# FEDERAL MARITIME COMMISSION

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No. 890

IN THE MATTER OF UNAPPROVED SECTION 15 AGREEMENTS—SPANISH/PORTUGUESE TRADE

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No. 891

IN THE MATTER OF RATES, CHARGES AND PRACTICES OF CARRIERS ENGAGED IN THE TRADE BETWEEN UNITED STATES AND SPAIN/PORTUGAL

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*Decided August 6, 1965*

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Three Respondents found during period from 1952 to 1959 to have entered into certain unapproved agreements or understandings in the trade between United States and Spain and to have failed immediately to file the agreements or understandings with the Federal Maritime Commission all in violation of section 15, Shipping Act, 1916.

Respondents found during period involved herein not to have been in violation of sections 16 and 17 of the Shipping Act, 1916.

*Burton H. White* and *Elliott B. Nixon*, on behalf of Compagnie de Navigation Fraissinet et Cyprien Fabre.

*Ralph D. Ray*, *Paul M. Bernstein*, *Stuart D. Baker*, *Carl S. Rowe*, *Frank B. Stone*, and *Lino A. Graglia* on behalf of American Export Lines, Inc.

*Thomas K. Roche* and *Sanford C. Miller*, on behalf of Concordia Line.

*J. Joseph Noble*, on behalf of Compania Espanola de Navegacion Maritima, S.A., and Compania Trasatlantica Espanola, S.A.

*Seymour H. Kligler* and *Herman Goldman*, on behalf of Naviera Aznar, S.A.

*Frank Gormley*, *William Jarrel Smith, Jr.*, *Roger A. McShea III*, and *Robert J. Blackwell*, as Hearing Counsel.

## REPORT

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

These proceedings arose as a result of the 1959 hearings before the Antitrust Subcommittee of the House Commttee on the Judiciary, where testimony was adduced indicating that certain steamship companies engaged in the trade between the United States and Spain/Portugal had since 1950 entered into certain agreements within the contemplation of section 15 of the Shipping Act, 1916 (the Act) without having filed said agreements with the Federal Maritime Board for approval and had paid commissions, rebates, refunds, bonifications, gratuities, and bonuses, etc., to shippers, forwarders and brokers in violation of sections 16 and 17 of the Act. Subsequently, the case was referred to the Board [1] for agency investigation and determination. Two orders of investigation were issued, one concerning unfiled agreements in possible violation of section 15 was docketed as No. 890, the other concerning commissions, refunds, and concessions made to shippers and others in possible violation of sections 16 and 17 was docketed as No. 891. American Export Lines, Inc. (Export), Compagnie de Navigation Fraissinet et Cyprien Fabre (Fabre), Concordia Line (Concordia), Compagnia Espanola de Navigacion Maritima, S.A. (Cia Espanola), Compagnia Trasatlantica (Royal Mail), Compania Trasatlantica Espanola, S.A. (Spanish Line), Ybarra and Company (Ybarra), and Naviera Aznar, S.A. (Aznar) were named as respondents in each proceeding. Ybarra was subsequently dismissed as a respondent because it did not serve the trade involved during the period covered by the investigations. All the remaining lines are currently respondents in these proceedings; however, Hearing Counsel has conceded that as to Cia Espanola, Royal Mail, Spanish Line, and Aznar there is insufficient evidence of record on which to base any findings of violations of the Act. Examiner Edward C. Johnson has recommended their dismissal as respondents herein, a recommendation with which we agree and hereby adopt.[2]

All of the exhibits introduced in evidence in this proceeding, an anthology of nearly 200 documents, were drawn from the files of respondents or their agents. Although a large majority of these documents were from the files of Export, documents from the files of agents

* Commissioner Barrett did not participate.

[1] By Reorganization Plan No. 7, 1961, effective August 12, 1961, the functions of the former Federal Maritime Board were transferred to the Federal Maritime Commission. Hereafter, the Federal Maritime Commission, as well as its predecessors, will be referred to as the "Commission."

[2] Future references to "respondents" will thus refer to Export, Fabre, and Concordia.

for Concordia and Fabre were introduced as well. Approximately 1 week prior to the hearings, Hearing Counsel served on all respondents a "Statement of Matters of Fact and Law To Be Asserted," and on the opening day of hearings, all respondents were served with copies of the exhibits upon which Hearing Counsel would rely to support their contentions. On the first day of testimony, upon the insistence of respondents' counsel, each of these documents was individually identified and numbered, and during the course of Hearing Counsel's presentation, several of the more crucial exhibits were the subject of direct examination. At the close of Hearing Counsel's case, but before respondents had summoned any witnesses on their own behalf, the exhibits previously identified were offered into evidence and accepted by the Examiner. Hearings were adjourned upon completion of Hearing Counsel's presentation and respondents were given some 3 months in which to prepare their case. During this interim period Export renewed a prior Motion of Discovery to procure certain documents from the files of co-respondents Fabre and Concordia which were located abroad. This motion was denied by the Commission.

In an initial decision, the Examiner found that Export, Fabre, and Concordia had committed extensive violations of sections 15, 16, and 17 of the Act. These respondents have excepted to all of the Examiner's findings of violations, to the Commission's jurisdiction to entertain the issues in this proceeding, and to alleged procedural errors in the conduct of the hearings.

## I. THE SPANISH-PORTUGUESE/UNITED STATES TRADE

The respondents were, during the period under investigation, common carriers engaged in the foreign commerce of the United States in the Spanish-Portuguese/United States trade. Export and Fabre were engaged in the trade both eastbound and westbound between the United States, and Spain and Portugal. Concordia, on the other hand, took no part in the eastbound trade and maintained no service from Portugal. Its service was confined to the westbound movement of cargo from the single port of Seville, Spain.

For many years prior to the period under investigation, the westbound trade from Spanish and Portuguese ports to the United States was within the ambit of the Spanish/Portugal North Atlantic Range Conference (SPNARC), established pursuant to Agreement 7350 which was approved by the Commission in December 1941 and later terminated in March 1962. Prior to 1950 all of the respondents, including Cia Espanola, Spanish Line, Royal Mail, Ybarra, and Aznar, were members of that conference.

With the resignation of Fabre line from the Conference in December 1950, however, came disunity, instability, and the ultimate failure of the Conference system in the westbound trade. Fabre line proved to be a formidable competitor of the Conference lines, setting rates below Conference levels, and siphoning off a significant amount of cargo from Conference carriers.

Although recognizing the problem, the Conference lines could not agree on a solution. While Export favored reducing Conference rates to meet Fabre's competition, the Spanish lines maintained that Conference rates were already too low and insisted upon increasing them. Unable to resolve this dispute, Export resigned from the Conference in March 1952.

Export's resignation brought a second principal carrier in the trade into competition with the Conference and further aggravated an already unstable situation. The rate on olives, the principal commodity, comprising 80 percent of the trade, was declared open by the Conference, and a rate war caused olive rates to drop 50 percent to a noncompensatory level. This situation led Export and Fabre to form the Spanish United States North Atlantic Ports Olive Conference (FMC Agreement 8160), which was entered into on August 26, 1952, and approved by the Commission on October 14, 1952. Concordia became a member of the Olive Conference on January 15, 1954. Against a background of these conditions, the Examiner has found that Export, Fabre, and Concordia embarked on a 7-year course of violations of sections 15, 16, and 17 of the Act between August 1952 and November 1959.

## II. Section 15 Violations

The Examiner found the following violations of section 15:

(1) During October 1952, Concordia, Export, and Fabre entered into an agreement in Paris, France, to charge the same rates for the carriage of olives from Spain to the United States.

(2) On May 15, 1954, Export, Fabre, and Concordia entered into a "gentlemen's agreement" at Barcelona, Spain, fixing certain rates and a common level of commissions payable to shippers, customshouse brokers, and forwarding agents on certain commodities moving in the eastbound and westbound trades between the United States and Spain and Portugal.

The Examiner found that by the terms of this agreement special rates were fixed by the respective lines for the carriage of steel sheets, steel plates, leaf tobacco, lubricating oil, milk, cornmeal, beans, and cheese in the eastbound trade; and a special rate

was fixed by the respective lines for the carriage of all foodstuffs consigned to the order of certain charitable institutions.

(3) On July 3, 1954, through their agents at Alicante, Spain, Export and Fabre entered into an agreement establishing a common level of freight rates for the carriage of cargo in general, with certain exceptions, and maximum refunds from that rate ranging from 15 percent to shippers to 3 percent to forwarding agents on movements from Spain to the United States.

(4) On July 22, 1954, Export, Fabre, and Concordia entered into an agreement at Seville, Spain, establishing a common level of freight rates for the carriage of olives stuffed with anchovies, cork board (agglomerated), essential oils, and medicinal oils from Spain to the United States.

(5) On July 24, 1959, Export and Fabre entered into an agreement in Barcelona, Spain, fixing the amounts of brokerage and/or commissions to be paid to shippers, forwarding agents, and customshouse brokers on the carriage of tiles, red oxide, mercury, cork, and lead bars westbound from Spanish ports in the Barcelona/Seville range to the United States.

(6) During the year 1958, Export and Fabre entered into an agreement fixing the freight rates for the carriage of lead bars from Spain to the United States.

None of the above agreements was filed with the Commission for approval as required.

*A. Jurisdiction*

Respondents take exception to the jurisdiction of the Commission to find the violations charged. It is urged that the alleged agreements were executed abroad by foreign nationals and were for the purpose of solving local Spanish and Portuguese problems. For the Commission to take jurisdiction over these activities and to encompass them within our regulatory authority would, according to respondents, give extraterritorial effect to the laws of the United States. The Commission "by applying its own theories of regulation," respondents contend, would impugn the sovereignty of foreign nations.

Respondents' arguments to the contrary notwithstanding, there can at this late date be no serious question as to the so-called "extraterritorial" application of the Shipping Act. *Kerr Steamship Co.* v. *United States*, 284 F. 2d 61 (2d Cir., 1960); *Montship Lines, Ltd.* v. *Federal Maritime Board*, 295 F. 2d 147 (D.C. Cir., 1961), *Hellenic Lines, Ltd.* v. *Federal Maritime Board*, 295 F. 2d 138 (D.C. Cir., 1960); *United States* v. *Anchor Line, Ltd.*, 232 Fed. Supp. 379 (S.D.N.Y. 1964). Respondents, however, urge that the circumstances of this

case set it apart from those previously considered by the Commission. While admitting that extraterritorial application of the Shipping Act would be justified in some instances, respondents contend that in this case,

> No American interest was prejudiced, and there is not the slightest evidence of those substantial effects within the United States necessary to support the extraterritorial application of American laws, even under the extreme doctrine of certain antitrust cases. * * *

This argument ignores the clear language of section 15 and suffers the infirmity of an improperly drawn analogy from the antitrust laws.

Respondents are all common carriers by water in foreign commerce within the meaning of the Act, and there is no question that the agreements in issue are of the kind covered by section 15, i.e. agreements fixing or regulating transportation rates or fares and regulating, preventing, or destroying competition in our foreign commerce. These facts having been established, nothing more is needed and the failure to file such agreements results in a violation of section 15. For in requiring the filing and approval of such agreements as a condition precedent to their lawfulness, Congress itself has determined that the agreements by their very nature have an "effect" on our foreign commerce. The precise nature and degree of that effect is irrelevant to any determination as to the applicability of the filing requirements of section 15. It is, however, important to a determination of whether or not a given agreement should be approved. Thus, respondents' contentions that the agreements in question actually benefited our commerce are premature and would have been relevant only to the question of approval under section 15. Moreover, respondents would seem to have placed themselves in the untenable position of arguing that there must be some period of operations under an agreement before any determination can be made as to the applicability thereto of section 15. For respondents argue that the acts regulated were of purely local significance because no "American * * * shipper or importer ever complained to the Commission or to anyone else that it had been unjustly or unfairly prejudiced or disadvantaged in any way." Just how respondents would square pre-approval operations under an agreement the "effect" of which bring it under section 15 with the clear language of that section making such operations unlawful does not appear anywhere in their contentions.

*B. Evidence*

Respondents take exception to the admissibility and probative value of the evidence on which findings of section 15 violations were based. We find that the record supports the Examiner's findings, except as specifically set forth in the discussion that follows:

*1. The Paris Agreement, October 1952*

The Spanish United States North Atlantic Ports Olive Conference agreement was signed by Export and Fabre on August 26, 1952, and approved by the Commission on October 14, 1952.

On October 6, 1952, however, prior to the approval of the Olive Conference agreement, a meeting was held in Paris between representatives of Export, Fabre, and Concordia. Mr. Orenstein, an official of Boise-Griffin Steamship Co., agents for Concordia, was present at this meeting and testified as to what transpired.

According to Mr. Orenstein's testimony, during these Paris discussions, Mr. Nicol of Export represented both Export and Fabre, and Mr. Haaland, managing director of Concordia, represented that line. The purpose of this meeting was to try to bring stability to the olive trade. The method adopted would be to try to get olives removed from the scope of the SPNARC. Once removed, Concordia (at this time still a member of the SPNARC) would join the Olive Conference, and Export and Fabre (the original signatories to the Olive Conference agreement) would rejoin the SPNARC, which would then cover all cargo except olives. Concordia agreed to the arrangement providing the members of the SPNARC could be persuaded to do the same. When asked whether any determinations were made as to westbound olive rates at this meeting, Mr. Orenstein testified:

Yes. * * *

[I]n this meeting * * * I raised no objection * * * that we would quote a higher rate than the cut rate we were then quoting, because I felt during the meeting that this was a * * * gesture of good will on our part to show American Export and Fabre that * * * that our desire was to try to stabilize the markets.

The fact is that we didn't carry many olives at the new rate because it was higher than the rate that the Garcia & Diaz was carrying it at.

* * * At any rate, we did agree that we [Concordia] would quote the same rate that they [Export and Fabre] would quote as from, I think, October 1st or something of that kind—I think 30- or 45-day period was to elapse before the new rates would be taken into effect * * *, in order that the trade itself might have sufficient notice of it.

The Paris agreement on olive rates lasted approximately 2 or 3 months, during which time Export, Fabre, and Concordia quoted the same rates on olives. Because of the refusal of the Spanish members of the SPNARC to go along as planned, however, the above agreement was terminated, and, according to Mr. Orenstein, "all rates returned to the starvation level."

Respondents except to the finding of a violation on the basis of this testimony on several grounds. Respondent Fabre stresses the fact that no officer or employee of Fabre was present at this meeting, but

Mr. Orenstein's testimony expressly indicated that Fabre was represented at this meeting by Mr. Nicol of Export.

Both Export and Fabre (but not Concordia) contend that the rates discussed were not to take effect for a period of 30–45 days after the meeting; and since the Olive Conference was approved 8 days after the meeting, the rates under the agreement were sanctioned by the Commission's approval of the Olive Conference agreement. Concordia's action in quoting the same rates is interpreted by respondents Export and Fabre as a unilateral decision to adopt the same rates as those of the Olive Conference. We believe Mr. Orenstein's testimony compels a more plausible inference, i.e. that Export and Fabre persuaded Concordia to enter into an agreement to charge the same rates as they would charge. This agreement, during a 2- or 3-month period, resulted in all three lines quoting the same rates on olives. It is true that several days later the Commission approved the Olive Conference agreement that lent official sanction to the rates before they were put into effect 30–45 days later. But the Olive Conference was approved as a bipartite agreement between Export and Fabre, not as a tripartite agreement between those carriers and Concordia. The inclusion of Concordia as a party to a rate agreement on olives was an action beyond the scope of the Commission's approval. It was a material modification of the agreement approved by the Commission and was required to be filed with the Commission for approval under section 15. The failure to inform the Commission of this modification was a violation of the Act on the part of Export, Fabre, and Concordia. *States Marine Lines* v. *Trans-Pacific Freight Conference of Japan*, 7 F.M.C. 257 (1962).

*2. The Gentlemen's Agreement of May 15, 1954*

The record amply supports the Examiner's conclusion that in May 1954, Export, Fabre, and Concordia entered into a gentlemen's agreement at Barcelona, Spain, fixing certain rates and a common level of commissions payable to shippers, customshouse brokers, and forwarding agents on certain commodities moving in the westbound trade between the United States and Spain.

Exhibit 73, introduced into evidence by Hearing Counsel, was a letter from the John F. Gehan organization, general agents of American Export for Spain and Portugal.[3] The letter was written by one José Gonzales, district director for Spain and Portugal, and addressed to Mr. F. G. Slater, general traffic manager of Export, who testified in this proceeding.

[3] John Gehan was actually vice president of Export. Export's agency in Spain, however, was operated under Mr. Gehan's name in order to gain a tax advantage available under Spanish law.

The letter indicated that:

> A list of the commissions being paid at Spanish ports to forwarding agents and shippers, in accordance with the usual practice, and following our talks in Barcelona with the Fabre and Concordia Lines on May 15, 1954, is also attached, as well as a detail on eastbound cargo, giving our special rates in force and commissions being paid to receivers.
>
> A statement concerning Portugal is also attached hereto.

Attached to this letter was a document entitled: "Detail of Commissions Paid At Spanish Ports On Westbound Cargoes, To Shippers and Forwarding Agents, In Accordance With The Gentlemen's Agreement Reached In Barcelona on May 15, 1954, With The Fabre and Concordia Line."[4]

This document set forth a list of Spanish ports (Barcelona, Tarragona, Valencia, Alicante, Malaga, Cadiz, Cartagena, and Seville), and for each port indicated a percentage of commission agreed to be paid to shippers, and, in some cases, to forwarding agents and custom brokers.

Also relevant in showing the existence of an agreement between these respondents is a portion of Mr. Slater's direct testimony in which he stated that he was aware of an agreement between Export, Fabre, and Concordia which was entered into some time during 1954.

Exhibit 99 was a contemporaneous travel report compiled by Mr. S. Marabotto, Export's director of freight traffic for Europe. Mr. Marabotto's report indicates that the meetings at Barcelona were held from May 4–7, 1954, not May 15, as indicated on exhibits 72 and 73. Parts of that report read as follows:

> Mr. S. Marabotto's Report on trip to Barcelona with Mr. A. R. Sasseville May 4/7, 1954
>
> * * * * * * *
>
> Purpose of the trip was to attend a joint meeting with Representatives of the Fabre Line and Concordia Line and with our respective Agents in Spain (Concordia Line was present only for what regarded the port of Seville), in order to avoid unnecessary competition among the three Lines and possibly improve the present freight situation in Spain.

There follows an extensive account of agreements between the lines as to rates and commissions from Spanish ports.

[4] This attachment to Mr. Gonzalez' letter, except for minor variations, was the same as Exhibit 72, a document with the same title. Exhibit 72 included a schedule of commissions to the port of Almeria as well as those ports named in Exhibit 73. Exhibit 72 indicated that a shipper called "Industries Cemar would receive a 5 percent commission on shipments from Valencia where other shippers would receive 3 percent, whereas Exhibit 73 had no such notation. Similarly Exhibit 73 indicated that a shipper named "Oxidos y Pinturas," shippers of red oxide would receive an 8 percent commission out of Malaga, where other shippers would only receive 3 percent. Exhibit 72 made no such distinction. Exhibit 72 was dated Jan. 12, 1958; Exhibit 73, Oct. 8, 1957. In all other respects the exhibits were materially identical.

Mr. Sasseville, who attended these meetings with Mr. Marabotto, was questioned concerning them as follows:

Q Now as a result of this trip and meeting of representatives of various lines—you did have a meeting with the various lines as a result of the trip with Mr. Marabotto?

A. Yes.

Q. Do you recall who attended that meeting?

A. Could you give me the date?

Q. I believe it was May 4th or 5th, 1954.

A. I do recall that there was a meeting in early May in Barcelona. The Fabre Line and the Concordia Line were present and [these were] all the lines I can think of at this time that attended that meeting.

[The witness was then shown Exhibit 99 for identification]

Q. To your knowledge, does that accurately reflect what transpired at that meeting and on that trip?

A. I believe you have to be a little more specific because this is written, I believe, by Mr. Marabotto, and like I have said before, the use of the English language—who use it as a second language, sometimes is not exact as to the interpretation which might be given here in the United States to words used by them.

Examiner Johnson: Otherwise, does it represent a reasonably accurate representation of what happened?

The Witness: It represents a reasonably accurate representation of what happened.

Exhibit 185 was a letter dated November 13, 1959, from Mr. J. T. Graziano, vice president of Export, to an official of the Maritime Administration. The letter reported, inter alia, as to westbound shipments from Spain:

American Export has been paying since May, 1954, according to statements made by the Freight Traffic Department, commissions to customs brokers, shippers, and forwarding agents at various ports and on certain commodities.

Mr. Graziano, the author of this letter, testified as follows:

[Hearing Counsel]: Do you know whether the payment by American Export Lines of commissions to custom house brokers, shippers and forwarding agents was done pursuant to an agreement with Fabre Line and Concordia Lines?

* * * * * * *

[Mr. Graziano]: I know now.

[Hearing Counsel]: When did you become aware of that?

[Mr. Graziano]: After the testimony at the Cellar Committee Hearing. I don't recall the exact date.

Respondents have indicated numerous exceptions to the Examiner's findings that an agreement between Export, Fabre, and Concordia was made at the May 1954 Barcelona meetings and to his conclusion that the activities of these respondents at Barcelona constituted any violation of section 15.

On the basis of the evidence set forth, the Examiner concluded that at the Barcelona meetings Export, Fabre, and Concordia had agreed on rates both in the eastbound and westbound Spanish and Portuguese trade. Respondents contend that regardless of any inferences that might be drawn from respondents' Barcelona discussions, these discussions were concerned only with the westbound Spanish trade, and that no discussion of the Portuguese trade, nor of the eastbound trade from Spain took place.

Respondents' exceptions in this regard are well taken. The Examiner's conclusion is apparently based on a misconstruction of exhibit 73. The quoted paragraphs of exhibit 73, Mr. Gonzalez' letter, indicate that three documents were enclosed with that letter: (1) A "Detail of Commissions paid at Spanish Ports on westbound cargoes, to shippers and forwarding agents, in accordance with the Gentlemen's Agreement reached in Barcelona on May 15, 1954, with the Fabre and Concordia Lines"; (2) A list of special rates and commissions on "Eastbound Traffic to Spain"; and (3) A "Detail of conditions prevailing from Portuguese ports."

However, the mere fact that items two and three were enclosed in the same letter as item one does not indicate that they are part of item one, or that the matters treated in items two and three were the product of the joint discussions at Barcelona. Indeed, all the relevant testimony and exhibits dealing with the Barcelona meetings indicate that they were concerned solely with westbound shipments from Spanish ports. Therefore we find insufficient evidence in the record to support a finding that the Barcelona agreement covered the eastbound Spanish trade and the Portuguese trade as well.

In addition, Concordia excepts to the Examiner's finding that it was a party to the Barcelona agreement. Concordia stresses the fact that although exhibits 72 and 73 indicate Concordia as a party, these documents were dated 1958 and 1957, respectively, despite the fact that the alleged agreements were entered into in May 1954. In contrast, Concordia contends, exhibit 99, "the only *contemporaneous* written evidence as to what transpired at the Barcelona meeting," shows that Concordia took no part in any agreements that may have been made. Our reading of exhibit 99 constrains us to reach a different conclusion. The above-quoted portion of exhibit 99 expressly indicated that Concordia's representatives took part in the discussion at Barcelona pertaining to Seville. The results of these discussions are set forth in exhibit 99 as follows:

*Seville:*

Mr. Haaland [Concordia's Managing Director] and his Agent, Mr. Siljestrom were present besides the Representatives of Fabre and A.E.L.

Instructions were passed to the effect that the rate of $17.00 should be enforced on Olive Oil as from June 15th.

| | |
|---|---|
| Furniture: | Tariff rate, less 3%. |
| Essential Oils: | A.E.L. is charging $80.<br>Concordia charges $30.<br>(Wide difference between the two quotations will be noted.) |
| Cork: | Agreed to enforce immediately the rate of $22.00 from Seville and all other Spanish ports. |

We believe on the basis of all the evidence that Concordia's participation in the Barcelona agreement was confined to agreements with Fabre and Export pertaining to the westbound trade from the port of Seville (the only port in the Spanish/Portuguese-United States trade regulary served by Concordia). But that Concordia was a party to the Barcelona agreement insofar as the port of Seville is concerned is clear, as an examination of exhibit 99 will show.

Respondents' next exception to the Examiner's finding of unlawful agreements arising out of the meeting in Barcelona states, in substance, that there was no intent by the participants at Barcelona to enter into any binding agreement. Rather, it was the purpose of these lines to discuss the problems of the trade with a view toward eliminating malpractices and to pave the way for the eventual formation of a conference. When asked whether the result of these meetings was agreement between the Lines on uniform rates and commissions, Mr. Sasseville, vice president of Export, who attended the Barcelona conferences, testified as follows:

> No; it was actually my interpretation of the thing that it was a meeting of the minds of the different lines in Barcelona; there was actually the liberty of each line to more or less conform with it or if they could do so, it would have been probably a way of normalizing the trade, which had been, more or less, disrupted * * *. And, what actually happened after this meeting is that insofar as we were concerned, we tried to maintain these rates and conditions, but whatever the other lines have done, we had no way of ascertaining * * * if they kept this agreement or not.

On the basis of this testimony, respondents contend that there was no multilateral assent to a common course of action since each of the lines retained the power to either adhere to or depart from these understandings. However, Mr. Sasseville's testimony expressly indicates that an agreement was, in fact, reached. While it might be true that the understandings of the lines did not create any legally enforceable rights or duties; nevertheless, a uniform level of rates and commissions was established to which each line would "more or less conform * * * if they could do so."

It is well settled that the scope of section 15 goes beyond the formally executed, legally enforceable contract. Its provisions apply with equal force to meetings of minds, tacit understandings, and other informal arrangements, whether oral or written. For an extended discussion of this point see, *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159, 189–190 (1962).

The Barcelona agreement between Export, Fabre, and Concordia, an informal understanding among these lines that certain uniform rates would be charged and uniform commissions paid, was clearly the type of informal arrangement contemplated by the Act. The failure to file a memorandum of this agreement with the Commission was a violation of section 15 by Export, Fabre, and Concordia.

*3. The July 1954 Agreement at Alicante and Seville*

During the course of the hearing in this proceeding, Mr. Sasseville testified that the negotiations at Barcelona did not result in final solutions to several of the problems existing in the trades from Alicante and Seville.[5] Accordingly, Export, Fabre, and Concordia directed their agents to meet at some time in the future to iron out whatever difficulties remained after the Barcelona discussions.

Hearing Counsel presented two documents in evidence, exhibits 63 and 64, setting forth agreements as to rates on various commodities moving from Seville (exhibit 63) and as to both rates and commissions from Alicante (exhibit 64). The Barcelona meetings were held, as indicated, on May 4–7. Exhibit 63 was dated July 22, 1954, and the names of the agents for Export, Fabre, and Concordia appear thereon. Exhibit 64, dated July 3, 1954, contains the names of agents of Export and Fabre.

The opening paragraph of exhibit 64 reads:

> In accordance with instructions received from American Export Lines Inc. and Cie De Navigation Cyprien Fabre, their respective Agents in the port of Alicante, Mr. Fernando Flores and J y A Lamaignere, got together on July 3rd, to consider the conditions established in the principal meeting held in Barcelona. * * *

These links produce a chain of evidence which led the Examiner to conclude that Export, Fabre, and Concordia entered into an agreement fixing rates from the port of Seville and that Export and Fabre entered into an agreement fixing rates and commissions from Alicante.

Respondents except to the Examiner's conclusion and contend that the evidence is insufficient to show that any such agreements existed. Respondents also claim that even if these agreements were made, they

[5] As we have noted, however, there were certain agreements reached at Barcelona as to the trade from Alicante and Seville.

were not authorized by the principals and did not constitute violations of section 15.

