] could violate the Act. At least there ought to be a substantial likelihood of such conduct.

No such substantial likelihood appears from the record before us.

A careful consideration of the record in this proceeding leads us to the conclusion that the examiner's disposition of the issues herein was well founded and proper.

Accordingly, we adopt the initial decision (a copy of which is attached hereto and made a part hereof)[1] as our own, and for the reasons set forth in the decision,

It is ordered, That, Agreement No. 131–21 is hereby approved.

Commissioner Patterson concurs in the result.

(Signed) THOMAS LISI,
Secretary.

[1] Initial decision of Gus O. Basham, Chief Examiner, page 703.

FEDERAL MARITIME COMMISSION

No. 1104

PACIFIC SEAFARERS, INC.

v.

ATLANTIC & GULF AMERICAN-FLAG BERTH OPERATORS, ET AL.

Decided March 17, 1965

Agreements concerning rates and other matters described in section 15 of the Shipping Act, 1916, as amended, not within jurisdiction of the Commission where they relate solely to foreign interport trade in goods of foreign origin and destination, even though Agency for International Development financed the procurement and shipment of the goods and only American-flag carriers were involved.

Unfiled agreements outside territorial jurisdiction under Shipping Act, 1916, are not brought within jurisdiction by use of same organizations set up to administer other agreements filed with and approved by the Commission, where the approved agreements dealt with different subject matter and were not modified by the unfiled agreements.

Marvin J. Coles, *Stanley O. Sher*, and *Armin U. Kuder* for complainant, Pacific Seafarers, Inc.

Elmer C. Maddy and *Ronald A. Capone* for respondents Atlantic & Gulf American-Flag Berth Operators and its member lines, except American Export Lines, Inc., Isbrandtsen Co., Inc., Lykes Bros. Steamship Co., Inc., and Waterman Steamship Corp.

Edward D. Ransom and *Gordon L. Poole* for respondents American-Flag Berth Operators and West Coast American-Flag Berth Operators and their member lines, except Isbrandtsen Co., Inc., Lykes Bros. Steamship Co., Inc. (not a member of WCAFBO) and Waterman Steamship Corp.

Edward S. Bagley for respondent Lykes Bros. Steamship Co., Inc.

Sterling Stoudenmire for respondent Waterman Steamship Corp.

Richard W. Kurrus and *James Jacobi* (Donald Caldera of counsel)

for respondents American Export Lines, Inc. and Isbrandtsen Co., Inc.

Herbert B. Mutter and *Robert J. Blackwell*, hearing counsel.

Walter T. Southworth, hearing examiner.

REPORT

BY THE COMMISSION: (JOHN HARLLEE, *Chairman;* JAMES V. DAY, *Vice Chairman;* GEORGE H. HEARN and JOHN S. PATTERSON, *Commissioners*)

This is a complaint case before us on exceptions to the initial decision of the examiner.

Complainant Pacific Seafarers, Inc. (PSI), alleges that respondents AGAFBO,[1] WCAFBO,[2] and AFBO,[3] together with their member lines, have unlawfully attempted to drive PSI out of the Taiwan-Thailand/South Vietnam trade. Complainant asserts that respondents: (1) Have violated section 15 of the Shipping Act (the Act) by operating pursuant to an agreement not filed with or approved by the Commission; (2) have violated section 18 of the Act (a) by not filing their concertedly established rates with the Commission, and (b) by maintaining rates that are so unreasonably low as to be detrimental to our commerce; and (3) have violated section 16 First of the Act by acting in a manner which is unduly prejudicial to complainant.

PSI operates a common carrier service with American-flag vessels in the Taiwan-Thailand/South Vietnam trade. It does not offer a service between the United States or any of its districts or territories or possessions on the one hand and a foreign country on the other hand. The principal commodity that it carries is cement and it was these cement offerings which prompted the institution of complainant's service. In addition to its common carrier service, a PSI affiliate operates a charter or tramp service in the same trade, again catering to cement principally. The cargoes carried by PSI are entirely commercial in nature originating in one foreign port and destined to another foreign port. The shipping arrangements as well as the sales of the commodities are made between foreign principals. Although the U.S. Government through the Agency for International Development (AID) ultimately finances the sales—including the cost of water transportation—our Government in no way participates in the transactions. Indeed, but for the cargo preference laws which require,

[1] Atlantic and Gulf Coast American Flag Berth Operators.

[2] West Coast American Flag Berth Operators.