We think the evidence of record supports the Examiner's findings. Mr. Sasseville's testimony that at Barcelona, Export, Fabre, and Concordia referred the problems of Alicante and Seville to their agents, together with documents from Export's files bearing the names of these agents executed soon after the Barcelona discussions and setting forth various agreements covering the trade from these ports, convinces us that anticompetitive agreements covering these ports were in fact entered into by Export, Fabre, and Concordia.[6]

Respondents contend, however, that even if these agreements were made, they were entered into by foreign agents acting without authority, and uninformed as to the requirements of American law. Accordingly, respondents contend, no violations of the Act arose from these agreements. Respondents rely on exhibit 62, a letter from a vice president of Export, to Export's European traffic director, purportedly repudiating these agreements. The letter, dated September 13, 1954, reads in part:

> I am returning to you the entire file, as this is absolutely illegal, and should never have been worked. The wording indicates that the principals have instructed the agents to do something which the principals, not having a conference, cannot do.

As is obvious from the whole record, it was a most common occurrence in this trade for Export, Fabre, and Concordia to conduct much of their business through agents. Respondents' delegation to agents of such considerable authority carries with it an obligation to thoroughly apprise their agents of the applicable law; for it is no less damaging to the public interest when the law is violated by design, or inadvertently; by an agent, acting on behalf of a principal, or by the principal itself. Sound enforcement of the Shipping Act of necessity demands that those subject to its terms be held to a strict standard of accountability for the acts of agents representing them. As we made clear in *Hellenic Lines Ltd.—Violation of Sections 16 (First) and 17*, 7 F.M.C. 673, 676 (1964), we cannot allow a carrier to "immunize itself from the common carrier responsibilities placed upon it by the Act by dissociating itself from any of its agent's activities which are brought into question." Such responsibilities extends to liability of the principal for violations of law by his agent.

[6] Concordia was not a party to the Alicante agreement. Hence, no violation by Concordia arising from the agreement is found. The record also shows that part of the agreement at Seville dealt with the freight rate on olives. Export, Fabre, and Concordia, at the time of the Seville agreement were members of an approved Olive Conference and were legally entitled to set common rates on that commodity. However, as we have indicated, the agreement at Seville encompassed more than olives and thus was beyond the scope of the Commission's approval.

The purported repudiation relied upon by respondents is insufficient to absolve this responsibility, for in fact it was no repudiation at all. "A repudiation by a principal of his agent's unauthorized act must be made in a definite, positive, and unequivocal manner, [and] communicated to the other party to the transaction," 3 C.J.S. 160 and cases there cited.

The exhibit which respondents consider to be a repudiation was merely an intracompany communication between officials of Export. There is no indication that the sentiments expressed in that letter were communicated to Fabre and Concordia, or, for that matter, even to Export's own agents, or that they had any effect in reversing the course already taken by respondents' agents. Respondents' exceptions pertaining to the agreements at Alicante and Seville are rejected.

*4. The 1959 Agreement at Barcelona*

The examiner found that Export and Fabre entered into an agreement at Barcelona in July 1959 fixing uniform levels of commissions on westbound shipments from Spanish ports.

The primary evidence of this agreement is exhibit 92, a document indicating the names of the principals and agents attending the July 1959 meetings, and a detailed statement of the resulting agreements between Export and Fabre. It is dated July 24, 1959, and is signed by Mr. Sasseville, Export's vice president, and by Mr. Regis Fraissinet, an official of Fabre Line.

On direct examination, Mr. Sasseville testified that although after the meetings at Barcelona in 1954, conditions in the trade were "more or less normal," "some years afterwards it would happen that the conditions which were prevalent prior to that meeting were coming to the surface again." The 1959 Barcelona meeting was an effort by Export and Fabre to regain the normalcy that had existed after the 1954 understandings at Barcelona. Mr. Sasseville was shown exhibit 92, and he testified that it was an accurate representation of what took place at the July 1959 meeting at Barcelona.

Reinforcing this convincing evidence is exhibit 2, an intraorganization message written by Mr. Slater, reading as follows:

Mr. F. O. Slater July 17, 1959
Vice Pres., Freight Traffic
GENOA Att: Mr. S. Marabotto
Dir. of Freight Traffic-Med. & Red Sea

*SPANISH AGENTS MEETING*

We have received your letter of June 25th and note the meeting between Mr. Regis Fraissinet and Mr. Sasseville, for the purpose of discussing the Spanish business, has been postponed to July 24th.

F. G. Slater

FGS–ha
cc to Mr. J. T. Graziano
Mr. Graziano: This meeting is for the purpose of standardizing westbound rates on cargo and commissions to agents, which has been the subject of various inquires from members of your department. I will advise you the outcome as soon as possible. The discussion will cover all westbound shipments, including those which come within the scope of the olive conference, as well as those which are not covered by any conference agreement.
FGS/

We think the evidence clearly supports the Examiner's finding that the July 24, 1959 agreement was made, and that the failure to file that agreement with the Commission was a violation of section 15.

5. In addition to the above violations, the Examiner found that in 1958, Export and Fabre entered into an agreement fixing the freight rates for the carriage of lead bars from Spain to the United States.

The Examiner apparently based his conclusion on exhibit 109, a cable sent by Mr. A. P. Portal, then assistant traffic manager for Export, to Export's headquarters in Genoa, Italy. The cable reads:

ELWELL ADVISES FABRE AND YOUR OFFICE AGREED QUOTE LEADBARS SPAIN USNH DOLLARS 14 XX TON ADVISE URGENT. [7]

This cable would appear merely an inquiry seeking to verify something the writer had heard. There is no response to this inquiry in the record, nor does any other evidence establish that an agreement existed. We agree with respondents that the evidence of this agreement is not sufficient to support a finding of a violation of the Act.

In addition, respondents except to each of the Examiner's findings of violations of section 15 based on the inadmissibility and insufficiency of the evidence relied upon. Respondents contend that Hearing Counsel offered most of their exhibits in evidence at the close of their direct case en masse without a proper showing of authenticity and relevance and that the exhibits were largely hearsay. Accordingly, respondents urge that the Examiner erred in accepting exhibits so offered and that findings based thereon were not supported by reliable, probative, and substantial evidence as required by section 7(c) of the Administrative Procedure Act.

The ultimate evidentiary use of the exhibits and the admissibility at the time of hearing are two different questions. As aptly stated by Professor Davis: [8]

[7] Elwell refers to Fabre's agents.
[8] Davis, Administrative Law Treatise, vol. 2, p. 251 (1958).

In cases tried before judges or administrators, the focus is less and less upon the somewhat artificial question of what evidence should be admitted or excluded and more and more upon the highly practical question of what weight should be given to particular evidence.

We will consider first the question of admissibility. We agree with the Examiner that the documents are relevant to the issues enumerated in the orders instituting these consolidated proceedings. As to the question of inadmissibility of these documents as hearsay, we reaffirm our holding on the same argument made in *Unapproved Section 15 Agreement—South African Trade*, 7 F.M.C. 159 (1962). Hearsay evidence may be admissible. Thus, the Examiner did not err in allowing Hearing Counsel's exhibits in evidence.

We turn now to the question of the weight to be afforded to these documents and to the question of the sufficiency of the evidence as a whole to support the findings made above. Again this subject was treated extensively in the *South African* case.

Weighing the evidentiary value of these documents must be done in the light of the entire record. For instance, a given document admitted in evidence, standing alone, may not be of sufficient weight to sustain a finding. However, that document may be supported by other related evidence; together these items of evidence may form the basis for a rational and dependable conclusion. Following this approach we have already rejected several of the Examiner's findings as unsupported by reliable, probative, and substantial evidence. However, where we have found violations of section 15, we have set forth the principal evidence of the violation in some detail. In each case, there is a reliable, probative, and substantial combination of documentary evidence and oral testimony. In each case, oral testimony amply corroborates the documentary evidence.

Respondents' contention that they were deprived of their right of cross-examination is likewise without merit. At all times during the proceeding respondents were aware of the matters of fact and law to be asserted by Hearing Counsel and were in possession of the exhibits on which Hearing Counsel would rely, each of which was given an exhibit number for identification. However, these documents were not formally offered into evidence until the close of Hearing Counsel's case. Nevertheless, respondents continually maintained that they were unable to conduct proper cross-examination until the exhibits were formally introduced in evidence. We believe that even at this stage of the proceeding, respondents had ample opportunity to cross-examine. But even if we should accept respondents' contention, still further opportunity presented itself to elicit from Hearing Counsel's witnesses

any testimony that might tend to cast additional light on the testimony and exhibits introduced. For, as indicated, at the close of Hearing Counsel's case, when all the documents in question were received in evidence, respondents had yet to put on their own case.

Practically all of the witnesses called by Hearing Counsel were either present or former officials or agents of the respondent lines. These were the type of witnesses readily available to respondents. In fact, Mr. Sasseville, an Export vice president, whose testimony was heavily relied upon by Hearing Counsel, was expressly advised by the Examiner, after his direct examination by Hearing Counsel, that at some time in the future he might be required to return to the stand for purposes of cross-examination. Yet when hearings were reconvened for the purpose of taking respondents' evidence, despite the fact that all of Hearing Counsel's testimony and exhibits were now part of the record, and despite the fact that Hearing Counsel's witnesses (respondents' own agents and officials) were available for either direct or cross-examination, *respondents did not recall one of these witnesses to the stand.* If, in fact, these witnesses could have contributed any facts to the respondents' case, the lack of any such evidence must be attributed to respondents' own neglect, rather than to any procedural unfairness.

Still another exception is raised by American Export Lines, the only respondent whose vessels fly the United States flag. Export contends that since most of the evidence in this proceeding came from its files, only Export was effectively investigated, and therefore the brunt of any adverse findings must fall on its shoulders. Further, Export contends that the denial of its motion to obtain discovery and inspection of documents from the files of Fabre and Concordia prevented its acquiring evidence which it claims would have demonstrated that no section 15 violations existed.

Export's first contention can scarcely be sustained in the light of the fact that our decision, while based largely on documents from Export's files, concludes that the Act was violated not only by Export, but by Fabre and Concordia as well. The very nature of a section 15 violation, i.e., unlawful agreements between two or more parties, is such that evidence of such an agreement will normally be sufficient not only against the line from whose files it originates, but against other parties to the unlawful agreement. So it was with the evidence obtained from Export. Our ultimate conclusions from this evidence left Export in no worse position than its coviolators, Fabre and Concordia.

The same reasoning can be applied to Export's claim that documents from the files of Fabre and Concordia could have disproved the existence of these unlawful agreements and that the Commission's denial

of its discovery motion to obtain these documents was prejudicial to Export. The agreements alleged by Hearing Counsel, and the evidence introduced to support these allegations, demonstrated that during the period of investigation Fabre and Concordia as well as Export were parties to unlawful agreements. Surely, if any material from the files of these respondents tended to show that agreements between Export, Fabre, and Concordia did not exist, it is not unreasonable to assume that Fabre and Concordia would have produced such evidence for the record.

In a final exception, respondents contend that there can be no finding that section 15 of the Act was violated by a mere failure to file agreements between carriers. Rather, respondents contend there must be a showing that these unfiled agreements were, in fact, carried out by the parties.

Here again, respondents raise an issue that has been the subject of much administrative consideration. The definitive rejection of this interpretation of section 15 is set forth in *Unapproved Section 15 Agreements—South African Trade*, *supra*, and that ground need not be traveled again.

On the basis of the foregoing, we conclude that Export, Fabre, and Concordia, by entering into the October 1952 Paris, France, agreement; the May 1954 Barcelona, Spain, agreement; and the July 1954 Seville agreement; and failing to file the aforesaid agreements with the Commission as required, have violated section 15 of the Shipping Act. In addition, Export and Fabre, having entered into the July 1954 Alicante agreement, and the July 1959 Barcelona agreement; and having failed to file those agreements with the Commission as required, have violated section 15 of the Shipping Act.

## *III. Violations of Sections 16 and 17*

The violations of section 15 found by the Examiner consisted in large part of agreements to pay uniform "refunds," "commission," etc., to shippers, forwarders, and customhouse brokers. The Examiner found that the payment of these refunds constituted unlawful rebates in violation of sections 16 and 17 of the Act. We do not believe there is a sufficient legal basis for these findings.

(1) Section 16 First and section 17.

Section 16 First of the Act makes it unlawful:

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

Section 17 reads in pertinent part:

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.

The crux of these sections is found in the words "advantage," "disadvantage," and "discriminatory." Their provisions were designed to prevent sellers of goods from gaining a larger share of the market for their product than they would normally attract because of cost advantages resulting from their goods being shipped at lower rates than those of their competitors.

In our opinion, there is insufficient evidence on this record to warrant a finding that sections 16 First and 17 have been violated.

(2) Section 16 Second.

This section makes it unlawful:

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

Thus the elements of a violation of this section are (1) the existence of a regular rate, and (2) the departure therefrom by unjust or unfair means.

In 1961, section 18(b) of the Shipping Act was amended to require all common carriers in the foreign commerce of the United States "to file with the Commission and keep open for public inspection tariffs showing all the rates and charges of such carrier or conference carriers for transportation *to and from* United States ports and foreign ports. * * * Public Law 87–346, 87th Cong., H.R. 6775 (1961). [Emphasis supplied.]

This amendment supplanted certain regulations which required only rates and charges *from* U.S. ports to be filed with the Commission.

During the period under investigation, therefore, these respondents were not required to file their rates and charges from Spanish ports to the United States, and, in fact no such schedule was filed.

It is respondents' contention that it was proper and lawful during that period to state their rates in terms of a given figure, less a given percentage refund to shippers, forwarders, and customshouse brokers, and that this base rate less discount was the "regular rate" for cargo moving in the Spain-United States trade. Respondents further contend, and the testimony supports their statement, that whenever a shipper was given a lower rate or a higher "commission" on any commodity all shippers of that commodity were given identical concessions. Thus, this newly negotiated rate became the "regular rate" for all shippers of that commodity.

We believe the quotation of rates in terms of a given figure less a percentage to be clumsy, confusing and fraught with opportunity for unlawful rate discrimination. On the basis of the record before us, however, we cannot find that the rates quoted by respondents were other than the "regular" rates for any commodity at that time, and thus cannot conclude that section 16 (Second) was violated.

In this connection we make one additional observation. Section 18 (b) now requires that all inbound rates be filed with the Commission and open to public inspection. The "regular rate" for the transportation of a commodity is the rate appearing in the carrier's tariff, and none other. Any discounts from that rate, or absorptions by the carrier of any chargs which would normally be borne by the shipper, must appear in the carrier's filed tariff. Our decision in this proceeding is not to be construed as authorizing charges or concessions at variance with rates on file with the Commission.

Commissioner JOHN S. PATTERSON concurring and dissenting:

SUMMARY

1. I concur with the majority insofar as it concludes that three respondent common carriers by water have failed to file agreements and have carried out agreements without approval in violation of section 15 of the Shipping Act, 1916, as amended (Act) and finds no violations by the five Spanish carriers; but dissent from the failure to find violations of sections 16 and 17 of the Act, to the extent noted herein, and from the decision to interpret section 18(b) of the Act.

2. The Examiner should be sustained in his conclusions that violations by the respondents American Export, Concordia, and Fabre of sections 15, 16, and 17 of the Act have been proven.

3. Respondent Fabre's exception that there is no proof of actual refunds to certain shippers from Alicante, Spain, and respondent Concordia's exception that there is no proof of undue preference and advantage in violation of section 16, second paragraph, subparagraph "First", or discrimination in violation of section 17, first paragraph, as a result of commissions agreed to at Barcelona, should be sustained.

4. The exceptions disputing our jurisdiction to adjudicate the consequences of actions occurring entirely outside the United States are not proper subjects for decision in this proceeding.

INTRODUCTION

The proceeding concerns two investigations ordered by our predcessor, the Federal Maritime Board (Board), by orders served January 18, 1960. The order in Docket No. 890 instituted an investigation of respondents' activities to determine whether agreements re-

ferred to in the recitals of the order had been entered into and carried out prior to approval in violation of section 15 of the Act, and the order in Docket No. 891 instituted an investigation of the same respondents' activities to determine whether such activities "have been carried out in violation of sections 16 and 17" of the Act.

Section 15, after requiring every common carrier by water to "file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier" dealing with specified subjects, and requiring approval or disapproval thereof, states:

"Any agreement * * * not approved, or disapproved, by the Commission shall be unlawful * * * before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement * * *"

Section 16 makes it 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 in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, Provided, that * * *."

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

and section 17 makes it unlawful for any common carrier by water to:

"demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports * * *."

For the purposes of this report, the respondents named in the preceding opinion and the abbreviated designations are used. This report will also refer to the Federal Maritime Commission as the "Commission," as transferee of the functions of the Board under Reorganization Plan No. 7, 1961.

REASONS FOR A SEPARATE REPORT

A separate report is deemed necessary because the majority report is considered to be inadequate for the following reasons:

*First*, it goes beyond the scope of the orders instituting the two investigations by vouchsafing an observation amounting to an interpretive rule on compliance with section 18(b), when there was no notice that compliance with this section was an issue in this adjudication.

*Second*, it does not show the ruling upon each exception presented as required to be shown by section 8(b) of the Administrative Procedure Act (APA).

*Third*, it does not identify each agreement by subject, date, and



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parties bound, nor state what was done "to carry out in whole or in part" each agreement, nor make a determination as to all the specific agreements which have not been filed, nor specify the dates to show how many days agreements were not filed (the penalties in section 15 of the Act apply to "each day such violation continues").

*Fourth*, it omits discussion of certain facts relevant to a claim American Export, Concordia, and Fabre charged less than established rates and charged different shippers of the same commodities different rates relevant to the violations of sections 16 and 17, and fails to find any violations of sections 16 and 17.

### SUMMARY OF EXCEPTIONS

My reading of the briefs discloses 16 subjects of exceptions (because of subdividing only 13 are numbered herein) instead of the 10 which I count as expressly ruled on in the preceding report. Two exceptions pertaining to 1958 actions, one Concordia exception pertaining to a failure to rule on proposed findings and conclusions, two separate exceptions dealing with violations of sections 16 and 17, and one exception relating to refunds by Fabre do not appear to have been ruled upon.

All respondents did not except to the various points as stated in the preceding report. Cia, Espanola, Spanish Line, Spanish Mail, Trasatlantica, and Aznar filed no exceptions. Also, all respondents did not make the same specific exceptions, as the preceding report implies. Therefore, my findings would apply only to the exceptions made by the specified respondents as noted in the summary herein of what are considered to be the exceptions.

The exceptions are as follows:

1. American Export and Fabre except to the finding that an agreement was proven to have been entered into October 6, 1952, at Paris, France, fixing rates for transporting olives from Spain to the United States.

2. American Export, Concordia, and Fabre except to the finding that an agreement was proven to have been entered into May 15, 1954, at Barcelona, Spain, fixing the percentage of freight rates to be paid to certain forwarders, shippers, and customhouse brokers in transportation east and westbound between United States, Spain, and Portugal.

3. (a) American Export and Fabre except to the finding that an agreement was proven to have been entered into July 3, 1954, at Alicante, Spain, fixing rates and refunds to shippers and forwarding agents for transporting various commodities between Spain and the United States.

(b) Fabre excepts to the finding that it refunded to certain Alicante shippers approximately 15 percent of the freight for the carriage of certain commodities to the United States and refunded to certain other shippers approximately 20 percent of the freight and these refunds were later reduced to 10 percent and 15 percent.

4. American Export, Concordia, and Fabre except to the finding that an agreement was proven to have been entered into July 22, 1954, at Seville, Spain, fixing rates for the transportation of anchovy-stuffed olives, corkboard, essential oils, and medicinal oils from Spain to the United States.

5. Fabre excepts to the finding that an agreement was proven to have been entered into with American Export "during the year 1958", and thereafter carried out, fixing the rates for the transportation of lead bars from Spain to the United States.

6. Fabre excepts to the finding that "during the year 1958" there was a practice of paying commissions or rebates of 7 percent and 7½ percent of the freight charges which were divided between a Portuguese forwarder and the ultimate receiver of the goods.

7. American Export and Fabre except to the finding that an agreement was proven to have been entered into July 24, 1959, at Barcelona, Spain, fixing rates of commissions to be paid to shippers, forwarders, and customhouse brokers for handling the transportation of tiles, lead oxide, mercury, cork, and lead bars from Spain to the United States.

8. (a) American Export excepts to the conclusion that violations of sections 16 and 17 are supported by findings of fact or evidence in the record.

(b) Concordia excepts to the finding that a violation of sections 16 and 17 was proven by the payment of commissions pursuant to the May 15, 1954, agreement at Barcelona, and excepts to the conclusion that violations of sections 16 and 17 are supported by findings of fact or evidence in the record.

(c) Fabre excepts to the conclusion that violations of sections 16 and 17 are supported by findings of fact or evidence in the record.

9. Concordia excepts to the Examiner's failure to rule on its proposed findings and conclusions.

10. American Export, Concordia, and Fabre except to the Examiner's failure to find and conclude that the Commission has no jurisdiction over the acts of these respondents performed outside the United States.

11. (a) American Export excepts that the Examiner's conclusions as to violation of sections 15, 16, and 17 of the Act are not supported by either sufficient findings of fact or evidence.

(b) Concordia and Fabre except to the Examiner's failure to find and conclude that the evidence in the record was not reliable, substantial, or probative, sufficiently to establish any statutory violation on the part of Fabre and Concordia.

12. American Export excepts that the procedural requirements of the APA, the Commission's Rules of Practice and Procedure, and due process of law were not complied with in this investigation.

13. American Export and Fabre except to the conclusion that each has violated section 15 in the absence of proof that agreements were carried out.

PROPOSED RULINGS ON EXCEPTIONS

Based on the facts and for the reasons hereinafter stated, the rulings on the exceptions should be as follows:

A. Exceptions noted in the items 1, 2, 3(a), 4, 5, 6, 7, 8(a), 8(b), and 8(c), 11(a), 11(b), 12, and 13 should be overruled as not being substantiated.

B. Exceptions noted in items 3(b) and 9 should be sustained.

C. Exception 10 is not ruled on.

The facts used as a basis for my findings and the discussion that follows are those set forth at the end of this report.

DISCUSSION AND REASONS FOR RULINGS ON EXCEPTIONS

Running through all of respondents' exceptions is a challenge of the validity of the evidence used to prove acts violating the law. Therefore, an essential preliminary is to justify the use of the evidence incorporated in the record. The evidence consisted of documents and testimony. The documents in the exhibits were copies of letters, interoffice memorandums, notes, telegrams, and minutes reproduced by photographic or other reproduction processes. Some were copies of originals, showing signatures; others were copies of carbon copies showing either no signature or typed-in names of signers. There were no original documents or certified copies. Other papers contained copies of minutes without signatures, but showed those present by name and briefly what was decided at the meetings. The documents referred to facts as having occurred and to agreements, but in the case of agreements did not constitute the agreement itself since the agreements were largely oral. The testimony was by officials of the respondents, and by others having knowledge of transactions. The documents were all introduced in evidence, examined by the Examiner and by the parties choosing to look them over, subject to cross-examination if desired, and admitted to the record by the Examiner. No one was

denied the opportunity of inspection and challenge. All papers were available for challenge. The cross-examination developed efforts to say the words in the papers did not necessarily mean what they appeared to mean. Counsel complained or found fault with the way they were admitted to record. Arguments of counsel questioned the validity of the evidence because of such faults, but no witness challenged the validity of any evidence of signatures and no one denied his signature on original papers here in copy form only; the veracity of the writers of the documents or the basic truth of the statements of facts described was not denied. There was no claim of forgery or lack of authenticity. There was ample opportunity to claim or prove any of these shortcomings. Some witnesses claimed lack of first-hand knowledge of events, but neither witnesses nor counsel claimed or proved that documents contained falsehoods or were not true evidence of what they purported to be on their face. Respondents did not prove lack of authority in any of their agents, officers, employees, or representatives. No witness was denied participation for the purpose of challenging any document, nor for any other purpose.

With regard to the testimony, much of it was equivocal and exculpatory. A person who is involved in talking about prices or concessions, or refunds with a competitor or with customers knows he is dealing with a subject which is also a subject of legal prohibitions dealing with agreements on prices or discriminatory treatment under American law (e.g., see Tr., p. 522 and p. 523). A carrier employee discussing ocean freight rates with a competitor is presumed to be aware of the Act in relation to his conduct. Inevitably such a person will be careful, ambiguous, or disingenuous to obscure the applicability of the law's prohibitions if they are being disregarded. He will not speak plainly, nor allow his conduct to be interpreted correctly, if possible. His words and conduct will have to be interpreted on the assumption of awareness of the law. Consequently, we cannot expect to find clear statements of intent to agree, prefer, or prejudice, nor to find, years later after opportunity to reflect and confer, witnesses who are responsive or candid about what they were doing in the first place. On the contrary, we can expect, as a matter of protection, reluctance to speak plainly, unresponsiveness, and confused incoherence as a product of guilty apprehensiveness. Most of the papers and witnesses had already been subjected to the investigations of a congressional committee regarding the acts adjudicated herein, creating real grounds for apprehensiveness. The consequences of the facts, if proven, had been made quite clear by the committee. Some of the testimony, but not all, reflects a great deal of obfuscation. In any event, the admission of key facts exists uncontroverted except as to the quality of the

proofs which are admittedly far from excellent, but not fatally defective.

Accordingly, the facts discussed are derived from all the documents found in the exhibits and on the basis that such documents contain reliable information and are true and correct copies of the exhibits received in evidence as established by a certification to this effect by the presiding examiner.[9] Reliance is also placed on the veracity of all the testimony as I interpret such testimony.

Following is a discussion of each exception:

1. The actions and words of respondents' agents, who met at a common time and place, in Paris, October 6, 1952, and, to use their own words, reached "an agreement" and "have further agreed" to adhere to the freight rates of an existing Conference tariff ("to maintain Spanish Conference rate structure") to which they were not otherwise obligated to maintain, prove an agreement meeting the description in section 15. The agreements concerned the rates to be charged for transporting olives and other commodities into the United States and therefore are agreements "fixing or regulating transportation rates * * *". The agreement by three competitors to use someone else's rates instead of each acting independently to choose his own rates is equivalent to fixing and regulating rates. The facts presented by the respondents concerning their resignation from a conference, a "rate war", efforts to reform a conference, and policy decisions have nothing to do with the existence or nonexistence of such an agreement. An agreement is usually preceded by negotiations and by conditions impelling agreement. An agreement is usually followed by acts of performance and further discussion as to the details of performance. What happens before and after the moment of agreement may not be used to obscure the fact that a meeting of minds on a common course of future action was achieved. All the evidence points to such achievement in Paris in 1952, and none of the respondents chose to deny that the records herein showing agreement occurred were truthful statements of the facts they reported, or that the persons involved were honorable persons who meant what they said and said what they meant. The first exception is not substantiated, and an unapproved agreement was entered into on a subject described in section 15 of the Act between American Export and Fabre, and existed from October 6, 1952, to October 14, 1952, when Agreement No. 8160 was approved to authorize rate fixing.

[9] With regard to the certification of the exhibits in relation to the time at which this report was prepared, the Docket binder containing exhibits was furnished this office May 10, 1965. The exhibits as certified by the Hearing Examiner as true and correct copies were placed therein by the Office of the Secretary during the week of May 3, 1965.

2. The actions and words of respondents' agents at Barcelona, Spain, on May 15, 1954, show agreement was achieved between American Export, Concordia, and Fabre when they reduced to a written memorandum showing a whole series of percentages to be deducted from freights paid on shipments in both directions and refunded to various classifications of persons shipping commodities. The participants, agents of respondents herein, agreed on commissions and agreed "to get together" from time to time for the purpose of revising the percentages or changing the recipients. The words of agreement appear more than once in the papers in evidence to show the intent of what was to be done by each. None of these adjustments in freight moneys are shown in any tariffs, but are given only to the preferred categories of persons known only to the respondents. Evidence showing that three competitors agreed to fixed percentages of freight charges to be refunded to specified shippers, forwarders, and customhouse brokers by name, and showing the declared purpose of the meetings, establishes an agreement fixing rates, giving special privileges and advantages, and regulating competition. The second exception is not substantiated, and an unfiled, unapproved agreement on a subject described in section 15 between American Export, Concordia, and Fabre existed and was carried out from May 15, 1954, to November 17, 1959, when it was terminated.

3. (a) The actions and words of respondents' agents at Alicante, Spain, on July 3, 1954, show agreement was achieved between American Export and Fabre to use certain existing conference freight rates for commodities shipped into the United States subject to specified percentage refunds of freight money. It was also shown that importers in the United States named the carriers and presumably paid freights in dollars. The agreement by two competitors to use someone else's rates and to fix percentages of freights to be refunded establishes an agreement to fix rates and give special privileges and advantages. The exception in 3(a) is not substantiated, and an unfiled, unapproved agreement on subjects described in section 15 between American Export and Fabre existed and was carried out from July 3, 1954, to November 17, 1959, when it was terminated.

(b) The actions shown by the minutes of the Alicante meeting on July 3, 1954, and by the American Export memorandum of September 13, 1954, prove that Fabre agreed to refund to at least four Alicante shippers 15 percent of the freight and to reduce other refunds. The evidence does not show proof of actual refunds and to this extent the exception in 3(b) is sustainable.

4. The actions and words of the respondents' agents at Seville, Spain, on July 22, 1954, show agreement was achieved between Amer-

ican Export, Concordia, and Fabre to establish freight rates on olives and other products shipped into the United States and to correspond with a shipper. An agreement between three competitors to establish prescribed freight rates on commodities and to make inquiries for the purpose of establishing a common rate likewise proves an agreement fixing rates. The fourth exception is not substantiated, and an unfiled, unapproved agreement on a subject described in section 15 between American Export, Concordia, and Fabre existed and was carried out from July 22, 1954, to November 17, 1959, when it was terminated.

5. The writings and explanation thereof by American Export's agents concerning the transportation of lead bars to New York show that an agreement existed as of September 2, 1958 (it is not possible from the record to fix the date the agreement came into being before September 2, 1958), between American Export and Fabre, fixing rates on lead bars. The fifth exception is not substantiated, and an unfiled, unapproved agreement on a subject described in section 15 between American Export and Fabre existed and was carried out from, at the latest, September 2, 1958, to November 17, 1959, when it was terminated.

6. The testimony and documents concerning the refund or commission out of part of the freight money paid for commodities transported by Fabre from United States to Portugal in August or September 1958 show that the practice of paying commissions or rebates in fact existed and that American Export was harmed by efforts to make exporters not choose its ships. Fabre thereby gave undue preference or advantage to all traffic on which the commissions or rebates were given and subjected American Export to undue prejudice and disadvantage in violation of section 16. If this were a case of Fabre paying a foreign importer or agent from a foreign country without reference to what happens in the United States, our laws would not apply to the actions, but where the payment is used to influence decisions made in the United States concerning which carrier to choose in routing of cargo originating in this country and to charge the amount paid out of freight moneys to forwarders in the United States, our laws apply. The applicable law is section 16 insofar as it makes it unlawful for any common carrier by water acting alone and indirectly to subject any particular person to undue disadvantage. American Export as a particular person was subjected to undue disadvantage in soliciting exporters in the United States to choose American Export as the carrier for commodities originating in the United States. Fabre violated section 16 by its actions. The sixth exception is not sustained.

7. The actions and words of respondents' agents at Barcelona, Spain, on July 24, 1959, show agreement was achieved between American Export and Fabre, fixing the commission rates or brokerage that would

be paid or divided up out of freight moneys for transporting specified commodities, including tiles, lead oxide, mercury, cork, and lead bars, to the United States and the absorption of transshipment expenses. An agreement between two competitors fixing commissions and brokerage percentages to be paid out of freight, specifying payment of transshipment expenses on certain commodities, and consulting on how to meet competition of other carriers establishes an agreement fixing freight rates, regulating competition, giving special privileges and advantages, and providing a cooperative working arrangement. The seventh exception is not substantiated, and an unfiled, unapproved agreement between American Export and Fabre on subjects described in section 15 existed and was carried out from July 24, 1959, to November 17, 1959, when it was terminated.

8. (a) The testimony and documents showing that American Export allowed commissions to shippers on freight in varying percentages, both as to types of shippers by commodities and to specified shippers by name, prove that American Export both alone and in conjunction with Fabre gave undue preference and advantage to the particular shippers receiving the commissions or refunds in violation of section 16, second paragraph, subparagraph "First". None of the commissions were shown to have been available to the public generally or to be in the tariffs. The testimony and documents showing that American Export allowed adjustments, reductions, or refunds from manifested rates for shippers of mercury, shelled filberts, olive oil, onions, and electrical equipment, but not to other shippers generally of the same commodities, regardless of tariff rates, and gave four named Alicante shippers a greater percentage commission than all other shippers, prove that American Export both alone and in conjunction with Fabre allowed such persons to obtain transportation of property at less than the regular rates then established and enforced on American Export's line by an unfair means in violation of section 16, second paragraph, subparagraph "Second". The same evidence, insofar as it shows only favored shippers were allowed an adjustment or a lower percentage with no other facts to distinguish them from other shippers, proves American Export charged or collected a rate or charge which is unjustly discriminatory between shippers in violation of section 17, first paragraph.

(b) The documents and testimony showing Concordia discounted westbound freight rates for equipment transported from Seville to New York by 18 percent for only one shipper proves that Concordia gave undue preference and advantage to the particular shipper receiving the discount from the current freight rate in violation of section 16, second paragraph, subparagraph "First". The same evidence

proves Concordia allowed such shipper to obtain transportation at les than the regular rates then established and enforced on Concordia' line by an unfair means in violation of section 16, second paragraph subparagraph "Second", and charged a rate that was unjustly dis criminatory between shippers in violation of section 17. With regarc to the commissions agreed to at Barcelona, applicable to westbounc shipments out of Seville, Concordia, by making agreements affecting rates not appearing in tariffs known to the public generally, allowed shippers to obtain transportation at less than the regular rates then established and enforced on Concordia's line by an unfair means in violation of section 16, second paragraph, subparagraph "Second", but since all shippers were treated equally there is no undue preference or advantage under section 16, "First", and no discrimination under section 17 as result of these particular acts. It is considered unfair not to publish the commission so shippers may see what all the terms of tranportation are and not have to rely on secret deals between carriers.

(c) The testimony and documents showing that Fabre allowed commissions to shippers on freight in varying percentages, both as to types of shippers by commodities and to four specified shippers in Alicante by name, prove that Fabre both alone and in conjunction with American Export gave undue preference and advantage to the particular shippers receiving commissions or refunds in violation of section 16, second paragraph, subparagraph "First". The testimony and documents showing that Fabre transported an automobile for a single shipper without charge and gave four named shippers a greater percentage commission than all other shippers prove that Fabre both alone and in conjunction with American Export allowed such persons to obtain transportation of property at less than the regular rates then established and enforced on Fabre's line by an unfair means in violation of section 16, second paragraph, subparagraph "Second". The same evidence, insofar as it shows only favored shippers were allowed either a greater percentage reduction in freight with no other facts to distinguish them from other shippers or were not allowed free transportation of automobiles, proves Fabre charged or collected a rate or charge which is unjustly discriminatory between shippers in violation of section 17, first paragraph. The preceding report finds no violation of sections 16 "First" and 17 by any respondent, but the simple assertion in conclusory form that "there is insufficient evidence on this record" to warrant a finding of violation does not satisfy standards requiring identifiable record support to refute what the Examiner found on this controversial issue. Judge Tenney recently rejected as

faulty support for injunctive relief sought by the Commission testimony of a witness that was "conclusory rather than factual" and "supplied no facts and figures to support his conclusion that public interest required the grant of the instant relief", *Federal Maritime Com'n* v. *Atlantic & Gulf/Panama Can. Zone*, 241 F. Supp. 766 (DCSDNY 1965). The case is not controlling here, but the reasoning contains wise advice. The Commission also has a responsibility to convince by facts and reasoning rather than by expecting review courts to accept its conclusory pronouncements on faith alone in the name of expertise. The facts showing grants of commissions to named persons and presumably not to others, refunds to selected named shippers, and paying forwarders a split of commissions, will have to be explained away by far more than conclusory assertions. Accordingly, I dissent from the preceding report insofar as it fails to reach any conclusion as to violations of sections 16 and 17 of the Act. I would conclude that the exceptions of American Export, Concordia, and Fabre in 8(a) and 8(b) are not substantiated and the Examiner should be sustained, except as to Concordia's exception in 8(b) regarding the Barcelona agreement transactions as a violation of section 17. Concordia is correct on the latter point.

9. Concordia's exception that the Examiner failed to rule on proposed findings and conclusions is sustainable, although the failure was not prejudicial because the Examiner disclosed how he would have ruled. A reading of the Examiner's decision shows he failed to rule expressly on each proposed finding as contemplated by section 8(b) of the APA, which requires that "the record shall show the ruling on each such finding" or conclusion presented. The reference is to the preceding sentence affording parties the opportunity to submit "proposed findings and conclusions" and "supporting reasons". Concordia used the opportunity and presented proposed findings and conclusions. Even though the proposed findings and conclusions were dealt with generally in the decision, and the courts support this technique, Concordia took the trouble to be explicit about its proposals, so it should have been easy to respond with a more precise compliance with the law's directions.

10. With regard to the tenth exception, the Commission initiated these two investigations on the premise it had jurisdiction over the respondents and over the subject to be adjudicated. As the facts were exposed in hearing, it was developed that the acts claimed to constitute violation of law were performed in Europe but involved products transported to the United States and the freight charges therefor,

most of which were paid here in dollars. (The tariffs are quoted in dollars, and it is assumed payment was in the same currency. The desirability of using dollar currency in our foreign commerce is also officially recognized in the light of trading conditions at the time.) The carriers used were chosen by importers in the United States. Whether the fact that initiating acts were performed and agreements consummated in Europe deprives us of jurisdiction or not is an issue that must be considered by others. As far as the words of the Act are concerned, the place of action makes no difference if foreign commerce is affected. Congress and the President have delegated responsibilities to the Commission to adjudicate the consequences of actions even though done outside United States boundaries recognized by international law. If such delegation is beyond the authority of the Congress or the President, the decision that this is so will have to be made either on the basis of constitutional or international law as defined by the judicial branch, or by Congress through amendment of the Act, or by international agreement. I would defer to higher authority and make no ruling on the tenth exception.

11. Exception 11 questions the evidence used. Such questions are discussed above. It is concluded that the evidence, lacking appropriate challenge of its basic veracity, is adequate. All the findings and conclusions are supported by reliable, substantial, and probative evidence in words and records. The eleventh exception (both parts (a) and (b)) is not substantiated. Insofar as 11(a) contains a separate exception, apart from the question of evidence, as to a conclusion of violation of sections 15, 16, and 17 of the Act, the exception is dealt with separately in rulings on exceptions 1 through 8.

12. The basis of American Export's exception as to compliance with the APA, our Rules of Practice and Procedure, and the Constitution of the United States in regard to "procedural due process", is that hearing counsel, as proponent of the order alleging violation, failed to meet the burden of proof. With regard to the latter, no specific provision of the Constitution is cited, and I do not pass on the constitutional issue. Presumably such issue will be reviewed in the courts if the issue is a serious one. Rule 10(o) of the Rules of Practice and Procedure and section 7(c) of the APA are cited to require that "the burden shall be on the proponent of the rule or order." Hearing counsel successfully obtained receipt by the Examiner of all the evidence needed to substantiate the charges in the order, as discussed in the reasons for overruling the eleventh and preceding exceptions. What happened was that after identification of the documents and allowance of testimony concerning them, respond-

ents did not bring in any invalidating documents or testimony, although given 3 months to do so. Respondents' failures may not be translated into proof of the documents' inadmissibility or invalidity. The documents were corroborated to the point where invalidation by respondents became necessary but was not forthcoming. The twelfth exception has not been substantiated.

13. There is no express provision in section 15 of proof that agreements must be "carried out", i.e., performed before a violation of the filing requirement is proven. The violation occurs when an agreement has been proven not to have been "filed immediately". Before filing, no approval is possible, because the Commission has nothing before it to approve. Carrying out, i.e., performing, agreements before approval is a separate, unlawful act under section 15. *Unapproved Section 15 Agreements—South African Trade*, 7 FMC 159 (1962). The thirteenth exception is not substantiated.

Finally, it is noted that the initiating order did not refer expressly to violations caused by failure to file immediately agreements as discussed herein, but this issue was known to the parties by the reference to section 15 of the Act and their claim that no agreements were entered into which required filing.

FACTS

The facts relevant to the alleged violations and used in the discussion are as follows:

1. A meeting held in Paris, France, on October 6, 1952, is referred to in a "promemoria" written under American Export letterhead, signed by the director, Freight Traffic—Europe, as of November 3, 1952, attended by "ourselves, Fabre, and Concordia at which 'an agreement was reached on different points' " (exhibit 84A, p. 2). The status of the agents or employees of the respondents and their authority to represent their principals or employers at this meeting was not denied. At this meeting, "a telegram of the following tenor was despatched to the Secretary of the Spanish Conference":

"CABLED SPANISH CONFERENCE * * * STOP AS FRIENDLY GESTURE FABRE AEL HAVE FURTHER AGREED WITH CONCORDIA THAT PENDING FORMAL MEETING AND HOPED FOR AGREEMENT TO MAINTAIN SPANISH CONFERENCE RATE STRUCTURE FROM THIS DATE AND REQUEST THAT MEMBERS SPANISH CONFERENCE ASSOCIATE THEMSELVES WITH SUCH STEPS THEREBY IMPROVING ATMOSPHERE AND LAYING FOUNDATION FOR SUCCESSFUL MEETING STOP * * *" (Exh. 84A, p. 3).

American Export was not a member of the "Spanish Conference", i.e., the Spanish-Portuguese Westbound Conference, and was not

bound to observe its rates without an agreement. The telegram also referred to a "newly formed olive conference now awaiting approval Maritime Board Washington * * *" and to "olive traffic". The traffic was from Spain (including the Port of Seville) and Portugal to the United States. Copies of correspondence relating to these subjects were marked for Fabre Line at Marseilles and for Concordia at Haugesund (exhibit 84A, Tr. 521–525).

2. A meeting was held in Barcelona, Spain, on May 15, 1954, attended by named individuals representing American Export, Concordia, and Fabre. The status of these individuals as agents, officers, or employees of the respondents and their authority to represent their principals or employers was not denied. At this meeting the respondents' representatives prepared a three-page schedule containing, according to its title, a "detail of commissions paid at Spanish ports on westbound cargoes to shippers and forwarding agents in accordance with the gentlemen's agreement reached in Barcelona, Spain, on May 15, 1954, with Fabre and Concordia Lines" (exhibit 72). Westbound cargoes meant cargoes going to the United States. Other details of commissions paid show at Alicante 5 percent "to all shippers", except an essential oil shipper by name, and three named paprika shippers who received 10 percent. Custom brokers received 3 percent. At Almeria, almond shippers, and at Malaga, all shippers received 3 percent. At Cadiz, all shippers received 5 percent, but 11 named wine shippers and shippers of paprika received 10 percent. At Seville, shippers of general cargo received 3 percent; forwarding agents of cork shippers, 3 percent; and shippers of essential oils and herbs, 3 percent. Commissions were prescribed as follows:

| | *Percent* |
|---|---|
| Miguelness S. A., Importers of Agricultural Machinery | 3 |
| Macaya S.A., Lube oil importers | 5 |
| Mobil Oil S.A., Lube oil importers | 5 |
| Cofinanso, Importers of Tallow | 3 |

(Exch. 70)

A "detail on conditions prevailing from Portuguese Ports" states:

*LISBON*

*Rebates on Eastbound Cargo:*

| | *Percent* |
|---|---|
| General Electric Portuguesa S.A.R.L., Importers of Electrical Material | 10 |
| Mendes & Anjes Lda., Importers of Stainless Steel | 10 |

Sardine shippers are granted "a compensation of Escudos 60.—per ton" on shipments via Portimao (exhibit 71). Importers and eastbound cargo refer to cargoes coming from the United States. Ameri-

can Export, Concordia, and Fabre are all competitors as common carriers by water in trade between ports in Spain and Portugal and ports on the Atlantic Coast of the United States, except that Concordia's competition is confined to shipments westbound to the United States from Seville, Spain. The travel report of May 11, 1954, of the director general for Europe for American Export states the purpose of his trip was:

"* * * to attend a joint meeting with the representatives of the Fabre Line and Concordia Line and with our respective agents in Spain (Concordia Line was present only for what regarded the port of Seville) in order to *avoid unnecessary competition* among the three lines and possibly improve the present freight situation in Spain." (underlying in exhibit copy) (Exh. 99, p. 2).

The report listed under each of the Spanish ports which became subject of actions on May 15, 1954, the names of the representatives of Concordia and Fabre at those ports. Further, the report stated, "It was agreed that the agents of the three lines in Seville will get together every month and will submit the questions that they may have to principals for decision." (Id., p. 4.) The notes show agreement to revise percentages and recipients from time to time. Other officials of American Export knew of these arrangements. American Export's vice president of Freight Traffic testified as follows:

"Q. Mr. x x x yesterday I asked you if you were aware of any agreement between Export and Fabre and Concordia, which was entered into sometime in 1954. Your answer was 'No, sir, I was not aware of any agreement.' Would you want that answer to stand on this record this morning?
"A. No.
"Q. Is your answer to that question this morning * * * it would be what, please?
"A. Yes." (Tr., 129–130).

A vice president of American Export testified:

"A. Well, it would appear from reading that first paragraph here under 'Barcelona' (Ex. 99) that there is a relation there as to what existed before the meeting took place * * * that these were matters that were reported at the particular meeting in Barcelona as said to be existing on shipments moving out of Barcelona. Earlier if you followed through under the same heading, 'Barcelona', you would see that there was an endeavor to bring law and order into the booking of cargo out of the port of Barcelona.
"These were the conditions of brokerage that were to be paid after the meeting on cargo, below a certain stated amount per ton and above a certain stated amount per ton. And looking at this document and from my recollection, this was to be paid to everybody." (Tr., 383.)

A letter under the letterhead of a general agent for Spain and Portugal, American Export Lines, Inc., Lisbon, October 7, 1957, addressed to the general freight traffic manager of American Export in New York, stated:

"In whet (sic) refers to Westbound traffic as you know we have a gentlemen's agreement with Fabre and Concordia, to which the Spanish Lines have also adhered."

The letter was signed by a district director for American Export, and copies were marked for other officials of American Export participating in the meetings referred to herein (exhibit 35). Correspondence in exhibits confirms that these agreements were being carried out.

3. A meeting was held in Alicante, Spain, July 3, 1954, attended by an agent of American Export and an agent of Fabre. The status of these persons as agents authorized to act for respondents is not denied. A translation of their notes (exhibit 64) states that "in accordance with instructions" from American Export and Fabre "their respective agents in the port of Alicante * * * got together July 3rd to consider the conditions established in the principal meeting in Barcelona, having agreed to the following * * *". There follows a statement that "the rates of freight to be applied and which will serve to determine the refunds agreed upon will be those of the old S&PNARC" (the Conference). The refunds were 15 percent to shippers and 3 percent to forwarding agents except four named "firms to which shall be granted a 20 percent refund plus 3 percent to the forwarding agents" from Conference rates. Exceptions were made for melons in cases, orange peels, and "Alluminum hollow" and the applicable rates were stated in dollars. Orange peels were allowed "15 percent and 3 percent refunds." The rates on aluminum were "exclusively for products of the firm" followed by the name of a Madrid firm (exhibit 64). An American Export interoffice memorandum marked "Confidential", dated September 13, 1954, from the director—Freight Traffic—Europe to the assistant freight traffic manager—New York, subject Spanish Traffic Alicante, refers to "the agreement existing with the Fabre Line" and states, "it has been agreed by the Alicante agents, viz., ours and the Fabre Line's, that effective October 1, 1954, the present refund of 20 percent on the rates of freight will be reduced to 15 percent on cargo loaded by the following shippers", and lists four named firms, "whereas for all other shippers the refund will be brought down from 15 percent to 10 percent." The memorandum shows the signature and lists carbon copies for an agent, the accounting department and "Seville" (exhibit 123). Correspondence in exhibitions confirms that these agreements were being carried out.

4. A meeting was held in Seville, Spain, July 22, 1954, attended by an agent of American Export, an agent of Concordia, and an agent of Fabre (the translation of the "Minutes"—exhibit 63—is signed by the above agents on behalf of an agent for American Export and

"agents" for Fabre and "Agencia Concordia" for Concordia). The status of these persons as agents authorized to act for respondents is not denied. The translated minutes show "resolutions" taken to establish the rate of freight from Seville, Spain, to the United States "for olives stuffed with anchovies in cases", corkboard, essential oils, and medicinal oils. It was "agreed" to write to a named shipper "to find out the value of essential and medicinal oils". The meeting was adjourned with no further business. Correspondence in exhibits confirms these agreements were being carried out.

5. A former employee of American Export (from July 1952 to August 1960—Tr., 588) as solicitor for westbound traffic from the Mediterranean area with the title of assistant traffic manager, advised the Genoa office of American Export that Fabre's New York agent by telegram dated September 2, 1958, "advises Fabre and your office agreed quote leadbars Spain USNH dollars 14 ton advise urgent" exhibit 109). With regard to the meaning of this cablegram, the witness whose name appears as sender was asked:

"Q. * * * what was the purpose of your advising the Genoa office of a $14 rate arrived at between yourselves and Fabre?
"A. Well, I get calls from time to time from the importer and these—you are quoting the same rate as the Fabre Line. I try to get—many a time I call the competitor and find out what they are quoting. In this case, I couldn't get any information, so I cabled Spain—I cabled Genoa, I should say, in this case." (Tr., pp. 608–609.)

There is no disproof that this agreement was carried out.

6. A witness employed by a forwarding company in New York having an agent in Portugal testified, and exhibits showed, that in 1958 (Tr., p. 686—referred to as "in the summer; August or September" 1958 in connection with shipments of petroleum products) the practice existed whereby part of the freight paid to Fabre for transportation eastbound to Portugal was refunded and the refund was divided between a Portuguese forwarding agent and the ultimate receiver of the goods or paid to consignees (exhibit 56). The refund was 7½ percent and 10 percent of freight paid (exhibits 10, 13, 16, 18, 27, 56; Tr., 692–702). Importers in Portugal, in response to the agent's solicitation efforts, would request that the forwarder's services be used by means of instructions to U.S. exporters to make shipments through the forwarder (Tr., 685). The agent was paid a commission for every shipment obtained (Tr., 686). The exporting shippers chose the carrier to be used. When American Export was chosen by American exporters, the Portuguese importers refused to pay the forwarding charges "and other insurance and departmental expenses" because American Export should not have been chosen (exhibits 173, 174, 175,



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176). American Export's Lisbon agents advised the Genoa and New York office that an importer of lubricating oil products was "lately approached by representatives of Fabre Line * * * who have granted them a bonus on freights of 7 percent * * *" (exhibits 16 and 18). Elsewhere the "bonus" was referred to as a "rebate" (exhibit 14).

7. A meeting was held in Barcelona, Spain, July 24, 1959, attended by two individuals representing American Export and a representative of Fabre and their respective agents at 10 cities in Spain. The minutes are signed by the American Export and Fabre representatives (exhibit 92). The minutes contain a statement of the "brokerages and/or commissions payable at Spanish ports Barcelona/Seville range" which "have been agreed upon, effective July 17, 1959". The agreed amount was "5 percent on the net revenue" except that tiles, lead oxide, mercury, cork, and lead bars were assigned other specified percentages. At the ports of Barcelona, Tarragona, Alicante, or Malaga, there was a "division of the 5 percent brokerage and/or commission" and it was "agreed among agents that the distribution will be 3½ percent for the shipper/forwarding agent and 1½ percent to the Custom House broker involved". "It is further agreed that the lines will absorb transhipment expenses * * *". The minutes continued: "In order to meet the action of competitive lines, it is hereby agreed that agents at any particular port may consult the agent of the other line * * *" (exhibit 92). All of the foregoing applied to cargoes to or from the United States. The American Export representative acknowledged he knew the meeting was to be held and the subjects to be discussed (exhibit 2). A copy was marked for a vice president of American Export with a detailed note concerning the purpose of the meting. Other proofs indicate these agreements were being carried out.

8. (a) American Export, on March 17, 1954, relative to a shipment of 2,500 flasks of Spanish mercury shipped from Cadiz to New York, covered by bills of lading "Nos. 9 and 10," wrote its general freight agent after referring to the rate shown on the manifest as $25 per ton: "This will be your authorization to adjust the rate on the above shipment to $20.50 per ton." (Exhibit 75.) Similar adjustments at different times in the same trade were made with respect to 4,750 flasks to $21 per ton (exhibit 77) and 2,500 flasks to $21 per ton (exhibit 78). On June 22, 1953, relative to a shipment of shelled filberts in 400 bags shipped from Barcelona to New York, covered by Bill of Lading 14, American Export's freight traffic manager wrote its general freight agent, after referring to the rate shown on the manifest of $33 per ton as the tariff rate, "This will be your authorization to adjust * * * to $30 per ton." (Exhibit 79.) On January 28, 1953, relative to 34 bills

of lading, Seville to New York, 2 bills of lading, Seville to Boston, 2 bills of lading, Seville to Philadelphia, and 5 bills of lading, Malaga to New York, covering drums of olive oil, authorization was given "to adjust the rates on the above shipments to $9.00 per ton" from the manifested tariff rate of $21 per ton (exhibit 81). Similar adjustments were made on Barcelona to New York shipments (exhibits 82, 84). The New York office of American Export was asked to refund, pursuant to agreement with an olive oil exporter, $288.48 to cover a reduction "on the established rate of $21.00 per ton on all their shipments of Olive Oil to U.S.N.A. ports". It was noted that "freights were payable at destination" and asked that payments be made to the exporter's New York agents in terms of dollars (exhibit 85). Similar refunds were made to New York agents of exporters of onions shipped from Seville to New York, resulting in a freight different from what was shown on bills of lading (exhibit 86). Other factually similar transactions were shown (exhibit 88; Tr., 141, 142, 151, 154, 155, 252–257, 327, 328, 346, 347, 506–515, 536–538). Reductions in 1955 and 1956 from manifested rates on shipments of electrical equipment from the United States to Spain were shown (exhibit 39; Tr., 42–44, 58).

(b) Concordia on October 15, 1958 (referring to "yesterday") "agreed" to a "demand" for an "18 percent rebate on the current freight rate" on certain equipment shipped from Seville to New York (exhibit 186). The letter, on Agencia Concordia Line, Sevilla (Spain) stationery, dated October 15, 1958, addressed to Concordia's New York agent, stated, "The rebate is to be deducted at yours when collecting the freight". The "yours" refers to the addressee agent of Concordia's office in New York (exhibit 186). Other documents confirm shipments and a bill of lading and schedule of eight shipments from Seville, Spain, westbound, are shown. There was also evidence of a dispute over the higher eastbound rate in comparison with the lower westbound rate, but this had no relation to the 18 percent reduction or discount from the "current freight rate," whatever it was (exhibits 186, 187). The testimony as to the dispute tended to obfuscate the true transaction by a discussion of the consequences of transshipment and the fact that the disputed rate involved an increase in applicable freight (Tr., 466–491).