[3] American Flag Berth Operators.

generally, that 50 percent of AID-financed cargoes move in American-flag bottoms, American-flag vessel participation in the movement might never have occurred. Further, the record is bereft of any evidence that the cement involved was cement transshipped from the United States.

AGAFBO is a conference of American-flag carriers which operates under approved Agreement No. 8086, WCAFBO operates under Agreement No. 8186. Parties to each of these agreements are permitted to act collectively in the negotiation of transportation rates and conditions of carriage respecting MSTS[4] cargoes (including related shipments) to and from U.S. ports and between foreign ports. Agreement No. 8750, an approved interconference agreement, permits meetings and discussions between AGAFBO and WCAFBO. None of these agreements permits the signatories to agree upon rates for either commercial or other Government-sponsored cargoes in our foreign commerce or in the foreign commerce of other nations. AFBO, an association of American-flag carriers organized in the early 1950's, is composed of carriers who are members of either AGAFBO, WCAFBO, or both, although membership in neither AGAFBO, nor WCAFBO, is a prerequisite to AFBO membership. AFBO purports to establish rates and conditions of carriage by its signatories between Taiwan/Japan and Thailand, Korea, Vietnam, the Philippines, Okinawa, and Cambodia. Its memoranda of agreed rates relate solely to commercial cargoes in these foreign interport trades. AFBO does not enjoy Commission approval under section 15 of the Act, nor are its tariffs filed with the Commission.[5]

Apart from the asserted violations of the Act, we are first confronted with the issue of jurisdiction. It is our judgment that the reach of the Act and, consequently our jurisdiction, does not extend to the matters complained of.

Admittedly, respondents entered into an agreement in the Taiwan-Thailand/South Vietnam trade and that agreement—AFBO—is the type which falls squarely within the purview of section 15. Parties to the AFBO agreement have not filed their agreement with the Commission, and have effectuated it without the Commission's prior approval. If our jurisdiction encompassed this trade, a classic violation of section 15 would be established, harm *vel non* to complainant notwithstanding.

While it is true that section 15 requires that:

every common carrier by water * * * shall file * * * a copy * * * of every agreement with another such carrier.

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[4] Military Sea Transportation Service.

[5] PSI, likewise, has not filed with the Commission any schedule of rates in the Taiwan-Thailand/South Vietnam trade.

the "common carrier by water" of section 15 is the entity defined in section 1:

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

And a common carrier in foreign commerce is defined as:

* * * a common carrier * * * engaged in the transportation by water of passengers or property between the United States or any of its districts, territories, or possessions and a foreign country, whether in the import or export trade. * * *

Hence, the reading of section 15 which Congress obviously intended requires that every common carrier by water in interstate commerce and every common carrier engaged in the transportation by water of passengers or property between the United States or any of its districts, territories, or possessions and a foreign country file with the Commission for prior approval certain species of agreements with other such carriers.

The record in this case makes perfectly clear that the conduct complained of is and has been exercised by carriers in a trade or trades other than between "the United States or any of its districts, territories or possessions and a foreign country," and no matter how offensive or horrendous that conduct, it does not fall within the authority of this Commission. There is not a modicum of evidence that brings the gravamen of the complaint within the purview of the Act. Complainants have attempted to cross the jurisdictional barrier on two grounds.

First, we shall deal with the claim that since the cargoes, including the cost of transportation, were financed by AID what otherwise might have been commerce between two (or more) foreign nations was converted to the commerce of the United States. We have noted, in this regard, that the ocean transportation and the sales were arranged between foreign principals and that neither AID nor any other agency of our Government participated in any of the commercial or shipping transactions. AID's concern began and ended with its role as financier.[6] The lending of funds by a Government agency to finance wholly foreign transactions, including ocean freight, does not convert foreign-to-foreign commerce into the foreign commerce of the United States, any more than would the lending of such money by an American private financial institution.

Our view in this regard is not unlike that generally held with respect to our antitrust laws:

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[6] "AID, itself, does not procure any commodities or make shipping arrangements. As a general rule, AID acts only in the capacity of a financing institution." Deposition of David E. Bell, AID Administrator, exhibit 106.