(c) Fabre refers in a response from Marseilles, France, dated September 20, 1954, to reports from its U.S. representative in New York to not recalling "having agreed to the free transportation" of an automobile for a shipper but stated, "we are not opposed to renewing this gesture if it was not made uselessly last year" (exhibit 172, pp. 4–5, heading "AUTOMOBILE POUR M. FELIX GOZLAN") (a translation is in exhibit 171).

9. The President of American Export, by letters dated November 17, 1959, wrote the managing director of Fabre Line and the president of Concordia Line, "if and to any extent any such agreement exists between our companies * * * it is terminated forthwith". The reference was to agreements relating to cargo moving between Spanish and Portuguese ports and ports in the United States. There is no evidence in the record and no claim that any alleged agreement herein was terminated before the date of these letters. Concordia provided transportation service only from Seville, Spain, westbound to the United States (Tr., 555).

10. Shipments of many commodities, olives in particular, are controlled in the United States by importers. Freights were payable at destination (United States) and receivers "had at all times a word to say regarding the routing of cargo" (exhibit 84A).

11. The record shows without denial, and it is substantiated by the files of the Commission, that no true copy or true and complete memorandum of any agreement subject of the proceedings was filed immediately or at any other time with the Commission.

### Findings and Ultimate Conclusion

Based on these facts and the reasons advanced, the decision of the Presiding Examiner should be affirmed with only the reservations noted herein.

## FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

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No. 890

In the Matter of Unapproved Section 15 Agreements—Spanish/Portuguese Trade

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No. 891

In the Matter of Rates, Charges and Practices of Carriers Engaged in the Trade Between United States and Spain/Portugal

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This proceeding was instituted by our predecessor, the Federal Maritime Board, upon its own motion. Investigation of the matters

involved having been completed by the entry, on the date hereof, of the Commission's report containing its findings and conclusions, which report is made a part hereof by reference:

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

By the Commission.

(Signed) THOMAS LISI
*Secretary.*

# FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 397

BARR SHIPPING CO., INC.

*v.*

ATLANTIC LINES, LTD.

Application under Rule 6(b) for permission to grant refund of portion of freight money. Denied.

*Stephen Doolos, Esq.*, for respondent Atlantic Lines, Ltd.

## INITIAL DECISION OF EDWARD C. JOHNSON, PRESIDING EXAMINER [1]

### PRELIMINARY

In this proceeding Atlantic Lines, Ltd. (Atlantic), styles itself as respondent and asks permission to pay $977.06 to Barr Shipping Co., Inc. (Barr), named herein as the complainant. In pertinent part Atlantic's application states:

### THE FACTS

"This application for an order authorizing the payment to the above named Complainant of 44 Beaver St., New York, N.Y., the sum of *nine hundred seventy-seven dollars and six cents* ($977.06), as reparation in connection with a shipment being specifically described as follows:

(1) Commodity, creosoted yellow pine, one shipment consisting of 23 bundles, measuring 807 cubic feet, weighing 80,962 pounds from New York to St. Thomas, Virgin Islands. Said shipment went forward on the M/V *Atlantic Pearl*, Voyage #10-South and is covered by Bill of Lading No. 27, New York/St. Thomas, dated July 27, 1964, a copy of which is enclosed.

The shipper as indicated on the bill of lading is Cross Austin & Ireland Lumber Co., with consignee shown as I.T.T. Caribbean Sales & Service, Virgin Islands Telephone Corp. at Charlotte Amalie, St.

[1] This decision became the decision of the Commission on August 6, 1965, and an order was issued denying the application.

Thomas, Virgin Islands. The freight figures for the subject shipment are as follows:

| | |
|---|---|
| 80962# @ 40.00/2000# | 1,619.24 |
| Tonnage due, 0.50/2240# | 18.07 |
| Landing charges, 0.216/100# | 174.88 |
| | 1,812.19 |

Payment in full has been received by this office from Messrs. Barr Shipping Co., Inc., their check number *01496*, dated *7-31-64*.

While under the provisions of Atlantic Lines, Ltd., Southbound Freight Tariff No. 3, F.M.C.—F. No. 3, the rate is correct, and Atlantic Lines, Ltd., is no way in violation of any of the provisions of the Shipping Act of 1916, as amended.

The shipper has based his freight calculations on the rate charged by the Alcoa Steamship Co., and has refused to reimburse Messrs. Barr Shipping Co., Inc., for any amount in excess of this figure.

On the basis of the Alcoa Steamship Co. tariff, the subject shipment would be freighted at follows:

| | |
|---|---|
| 17,989 B/F @ 31.50/1000 | 566.65 |
| Plus 20% since creasoted | 113.33 |
| Landing charges, 7.62/1000 | 137.09 |
| Tonnage dues | 18.07 |
| | 835.13 |

The difference between the above and the freight charged by Atlantic Lines, Ltd., is $977.06, and as we have been paid in full, Messrs. Barr Shipping Co., Inc., are now out of pocket in this amount.

Under these circumstances, Atlantic Lines, Ltd., shall with the authority and permission of the Commission agree to the refund in question.

## Comments and Conclusion

Beyond the scanty facts submitted in this complaint, it would appear that there is no basis for equitable relief or the granting of any refund, as requested. Admittedly, the southbound freight tariff provisions of Atlantic Lines, Ltd., covering this commodity provided for a total charge of $1,812.19 for the services performed and Barr Shipping Co., Inc. (Barr), freight forwarder and broker of New York City, has paid the full amount involved. The shipper, Cross Austin & Ireland Lumber Co. (Cross Austin) discovered, it would appear, altogether too late, and unfortunately for them, that Alcoa Steamship Co.'s (Alcoa) tariff was less and that Alcoa would have covered the shipment involved for the lesser amount of $835.13.

The shipper, Cross Austin, has refused to reimburse Barr Shipping Co., Inc., for any amount in excess of this lesser figure of $835.13 and respondent Atlantic Lines, Ltd., now seeks authority to refund to Barr Shipping Co., Inc., the difference of $977.06.

On this record there is no basis for a finding that the carrier, at any time, intended to apply other than the rate which was charged. There was no misquotation of any rate, no showing of any inadvertence, oversight, or inadequacy on the part of anyone involved in this proceeding. The rate charged was the rate on file by Atlantic Lines, Ltd., even though it was a rate in excess of that charged by a competing line (Alcoa). There is no showing that the rate charged was unreasonable and unjust. In consequence, the application for permission to make the refund is accordingly denied.

Section 2 of the Intercoastal Shipping Act, 1933, as amended, requires that any common carrier by water in domestic commerce charge and collect the legally applicable tariff rates on file with the Federal Maritime Commission and in effect at the time the services were performed. Respondent Atlantic Lines, Ltd., is therefore required to collect the applicable tariff charges or exhaust all available legal remedies in an attempt to do so.

(Signed) EDWARD C. JOHNSON,
*Presiding Examiner.*

# FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 396

SEA-LAND SERVICE, INC.—APPLICATION TO WAIVE UNDERCHARGES

Application under Rule 6(b), for permission to waive undercharges on shipments of general cargo in the domestic offshore trade between New York and Puerto Rico, granted.[1]

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

INITIAL DECISION OF BENJAMIN A. THEEMAN, HEARING EXAMINER [2]

This application seeks approval for the waiver of undercharges totaling $476.15 on 257 shipments tendered to Sea-Land Service, Inc. (Sea-Land), by shippers in the New York Metropolitan area during the period from December 1, 1964, through December 4, 1964.

Sea-Land maintains a "containerized" service between New York and Puerto Rico for the land-water transportation of general cargo. As part of the service, Sea-Land provides a pick up and delivery of cargo at inland points. The pick up and delivery is performed by motor carriers licensed by the Interstate Commerce Commission (ICC) to operate between the inland points and Sea-Land's New York terminal. The motor carriers charge Sea-Land in accordance with their ICC tariff. Sea-Land's rules, regulations and charges governing pick up and delivery are published in its Freight Tariff No. 7, FMC–F No. 3 [3] filed with the Federal Maritime Commission (Commission).

On October 16, 1964, Sea-Land issued and filed with the Commission 3d Revised Page No. 7, FMC–F No. 3, increasing, effective December 1, 1964, certain of its pick up and delivery rates in the New York Metropolitan area. This was done because the motor carriers were pro-

[1] Commissioner Patterson dissents because he holds that the conclusion of the majority supporting the Examiner's disposition of the issues is not in compliance with the law as he interprets it. The tariff filing rule in sec. 18(a) of the Shipping Act is just as stringent as the requirements of sec 18(b). The significant point is compliance with the law not whether it would be "equitable" which is the Examiner's unexplained reason for not enforcing the filed tariff.

[2] This decision became the decision of the Commission on August 12, 1965, and an order was issued granting the application.

[3] Sea-Land's rates for the water transportation are contained in its Outward Freight Tariff No. 2, FMC–F No. 3 (Pan-Atlantic SS Corp. FMC–F series) but are not pertinent to this proceeding.

posing to revise their tariffs to increase the level of charges by approximately 7 percent effective December 1, 1964. Sea-Land's revised rates were intended to compensate it for the increases it would be paying the motor carriers.

On or about November 24, 1964, Sea-Land learned that the motor carriers had deferred publication of their increased rates. Not desiring to put its increase into effect first, Sea-Land on November 24, 1964, petitioned and received special permission from the Commission to cancel Sea-Land's proposed increase set forth in 3d Revised Page No. 7. Accordingly, Sea-Land issued 4th Revised Page No. 7, canceling the proposed increases effective December 1, 1964.

Due to a clerical omission 4th Revised Page No. 7 was inadvertently not filed with the Commission and, therefore, never became effective. Sea-Land, however, under the impression that it was in effect, printed and distributed the page among the users of its tariff. Under these circumstances, the applicable rate effective December 1, 1964, was the increased rate shown on 3d Revised Page No. 7.

On the afternoon of December 3, 1964, Sea-Land became aware of its failure to file. Immediately, it petitioned the Commission for special permission to issue on not less than one day's notice another 4th Revised Page No. 7 canceling the increases. On December 4, 1964, the Commission again granted special permission. On the same day, Sea-Land issued a second 4th Revised No. 7 bearing an effective date of December 5, 1964. This revised page was duly filed with the Commission, thereby canceling the increase as of December 5, 1964, and restoring the rates that had previously been in effect for over two years.[4]

From December 1 through December 4, 1964, while the increased rate was applicable, Sea-Land picked up 257 separate shipments for movement through its transportation system. Sea-Land billed the shippers at the lower rate as shown on 4th Revised Page No. 7 but did not bill any of them at the increased rate and collected no part of the increase. The 257 shipments weighed a total of 399,887 pounds. The total amount billed was $2,208.55. The applicable rate charges totaled $2,684.70. The difference yields the undercharges of $476.15 for which approval to waive is requested.

Sea-Land states there are no shipments other than the 257 listed herein entitled to consideration by the Commission.[5]

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[4] See Original Revised Page No. 7, FMC–F No. 3, effective October 15, 1962, on file with the Commission.

[5] There are no other parties to this proceeding.

DISCUSSION

The application does not include shippers' certificates as set out in the form in Appendix II (5) of the Commission Rules.[6] In response to FMC's request that the application include such certificates, Sea-Land replied that it would not be possible to comply, would create too great a burden on all parties and that no "real purpose would be served by obtaining the requested certificates, since neither shipper nor consignee could certify that the charges had been borne and paid by them."

Sea-Land could comply with the Rules by obtaining and filing a modified certification as to each shipment conforming to the facts herein. However, the 257 undercharges range from $0.02 and $0.28 to $6.50; the average undercharge is $1.85; and about 155 of the 257 items do not exceed $1.50. Under these circumstances to require Sea-Land to obtain a modified certificate would cause Sea-Land undue hardship in that Sea-Land would be compelled to incur excessive cost in relation to the amount of the undercharge, undergo considerable inconvenience and expend a disproportionate amount of time. Such a requirement would not further the purpose of the special docket proceeding which "is designed to reduce, insofar as possible, the time and expense of the parties, the Commission and its staff." Special *Docket No. 268, South Atlantic & Caribbean Line, Inc.*, mimeo decision dated June 30, 1964. Accordingly, pursuant to Rule 1(i) the requirement of filling the shippers' certificates is hereby waived.

There is no question that the legal rates for the shipments in question during the period December 1 through December 4, 1964, were the increased rates stated in 3d Revised Page No. 7. Sea-Land, however, has charged the lower rate stated in the 4th Revised Page No. 7. The provisions of section 18(a) of the Shipping Act of 1916, as amended, and section 2 of the Intercoastal Shipping Act of 1933, make it unlawful to charge or demand or collect or receive a greater or less or different compensation for the rates, fares, and/or charges which are specified in the schedules filed with the Commission and in effect at the time of the shipment. The facts show that the failure to file the first 4th Revised Page No. 7 with the Commission was neither deliberate nor intentional and was due solely to the error of the carrier. Under the circumstances it would not be equitable that the burden of this failure should fall on the innocent shippers.

The shipments considered herein were transported in the domestic off shore trade. In such instances, the Commission has held that under

[6] This certificate reads as follows:
"I hereby certify that charges of $_______ on the shipments involved herein were paid and borne as such by __________________ Company, and by no other."

the authority granted by section 18(a) of the act and section 4 of the Intercoastal Act, the special docket technique long used by the Commission is applicable.[7]

It has been held that when rates are maintained for some time, increased for a short period, and then reduced to the former basis, a presumption arises that the advanced rate was unreasonable.[8] In this instance, the presumption is buttressed by the fact that the increase was put into effect to compensate for a cost that did not materialize, i.e., the proposed increase of the motor carriers.

The lower rate has been in effect since October 15, 1962, except for the four days in question. Examination of the Commission records show no evidence of any complaint about the reasonableness of the lower rate since its inception.[9] Under these circumstances, an active rate in existence for this length of time is presumptively reasonable.[10]

Under the special circumstances of this record, it appears clear that the lower rate was reasonable and the advanced rate was unreasonable and unjust to the extent of the increase.[11]

No discrimination will result as among shippers if the application is granted because there were no shipments made via Sea-Land during the period in question out of the New York Metropolitan area other than those which are the subject of this proceeding.

The application is accordingly granted.[12]

(Signed) BENJAMIN A. THEEMAN,
*Presiding Examiner.*

MARCH 18, 1965.

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[7] Note the language on pages 6 and 7 of the mimeographed decision of the Commission dated January 13, 1965 in Special Dockets Nos. 377 and 378, *Ludwig Muller Co., Inc.* v. *Peralta Shipping Corp., Agents, etc., Application of Lykes Bros. Steamship Co., Inc.*

[8] *Auburn Mills* v. *Chicago & A.R. Co.*, 221 I.C.C. 475, 507, citing *Ocheltree Grain Co.* v. *St. Louis & S.F.R. Co.*, 13 I.C.C. 46; *Millar* v. *N.Y. Central & H.R.R. Co.*, 19 I.C.C. 78; *Gannet Co., Inc.* v. *B. & O. RR. Co.*, 219 I.C.C. 617. See also *H. Kramer & Co.* v. *Inland Waterways Corp.*, 1 U.S.M.C 630, 632.

[9] See *Holly Sugar Corporation* v. *Alton Railroad Co. et al.*, 216 I.C.C. 85, where the ICC stated on page 90 that it "has recognized that in determining the reasonableness of rates in the past, consideration should be given to the fact that during the time they were in effect no complaint thereof was made."

[10] *In the Matter of Sugar from Virgin Islands to the United States*, 1 U S.M.C. 695, 697; *Gulf Westbound Intercoastal Soya Bean Oil Meal Rates*, 1 U.S.S.B.B. 554, 560; *S. H. Kress & Co.* v. *Baltimore Mail Steamship, etc.*, 2 U.S.M.C. 450, 451, 452. Also, *Crude Petroleum from Mississippi to Illinois, etc.*, 255 I.C.C. 763, 765.

[11] See *Oxenberg Bros. Inc.* v. *United States*, 3 FMB 583, cited on page 7 *of Special Dockets Nos. 377 and 378*, supra; also *H. Kramer & Co.* v. *Inland Waterways Corp.*, supra at page 632.

[12] Under circumstances closely similar to those contained in this record, the Commission granted the waiver requested on the basis that the nonfiling of the page of the tariff was an unfair practice. See *Y. Higa Enterprises, Ltd.* v. *Pacific Far East Lines, Inc.*, 7 FMC 62, 64, decided January 18, 1962.

# FEDERAL MARITIME COMMISSION

No. 1082

THATCHER GLASS MANUFACTURING CO., INC.

*v.*

SEA-LAND SERVICE, INC., PUERTO RICAN DIVISION

*Decided August 13, 1965*

Minimum rate of $500 per trailerload for transportation of glass bottles from Jacksonville to Puerto Rico with transshipment at Port Newark found (1) not to be unjust and unreasonable; and (2) not to favor Port Newark shippers to the undue or unreasonable prejudice or disadvantage of Jacksonville shippers.

*Raymond W. Mitchell* and *Charles S. Doskow* for complainant.
*C. H. Wheeler* for respondent.

## REPORT

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

This proceeding was initiated by the complaint of Thatcher Glass Manufacturing Co., Inc. (Thatcher), against Sea-Land, Inc., Puerto Rican Division (Sea-Land), alleging that Sea-Land's minimum charge of $500 per container on shipments moving between Jacksonville, Fla., and Mayaguez, Puerto Rico, are unduly and unreasonably prejudicial, unjustly discriminatory, and unjust and unreasonable in violation of sections 16 and 18 of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933. Thatcher seeks reparations in the sum of $2,036.19.

Examiner Benjamin A. Theeman in his Initial Decision concluded that Thatcher had failed to establish any of the alleged violations and recommended dismissal of the complaint. Exceptions and replies have been filed. No oral argument was requested and none was held. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified by the facts, or not related to material issues in this proceeding.

## FACTS

Thatcher is a domestic manufacturer of glass bottles and containers and maintains plants at Elmira, New York, Streator, Illinois, Lawrenceburg, Kansas, Saugus, California, and Tampa, Florida.

Respondent, Sea-Land, is a common carrier by water operating in the offshore domestic trade and the coastwise trade. The offshore domestic trade is conducted by the Puerto Rican Division of Sea-Land, and the coastwise trade is conducted by Sea-Land's Coastwise Division. Under Sea-Land's general management each division is set up as a separate operating division, each has its own vessels, personnel, terminal facilities, etc., and each division maintains separate books and accounts and files separate tariffs. For the period in question, the Coastwise Division provided a weekly service between ports of the Gulf and Atlantic Coasts including Jacksonville and Port Newark. The Puerto Rican Division offered a direct service between Baltimore and Port Newark on the U.S. Atlantic Coast and San Juan, Ponce, and Mayaguez, Puerto Rico.

In addition the Puerto Rican Division offered an indirect service from Jacksonville to Puerto Rico by loading the cargo aboard a Coastwise Division vessel at Jacksonville, carrying it to Port Newark, and there placing it aboard a Puerto Rican Division vessel for shipment to Puerto Rico.[1] The total distance of the indirect route is about 2,400 miles, and the distance from New York to Puerto Rico is about 1,500 miles. A carrier operating directly between Jacksonville and Puerto Rico would travel a distance of approximately 1,300 miles. Although Sea-Land's applicable tariff did not mention transshipment at Port Newark, the record is clear that Thatcher was aware that Sea-Land maintained no direct service from Jacksonville to Puerto Rico.

On September 29, 1962, Thatcher shipped via Sea-Land from Jacksonville to Mayaguez five trailer loads of glass bottles manufactured at its Tampa factory; four of these weighed 24,006 pounds each, the fifth weighed 24,229 pounds. In October Thatcher shipped four trailer loads each weighing 23,500 pounds. All of the trailer loads in question measured in excess of 1,400 cubic feet.

At the time the shipments in question were made, Sea-Land's applicable tariff was Outward Freight Tariff No. 2 on file with the Commission as FMC–F No. 3. The applicable rate on glass bottles from all ports of call to Puerto Rico was 115 cents per 100 pounds except that from Jacksonville, the tariff provided that "* * * trailer

[1] In April 1963, Sea-Land commenced a direct service between Jacksonville and Puerto Rico. In August 1963, direct service ceased, and indirect service was reestablished.

load shipments will be accepted, subject to the following minimum charges per trailers. * * *

Dry cargo or open top trailer. (For the purpose of this rule, a trailerload shipment of dry cargo is defined as one that weighs 24,000 lbs. or more or measures 1,400 cubic feet or more.) $500.00 per trailer."

Accordingly, Thatcher paid freight at the rate of $500 for each trailer load, a total of $4,500. The same cargo computed at the rate of 115 cents per 100 pounds totals $2,463.81. The difference between the two totals, or $2,036.19, is the amount claimed by Thatcher as reparation.[2]

In his initial decision the Examiner found that the $500 per trailerload minimum rate from Jacksonville to Puerto Rico had not been shown (1) to be unjust or unreasonable or (2) to illegally favor Port Newark shippers to the undue or unreasonable prejudice or disadvantage of Jacksonville shippers. We agree with the Examiner.

## DISCUSSION AND CONCLUSIONS

The gravamen of Thatcher's complaint is that Sea-Land's rate out of Jacksonville is too high, yet it has presented no evidence to demonstrate the unjustness or unreasonableness of this $500 minimum charge. To the contrary, Sea-Land has shown that the rate is insufficient to cover the cost of transporting the bottles from Jacksonville to Puerto Rico.

We are of the opinion, therefore, that the Examiner properly concluded that on the record the $500 minimum rate from Jacksonville to Puerto Rico had not been shown to be unjust or unreasonable within the meaning of section 18 of the Shipping Act, 1916, and of sections 3 and 4 of the Intercoastal Shipping Act, 1933.

Thatcher also contends that the difference between the rate from Jacksonville as compared to the rate for the carriage of like articles from other ports results in undue preference, prejudice or discrimina-

[2] For the purpose of this proceeding and ease of calculation, the parties used a standard trailer load of glass bottles having a cubic content of 1,800 cu. ft. and a weight of 24,000 lbs. On this basis the following schedule shows the approximate rate per cubic foot and per hundred pounds for a trailer load shipment by Sea-Land from Jacksonville and from Port Newark.

| | *Rate (Cents/Cu. Ft.)* | *Rate (Cents/CWT)* | *Rate Per TL (Dollars)* |
|---|---|---|---|
| Jacksonville/Puerto Rico (via Port Newark) | 27.8 | 208.0 | 500.00 |
| Port Newark/Puerto Rico | 15.3 | 115.0 | 276.00 |

The record shows that for bookkeeping purposes, Sea-Land allocated the revenue received in the Puerto Rican trade on the basis of 40 percent to Coastwide Division and 60 percent to Puerto Rican Division. The distribution was based on the distance in the leg covered by each division in the Puerto Rican trade. There has been no showing that this allocation reflected either rates or costs.

tion in violation of section 16 First of the Shipping Act, 1916, as alleged. This contention is grounded on the allegation that Sea-Land had failed to justify its indirect service from Jacksonville to Puerto Rico. Thatcher argues that this results in the application of a higher charge from a port closer to the destination of the goods than from a more distant port which in turn subjects Thatcher to the payment of rates which are unduly discriminatory.

We agree with the Examiner who correctly concluded that Sea-Land legally initiated and maintained its indirect service and that the Commission does not have the power to compel a direct service.[3]

Therefore, absent a direct service from Jacksonville, the fact of transshipment plus its attendent costs does warrant the existence of a higher level of charges from Jacksonville than from Port Newark.

Thatcher asserts it received no benefits from the 900-mile backhaul from Jacksonville to Port Newark, but that the additional transit time and extra handling at Port Newark is detrimental to its operations. Yet Thatcher has produced no evidence to substantiate its position that the backhaul has caused it any loss or delay in connection with any of its shipments. In fact, although there were alternate carriers available to it, which offered direct service from Florida to Puerto Rico, Thatcher continued to transport its cargo via Sea-Land's vessels.[4] Thatcher testified, in effect, that it used Sea-Land because (1) the type and quality of Sea-Land's service was of major importance to Thatcher's Puerto Rico business and (2) Sea-Land's rate was lower than TMT's or SACL's.

On the basis of this testimony, it is clear to us, as it was to the Examiner, that in evaluating the services available to it, Thatcher did not allow the transshipment factor appendant to Sea-Land's indirect service to deter it from making use of that service.

Section 16 first makes it unlawful for any common carrier by water to make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever. By its express terms, this section provides that only those preferences or advantages which are undue or unreasonable are

[3] See *Harbor Commission, City of San Diego, California* v. *Matson Navigation Company*, 7 FMC 394, 400 (1962).

[4] During September and October 1962, TMT Trailer Ferry, Inc. (TMT) maintained a direct containerized service from Jacksonville and Miami, Fla., to San Juan, Puerto Rico. South Atlantic & Caribbean Line, Inc. (SACL) maintained a direct but noncontainerized service from Savannah, Ga., and Miami, Fla., to San Juan, Puerto Rico. The rate for a comparative trailer load on TMT to San Juan was 32¢/cu. ft. or $576/TL. On SACL it was 28¢/cu. ft. or $504/TL.

In December 1962, two additional lines, Waterman of Puerto Rico and Indian River Towing Co., commenced direct service to Puerto Rico at a rate for a comparative trailer load of 31¢/cu. ft. or $558 a trailer load. One was the Indian River's service out of Tampa ; Waterman's was from Mobile, Ala.

deemed to be unlawful. A discrimination in rates, resulting from a substantial difference in the cost of operation, in the services performed, or in the transportation conditions, may not be unreasonable.[5] Indeed, in *Philadelphia Ocean Traffic Bureau* v. *Export SS Corporation*, 1 USSBB 538, 541 (1936), the Shipping Board stated:

> The uniformity of treatment contemplated by the Shipping Act is a relative equality based upon transportation conditions only. To justify an order compelling the equality of rates, the complainant must show a substantial similarity of conditions surrounding the transportation under the rates sought to be equalized.

As the Examiner found, Thatcher has failed to show a similarity of transportation conditions in the two trades. Absent such a showing of similarity, there is no sound basis for a comparison of the charge from Port Newark to Puerto Rico with the charge from Jacksonville. Thatcher again disregards the fact that Sea-Land's indirect service is legally maintained and that absent a direct-service traffic moving out of Jacksonville must be backhauled some 900 miles to Port Newark. In this connection, Sea-Land has shown that substantial differences in circumstances and costs are incurred incidental to its common carriage of goods between Jacksonville and Puerto Rico as opposed to the transportation of goods between Port Newark and Puerto Rico.

The record shows that the additional services performed by Sea-Land due to its indirect service consist of making the booking arrangements at Jacksonville, dispatching a container to pick up the freight, stevedoring the container aboard a coastwise vessel, transporting the cargo to Port Newark, and tendering it to a Puerto Rican Division vessel for carriage to Puerto Rico.

Sea-Land testified that due to the difference in operation it incurred an increased cost of $.097 per cubic foot to transport cargo to Puerto Rico via Port Newark and that it was because of the additional expense involved in the indirect movement that it established the $500 minimum rate.[6] Thatcher objects to the adoption of Sea-Land's cost

[5] *U.S.* v. *Illinois Cent. R.R.*, 263 U.S. 515, 524 (1924).