* * * (I)t is clear that the mere financing by Americans of manufacturing, mining, or other local activities abroad does not come within the Sherman Act. *Report of the Attorney General's National Committee to Study the Antitrust Laws (1955).*

In short, our jurisdiction cannot be expanded or contracted merely by the underlying financial arrangements of ocean shipping.[7]

Finally, PSI argues alternatively that (a) AFBO itself, is an agreement within the purview of section 15 and should have been filed and approved before its effectuation, or (b) it is part and parcel of AGAFBO and/or WCAFBO which, as a modification thereof, should have been filed and approved prior to implementation.

As the record establishes, AFBO is an organization of American-flag vessels plying a trade totally within the confines of foreign Far Eastern ports. For the simple reason that the trade does not involve as one terminus any port in a State, district, territory or possession of the United States, the carriers, within the AFBO context cannot be deemed to be engaged in the foreign commerce of the United States.

Complainant's alternative argument, although equally defective, is more engaging. In support of its proposition it points to the use of AGAFBO and WCAFBO offices (and officers) for the transaction of some of AFBO's business and cites precedents which indicate that our jurisdiction often involves foreign-to-foreign commerce.

As the Examiner noted, the use of the "physical organization or 'machinery'" of the two approved agreements by the AFBO group is immaterial to whether or not AFBO constitutes an agreement within the purview of section 15.

There is no relationship between AFBO on the one hand and AGAFBO and WCAFBO on the other hand, save an overlapping of memberships and some confusing of the organizations administering the agreements. But it is crystal clear that AGAFBO and WCAFBO do not encompass the foreign-to-foreign movement of commercial cargoes, whether or not financed or owned by our Government. Were AGAFBO and WCAFBO to agree on rates and conditions of cargo moving on *our* foreign commerce not specifically authorized by the approved agreements, a different result might have been reached.

The cases cited by complainant fall far short of aiding its theories. In *States Marine Lines, Inc.* v. *Trans-Pacific Freight Conf.*, 7 FMC 204 (1962), the Commission considered the legality of an approved neutral body provision in the context of the filed and approved agree-

[7] A second argument advanced by PSI is not dissimilar from its AID claim. Briefly, its thrust is that the mere *operation* of U.S.-flag vessels constitutes a "part of the commerce of the United States." No authority is found to support this assertion. We have noted that PSI's operation has been wholly foreign. We believe such operation constitutes "other local activities abroad," *Attorney General's National Committee, supra.*

ments. The particular transaction which triggered the proceeding, the movement of oranges from Japan to Canada, was entirely irrelevant. The real question in issue was whether conference was effectuating a neutral body provision compatible with the one which had been approved as a modification to its basic or organic agreement. Upon review, the court, in *Trans-Pacific Freight Conference of Japan* v. *FMC*, 314 F. 2d 277 (1963), addressed itself to the jurisdictional issue in foreign-to-foreign commerce and concluded that the neutral body's fines were assessed *not* "for any act or thing done in connection with the shipments from Japan to Canada." The court significantly brushed aside the Conference's contention of no jurisdiction with the statement:

* * * (W)e think that petitioners' assertion of lack of jurisdiction is without validity for a more fundamental reason. When the members of the conference chose to adopt their conference agreement and its various amendments, they deliberately elected to enter into a single unitary agreement "to promote commerce from Japan, Korea, and Okinawa to Hawaii and Pacific coast ports of the United States *and Canada*." (Emphasis ours.)

Further, *Oranje Line, et al.* v. *Anchor Line Limited*, 5 FMB 714 (1959), the Board noted that the trade between Canada and the United Kingdom was encompassed explicitly by the very terms of the agreement:

It is clear that in this case, where the agreements cover both the foreign commerce of the United States and also the intimately related foreign commerce of Canada our jurisdiction exists.

In the case before us, the subject matter of the AFBO agreement is not set forth in the AGAFBO and WCAFBO agreements, nor is the subject matter "intimately related" to our foreign commerce.[8]

In the case at hand the AFBO agreement neither directly nor materially affected our foreign commerce.

Since we have no jurisdiction in the premises, we shall not address ourselves to the other contentions raised by complainants. Accordingly,

It is Ordered, That the complaint is hereby dismissed.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

[8] Complainant has placed some reliance on *United States* v. *Anchor Line, Ltd.*, 232 F. Supp 379 (1964). Involved in that case were agreements made abroad which directly related to the foreign commerce of the United States:

"The vital principle to the applied in determining whether the United States courts have jurisdiction over foreign-flag carriers who fail to file contracts entered into abroad is whether the performance of those contracts or effectuation of those arrangements *operated in this country so as to affect our foreign commerce directly and materially.*" (Emphasis added.)