[6] Evidence was introduced at the hearing by Sea-Land showing the cost incurred by it in transporting a cubic foot (cu. ft.) of cargo from Jacksonville to Puerto Rico indirectly (via Port Newark), and from Port Newark to Puerto Rico directly during 1962. This cost may be summarized as follows:

| Ports | Cost (cents) |
|---|---|
| (1) Jacksonville/Port Newark | 0.190 |
| Port Newark/Puerto Rico | .379 |
| Total | .569 |
| (2) Port Newark/Puerto Rico | .472 |

The difference between the cost figures for the direct cargo from Port Newark and the transshipped cargo results from the inclusion in the former of a factor for terminal handling of local cargo in Port Newark that does not occur in connection with the transshipped cargo.

figures by the Examiner on the ground that Sea-Land is building unjustifiable elements into its cost by utilizing two divisions and an artificial allocation of costs. These contentions, however, appear to be no more than conjecture, since nowhere in the record has Thatcher presented any concrete evidence in support of their allegations. In our view, the manner in which Sea-Land divides its revenues and costs between its two divisions has no relevancy to this case because the sole issue in this proceeding is the justness and reasonableness of the total charge applied by it from Jacksonville to Puerto Rico.

Thatcher also offered considerable evidence to attempt to show that it was unable to quote prices competitively from its Tampa plant because of the existence of Sea-Land's $500 minimum rate and that consequently it suffered a lessening of business. The Examiner properly concluded that the evidence in the record did not support this contention.

Thatcher started its Tampa plant in 1960 the year that Sea-Land commenced its indirect service to Puerto Rico. Thatcher submitted a schedule showing shipments of bottles to Puerto Rico from its Tampa factory via Jacksonville for the period 1960 through April 1963.[7] Thatcher points to the fact that for the first 4 months of 1963 it did less business with Puerto Rico than it did in the first 4 months of 1962, and it attributes this decline to Sea-Land's minimum rate. Even a cursory examination of the schedule submitted demonstrates that Thatcher is not seeing the forest for the trees, for this schedule also shows that during the years 1960 through 1962 inclusive Thatcher tripled its tonnage while increasing the dollar value of its exports from its Tampa plant from $116,000 to $328,000. During this period, Sea-Land's 115 cents per 100 lb. rate from Port Newark was in effect, Sea-Land's $500 minimum rate from Jacksonville, and the higher rates of SACL and TMT were all in effect. Utilizing Thatcher's own figures, we can only conclude that Sea-Land's minimum $500 rate in no way stifled or lessened Thatcher's business. As the Examiner stated:

> It appears odd that after operating for 3 years with the $500 rate and effecting a rather marked increase in business during that period that Thatcher should now claim that the $500 rate has been unduly prejudicial and operated to its disadvantage.[8]

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[7] This schedule read as follows:

Shipments to Puerto Rico from Tampa Plant—by Year

| *Year* | *Dollars* | *Tonnage* |
|---|---|---|
| 1960 | 116, 000 | 1, 004 |
| 1961 | 146, 000 | 1, 318 |
| 1962 | 328, 000 | 3, 243 |
| 1963 (4 mos.) | 72, 000 | 623 |

[8] It is well established that the value of a service to the shipper in a general sense is the ability to reach a market at a profit. See *Gulf Westbound Intercoastal Soya Oil Meal Rates*, 1 USSBB 554, 560 (1936); *Eastbound Intercoastal Lumber*, 1 USMC 608, 620 (1936).

On the basis of the foregoing, we are of the opinion that the existence of Sea-Land's minimum charge of $500 per container load shipment cannot and does not subject shippers to undue prejudice or discrimination in violation of the Shipping Act, 1916.

An order dismissing the complaint will be entered.

By the Commission.

# FEDERAL MARITIME COMMISSION

No. 1082

THATCHER GLASS MANUFACTURING CO., INC.

*v.*

SEA-LAND SERVICE, INC., PUERTO RICAN DIVISION

## ORDER

This proceeding being at issue upon complaint, having been duly heard, and full investigation having been had, and the Commission on this day having made and entered a report stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof:

*It is ordered*, That the complaint in this proceeding is dismissed.

By the Commission.

(Signed) THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

No. 1084

INVESTIGATION OF WHARFAGE CHARGES ON BULK GRAIN AT PACIFIC COAST PORTS

*Decided August 18, 1965*

Assessment of wharfage charges on grain moving through marine terminal elevators on the Pacific coast pursuant to the Department of Agriculture's Uniform Grain Storage Agreement found not to constitute an unjust or unreasonable practice under section 17 of the Shipping Act, 1916.

*Joseph E. Quin* and *Charles W. Buck* for Secretary of Agriculture and Commodity Credit Corporation, Intervener.

*H. Stanton Orser* for Stockton Elevators, Port of Stockton Grain Terminal, Inc., Port of San Francisco Grain Terminal, Inc., Koppel Bulk Terminal, PVO Long Beach Elevators, Los Angeles Harbor Grain Terminal, West Coast Checkerboard Elevator Co., and California Association of Terminal Elevators; *Clarence Morse* for Sacramento Yolo Port District; *J. Richard Townsend* for Stockton Port District; *Arthur W. Nordstrom* and *Walter C. Foster* for Port of Los Angeles; *Miriam E. Wolff* for San Francisco Port Authority; *Thomas J. White* for Archer-Daniels-Midland Co., Kerr Grain Corp., Continental Grain Co., F. H. Peavey & Co., North Pacific Grain Growers, Inc., Cargill, Inc., Lewis Dreyfus Corp. and Harbor Island Dock Co.; *Leslie E. Still* for Port of Long Beach; *J. Kerwin Rooney* for Port of Oakland; *Aaron H. Glickman* for California Association of Port Authorities, and *William R. Daly* for San Diego Unified Port District; respondents and interveners.

*Norman D. Kline* and *Frank Gormley*, Hearing Counsel.

## REPORT

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

This case comes before us on exceptions by the Department of Agri-

culture to an Initial Decision of the Chief Examiner. Agriculture excepts generally to the entire Initial Decision as well as specifically to certain alleged errors of the Examiner.

The exceptions fall into three general categories:

a. Those making arguments raised before and correctly disposed of by the Examiner.

b. Those pointing out alleged factual errors in the Initial Decision.

c. Those alleging that portions of the Initial Decision are unclear.

The vast majority of Agriculture's exceptions was considered by the Examiner and in our opinion correctly disposed of in the Initial Decision.

We therefore adopt the Examiner's Initial Decision as our own with modifications which have been made to correct factual errors pointed out by Agriculture or for the purposes of clarification. Footnotes have been inserted indicating places where changes have been made and places where suggested changes have been rejected:

By order dated December 19, 1962, the Commission instituted an investigation to determine whether the practice of assessing wharfage charges on grain moving through marine terminal elevators on the Pacific coast of the United States pursuant to the Department of Agriculture's Uniform Grain Storage Agreement (UGSA) constitutes an unjust and unreasonable practice within the meaning of section 17 of the Shipping Act, 1916. The marine terminal elevators listed below were named respondents.[1]

The order recited that both the General Accounting Office and the Commodity Credit Corporation (CCC) had questioned the propriety of such wharfage charges which are assessed on CCC-owned grain at Pacific coast elevators only.

The Department of Agriculture and CCC, an agency thereof, intervened. They are hereinafter referred to as "Agriculture." Also intervening were Sacramento-Yolo Port District, San Diego Unified Port District, the California Association of Port Authorities, and the California Association of Terminal Elevators. The latter interveners sup-

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[1](a) Port of Stockton, Calif.; San Francisco Port Authority, San Francisco, Calif.; Port of Long Beach, Long Beach, Calif.; Port of Los Angeles, Los Angeles, Calif.; Port of Oakland, Oakland, Calif.

(b) Stockton Elevators, Stockton, Calif.; Port of Stockton Grain Terminal, Inc., Stockton, Calif.; Port of San Francisco Grain Terminal, Inc., San Francisco, Calif.; Koppel Bulk Terminal, Long Beach, Calif.; Pacific Vegetable Oil Corp., Long Beach Elevators, Stockton, Calif.; Los Angeles Harbor Grain Terminal, Wilmington, Calif.; West Coast Checkerboard Elevator Co., Oakland, Calif.; Cargill, Inc., Portland, Oreg.; Continental Grain Co., Portland, Oreg.; Lewis Dreyfus Corp., Portland, Oreg.; Kerr Grain Corp., Portland, Oreg.; F. H. Peavey & Co., Portland, Oreg.; Archer-Daniels-Midland Co., Portland, Oreg.; Harbor Island Dock & Warehouse Co., Seattle, Wash.; North Pacific Grain Growers, Inc., Portland, Oreg.

port respondents' position and hereinafter will be included in the term "respondents".

The UGSA is entered into by CCC and various warehouses about the Nation covering the receiving, storing, and loading out of CCC or other Government-owned grain. Respondents who are signatories to UGSA have been asked by Agriculture to execute a "Port Supplement" to UGSA, the effect of which is to delete the requirement that CCC pay wharfage. Only one of the respondents, the Lewis Dreyfus Corp. (Portland, Oreg.), signed the supplement.[2]

The publicly owned port terminals lease their grain elevators to independent contractors, who conduct the public port terminal operations. The public port terminals are not signatories to UGSA, but collect wharfage on bulk grain (including CCC grain) and other commodities.

The other respondents are signatories to UGSA. These include the lessee operators at public terminals in California, which do not receive wharfage, and the privately owned or the leased terminals in the Pacific Northwest, which do assess and collect wharfage on CCC and other bulk grain, with the exception of the Dreyfus Corp.

*Contentions of parties*

Agriculture contends that the practice in question is unjust and unreasonable because (1) no service, either direct or indirect, is offered by respondents in return for wharfage; (2) that the UGSA rate for receiving, storing, and loading out fully compensates respondents; (3) that there is no economic justification for wharfage under the UGSA; (4) that operations of marine terminal elevators should be looked at *en toto* and Pacific coast elevators should be treated in the same manner as other elevator operators; and (5) that the operation of a marine terminal elevator is a nonwharfinger activity under the so-called Freas formula (approved by the Commission in docket 640 *infra*), and therefore assessment of a wharfage charge is improper.

Agriculture states that it does not object to wharfage on sacked grain, that it is not seeking any exemption from the payment of wharfage on bulk grain on the ground that as a Government agency its situation would be different from that of other shippers, and that wharfage is not a proper charge even against commercial bulk grain.

The position of respondents, which is concurred in by Hearing Counsel, is the exact opposite of Agriculture's. Additionally, they contend that historically, wharfage has been recognized as a valid charge for the *use* of the facilities; and that since wharfage is a user charge, no physical service is involved.

The level of the wharfage charges is not an issue.

[2] This paragraph and the two following it have been reworded to correct the errors noted in Agriculture's first exception.

*Jurisdiction of Commission* [3]

In certain cases the Commission has considered the status of grain elevators which not only provide storage for grain but also have facilities used to load grain into common carrier vessels. It has held consistently that while the storage operation was not subject to its jurisdiction, the operation of loading ships was a terminal activity over which it did have jurisdiction. *D. J. Roach* v. *Albany Port District*, 5 F.M.B. 333 (1957); *Agreements 8225 and 8225-1*, 5 F.M.B. 648 (1959); *California Stevedore & Ballast Co.* v. *Stockton Port District*, 7 F.M.C. 75 (1962).

*Wharfage generally*

The Commission in *Terminal Rate Increases—Puget Sound Ports*, 3 U.S.M.C. 21, 24 (1948), approved the following definition of wharfage contained in the tariff of the Port of Seattle:

> Wharfage is the charge that is assessed on all freight passing or conveyed over, onto, or under wharves or between vessels or overside vessels when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is the charge for use of wharf and does not include charges for any other service. (Physical services are also defined and charges are provided therefor.)

In all essential respects this is the meaning of wharfage as defined in the tariffs of all respondents herein, also as used in the Freas formula. Wharfage is assessed against bulk grain as on other commodities.[4]

In *Interchange of Freight at Boston*, 2 U.S.M.C. 671 (1942), the Commission held that the practice of charging wharfage for use of wharf facilities by cargo passing on, over, or through the facilities was a lawful practice, and that the wharf operator had a clear right to compensation for the use of its facilities.

In *Evans Cooperage Co. Inc.* v. *Board of Commissioners of the Port of New Orleans*, 6 F.M.B. 415 (1961) the cargo was transferred to ship from a barge alongside the ship which was moored to the wharf, and the cargo did not move across the wharf. The Commission, nevertheless, held that the wharfage charge was properly assessed; and that whether the wharf space alongside the ship being served is utilized by others or not does not alter the obligation of maintaining the facility and of assessing users of the facility reasonable charges which will provide continued existence of the facility.

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[3] As used here "Commission" includes its predecessor agencies.

[4] Agriculture asserts that the Examiner's reliance on the definition of wharfage contained in the tariff of the Port of Seattle was faulty as not being typical of respondents' tariffs. Our review of the evidence leads us to affirm that the Examiner was correct in stating that essentially Seattle's tariff was typical. The wharfage provisions in all the tariffs are alike in that they clearly show that wharfage is intended to be a "use" rather than a "service" charge.

The courts recognized early the right of riparian owners to levy a reasonable wharfage charge as compensation for the use of their facilities. *Ensminger* v. *People*, 95 Am. Dec. 495 (Illinois 1868); *Ouachita Packet Co.* v. *Aiken*, 121 U.S. 444 (1887).

Wharfage had its inception on the Pacific coast more than 100 years ago. Tariffs of terminals in both California and the Pacific Northwest issued prior to 1920 show that wharfage was assessed at that time. It has been assessed on both general cargo and bulk cargo; and on bulk grain moving pursuant to the UGSA since that agreement was established. Charges range from 36 cents per net ton in the Northwest to 45 and 50 cents in California.

(1) *It is found and concluded* that (a) wharfage by definition is a charge against cargo for the use of terminal facilities, not for physical services rendered to the cargo; (b) that the owners of marine terminal facilities are entitled as a matter of law to compensation for the use of their facilities; (c) that use of facilities is made by the cargo even though it does not touch the wharf; (d) that wharfage is justified on the Pacific coast from a historical standpoint; and (e) that wharfage on bulk grain has been assessed at marine terminal elevators on the Pacific coast since the inception of such movement.

*Applicability of the Freas formula*

The pattern of port terminal charge at California ports was established in Commission dockets 555 [5] and 640.[6] This pattern was extended to ports in the Pacific Northwest in docket 744,[7] wherein the Commission approved the application of the Freas formula to terminals at those ports.

In docket 555 the Commission recognized the principle of allocation of expenses and charges to the various uses and services, and the identification and separation of charges as between ship and cargo, based on the so-called Edwards-Differding formula. It found also that the failure of a port terminal to charge compensatory rates for a particular service casts an unfair burden on users of other service in violation of sections 16 and 17 of the 1916 act.

In docket 640 the Commission approved the Freas formula,[8] which was a refinement and simplification of the Edwards-Differding formula, "as a proper method of segregating terminal costs and carrying charges, and of apportioning such costs and charges to the various wharfinger services." The Commission also found that publicly owned

[5] *Practices, Etc., of San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941).

[6] *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57 (1948).

[7] *Terminal Rate Structure—Pacific Northwest Ports*, 5 F.M.B. 53 (1956).

[8] Howard G. Freas, then rate expert of the California Public Utilities Commission, was employed by the U.S. Maritime Commission to make this study.

terminals, as well as privately owned terminals, were entitled to a fair return on investment in wharfinger facilities.

Freas' study, which embraced the operations of 10 California port terminals for the fiscal year 1939–40, covered the primary function of interchanging cargo from inland carriers to oceangoing vessels; i.e., receiving, holding, and delivery of cargo, which activities he classified as wharfinger operations. Activities not closely related thereto were classified as nonwharfinger operations.

Freas prepared a series of schedules designed to allocate the costs of providing marine terminal facilities. Included in the schedules was a column allocating costs for "special facilities." In such column he placed oil terminals, which consist of a wharf for tying up vessels, for the support of pipelines, and for personnel engaged in tying up vessels and making line connections. In applying the formula to oil terminal wharves, Freas determined that the pipeline going over or under the wharf, and the structures and land which support it should be classified as a part of the wharfinger facility.

Respondents contend that if marine terminal elevators handling bulk grain had been in existence in California in 1940, which they deny, Freas would have included them in "special facilities," as he did oil wharves, and therefore would have classified them as wharfinger facilities.

Agriculture contends that grain terminals did exist at Stockton and San Francisco in 1940, and that Freas excluded them as nonwharfinger facilities, therefore the formula does not apply here. Its contention is based upon the opinion to that effect given by R. V. Cearfoss, a traffic manager for Agriculture, whose knowledge of the Freas formula was obtained from reading the formula and report thereon, and the testimony and decisions thereon.

Respondents' contention that the Freas formula does apply is based upon the testimony of Philip E. Linnekin, a certified public accountant who worked with Freas in developing the formula; who visited the terminals involved and gathered the basic data used in the study; and who has appeared as an expert witness on the application of the Freas formula in several Commission proceedings.

Linnekin and another qualified witness testified that in 1940 all of the grain moving over California terminals was in sacks; that the so-called grain terminals at Stockton and San Francisco were warehouses for sacked grain, located away from the dock; that the movement of sacked grain from warehouse to ship involved the use of wharfinger facilities; that wharfage was charged on such grain; and that bulk grain did not commence to move over marine terminal elevators in California until after World War II. The wharfage charge was con-

tinued on bulk grain—by both port authorities and marine terminal elevators on the Pacific coast.

Linnekin also testified that if there had been bulk grain terminals in California at the time of the Freas study (1940), they would have been included in Wharfinger operations as "special facilities", as were bulk oil and lumber terminals, and the costs of such operations would have been separately determined. After including lumber and oil terminals as special facilities, the formula states: "A like course should be followed in connection with the handling of any other commodity that moves in large quantities under circumstances which are unique," citing as an example a wharf devoted exclusively to the handling of sugar.

Linnekin testified further that under the Freas formula a portion of all costs pertaining to facilities which are required by and used by the cargo in connection with interchange between inland carriers and oceangoing vessels is properly allocated to wharfage; that such principle is applicable to bulk grain, as well as to other cargo; that wharfage is assessed and has been assessed for many years on all cargo for the use of terminal facilities; and that it is a clearly justifiable charge against bulk grain under the Freas formula.

The following facilities at port terminal elevators should be allocated to wharfage under the principles of the Freas formula, according to Linnekin: Land, railroad trackage, foundation, headhouse, dock or wharf, ship gallery, cleaning and conditioning equipment, scales, elevator legs, conveyors, truck dumper, railroad car tipple, barge unloader and barge dock, inspection station, locomotives or truckmobiles, dust collection system, and improved roads.

The formula provides separate charges for labor and services in connection with handling the cargo. Linnekin states, therefore, that when the formula is properly applied, it is not possible to duplicate costs in more than one tariff charge.

(2) Upon basis of the foregoing testimony *it is found and concluded* that the marine terminal elevators involved here are engaged in wharfinger operations, and that under the principles of the Freas formula, the assessment of wharfage on bulk grain at such facilities is justified.

*Economic justification of wharfage on bulk grain*

Respondents presented testimony to show that the assessment of wharfage is economically justified as a means of recovering compensation for the use of their facilities which pertain to the terminal aspects of their operations, i.e., those facilities which they are required to provide for the rapid and efficient interchange of bulk grain from inland carriers to oceangoing vessels.

Linnekin compared the facilities of a group of 11 port terminal elevators with a group of 5 country, i.e., inland elevators, using examples in each category which he considered typical on the Pacific coast. The country elevator was used because he considered that it represents the extent of the facilities of grain elevators which are used for purely storage purposes. This purpose was to contrast what he regarded as the relatively simple operation of a country elevator with the complex operation of a marine terminal elevator.[9] He testified that the facilities required by the marine terminal elevator were those described above; and that they were necessary to the interchange of cargo between inland carriers and oceangoing vessels. Similar evidence was presented by Harry N. Starr, a civil engineer experienced in the construction of grain terminals, and Pacific coast superintendent of respondent Cargill, in charge of three marine terminal elevators and eight country elevators. Starr showed the difference between a marine terminal elevator and a country elevator, stating that the country elevator was located away from a seaport. Its operations are relatively simple. It has two main purposes, receiving or collecting grain from its local producing area and forwarding the grain domestically or to the marine terminal elevator. Linnekin's comparison shows, among other wide differences, that the average marine terminal elevator, compared with the average country elevator, can receive twice as much grain per hour by truck, can handle almost five times as many rail cars per day, requires twice as much land, and has an investment per bushel of more than three times that of the country elevator, i.e., $1.19 per bushel as against $0.36 per bushel. Agriculture computes an average capital investment of $0.46 per bushel for 36 country and inland elevators in California, Oregon, and Washington.

Respondents emphasize that despite these significant differences, marine terminal elevators receive the same compensation as country elevators on CCC-owned grain.

Agriculture points out a wide variance between the average capital investment in country elevators shown by Linnekin and Starr. This is not significant when it is considered that Linnekin used original cost without deducting depreciation, while Starr used replacement cost; and Linnekin showed the investment in the complete marine terminal elevator, including the storage facility, while Starr considered only those items of cost at the marine terminal elevator that are allocated to wharfage, excluding the storage facility.

Agriculture contends that investment per bushel should be com-

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[9] He pointed out that at country elevators there are no wharves, the structures are less costly, there is far less machinery, and the area and value of land is greater—than at marine terminal elevators.

puted upon basis of the volume handled rather than on capacity of the elevator. While the rate of turnover might be a consideration in determining the level of the rate, which is not involved here, it would have no bearing on the question of whether wharfage is properly assessed because the investment must be made to provide adequate facilities and it must be recovered, regardless of whether there is a turnover of once or many times a year.

In an effort to show that the country elevators used by Linnekin and Starr were not typical, Agriculture presented testimony to the effect that inland elevators elsewhere in the country and on the Pacific coast have equipment similar to and sometimes more elaborate than those of marine terminal elevators.[10] Since the area of this investigation is limited to the Pacific coast, the testimony as to elevators in the Midwest and elsewhere is not germane.

Agriculture's tenth exception involves the semantics of this grain elevator classification. As Agriculture admits the validity of the classification was not at issue, the exception is rejected.

While it is true that all of the inland terminals cited by Agriculture combined might have the same equipment and do generally the same things that a marine terminal elevator can do, they cannot do all of the things the latter can do, for instance loading oceangoing ships.

(3) From the foregoing *it is found and concluded* that marine terminal elevators have an investment in facilities which pertain to the terminal aspects of their operations, and that there is an economic justification for their assessment of wharfage in order to recoup the investment in such facilities.

*Coverage and adequacy of UGSA payment*

Agriculture contends that even if wharfage is proper, it is compensated for by the UGSA rate for receiving, storing, and loading out of grains. Its position is that such rate compensates the marine terminal operator for all services rendered from the time grain is received until it leaves the spout over the ship, and to be compelled also to pay wharfage constitutes a double payment.

The public port terminals who are not parties to the UGSA point out that even if the UGSA rates are fully compensatory to the ter-

[10] Agriculture divides grain elevators or warehouses into (1) terminal elevators or warehouses and (2) country elevators or warehouses, on the basis of whether official weights and grades can be secured at the warehouse. These are furnished by the former but not the latter. The terminal elevators are divided into marine or port terminal elevators and inland terminal elevators, the latter being known generally as subterminal elevators. It is not apparent that this classification for the purposes of the UGSA is any more valid than that used by respondents.

minal elevators with whom Agriculture has a UGSA contract, such rates provide no compensation at all to them as nonsignatories to such contract. They contend therefore that the UGSA can have no legal effect upon their right to collect any and all lawful charges.

Agriculture relies upon a cost study to prove that the UGSA rates compensate for wharfage. This cost study made in 1959, was adjusted to cover eight of the marine terminal elevators on the Pacific coast, and elevators in seven Western States. After adjustments were made in items of depreciation, interest on investment and working capital, the storage and handling costs were found to be 12.26 cents per bushel at the eight port terminals; and 12.9 cents at the country elevators and 12.29 cents at the port terminals in the seven Western States. Agriculture emphasizes that all of these costs are substantially less than the 16 cents paid for storage and handling under the UGSA. From this fact Agriculture concludes that such charge provides compensation for all cost items which relate to the operations of grain elevators, including wharfage.

Respondents criticize this cost study on the following grounds. It admittedly covers storing and handling only and specifically excludes wharfage and all expenses of wharfage, value of wharfage facilities, return on investment therein, and cost of shrinkage and deterioration. It is outdated and is involved in technical disputes such as a possible distortion because the basic cost used, although adjusted, is an average for all terminals throughout the country and therefore not applicable to marine terminal elevators on the Pacific coast. It is unrealistic to assume that a marine terminal elevator and a country elevator can operate on the same charges, and that no additional charge should be made at marine terminal elevators for use of added facilities which are not required at country elevators. The cost of operation of marine terminal elevators has increased from 25 to 40 percent since 1959, compared with the 30 percent differential between the developed cost of 12.29 cents per bushel and the storage and handling rate of 16 cents per bushel provided by UGSA. Since the present-day volume of grain handled is less than in 1959, the cost per bushel obtained by dividing the total cost by bushels handled would be materially higher, resulting in a narrower margin between cost per bushel and the UGSA rate.

Agriculture admits that costs probably have increased, but states that as a result of the Examiner's ruling, it was unable to obtain later cost data from respondents.[11] Agriculture also admits that it excluded wharfage as income or expense and did not make an allowance for return on investment because "The study was designed to

[11] Considering the findings hereinafter made and the basis therefor, the fact that the cost study is not up to date is irrelevant.

show the revenues and costs of the operations of the grain elevator in receiving, storing, and loading out grain under the UGSA. If wharfage figures had been included they would now have to be taken out to reveal what we contend is the pertinent and proper data for the total operations of the grain elevators."

Thus far, it has been found that wharfage is justified under the Freas formula and from an economic standpoint, but that it was not included as a factor in establishing the UGSA rate, and that if it had been included it would be taken out.

Further concerning the coverage of the UGSA rate, it is important to note that the UGSA expressly provides for the payment on CCC grain of "Customary or mandatory wharfage charges where grain is received at port locations." A similar provision has been in effect in the UGSA since 1940. Wharfage charges published in respondents' tariffs fit this description. The UGSA does not provide for any other type of compensation in lieu of wharfage, nor does it provide that wharfage will not be paid. This being so, how can it be said that other types of compensation specified in UGSA would compensate for wharfage?

The only other form of compensation specified in the UGSA, except wharfage, relates solely to the handling and storing of grain. The handling charge—for receiving and loading out—is for the service of the physical handling of the grain into and out of the elevator, while wharfage is for the use of terminal facilities. Storage is the service of safekeeping the grain in the warehouse and includes insuring, preparation of warehouse receipts and other similar services. Storage is assessed on the basis of time per bushel, and wharfage on a per-bushel or per-ton basis.[12]

Finally, it will be noted that the rates paid for handling and storing CCC grain are the same for marine terminal elevators, and for country elevators which do not have terminal facilities. This indicates that the charges cover only what the name implies—the storing and handling of grain. This is apparent because the additional charges which were to be paid, i.e., wharfage charges, were to be paid only at port locations. The only logical conclusion to be drawn from these facts is that handling and storage charges were not intended to cover compensation for the additional facilities of a terminal nature which are not found at a country elevator.

(4) *It is found and concluded* therefore that the UGSA handling and storing charges are not a duplication of the wharfage charge, and that they do not provide any compensation for wharfage.

[12] The statements concerning the differences between wharfage and handling and storing charges are based upon the testimony of Harvey B. Hart, manager of the port of Longview, Wash.

Assuming that such rates did compensate in some manner for wharfage, the fact that Agriculture prefers to pay for terminal services and uses in a lump sum does not render the Commission approved and required[13] practice of publishing and charging individual rates for separate service unlawful. This is especially true on the Pacific coast where the terminal rate structure, more than in any other region of the country, has been litigated before, and analyzed and approved by, the Commission. It is inconceivable that a rate system which has been stabilized upon such sound principles, should be suddenly upset because of Agriculture's preferred method of dealing with marine terminal elevators in the storing and handling of CCC-owned bulk grain. To the contrary, it would seem more logical and less difficult for Agriculture to clarify the ambiguities in its agreements and practices concerning wharfage, and to make clear provisions in the UGSA for legitimate wharfage.

(5) In view of the fact that the UGSA provides for the payment of customary and mandatory wharfage at port locations, and the further fact that its rates for storing and handling do not compensate for wharfage, *it is found and concluded* that the UGSA is not relevant to the question of whether the practice of assessing wharfage on CCC-owned bulk grain at marine terminal elevators on the Pacific coast is lawful.

*Justification of wharfage though no service is provided*

Agriculture maintains that wharfage is not justified because no service is provided in return for the wharfage charge.

It is clear from the approved definition of wharfage at Seattle in 3 U.S.M.C. 21, *supra*, from the similar definitions in respondents' tariffs, from the treatment of wharfage in the Freas formula and Linnekin's testimony, thereon, and from the distinction made by Hart between handling and wharfage, that wharfage is a user charge and does not contemplate the performance of a physical handling service as contended by Agriculture.

The marine terminal elevators here, like general cargo terminals, provide berthing facilities, i.e, docks and wharves, vertical instead of horizontal transit sheds, cargo areas, equipment to load and unload trucks and rail cars, and conveyors to load ships. Bulk grain uses the conveyor system for the interchange from elevator to ship in the same manner as oil uses a pipeline.

[13] In *Terminal Rate Increases—Puget Sound Ports,* 3 U.S.M.C. 21 (1948) the Commission stated that "We are of the opinion that there should be uniform and clear definitions of various terminal services, and a clear and inclusive list of the specific activities contained in each definition in order to enable the terminal operators, the shipping public, carriers, and us to determine whether such service is bearing its fair share of the cost load."

Agriculture contends that the conveyor and spout, also the berthing facilities are necessary to the operation of the elevator and to a degree are a part of the investment in the elevator. It also maintains that whatever benefit the ship receives from the use of the wharf is compensated for by dockage, and in some cases service charges paid to the marine terminal elevator. As seen hereinbefore, these contentions cannot be sustained under the principle of the Freas formula.

Agriculture admits that there is some use made of wharf facilities, i.e., "electricity to operate trimming machines if required, and the use of piers for the movement of men and equipment to and from the ship."

(6) *It is found and concluded* that CCC-owned bulk grain uses respondents facilities when transferred from elevator to oceangoing vessels, and as stated hereinbefore, respondents are entitled to assess wharfage for the use of such facilities.

*Consequences of elimination of wharfage on CCC-owned grain* [14]

The record shows that respondents have invested large sums in the construction of marine terminals and that they rely heavily upon wharfage to recoup their investment, and for maintenance and improvements. For instance, at the port of Los Angeles wharfage is responsible for about 37 percent of total revenue, bulk wharfage amounting to almost 7.5 percent. At the port of Long Beach wharfage on bulk commodities represents 7 percent of total revenue, which if eliminated would reduce its profit from 12 to 5 percent.

The exemption of bulk grain from wharfage might unlawfully prejudice or disadvantage other commodities using the wharf, and the exclusion of Agriculture from the wharfage charge which other signatories to the UGSA are required to pay might be an unlawful prejudice against them.

*Exclusion by Examiner of evidence relating to wharfage at Gulf and Atlantic ports*

Agriculture states that "respondents look at the issue from the point of view of the west coast export trade, and that [Agriculture] approaches it from a national viewpoint." It adds that the operations of grain elevators under the UGSA should be looked at *en toto*, since those on the Pacific coast are no different than other elevators in the United States.

Agriculture offered evidence relating to wharfage practices of marine terminal elevators at gulf and Atlantic ports, which was excluded as evidence by the Examiner, but accepted as an offer of proof.

[14] This section has been reworded to clarify the portions of the Initial Decision objected to in points 16 and 17 of Agriculture's exceptions.

This testimony is not relevant for the following reasons. The order concerns only grain moving through port elevators on the Pacific coast. The terminal rate structure on the Pacific coast is patterned after decisions of the Commission, which is not true as to the terminal situation at gulf and Atlantic ports. Many of the port terminals on the east coast are owned by railroads which do not assess wharfage because such charges are included in a shipside rail rate covering all terminal services, and applying to and from nonrail as well as rail terminals. For this reason nonrail terminals cannot assess wharfage on rail traffic because to do so would result in double charges for wharfage and consequent loss of business to the nonrail terminals. *Wharfage Charges and Practices at Boston, Mass.*, 2 U.S.M.C. 245 (1940). Also, the Commission refused to consider the failure to charge wharfage at New York as pertinent to the practice in the gulf, stating that "The New York area undoubtedly reflects such costs in charges for other services." *Evans Cooperage case, supra.*

ULTIMATE FINDINGS AND CONCLUSIONS

In view of the findings and conclusions reached hereinbefore, *it is found and concluded* ultimately that the practice of assessing wharfage charges on grain moving through marine terminal elevators on the Pacific coast pursuant to the Department of Agriculture's Uniform Grain Storage Agreement does not constitute an unjust or unreasonable practice within the meaning of section 17 of the Shipping Act, 1916.

The proceeding is discontinued.

*Commissioner Hearn concurring:*

I concur in the result reached by the majority. My concurrence is based on the simple fact that terminal operators' properties are being *used* for the lading of Agriculture's grain, and the use of those facilities merits, indeed requires, compensation. The level of that compensation, i.e., the rate, is not in issue here. It is unrealistic, I believe, to suggest that only *services* merit compensation.

*John S. Patterson, Vice Chairman, dissenting:*

CONCLUSION

Based on the record before me in this proceeding, my conclusion is that the assessment of wharfage charges on bulk grain stored and loaded out through port elevator facilities of the respondents pursuant to the Uniform Grain Storage Agreement (UGSA) between Commodity Credit Corporation (CCC) (an agency of the United States administered within the Department of Agriculture (Depart-

ment)) and bulk grain terminal operators is an unjust and unreasonable practice in contravention of section 17 of the Shipping Act, 1916 (Act).

As regards my conclusion stated above, the reasons in support and my dissent are advanced in the following statement, after noting the points on which I have no differences and the points on which I differ with the majority report herein.

I have no differences with the majority opinion in regard to our jurisdiction, nor to its findings (1) as to points (a) through (e) on what wharfage is for or (2) that terminal operators are engaged in wharfinger operations or (3) that there is an economic justification for assessment of wharfage by terminal operators or (6) that CCC-owned bulk grain uses respondents' facilities, except for the statement respondents are "entitled" to assess wharfage presumably by virtue of such use. I do not agree with the findings (4) and (5).

Findings (1), (2), (3), and (6) are adequate as far as they go, but fail to reach the basic problems of, *first*, *whether* the use of terminal facilities available for general cargo is the same as the use of bulk grain facilities under modern conditions and, *second*, whether it is a reasonable practice to charge wharfage for the latter use when other means of compensation exist. With regard to the *first point*, the majority refers to charges against "cargo," to "terminal facilities," to "compensation," and to "wharfinger operations" as though these were all well understood things for which the cargo must bear a charge in order to allow recovery of an investment. Whether or not any regulation or practice making a charge is just and reasonable, however, requires detailed examination of what is described by such terms as disclosed by the present record. When the cargo is bulk grain and the terminal facilities are highly specialized equipment and the compensation is a schedule of rates paid by contract and the wharfinger operations of the past no longer exist, we must go further and adjudicate the special consequences of the new facts, instead of relying on the testimony of a witness as to what might have been almost 25 years ago if today's facts existed then. With regard to the *second point*, the majority refers to the adequacy of compensation by finding fault with a cost study used to determine the schedule of rates to be paid by contract, but such a complaint does not reach to the reasonableness of a regulation or practice of charging wharfage by respondents as "other persons"; rather it is addressed to an economic issue over which we have no jurisdiction; namely, whether another Government agency has adequately negotiated and compensated for what it uses.

Both (4) and (5) seem to agree that wharfage is justified because the UGSA rates and charges pursuant thereto do not provide the terminal operator with enough money to "compensate" for the use of wharf facilities by storers of bulk grain. If wharfage is justified by economics the regulation or practice becomes a just and reasonable one, the argument goes. This conclusion, stated one way or another, is also reflected in the majority's findings and conclusions (1), (2), (3), and (6), and whether it is so or not seems to be the central issue. The response is that the facts do not support a conclusion of noncompensation for what is used unless wharfage is paid. First, the CCC as a storer of bulk grain does not use the general cargo wharf part of the terminal, and, second, CCC pays for everything it uses under the UGSA; consequently, charging wharfage for bulk grain handled under UGSA is an unjust practice.

The majority's reasoning is also supported by rhetoric which fails to take these significant factors of separation and differences in operations into account. Typical of reliance on verbal forms is the semantic quibble over whether wharfage is a use rather than a service charge. The use of a facility is the same thing as obtaining a service. If there is a charge for service involving use and then another charge for "use," there is a duplication of charges for the same thing. Another example is Finding (2) "that the marine terminal elevators involved here are engaged in wharfinger operations." Such a verbal classification as "wharfinger" is not enough to resolve the issue of reasonableness in what respondents are doing, regardless of how the operations are labeled.

The facts and discussion of the consequences therefrom follow:

FACTS

1. The Department's Uniform Grain Storage Agreement Form CCC-25 (5-17-60) provides, with respect to wharfage:

> 5. AGREEMENT TO COVER ALL THE GRAIN ACCEPTED—(a) The provisions of this agreement shall apply to all the grain accepted by the warehouseman and the Uniform Grain Storage Agreement Schedule of Rates, hereinafter referred to as "Schedule of Rates," shall apply to all the grain on which warehouse charges are payable by CCC. All the grain accepted by the warehouseman shall be received, stored (if in storable condition) up to the capacity made available by him, conditioned, loaded out, billed and shipped as requested by CCC or other authorized persons in accordance with the provisions of this agreement.

The same provision has been in prior forms. The "Schedule of Rates" referred to contains the provision, "The following additional rates shall apply: * * *. 2. Customary or mandatory wharfage charges where grain is received at port locations" (exhibit 28).

Under the UGSA the warehouseman represents that he owns or operates the warehouse and has the specified equipment and facilities for receiving, handling, conditioning, warehousing, storage, and loading out bulk grain covered by the agreement. Receiving grain is defined as receiving and unloading grain from cars, boats, barges, trucks, or other conveyances and elevating into the storage place. Loading out includes moving to and loading into cars, boats, etc., and other conveyances (exhibit 28). Language of the same or similar import has been used since 1940 (exhibit 36).

2. Wharfage charges paid pursuant to UGSA obligations on CCC grain at west coast ports for the 6 months ended December 31, 1961, amounted to $375,000, or an average of $2,000 per day (Id). Wharfage is not paid by CCC at gulf coast, east coast, and Great Lakes ports (Id). Wharfage is not paid at one bulk-grain terminal facility at Portland, Oreg.

3. Fairly typical examples of tariff provisions relating to wharfage at ports in California, Oregon, and Washington are as follows:

PORT OF STOCKTON, CALIF., TARIFF NO. 3—Wharfage is the charge assessed against merchandise, cargo, vessels' stores, fuel, and supplies, for passage on, over, under, or through any wharf, pier, or sea-wall structure, inward or outward, or loaded or discharged while vessel is moored in any slip, basin, channel, or canal.

*Oregon—Washington*—Wharfage is a charge for the use of grain facilities and is assessed on all grain received therein whether or not such grain is eventually delivered to the vessel. No services are covered by this charge. (See the following tariffs: LDC Dock and Elevator Terminal and Grain Tariff No. 6—applying at LDC Dock & Elevator, Portland, Oreg., operated by Lewis Dreyfus Corp., owner; Cargill Incorporated Grain Tariff No. 15—Seattle, Wash., and Portland, Oreg.; Archer-Daniels Midland Grain Tariff No. 5—Vancouver, Wash., and Tacoma, Wash.; Long Bell Warehouse Grain Tariffs 8 and 17—Longview, Wash., elevator, operated by Continental Grain Co.; Continental Portland Elevator Grain Tariff No. 6—elevator operated by Continental Grain Co., owner; F. H. Peavey & Co. Tariff No. 2—Portland, Oreg.; Kerr Grain Corp. Tariff—Portland, Oreg.; North Pacific Grain Growers Tariff—Seattle, Wash. The only exception is Harbor Island Dock & Warehouse Co. Tariff No. 11—Seattle, Wash.) (The tariff of Seattle is not relevant because bulk grain is not subject to the tariff.) Grain terminals, as distinguished from port authorities, have comparable provisions, including express statements that make wharfage applicable to "all grain," "whether or not delivered to vessel," and "grain and other bulk commodities" (exhibit No. 17).

4. Wharfage began as a charge on the west coast more than 100 years ago and tariffs issued prior to 1920 show wharfage charges at that time (Tr., 137–138, 199–200).

5. Grain formerly was moved in sacks and wharfage was collected thereon the same as on general cargo (Tr., 52; 138, 1. 16–25; and 510). Before the modern terminal was developed, when grain was handled in bulk, it was by means of a gantry crane and "clam shell" or bucket-type holders. Fast conveyor belts and pneumatic methods had not been developed (Tr., 52, 1. 4–8). When grain began being moved in bulk, wharfage continued to be charged (Tr., 138–9, 202–3). Bulk movements did not begin through California terminals until after World War II (Tr., 139, 1. 1–4). The movement of grain in bulk and facilities therefor was common in the Northwest before 1948, but was just starting in California during 1944–1946 when the U.S. Maritime Commission made a study applied "to terminal operations for the prewar fiscal year ending June 30, 1940", 3 USMC 57, 59. At the time of the study, "the only grain handled was in sacks entirely" at Stockton (Tr., 510). The change to bulk in California occurred mostly after 1948 (Tr., 511).

6. Bulk movement of grain by conveyor systems began after the construction of silo storage facilities on land adjacent to deep water sufficient for a ship. Such facilities consist of the following:

(1) Headhouse.
(2) Ship gallery and dock.
(3) Elevator legs.
(4) Cleaning and conditioning equipment.
(5) Conveyors.
(6) Truck dumper.
(7) Railroad car tipper.
(8) Barge unloader.
(9) Dust collector.
(10) Inspection and weighing station.
(11) Locomotives, scoopmobiles, trucks, etc.
(12) Storage silos.

A diagram of typical facilities is a part hereof as attachment I. These facilities are separate from general cargo wharves, but may be adjacent thereto, as shown on attachment II.

7. A wharf is a structure built on the shore and extending into deep water for the purpose of enabling ships to come along-side to receive or discharge cargo or passengers thereon. Wharfage is a charge made for the use of the wharf, including temporary storage or resting by cargo before being moved further on its journey. Property and passengers usually move to and from land to water conveyance over the surface of the wharf (De Kerchove International Maritime Dictionary

and Glossary of Shipbuilding and Outfitting Terms by Eddington). Wharfage is charged or assessed to the owner of the cargo.

8. The purpose of a marine grain elevator is to get the grain from the elevator to the ship (Tr., 394). At a grain elevator terminal, grain is transferred from a storage bin or silo by elevation to a height, then out along conveyors high above the platform to which ships are moored, to movable spouts over the ship where the grain comes out into the ship's holds or storage bins for stowing by stevedores working in the holds. The stevedores spread the grain around so as to keep the ship trimmed and floating properly. The complete process was described as follows: "The men open valves under the storage bins to allow grain to flow onto the conveyor which delivers it to an elevator leg and the grain is then elevated to a shipping scale where it is weighed by a state licensed weighman. It is then dumped from the scale through a surge bin onto a conveyor which moves it from the elevator headhouse to the ship gallery. There it is taken off the conveyor belt and put down a spout which delivers it to the ship" (Tr., 20, l. 19–21, l. 7). The ship gallery houses the conveyors and spouts. All the work of stevedores is performed in or on the ship and the only use made of a wharf is as the source of an electrical outlet for wires connecting trimming machines, if required, and for the use of the platforms for movement of men and equipment between the land and the ship. At such facilities grain may also be inspected and classified by grade and quality.

9. At the port of Los Angeles, in charge of the Board of Harbor Commissioners, no contract with CCC is entered into, and all cargo, including bulk grain, pays wharfage only (Tr., 181, l. 3–8). At this port there is a conveyor over the dock and along the dock reaching to ships (Tr., 176, l. 25; 177, l. 1–6). The grain terminal uses a small part of the wharf and has a gantry crane on the wharf and is the only fixture on the wharf (Tr., 178, l. 22–25). The conveyor occupies a small space on the wharf, "probably two high line rail tracks * * * from an area of about 18 by 20" (Tr. 179, l. 1–3). The plant for the grain is in the rear of the wharf (Tr., 177, l. 11–24). The compensation that a private operator pays the Board for its use of leased premises does not include any right or compensation for the conveyor system (Tr., 178, l. 3–8). The whole wharf is tied up to load a ship (Tr., 179, l. 5–6). The Board is compensated entirely for use of the conveyor through wharfage (Tr., 178, l. 9–13; 179, l. 21–22), and the practice of assessing what passes over the wharf has existed since 1911 (Tr., 180, l. 1–4). Counsel for San Francisco stated for the record that its "operation is physically the same as the operation at Los Angeles" (Tr., 222). (Note: The state-

ment is accepted at face value, but not as a substitute for evidence. The record lacks detailed evidence as to this port.)

10. The Department of Agriculture, Commodity Stabilization Service, Grain Division, prepared a study of commercial grain storage and handling direct operational costs. Its purpose was "to develop valid information on the actual costs of handling and storing grain in commercial facilities" (exhibit 29, p. 1) to serve as the basis for a fee schedule to compensate grain handlers. The survey was preceded by the issue of a 43-page manual for the use of personnel engaged in the study. The manual stated the purpose to develop such information and covered the techniques to be followed and the information to be developed by means of questionnaires, interviews, preparation of schedules containing data, summaries, and finally reports. The study covered approximately 100 warehouses in area 1 (see below), including 8 terminal port warehouses (Tr., 410). Detailed summary tabulations of grain storage costs and grain handling costs were prepared, which are now official records of the Department of Agriculture (Tr., 412) (exhibits 31–32). A combined storage cost and a combined handling cost summary tabulation for the eight selected west coast port terminals was presented, showing totals in cents per bushel of grain (exhibits 33–34). Survey schedules covered revenue by functions, depreciation of assets, and operating costs prorated according to business activities (exhibit 30). Each covered detailed accounting items of fixed and variable costs relative to interest on investment, insurance, taxes, licenses, leases, and rentals, personnel expenses, and so on. The survey did not include revenues or expenses expressly applicable to wharfage as such (Tr., 412, 436). Costs with reference to any part of the warehouse facility that should be allocated to wharfage were not deleted in the study (Tr., 436). The survey was completed in February 1960. The survey disclosed the following average costs:

| "UGSA rate area | Average cost per bushel (cents) | | |
|---|---|---|---|
| | Storage per annum | Handling | Total |
| 1 | 8.7 | 2.8 | 11.5 |
| 2 | 7.1 | 3.6 | 10.7 |
| 3 | 7.7 | 3.3 | 11.0 |
| 4 | 8.1 | 5.2 | 13.3 |
| 5 | 16.5 | 1.8 | 18.3 |
| National average | 8.0 | 3.4 | 11.4 |
| Current UGSA rates | 13.5 | 2.5 | 16.0 |

"(Above figures are rounded to a one decimal fraction)" (exhibit 36). Area 1 comprises Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington.

11. The testimony showed the following items of expense are included in part in those recovered from wharfage charges and are also

included in those recovered from the charges to the Department under UGSA:

(1) Railroad trackage in roadways (Tr., 102, 1. 8–17; 103, 1. 2–9).
(2) Cleaning and conditioning equipment (Tr., 103, 1. 10–23).
(3) Scales.
(4) Elevator legs.
(5) Conveyors.
(6) Truck dumpers (Id).
(7) Railroad car tipper (Tr., 106, 1. 19, 1. 25; 107, 1. 1–23).
(8) Barge unloader equipment (Tr., 107, 1. 24–25; 108, 1. 1–19).
(9) Dust collection systems (Tr., 108, 1. 20–25; 109, 1. 1–9; 110, 1. 1–11).
(10) Inspection stations (Tr., 110, 1. 17–24).
(11) Small locomotives or trackmobiles (Tr., 111, 1. 1–18).
(12) Superintendence, cleaning sheds and docks and watchmen (Tr., 111, 1. 19–25; 112, 1. 1–21).

12. A witness asserted that the following additional facilities are required at a marine terminal elevator facility:

(1) Additional land.
(2) Additional railroad trackage.
(3) Heavy piling for foundations due to proximity to water.
(4) Larger more complex headhouses for housing equipment.
(5) Wharf.
(6) More elaborate equipment such as conveyor systems, scales, dust control, and electrical control equipment and elevator legs.
(7) More elaborate systems for speedy handling of incoming grain, including platform truck dumpers, railroad car tippers, and barge unloaders.
(8) Sampling and inspection offices.
(9) Cleaning and conditioning equipment (Tr., 75–7).

It was further asserted that wharfage includes charges for a portion of superintendence, checking, direct dock labor, watchmen, claims, clearing sheds, salaries, payments to general officers, clerical, accounting, legal, and traffic and solicitation expenses. Wharfage was also claimed to include charges to meet police and fire protection expenses.

13. The annexed attachment II shows a separation at the port of Stockton, Calif., between areas, facilities constructed thereon, and types of platforms to which ships are moored with regard to a bulk-grain elevator facility and a wharf facility (exhibit 37). (The labels and separating line have been added for the purpose of this report.) Similar separation of facilities was shown at Longview, Wash. (exhibit 1), Kalama, Wash. (exhibit 10—no general cargo wharf shown), and Long Beach, Calif. (exhibits 12 and 23 at p. 2).

FINDINGS

Considering these facts, the following findings should be made in this proceeding:

1. A tariff regulation creating, and the practice of charging, wharfage for handling, including loading out, grain in bulk is a regulation and practice relating to or connected with the handling, storing, or delivering of property.

2. The receiving, storing, processing, and loading out of bulk grain through conveyors and spouts into ships involve the handling, storing, or delivering of property.

3. Respondents are compensated by the CCC pursuant to the UGSA for the use of all facilities and for all related services connected with the handling, storing, and delivery of bulk grain.

4. The charge of wharfage in addition to payments under the UGSA results in the establishment, observance, and enforcement of a regulation and practice of charging either payments for the use of a facility that does not exist in storing, handling, and loading out bulk grain, or double payments for the use of a facility already paid for under the UGSA.

5. Double payment for the same service is accomplished when railroad trackage, foundation, headhouse, dock or wharf, ship gallery, cleaning and equipment, scales, elevator legs, conveyors, truck dumper, railroad car tipper, barge unloader and barge dock, inspection station, locomotives or truckmobiles, dust collection system, and improved road facilities are attributed to wharfage and charged for as wharfage as well as under the UGSA. Payment for facilities and services that do not exist is accomplished when wharfage is charged for services and facilities used for general cargo rather than for bulk grain.

6. Respondents are other persons subject to the act.

7. Both Los Angeles and San Francisco claimed to have the same "physical situation"—relating to the intrusion of grain facilities on the wharf and direct use thereof—and both not to have entered into a UGSA. San Francisco claimed further, contrary to the assertion herein, that facilities and services covered by wharfage were not compensated by rentals from a grain storage operator. It is not considered to be possible on this record to adjudicate and make any findings as to the justness and reasonableness of these respondents' rules until the precise application of all payments can be determined on a more complete record. The foregoing may possibly apply to other persons who are not contracting operators of bulk-grain facilities, but are lessors of property occupied by bulk-grain facilities. As will be discussed, the CCC does not contest the justness and reasonableness of the establishing, observing, and enforcing of any regulation or practice which involves a charge for actual services rendered or use of facilities furnished and not otherwise compensated.

REASON OR BASIS FOR FINDINGS

My reasons for the findings and conclusions herein follow.

There is virtually no dispute as to the facts, nor that the respondent grain elevator terminal operators are "other persons subject to this act" as defined in the first section of the act. Inferences to be drawn from the agreed facts are in dispute. The sole question is whether charging CCC wharfage as a "practice" or "regulation" in tariffs is a just and reasonable one relating to or connected with the receiving, handling, storing, and delivering of bulk grain, as property, when respondent operators perform the UGSA and receive compensation thereunder at any facility where wharfage is charged (with the exceptions noted).

I have only the two basic reasons noted above, and restated in more detail below, for believing the charge is an unreasonable practice on the facts herein:

1. Because of the facts showing an entirely separate and different operation for handling bulk grain as differentiated from the facilities for handling general cargo, wharfage, however defined and however long applied in the past, is not applicable to CCC as an owner of bulk grain handled and loaded out pursuant to the UGSA.

2. The payment of the fees provided in the UGSA schedule of rates compensates operators for all use of their facilities and for all their costs of handling and loading out bulk grain; consequently, added wharfage should not be charged against bulk grain under UGSA. In other words, the facts show separation and differentiation of bulk grain facilities from those used for general cargo to which wharfage is applicable and compensation for the separate facilities used.

Changed conditions have created the separate and different grain handling operation and have converted wharfage from what was once a charge for facilitities actualy used to a charge on CCC for facilities not used, but paid for by other means. Bulk grain no longer moves over a wharf as it once did when wharfage was applicable to then existing facts. The changed conditions have not resulted in any additional expenses that are not paid for from wharfage on grain, and, if anything, have resulted in less expense as far as use of the traditional wharf is concerned.

With regard to the first point, past and present conditions have to be compared to see just how wharfage is no longer chargeable for what happens to bulk grain in modern, separate grain-handling facilities.

At the time the Department developed its uniform contract form, including the obligation to pay customary or mandatory wharfage, there was no bulk delivery of grain in California. There may have

been some bulk handling at Stockton and Los Angeles (the record is not clear), and there was bulk handling in Oregon and Washington, but not with the storage and handling facilities used today. Cranes and digging and lifting equipment were used to hoist any bulk grain at wharves. At that time it was customary to carry grain across a wharf in sacks. To the extent this type of operation continues, and with regard to such operations, the Department is not seeking exemption from the payment of wharfage (Tr., 184, 1. 14–25; 185, 1. 1–2). Wharfage was and is justified where sacked grain is handled. Sacked grain is handled the same as general cargo at port locations. The physical possession of such cargo changes hands at a place on the wharf, in a shed or at some place of rest adjacent to the pier. The identifiable change of possession is considered a use or service. The needed facilities, such as shelters, platforms, trucks, and other moving equipment, are furnished as part of the use. Sacked grain may be stored free of charge for a specified period while being assembled into cargo lots, and the wharf is not usable for other cargo to some extent by this activity. The delay is an expense to the wharfinger. The time of use is compensated for in wharfage. In such cases, wharfage is the *only* payment to the terminal operator.

The modern grain terminal is apart from the traditional wharf facility with its flat platforms and storage sheds. Storage and handling of grain no longer involve the use of the wharf. Other methods of paying the terminal operator now exist. The UGSA is one of these methods of payment. Performance of the UGSA does not require use of a general cargo wharf.

The facts shown in items 5 and 6 establish that today the function of providing wharf facilities and bulk grain terminal facilities in the usual west coast arrangement are different and unrelated and that the investment in each and most of the services performed at each involve unrelated expenses to be met from charges for the use of each. There is some overlapping, such as the use of railroad tracks, but what is used is paid for. The facts equally establish that storage in a silo is not the same as the resting of general cargo on a wharf awaiting shipment, and the passage of grain through conveyors is not the same as the movement of general cargo over a wharf platform to the ship's side. There is a difference of function and use of facilities. The facts show that if a ship were to take on both bulk grain and general cargo, it would have to move from one berth to another at most of the ports described in this record. At the general cargo wharf, there would be no other compensation to the operator other than wharfage. At the grain terminal, fees based on bushels handled

are the compensation. Separation of, and differences in, facilities used reasonably demand that wharfage applicable to facilities used for transferring general cargo not be applied to facilities used for entirely different types of cargo handling facilities and even different types of ships and covered by other payments. It is not a reasonable regulation to take a generalized definition such as wharfage, which speaks of commodities conveyed "over, onto, or under wharves", but which was so formulated before there was any such thing as modern bulk grain handling and then saying the words are broad enough to apply and therefore it is reasonable to apply them to bulk grain. If the facts had changed only slightly, there might be some reason to the position, but this is far from the case. Wharfage is for the use of a limited type of terminal facility, not for anything that might be built on the water used by ships. The bulk cargo owner who pays for what he uses under a contract is not justly treated when he has to pay wharfage for general cargo facilities he does not use. A reasonable distinction may be made between the two facilities used, based on separation and other differences of handling techniques and different methods of charging justified for each.

Mention was made of the Department's position of not seeking exemption from wharfage on general cargo, nor in those cases where bulk grain may make direct use of the general cargo wharf (possibly the case at Los Angeles and San Francisco). The Department has made it clear in briefs and testimony that CCC is willing to pay for all facilities actually used and for services rendered including wharfage if it is shown to have received something for its money. The CCC is not seeking any exemption as a Government agency as distinguished from other shippers, although recognizing there may be different facts as to the relationship because of obligations under the UGSA (Tr., 184–188).

Neither our predecessor's report in docket No. 640 of August 24, 1948 (3 USMC 57) nor the testimony of a witness who helped prepare the study helps the majority. If anything, the report substantiates exclusion of wharfage as a charge applicable to bulk grain handled at separate facilities under present conditions showing grain has moved away from the wharf. In that report a formula was approved, providing for the segregation of port expenses among wharfinger and nonwharfinger operations. Wharfinger expenses were apportioned among various charges in port tariffs. The charge for wharf-related expenses was found to be the proportionate cost of ownership and maintenance of the cargo resting areas, sheds, and rail and truck areas and facilities. The study, however, did not include bulk grain silos, conveyors, and appurtenant rail and truck areas as the basis for com-

puting wharf and other port charges. Grain warehousing was not considered a wharf function under the formula (3 USMC at 97 and Tr., 275, 278, 283–284). The study was based on facts existing at most California ports, without reference to bulk grain operations, and was made with reference to the fiscal year ended June 30, 1940, before operations of the type described herein existed to any extent. The study did not cover Oregon and Washington where some bulk grain facilities of the type used at that time existed. Such facilities were not shown to be the same as what we have today. Even this study, however, is of no help in a classification of modern operations, because the author of the study expressly identified the port grain facilities at San Francisco and Stockton as "grain terminals and nonwharfinger operations" (Tr., 275, 283–284). The bulk facilities were known about and were excluded. Comparisons between relatively nonexistent bulk grain operations in California in 1939–40 and then existing bulk oil and lumber handling facilities are of no help either, because the handling of these commodities involved direct use of the wharf (as where the oil pipes were laid on the surface and the part of the wharf they used could not be used for anything else and lumber was put down on the wharf platform), and there was no showing that the wharfinger was compensated in any other way such as by a contract comparable to the UGSA.

The testimony of the witness who worked on preparing the record in docket No. 640 involved what might have been if modern facilities existed. The witness was a certified public accountant and had no particular competence for giving the technical proof needed to show differences between what goes on at a wharf and at a grain facility. Much of his testimony was speculation as to what "would have been included" in the study "if there had been bulk grain terminals". He appeared primarily as the expert witness on what was meant by the 1946 study our predecessors caused to be made, because he was employed in making the study with Mr. Howard Freas, his supervisor, over 18 years ago. What he says today is only his understanding, rather than a statement of present facts, and this understanding is relevant only if the study itself bears on the decision made today. The study itself is of no significance to the present decision, because the study dealt with entirely different facts and because its use presupposes the issues herein are resolved simply by applying the right labels—wharfinger or nonwharfinger—to what happens when grain is stored in bulk silos and loaded out by conveyors under a special contract. The testimony covers theories, opinions, and explanations supporting the majority understanding of the situation, but it does not provide

any helpful analysis of what goes on today in relation to wharfage on bulk grain.

It is also not possible for the testimony about the formula devised in docket No. 640 to provide any helpful guide, because it is a formula only, rather than a principle to be applied to today's facts. Neither does the formula guide the justness of the charges. The formula was used merely to allocate costs among the services from which revenue was derived at a wharf as it was known in 1946 and earlier. The formula provided an operator with information as to revenue, cost, and profit or loss from each unit of service and enabled an operator to decide what rates should be for each service, based on accurately determined and allocated costs and profits (exhibit 14, Tr., 58–59). It is important to note the formula has no ratemaking function, nor does it justify by itself any particular charge. Whether or not the result of using the formula discloses a justification for assessing wharfage depends on the facts to which the result is applied. The purpose of this adjudication is to find out these matters.

What the majority has done with this testimony and the formula is to decide that the entire terminal area, including the part on which bulk grain storage elevators are located, must bear an allocation for wharfage, regardless of use of the general cargo wharf part and possibly regardless even of the existence of a general cargo wharf, and has decided that the word "over" in reference to cargo passing over the wharf may also be stretched to cover the aerial transit of bulk grain over the narrow service platform to which the ship is moored and through overhead conveyors out of spouts into a ship. The traditional type of wharf is not used; nevertheless, the wharfage charge pursues unsacked bulk grain even though new contract obligations were devised to take care of the cost of the new facilities.

The second point is that the UGSA schedule of rates based on the number of bushels handled fully compensates respondents for all their expenses of performing the contract; therefore, it is an unreasonable practice to apply wharfage tariff rules to obtain additional compensation.

The schedule was developed for the purpose of determining what costs and expenses a terminal operator incurs in performing obligations under the UGSA and what fair rates per bushel should be paid by the Government. The Department conducted a survey of bulk grain terminal operations in October and November 1959 to develop the necessary information. The study showed all the conditions of performance of contracts and the cost elements requiring reimbursement to contractors in connection with grain operations. It was a comprehensive nationwide survey of every reasonably related cost of

owning (see Exhibits 29, 34), leasing (Id., p. 35), operating and maintaining (Id., pp. 35–40 and exhibits 30–31) grain terminals and handling facilities. The study disclosed that the elements included in wharfage charges applicable at port locations to bulk grain were considered and included (exhibit 29). Wharfage as a separate cost element was not included. The purpose of not including wharfage charges, but of including ("not deleting") costs allocable to wharfage, was to prevent the very overlapping of payments that the wharfage regulation creates if it is enforced.

The survey was designed to develop average costs in an area. Respondents claim their greater costs were not considered and wharfage elements were excluded. The facts do not substantiate the claim. Eight elevator terminals located at west coast ports were included in the western area survey which included the area in which these respondents operate. The record showed that similar inland elevators included in the survey existed that were built just as substantially and had the same facilities, including heavy pilings, railroad car tippers, etc., to the same extent as port elevators, although no two facilities were alike or included the identical facilities. Many inland elevator terminals surveyed were unquestionably smaller, but their costs only contributed to a determination of the average and the survey left out nothing peculiar to respondents' larger terminal facilities. The average costs developed were used to prepare a uniform rate schedule acceptable to all contractors, not to provide a cost-plus contract for a particular group or individuals which might have higher costs. The survey did not disclose that the west coast area port terminal operators had higher costs of performing storage and handling functions, nor disclose that any operator was not being fully compensated. Everything in fact 6 was considered where these elements existed. The comprehensiveness of the costs to be paid from the rates left nothing to be met from wharfage charges payable by CCC. Fact 10 shows adequately the comprehensive nature of the survey.

Nevertheless, respondents claim and the majority agrees that something was left out. This omission is established in several ways. It is stated operators are "entitled as a matter of law to compensation" and "wharfage is justified," or under the "Freas formula the assessment of wharfage on bulk grain * * * is justified" (the formula deals with cost allocation to determine compensation), or the operators "have an investment in facilities" and "there is an economic justification for the assessment of wharfage * * * to recoup the investment * * *" and, finally, "rates for storing and handling do not compensate for wharfage." These statements fall short of deciding whether an

economic justification for the use of the terminal facilities also justifies charges for using terminal faciilties that are not used or charges for terminal facilities that are already paid for in another form. The economic justification of payment for the use of a wharf is not questioned. Whether or not the wharf is used is questioned. The objective of the survey was to develop a fee schedule which would provide the justified compensation for what is used, no matter what the payment may be called. An objective of this adjudication was to find out just how the wharf is used, and I found out it is not used, but CCC is supposed to pay for it anyway. The rate schedule was to pay for all, not just some, costs, and this objective was also accomplished, as substantiated by the testimony and documents in the record.

The claimed extra facilities not covered by the survey were summarized as being the following:

(1) Extra wharf facilities necessary only at port terminals;

(2) A share of superintendence service, certain labor items and administrative overhead expense; and

(3) "Other aids and benefits" consisting of police and fire protection.

The extra wharf facilities in item (1) and any other extras, such as those referred to in item 12 in the facts were not only accounted for in the survey and influenced the averages developed, but are part of the "equipment and facilities listed" in the contractor's agreement "for the receiving, handling, conditioning, warehousing, storing, and loading out of grain" which the contractor represents he "owns or operates" for performing the UGSA (exhibit 28). The contractor does not represent that he has only part of the equipment needed, or that the fees pay for only part of what he has to perform with, but everything needed to perform and thereby earn his scheduled payments. Neither the UGSA nor the survey contemplated payment for additional land, railroad trackage, heavy piling, or any other of the nine items in fact 12 to be compensated separately if needed to perform. Where the contractor is an operator under a lease from a port agency, the port gets its share of money for the wharf-related expenses from the rent. The contractor-operator obtains his expenses, of which rent is one, from the UGSA payments. If the rent does not cover the charge, as may be possible at Los Angeles or San Francisco, CCC is willing to review its payment obligations, as I understand its testimony. Even if a special platform over the water is needed to get to a ship with equipment, as shown in the pictures, there is no use of it as a wharfinger facility, as traditionally understood, by moving freight between a place of rest on the wharf and ship's sling. It is



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stated wharfage is the charge for the use of wharf and does not include charges for any other service. *Terminal Rate Increases—Puget Sound Ports*, 3 U.S.M.C. 21, 24 (1948). The statement is not questioned. The grain delivery operation involves no such use, however, whether or not there is a "service."

In *Interchange of Freight at Boston*, 2 U.S.M.C. 671 at page 673 (1942), wharfage was defined:

> As used herein the term "wharfage" means a charge made by a pier owner or operator against shippers or consignees for cargo conveyed on, over, or through a terminal facility, or loaded or discharged while a vessel is on berth. It is a charge for use of the pier alone. Wharfage charges or rates quoted in this report will be those applicable on general merchandise package freight. It is unnecessary to consider special rates or services relating to such commodities as bulk grain, coal, coke, ore, lumber, shingles, ship's stores, or fuel oil.

With reference to superintendence, labor, and administrative overhead under (2) above, the record contains no facts showing how the share of superintendence and other expenses are not paid for if wharfage is eliminated. The share of expenses for superintendence checking, direct dock labor, watchmen, claims, cleaning of sheds, salaries, expenses of general officers, and clerical, accounting, legal, traffic, and solicitation functions were considered in the survey and compensated insofar as they pertain to grain terminal operations (Tr., 245) and are required to perform the contract.

Other aids and benefits referred to in item (3), such as police and fire protection, are exactly the same as they would be anywhere away from the water at any other grain terminal and are not attributable to furnishing a wharf alone, but to the entire property. These costs too were considered in making up the rate schedule.

A witness stated that to a large extent he was basing his justification for a wharfage charge "on the investment in port terminal elevators" (Tr., 106, 1. 6–15). The claim is that when "CCC pays the respondents' charges for receiving and loading out grain, they are paying for a specific service, that is, the physcial handling of the grain into the elevator and away from the marine terminal facility into ocean vessels * * *" and wharfage is something more for the use of the marine terminal facility (Tr., 206) to cover the omitted items of expense. The Department's rate schedule, however, was not just based on manpower costs, omitting depreciation and investment. Performance of the UGSA required use of the physical facilities as well as the services of people and both are paid for. The Department produced its 43-page manual showing in detail what figures were to be developed by enumerators participating in the nationwide survey of grain storage handling costs. Detailed schedules showing they were brought together and

summarized were produced in evidence and finally over 50 pages of summaries of enumerators' tabulations were placed on record, showing both bushels of grain handled and dollar-and-cents costs of handling the grain under various conditions. The survey was shown to cover all types of elevators, whether "country" or "inland" terminals, and those at port localities. The survey covered terminals with both light and heavy investments, without distinction. Nothing was left out or given special treatment, although the survey did not include detailed examinations of private business accounting records. Tables showing combined storage and handling cost items at eight selected west coast port terminals was produced. The rates were based both on the nationwide study and on "subsequent negotiations with the warehouse industry", according to the General Accounting Office's letter to the Agricultural Stabilization and Conservation Service (exhibit 36—attachment—see: 3d para.), "It provided for the inclusion of all costs applicable to owning or leasing necessary warehouses, equipment and facilities as well as operation and maintenance and other costs incident to storing and handling grain". The survey and the rates based thereon did not just cover storing and handling in the elevator itself (Id.). It included load-in and loading-out.

In spite of this preponderance of evidence, the majority, in effect, is taking a witness' testimony, with no additional documented proof, to convince itself that something was left out, such as use of the investment, to be compensated by wharfage.

To the claims that the Department's cost survey covered only "country" elevator facilities and excluded the many additional items of investment and expense of elevators at marine loading places (Tr., 206) and marine terminal wharf facilities are "over and above" those at country elevators, I can only say I have been unable to find proof of the omitted extras.

The majority accepts the testimony that country elevators were of relatively simple operation in comparison with "the complex operation of a marine terminal operation". There was other testimony, however, substantiating what the survey showed, that some inland country elevators were just as complex, being built on strong pilings, having railroad car tippers and other facilities already noted, and this testimony was backed up by photographs in the record plus testimony of the Department's witnesses. Others do not, as has been noted, but all contribute to the average. Some of these inland facilities were on rivers and were included in the nationwide survey underlying the fee schedule. Also, west coast terminal elevators were included in the cost survey used to make up the fee schedule. A supplemental survey of

the latter was made. Therefore, any conclusions based on separate treatment of the two types of elevators have no premises to support them.

The respondents by comparison do not support the reasonableness of the practice of applying wharfage tariff rules to obtain additional compensation for respondents by any such ascertainment of costs or of what wharfage pays for at grain terminals. The record is limited to testimony by witnesses of their understanding of what costs wharfage covers based on facts existing 25 years ago as reported by our predecessor with respect to practices traditional at that time, and to arguments apparently based on the simultaneous appearance of an obligation to pay wharfage in the UGSA and in the respondents' tariff rules. The inapplicability of these ancient facts and formulas, both from the point of view of what exists today and of what the UGSA rate schedule pays for, has been covered.

The wharfage definition arguments are reflected in the majority's statement that "the UGSA expressly provides for the payment on CCC grain of 'Customary or mandatory wharfage charges where grain is received at port locations' " and "Wharfage charges published in respondents' tariffs fit this description" followed by the unanswered rhetorical question, "how can it be said that other types of compensation specified in UGSA would compensate for wharfage?". The answer depends on the facts, not on what may be said now in questioning someone's consistency. The inference is that if it may be said wharfage described in the tariff fits the description of the customary and mandatory wharfage that may be paid, all issues will be neatly resolved because the Department would not be so inconsistent as to write such a contract and to pay if it were not due for something. I do not see the issue as one of pure logic to be decided by matching up the simultaneous appearance of references to wharfage in two documents to achieve such expensive consequences for the Department. It is not reasonable to find that because a definition is broad enough to cover the operation it automatically applies to contemporary facts of bulk grain handling. The issue is whether it is a just and reasonable practice in handling property if today's facts involve charging twice for the use of the same facility and related services if the terminal area is viewed as a unit, or to charge anything if nothing is furnished, no matter how the function may be defined or classified or matched up or logically explained. We are not dealing with rhetoric, but with real obligations to pay money at the rate of $2,000 wharfage a day to west coast grain terminals in exchange for objectively ascertainable use.

Finally, there is no question of injustice through noncompensation

of respondents even if the wharfage charges are dropped under the facts of this case. One elevator facilitiy at Portland, Oreg., does not now charge wharfage, apparently recognizing the reality of such factors. The survey cost for the eight west coast facilities was 12.70 cents per bushel, and adjusted costs were 12.26 cents. For all marine terminal elevators in the seven Western States, the survey cost was also 12.70 cents and the adjusted cost was 12.29 cents. The 16 cents paid under the UGSA was 3.3 cents or 26 percent higher than the survey costs and, respectively, 3.74 and 3.71 cents or 30.5 and 30.2 percent higher than adjusted costs. The 1960 schedule of rates under the UGSA exceeded all costs of receiving, handling, conditioning, warehousing, storage, and loading out of bulk grain. The majority uses these figures to discuss the coverage and adequacy of UGSA payments and states that anyway if they are compensatory to contractors they are not to public port terminals which do not have UGSA obligations. Amounts for rent may cover wharfage due by operators to port authorities. The CCC's liability for wharfage where there is no contract is not an issue. We are not adjudicating the public port terminals' right to wharfage apart from the UGSA. Possibly, CCC is liable for wharfage under other conditions. The Department has stated its willingness to look into any such situation.

Flaws were also detected in the Department's studies. Defects in the Department's study are irrelevant, however. If there are flaws the Department is willing to restudy the matter and negotiate adjustments. The point is that the study is only the basis for making administrative decisions about a fee schedule that is supposed to cover all costs of storing and loading out (handling) grain. Negotiations preceded adoption of the schedule. Further changes were made. Thereafter, contractors were tendered the contract. If the rates fail to compensate today, new negotiations are in order to change the fees, rather than efforts on our part to distort a charge for wharfage by justifying its application to bulk grain handling because the study is flawed by being outdated or the rates inadequate. If the rates do not now compensate, the remedy is not to justify the practice or regulation of charging wharfage for unproven use of adjacent wharves, but to change the rates.

A great deal of the difficulty is this case has been caused by failure of the Departmental employees, for so many years, to perceive what has been happening until more perceptive employees of the General Accounting Office pointed it out to them. No need is seen, however, to keep going on with an obvious unfairness that has grown up over the years without anybody ever noticing it until the Comptroller General made an issue of the problem. Continued old wrongs do not

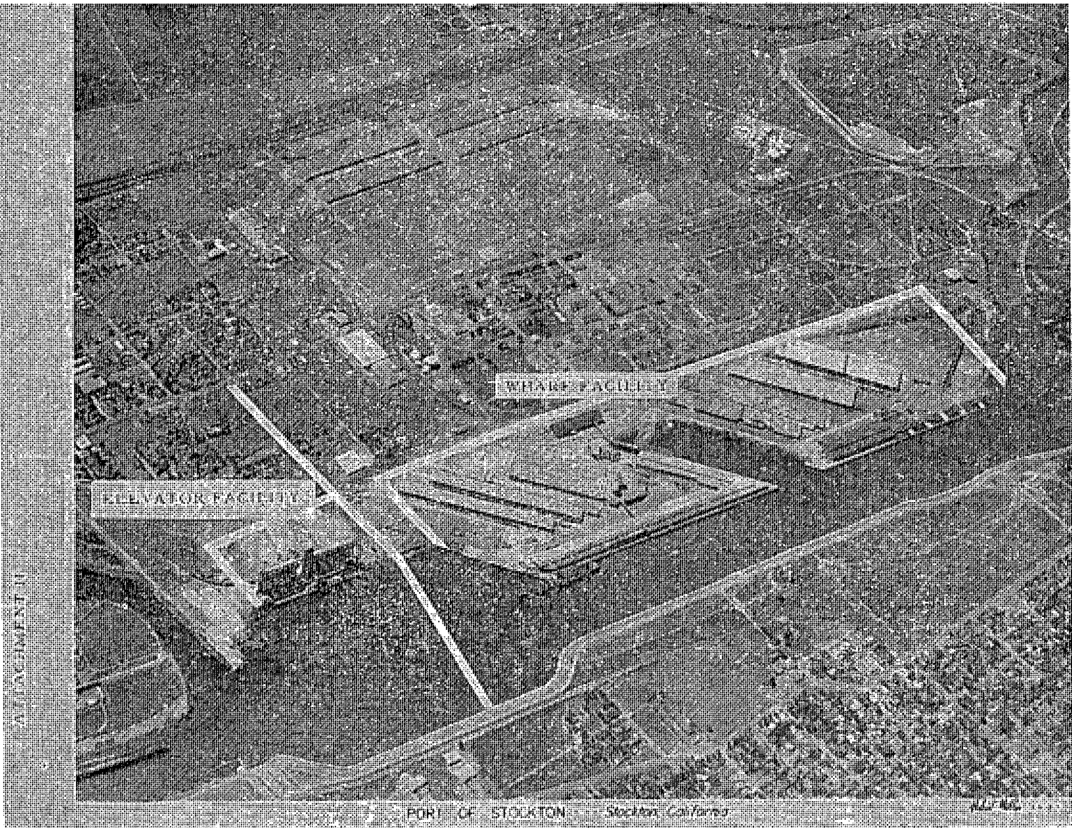
make a present right. The time has come to straighten out these wharfage charges so that each type of shipper pays for what he uses and does not pay for what he does not use, thereby subsidizing other users, which is unfair. In the meantime, the CCC has obligated itself, in addition to fully compensatory payments, to pay for something it was not getting. There appears to be a feeling that respondents have acquired a vested right to the continuation of this condition. Respondents' argument to some extent is that it is a just and reasonable practice to hold the CCC to its generous bargain. The argument has appeal, but our authority does not extend to the relief of this situation, only to the enforcement of section 17. The CCC will have to negotiate its way out of its bargain. Our authority extends to adjudicating what are just and reasonable practices by respondents in the handling of property and to deciding that wharfage regulations applied to CCC are unjust and unreasonable because the respondents are in fact compensated for all the uses provided CCC as a storer of bulk grain and respondents do not provide the use of wharf facilities to CCC.

SUMMARY

I would conclude that by applying wharfage regulations to CCC under the facts shown, respondents violate section 17 of the act.

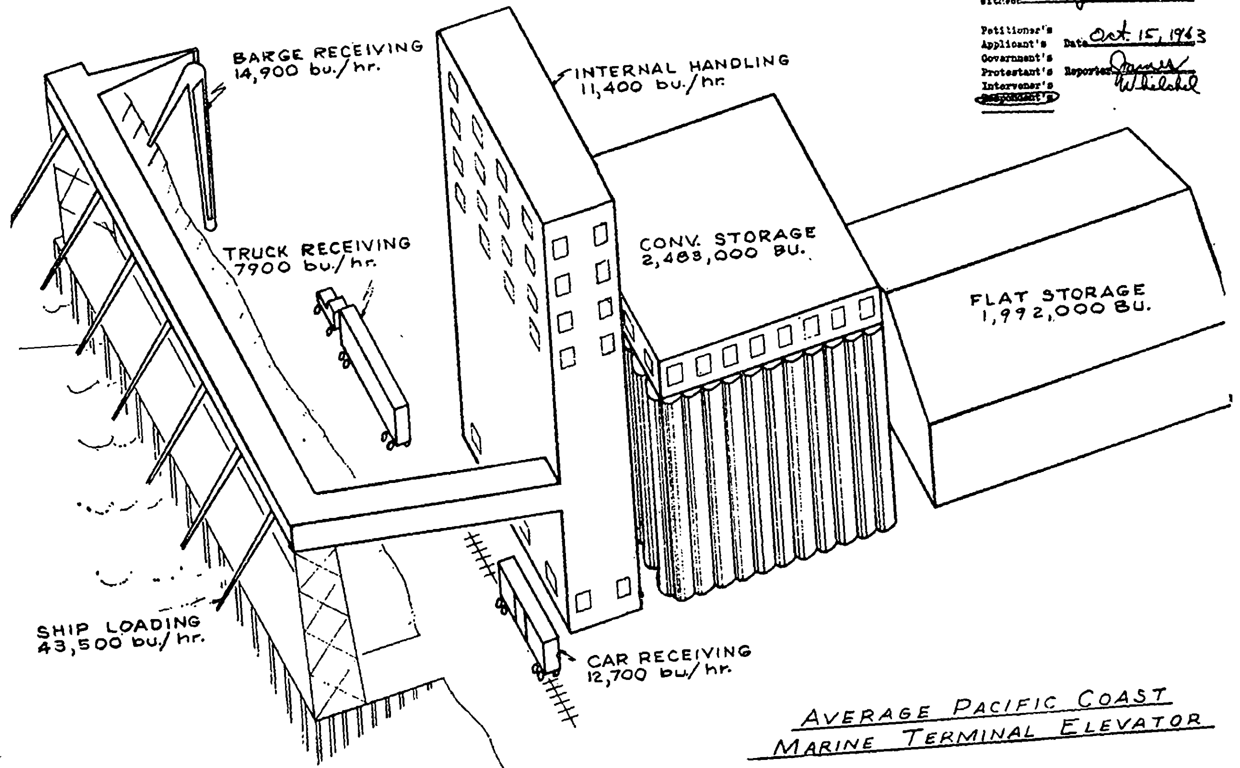
For the reasons advanced above, my ultimate conclusion requires my dissent from the majority's opinion finding no such violation.

(Signed) THOMAS LISI,
*Secretary.*




ATTACHMENT II

Docket No. 1094 Exhibit No. 6
Witness: Harry N. Starr
Petitioner's
Applicant's
Government's
Protestant's
Intervener's
Date: Oct. 15, 1963
Reporter: James Whitehead




AVERAGE PACIFIC COAST
MARINE TERMINAL ELEVATOR

# FEDERAL MARITIME COMMISSION

No. 971

NEW ORLEANS STEAMSHIP ASSOCIATION

*v.*

BUNGE CORPORATION AND SOUTHERN STEVEDORING COMPANY, INC.

*Decided August 24, 1965*

Operations of respondents found not to violate Shipping Act, 1916, as respondent Bunge held not subject to Commission jurisdiction.

Transportation by Bunge on chartered vessels on f.o.b. and c.i.f. bases for multiple consignees does not of itself constitute common carriage or the furnishing of terminal facilities in connection with a common carrier by water.

*Walter Carroll* and *Edward S. Bagley* for complainant.

*Andrew P. Carter*, *Michael Greenberg*, and *Philip Kazon* for respondent Bunge Corp.

*Henry C. Vosbein* for respondent Southern Stevedoring Co.

## REPORT

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

This is a complaint proceeding in which New Orleans Steamship Association alleges that respondents, Bunge Corp. and Southern Stevedoring Co., Inc., entered into and are carrying out an unapproved exclusive stevedoring agreement in violation of section 15 of the Shipping Act, 1916 (46 U.S.C. 814), and that respondent Bunge Corp., in furtherance of the agreement, has denied stevedores access to its dock and the use of its electrical supply in violation of sections 16 and 17 of the act (46 U.S.C. 815, 816). Chief Examiner Gus O. Basham held hearings and issued an initial decision; we heard oral argument.

New Orleans Steamship Association is a trade association composed of steamship owners, steamship agents, and stevedores engaging in business in an around the port of New Orleans.

Respondent Bunge, a New York corporation, owns and operates a waterfront terminal grain elevator located at Destrehan, La., on the Mississippi River above New Orleans, at which it regularly stores grain prior to export to customers abroad. Bunge also owns, through a wholly owned subsidiary, the Port Richmond Elevator at the port of Philadelphia, Pa.

Respondent, Southern Stevedoring Co., Inc., is a Louisiana corporation which is engaged in the stevedore business in the New Orleans area.

## FACTS

Bunge's terminal grain elevator, which was put into operation in September 1961, was constructed at a cost in excess of $7 million. In its first full year of operation, 1962, the elevator loaded out to vessels 195.5 million bushels of grain, a tonnage greater than any other elevator in the world.

The maritime facilities, those facilities located out over the Missisippi River, consist of a dock on which is constructed a loading gallery, barge unloading equipment, and a storage shed and office leased to Southern. The dock structures are owned by Bunge, except for a powerline which Bunge has permitted Southern to install from Bunge's substation to the dock area in order to supply electric current for Southern's grain trimming machines.

Bunge's warehouse facilities at Destrehan are covered by a license issued by the Department of Agriculture pursuant to the United States Warehouse Act (7 U.S.C. 241–273).[1] The dock and other waterfront facilities are neither described in nor subject to this license. Bunge obtained a license from the Department of Agriculture solely in order to be eligible for storage in the elevator of grain of the Commodity Credit Corporation (CCC). The Uniform Grain Storage Agreement between CCC and Bunge requires Bunge, inter alia, to load out and ship grain as requested by CCC, or other authorized persons, in the "transportation conveyance" specified by the owner of the grain which includes "cars, boats, barges, trucks, or other conveyances." All CCC grain is accepted subject to the condition, imposed by Bunge, that it may buy such grain in storage, which it does.

Bunge's initial tariff, Dock Tariff No. 1, which was published on September 1, 1961, and filed with the Commission prior to the com-

[1] Sec. 254 provides as follows:

"Every warehouseman conducting a warehouse licensed under this chapter shall receive for storage therein, so far as its capacity permits, any agricultural product of the kind customarily stored therein by him which may be tendered to him in a suitable condition for warehousing, in the usual manner in the ordinary and usual course of business, without making any discrimination between persons desiring to avail themselves of warehouse facilities."

mencement of operations at the elevator, contained, among other things, the usual provision for preference to "liners" in the assignment of berths. However, within the first 2 months of the elevator's operation, it became apparent that the potential volume of the elevator could not be fully utilized if part cargoes were to be loaded; too much time was lost in docking and undocking and preparing the vessel for loading, in relation to the tonnage loaded, where a part cargo was involved. Furthermore, the small space available for loading on a liner did not enable the elevator to get a run of grain at full elevator speed, and the steamship companies insisted on preference in loading which required taking the liners out of chronological order to the detriment of charterers of other vessels.

After a meeting of Bunge officials with members of the Commission staff, who suggested that if part cargoes were not to be loaded, the dock tariffs should be amended to specify that no common carriers would be accepted for berthing, the Bunge management published and filed with the Commission, on November 22, 1961, Supplement No. 2 to Dock Tariff No. 1, which provided that "until further notice common carriers by water as defined by the Shipping Act of 1916, shall not be accepted for loading at the elevator * * *."

During the time between the opening of the elevator in mid-September 1961, and November 22, 1961, Southern loaded at the Bunge elevator at Destrehan a total of six regularly scheduled liners. In the course of the loading of these vessels at the Destrehan elevator, Bunge furnished the dock, loading gallery, and appurtenances; and Southern furnished grain-trimming machines, the electrical powerline owned by it, and spouts, nozzles, extensions, etc., necessary to convey the grain from the end of spout on the elevator to the hold of the vessel. Since the effective date of Supplement No. 2 to Dock Tariff No. 1, the only vessels which have been permitted to call at the facility have been vessels under charter for the carriage of full cargoes of grain, and no loading of parcels of grain or other general cargo has been permitted.

Bunge maintains solicitation offices abroad through which grain sales are made. Such sales are generally on the basis of f.o.b. or c.i.f. terms.

A large majority of the vessels which load at the facility is under charter to Bunge to carry cargoes of grain sold by it to customers on a c.i.f. basis. Bunge's ocean marine chartering department concludes charter parties with the vessels' owners or agents, usually voyage or consecutive voyage charters, for the carriage for Bunge as shipper of a full cargo of grain. Whether the cargo may eventually be delivered

to one or more than one consignee-customer, Bunge appears on the bill of lading as the shipper.

Bunge has the right under its c.i.f. contracts of sale to decide, within 5 days after the vessel has put to sea, which buyer's contract it will make a declaration against and so notify. If a premium price develops during the 5-day period, Bunge may sell the grain to a new customer during the voyage. Only after the decision has been made are the bills of lading prepared for the vessel agent's signature and issued. All grain loaded on the vessels chartered by Bunge is used to fulfill its prior c.i.f. sales commitments under which it has the obligation to deliver to the foreign port.

On f.o.b. sales, where the obligation is upon Bunge's customer to take delivery at the elevator and to provide for transportation of the grain, Bunge's published dock tariff requires the vessel chartered by the customer to make application for a berth.

Bunge has the right to appoint the stevedore for the large majority of vessels, since the major proportion of its sales are on c.i.f. terms and, as to these, it charters the vessels to carry the grain, with the proviso in the charter party that Bunge may select the stevedore. On all f.o.b. sales the selection of the stevedore rests with the owner of the vessel or the buyer of the grain, depending upon the terms of the charter party.

There are two agreements between Bunge and Southern: (1) a written agreement dated August 31, 1961, providing that Southern shall stevedore all vessels loading at Bunge's Destrehan facility with respect to which Bunge has the right to designate the stevedore and that the rates and conditions governing the stevedoring "shall be equal to the competitive rates and conditions prevailing in the port of New Orleans, which shall be mutually agreed upon from time to time and set forth" in an appended schedule; and (2) a written agreement dated June 27, 1961, leasing storage and office space to Southern on Bunge's dock and providing for maintenance and repair work on Southern's equipment by Bunge's maintenance crew in return for a "rental and service charge" of 2 cents per ton on bulk carriers and self-trimmers and 5 cents per ton on all other vessels. This charge covered all vessels loaded by Southern at the Bunge elevator and produces revenue paid by Southern to Bunge of at least $144,000 per year. The "rental and service charge" was described by Bunge as an "access" cost paid by Southern to gain access to vessels over the dock. Southern's president stated that he could not afford to pay this charge to Bunge absent the "arrangement."

Neither agreement is for a specified term; both may be terminated by Bunge unilaterally. There is no agreement between Southern and

Bunge concerning the appointment of stevedores for vessels of which Bunge is not the charterer, although Bunge informed interested persons, by a memorandum dated November 1, 1961, that although they were free to appoint outside stevedores, Bunge did not desire to encourage other stevedores in working at Destrehan, and that use should be made of Southern "in order to further the interests of all concerned."

Bunge has developed a grain elevator at Destrehan which has a loading-out rate greater than that of any other grain elevator in the world, and it has built this facility at great expense, largely for the handling of its own grain. It has decided that for the most economically efficient functioning of this facility, it is necessary that only one stevedore be allowed access to its dock and electric supply.

Bunge believed, based upon its past experience with Southern at other terminals in the gulf area, that Southern would be the stevedore best qualified for the job.

Bunge has required Southern as a condition of its appointment and continued employment to (1) make available trimming machines of sufficient power to take full delivery capacity of the elevator, (2) provide sufficient labor and equipment to maximize mechanical trimming speed,[2] and (3) provide the maximum hand trimming labor which can be efficiently utilized during the loading of tankers.

Southern has the advantage of having the same crew and supervisory personnel stevedoring on a regular basis at the facility. While the labor used by Southern at Destrehan is drawn from the same labor pool as that of the other New Orleans area stevedores, the contracting foreman has the right of choice of the men he will employ. Southern has exercised this right to develop an experienced crew of longshoremen who are familiar with the facility because of their regular employment there.

There is no agreement between Bunge and Southern to exclude outside stevedores from Bunge's dock. However, Bunge does unilaterally restrict the use of its dock to Southern and has so informed other stevedores or ship's agents who have inquired. When stevedoring a vessel at Destrehan, other stevedores must bring their labor force and all necessary machinery to the vessel by launch. Stevedoring equipment, including trimming machines, spout extensions, nozzles, elbows, and an electricity power source for trimming machines, must be supplied by the stevedore. However, where either an owner or charterer of a vessel appoints a stevedore other than Southern, Bunge's elevator personnel fully cooperate with that stevedore.

[2] Southern is required to have a minimum of three trimming machines and three machine gangs available for the loading of all dry cargo vessels, while it is the customary practice of other stevedores to use only two such machines.

Except for nine vessels stevedored by Louisiana Stevedores, Inc., at Destrehan, no shipowner or charterer has employed a stevedore other than Southern at the facility. On an experimental basis, Louisiana borrowed the nozzles, extensions, and spouts required for the operation from another grain elevator in the area. It hired its personnel to report to a launch engaged to transport them, together with the stevedoring equipment, to the vessel's side as it was moored to the dock at Destrehan. The equipment and personnel were removed from the vessel by discharging them over the side to the launch which was standing by on the outboard side of the vessel.

On dry-cargo vessels, it was necessary for it to hire a barge and generators to furnish electricity for its grain-trimming machines in addition to the launch facilities required for its personnel and other equipment. The additional inconvenience and expense which Louisiana was required to incur forced it to conclude that on dry-cargo vessels it was not in a position to offer effective competition, even at the rates fixed by Bunge and Southern. Louisiana, however, found that it could under-quote the Southern rates on bulk carriers and tankers on which no machine trimming is required, and ultimately Southern was forced to reduce its rates on tankers.

A comparison of Louisiana's and Southern's loading time on the SS *Mauritanie*, a dry cargo vessel, which both loaded at Destrehan, reveals that Louisiana increased loading time by about 7 hours as a result of its failure to have sufficient labor and adequate machines to take the full capacity of grain that the elevator could have delivered. This loss of 7 hours represents a loss to the elevator of at least 4,200 tons of production (based on rate of 600 tons per hour) and a loss to the vessel in turnaround time.

On the tanker, SS *Richmond*, loaded at Destrehan, both by Southern and Louisiana, with full cargoes of the same type of grain, Southern averaged 614 tons per hour to Louisiana's 560 tons per hour and stowed 117 tons more in the vessel in 2½ hours less than Louisiana's loading time. The total financial advantage to the owner from Southern's performance in full loading and faster turnaround time was in excess of $2,000.

Bunge contends that the combination of narrow roadway, swift current, and activity on the dock creates a potentially hazardous situation for persons unfamiliar with the facility. One Bunge employee who fell off a barge and was sucked under by the current was drowned; seamen have fallen from the dock.

Bunge has sought to protect itself against these hazards and liability for injury with respect to the stevedoring operations by limiting the

use of the dock solely to its resident stevedore and by requiring Southern to carry adequate insurance against all risks involved and to hold Bunge harmless from any claim by stevedoring personnel. Southern works regularly at the facility and its employees, therefore, have become familiar with the dock and the barge unloading operation. Risk of their interference with Bunge's barge unloading employees and equipment is thereby minimized, as is the danger of accident and injury.

DISCUSSION

The Chief Examiner in his initial decision determined that Bunge, since November 22, 1961, was neither a common carrier by water nor other person subject to the act. He, therefore, concluded that, since any claim under sections 15, 16, and 17 of the act, regarding the operation of Bunge's Destrehan facility, must be based upon the Commission's jurisdiction over Bunge, and since the Commission was without jurisdiction, no relief could be granted.[3]

Complainant New Orleans Steamship Association excepts to the examiner's failure to find that respondents are subject to Commission jurisdiction. Complainant's jurisdictional argument is premised upon the following grounds: (1) the present operations of respondents are conducted in connection with a common carrier by water; (2) Bunge, having served common carrier vessels, could not divest itself of the status created thereby by its tariff modification that it would not serve common carriers; and (3) Bunge's operations at Destrehan are subject to the Commission's jurisdiction by virtue of its operations at Port Richmond.

Initially, complainant argues that Bunge, by maintaining a continuity of service of individual vessels, regularity of service in its overall operation, carriage on a single voyage for a variety of cargo owners on a c.i.f. basis, and solicitation through its sales offices, is itself a common carrier.

The argument is ingenious, but will not bear up under examination. While, as complainant correctly points out, the status of a person as a common carrier is not dependent upon publication of a sailing schedule, solicitation of cargo, or advertisement, there is one ingredient of common carriage which is essential to its existence and which is not present in Bunge's operations—the undertaking to carry for hire for those seeking to employ the carrier.

[3] Although the Chief Examiner found that Bunge was subject to the act as an "other person" before Nov. 22, 1961, he made no substantive findings for that period under sec. 15, 16, or 17, because less than 2 months of operation was involved, because the matter was moot, because there was no question of reparations, and because no regulatory purpose would be served by giving further consideration to the allegations. No exception was taken to this finding.

In some, though admittedly not most, cases, sales of grain are made to Bunge's customers on an f.o.b. basis, in which instances carriage is not aboard Bunge's vessels but on those chartered by the customers. Even with respect to those sales made under c.i.f. terms, Bunge has the right under its contracts of sale to decide within 5 days after the vessel has put to sea which buyer's contract it will fulfill. Such an arrangement could not by any stretch of the imagination be called a sale of space. All of Bunge's shipments are in fulfillment of contracts for the sale of grain. Bunge does not undertake to carry for anyone; it does not sell ocean transportation; it merely delivers grain in chartered vessels to its customers.

Complainant admits that the utilization by a grain merchant of a c.i.f. sales contract does not make the merchant a common carrier. It further concedes that the consolidation of shipments for various consignees on a c.i.f. basis would not make Bunge a common carrier. What complainant is in fact contending is that because Bunge regularly sells to many consignees on a c.i.f. basis, it is a common carrier. Where, however, as here, a merchant also regularly sells on a f.o.b. basis and does not undertake to carry for anyone or sell ocean transportation, it cannot be held to be a common carrier. We, therefore, find that since November 22, 1961, the day Bunge barred common carriers from calling at its Destrehan facility, we have had no jurisdiction over its operations there.

Secondly, complainant excepts to the initial decision on the grounds that the examiner erred in failing to find that Bunge was subject to our jurisdiction since Bunge, once subject to our jurisdiction, could not divest itself of that status. Specifically, complainant alleges that the refusal to serve common carriers embodied in Bunge's tariff is illegal as Bunge has an obligation under its warehouse license and the Warehouse Act, supra, to load grain on any "transportation conveyance" specified by the owner of the grain in the nondiscriminatory manner.

The warehouse license covers storage, not maritime facilities. As we have often stated, jurisdiction residing in the Secretary of Agriculture over the storage portion of facilities in no way affects our jurisdiction over the terminal portion of those facilities.[4] Moreover, even assuming that our deliberations are to be influenced by the policy relating to Bunge's obligations as a public warehouseman, we cannot say that Bunge has breached any of these obligations. Section 254

[4] *Agreements 8225 and 8225–1,* 5 F.M.B. 648, 653 (1959), aff'd sub. nom.; *Greater Baton Rouge Port Commission* v. *United States,* 287 F. 2d 86 (5th Cir. 1961); *Calif. S. & B. Co.* v. *Stockton Port District,* 7 F.M.C. 75, 81 (1962); *D. J. Roach, Inc.* v. *Albany Port District,* 5 F.M.B. 333, 334 (1957).

of the Warehouse Act merely requires that a warehouseman not discriminate between the users of his facilities. Bunge has not discriminated—it has imposed its refusal to furnish terminal facilities in connection with common carriers with reference to all of the grain in its elevator, regardless of ownership. Furthermore, no user of the storage facility has objected to the ban on common carriers, and there is no showing that any such user has ever demanded a common carrier as a "transportation conveyance." Even if such a demand were made in the future, Bunge would have the alternative of surrendering its license rather than opening its facilities to common carriers.

Complainant also excepts to the Chief Examiner's finding of a lack of jurisdiction because Bunge operates as an "other person" elsewhere. In support of this argument, complainant cites *Grace Line, Inc.* v. *FMB*, 280 F. 2d 790 (2d Cir. 1960), implying that common carriers are subject to our jurisdiction not only to the extent of their common carriage, but over all their activities. Accepting arguendo that the argument is applicable to "other persons" as well as to "common carriers," it is clear that the import of the language is this: a person manifestly subject to our jurisdiction may not so segment its operation to make part of it subject and part of it exempt when this segmentation is unjustly discriminatory. Here, there is no showing that Bunge's other operations have in any manner affected the Destrehan facility.

The complaint is dismissed.

Commissioner HEARN concurring:

I concur in the result reached by the majority and I adopt their rationale.

With respect to the period during which Bunge, in the operation of its Destrehan facility, was an "other person" subject to the Shipping Act, *International Trading Corp.* v. *Fall River Pier Line*, 7 FMC 219 (1962), I note the presiding examiner's failure to make substantive findings on the ground that the matter was moot and because reparation was not sought. Since no exceptions were taken and since the matter before us is a simple complaint and answer case, I agree that the matter should not here be examined.

Commissioner JOHN S. PATTERSON concurring and dissenting:

CONCLUSIONS

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

1. Complainant New Orleans Steamship Association (New Orleans) has failed to prove that respondent Bunge Corp. (Bunge) violated section 15 of the Shipping Act, 1916, as amended (Act).

2. Complainant has proven that respondent Bunge violated section 16 of the Act by subjecting stevedores other than respondent Southern Stevedoring Co., Inc. (Southern Stevedoring), to unreasonable disadvantage.

3. Complainant has proven that respondent Bunge before November 22, 1961, failed to establish and enforce just and reasonable practices relating to or connected with the handling and delivering of property contrary to section 17 of the Act.

4. Complainant has failed to prove that respondent Southern Stevedoring is now subject to the provisions of sections 15, 16, or 17 insofar as the facts in this record are concerned; therefore, Southern Stevedoring is not now violating any provision of the Act.

I further conclude and concur with the majority that complainant's exceptions are not substantiated and the Commission at this time has no jurisdiction over either respondent because neither is within the definition of common carrier by water or of an "other person subject to this act."

INTRODUCTION

As regards my conclusions stated above, the reasons in support of them and for my concurrence and dissent are as follows:

The Federal Maritime Commission (Commission), where a violation of law is charged by complainant, having reasonable grounds therefor, is not authorized to disregard, as the majority has done, a responsibility to adjudicate the consequences of actions by Respondents before November 22, 1961, either because the examiner made no findings or because no exceptions were taken to the failure. The report fails to respond to all the charges in the complaint which covered actions before and after said date, and to give reasons why each charge is proven or not proven as support for rulings. The facts showed that before November 22, 1961, Bunge was carrying on the business of furnishing wharfage, dock, and other terminal facilities in connection with a common carrier by water as defined in the first section of the act. Having acknowledged the existence of jurisdiction in this period, the majority may not disregard adjudicating responsibilities with respect thereto. If actions during this period violate the law, a court, in the discharge of its responsibilities for fixing the amounts of penalties prescribed in sections 15, 16, or 32 of the act, might be influenced by the fact of presently changed operations, but not the Commission, whose functions under Reorganization Plan No. 7 of 1961 and the act are subject to no exception from the responsibility to adjudicate complaints and decide on the consequences of facts no matter when the facts occurred as shown in hearings.

The complaint states that:

1. In violation of section 15, respondents entered into an agreement which was not filed immediately and was carried out before approval, "providing for the giving and receiving of special rates, accommodations, and other special privileges or advantages, controlling, regulating, preventing and destroying competition and providing for an exclusive preferential and cooperative working arrangement, * * *" (Complaint, par. 6 and 8); and acted to the detriment of commerce in other specified ways (Complaint, par. 9).

2. In violation of section 16, Bunge gave Southern Stevedoring preferential rates and, by preventing other stevedores from using Bunge's property, gave, as I construe paragraph 7 of the complaint, undue advantage to Southern Stevedoring.

3. In violation of section 17, respondents observed unjust and unreasonable regulations and practices relating to and connected with the receiving, handling, storing, and delivering of property (Complaint, par. 10).

After hearing the evidence, the examiner decided the respondent was not, after November 22, 1961, an "other person" as defined in the first section of the Act, and therefore not subject to the provisions of the Act. Before November 22, 1961, the examiner decided that since the acts subject to the complaint had ceased, "the matter is moot" and "no regulatory purpose would be served by giving further consideration" to the complaint, and the complaint should be dismissed because no one asked for reparation. No authority is cited for this exercise of discretion. Actions subject to penalty (sec. 15), or alleged to constitute misdeameanors (sec. 16), or prohibited (sec. 17) do not become "moot" because they have stopped, or did not last long, or complainants did not ask for reparation. Serving a regulatory purpose and the existence of a claim for reparation are not prequalifications on the discharge of adjudicating responsibilities under any law applicable to the Commission's functions.

The majority was silent about the far-reaching implications of these considerations as justifications for avoiding administrative adjudication, and dealt solely with the exceptions as to the Commission's jurisdiction. The rulings on the two exceptions as to our jurisdiction over Bunge were correctly made, but do not go far enough.

FACTS

A short recapitulation of the facts, the elimination of many irrelevant ones, and the addition of some omitted but significant ones will make the findings herein more clear:

1. Bunge, in the summer of 1961, completed construction of a large grain elevator facility at Destrehan, La., on the east bank of the Mississippi River, about 13 miles north of the upper limits of the port of New Orleans, La. (exhibit 19, par. 2).

2. (a) Bunge's Dock Tariff No. 1, effective September 1, 1961 (exhibit 18), provides "vessels classified as 'liners' shall be given preference in the assignment of berths over all other vessels" with certain exceptions (Id., p. 3, par. 5). A "liner" is defined as "a vessel whose steamship company has regular scheduled sailings * * * whose sailing has been advertised * * *" (Id.).

(b) Between the opening of Bunge's facility in mid-September 1961 and November 22, 1961, Southern Stevedoring loaded five ships which were regularly scheduled liners (Tr., 246–247).

(c) On November 22, 1961, Bunge issued Supplement No. 2 to its Dock Tariff No. 1 (exhibit 18), by which "common carriers by water, as defined by the Shipping Act of 1916, shall not be accepted for loading at the elevator."

3. Southern Stevedoring performs no other services than loading or unloading grain to or from ships (Tr., 613, 614). To perform its services Southern Stevedoring provides and uses trimming machines and appurtenant parts, nozzles, spout extensions, elbows, wagons, and miscellaneous gear such as light extensions (Tr., 31–32, 614–615). Southern Stevedoring owns all the equipment used after the grain leaves the spout (Tr., 33). Bunge provides the spouts, galleries, and other grain conveyors.

4. Bunge entered into two contracts dated June 27, 1961 (exhibit 1), and August 31, 1961 (exhibit 4), together giving stevedoring rights at the Destrehan facility to Southern Stevedoring. The June 27 agreement allowed Southern Stevedoring to use a small office building and storage shed, which photographs showed to be a little smaller than an average single-car garage, and made its maintenance crew available for repairing the stevedores' equipment. The rental and service charges resulted in at least $144,000 a year paid to Bunge (Tr., 279). The August 31 agreement obligated Southern Stevedoring to "stevedore all vessels loading at owner's [Bunge's] dock at Destrehan, La., with respect to which owner has the right to designate contractor [Southern Stevedoring] as stevedore * * *" (par. 1). Rates were prescribed per ton of 2240 pounds for various types of grains and ships, and it was stated: "Contractor shall invoice the party responsible for the stevedoring service * * *" (par. 2).

5. Louisiana Stevedores and other stevedores which might be retained by ships as to which Bunge did not have the "right to designate

contractor as stevedore" were not allowed to move across the wharf (Tr., 254, 430) in the event of retention and had to furnish their own stevedoring equipment for handling the grain (Tr., 431). Bunge made no efforts to make electricity available nor to have Southern Stevedoring make electricity available (Tr., 586–587), and, when requested for either electricity or access to the wharf, Bunge gave such answers as "since the activity which they sought to perform was to be conducted wholly upon the vessel they make whatever arrangements they could to do the job themselves and not to look to us" (Tr., 587). Powerlines and spout extensions were not available to other stevedores (Tr., 89, 90), although such facilities and pipes, nozzles, and knuckles were "ordinarily required of the elevator" (Tr., 102) and were supplied by other elevators (Tr., 108–109).

6. Other stevedores who were treated the same as Louisiana Stevedores also had to use launches or barges for personnel and equipment needed to stevedore ships at the Bunge facility (Tr., 103–105). Electric generators had to be supplied (Tr., 104). Armed guards prevented overland use of the facility by others (Tr., 105 and exhibit 10). The time consumed by access to ships by "alternative means" (Tr., 588), i.e., by launch (Tr., 589), was greater, and it was more expensive than for those using the wharf (Tr., 107–108).

7. The record showed that Louisiana Stevedores' employees were denied access and were required to use launches, tugs, and barges in stevedoring nine ships between February 2, 1962, and February 25, 1963, as they would have been required to do from September 1, 1961, onward. The ships were not shown to be common carriers by water. Bunge's policies and practices provided for exclusion of other stevedores before November 22, 1961 (see Fact No. 8). The first inquiry that was made for permission "to stevedore vessels standing at the Bunge dock" involved "one of the first vessels that was loaded," but the testimony did not show the status of the carrier (Tr., 430). The inquiring stevedore was told in substance, "they would not be permitted access over the dock, that they would have to furnish their own stevedoring equipment for handling the grain" (Tr., 430–431).

8. Bunge, in a "Memorandum" to the public dated November 1, 1961, stated that to operate its facility efficiently, "it had been necessary to exercise control over various aspects of an integrated grain export operation oftentimes left in the hands of others or not attended to at all" (exhibit 19, par. 1). Further, in order to minimize the problem of inefficiency in stevedoring, "Bunge decided to appoint a resident stevedore to perform all stevedoring work which it controls" (exhibit 19, par. 4); the memorandum stated its reasons for this action.

Bunge disavowed "the authority in some cases to dictate to a vessel owner the stevedore that must be employed on vessels * * *," but "does not desire to encourage other stevedores in working at Destrehan * * *" and "earnestly requests" vessel owners and charterers "to make use of the resident stevedore in order to further the interests of all concerned" (exhibit 19, par. 5). A "Statement by Bunge Corp. of its Policy and Practices With Respect to Stevedoring at its Destrehan Elevator" dated October 26, 1961, contained similar statements as the later memorandum and stated: "Bunge has decided to refrain from making its dock facilities available to other than its resident stevedore" (exhibit 21, par. 4, p. 10).

## Findings

1. (a) Between the time Bunge began operations and until November 22, 1961, Respondent was an "other person subject to this act" as defined in the first section of the Act.

(b) Southern Stevedoring was not at any time an "other person subject to this act," because it furnished no facilities described in the first section of the Act.

2. Respondents did not make any agreement of a type described in section 15 of the Act.

3. Respondents before November 22, 1961, subjected particular persons to unreasonable disadvantage.

4. Respondent Bunge's agreement, policies, and practices established an unjust and unreasonable regulation and practice related to the handling and delivering of property consisting of bulk grain.

5. After November 22, 1961, Respondents' activities have not been subject to the Act.

## REASONS AND DISCUSSION

*Finding 1.* Bunge's tariffs and actions in serving before November 22, 1961, common carriers by water at its dock, wharf, and terminal storage facilities showed that Bunge furnished such facilities in connection with common carriers by water. Southern Stevedoring did not furnish wharf, dock, or terminal facilities, but furnished only services of stevedoring which are not one of the facilities covered by the definition of an "other person." Southern Stevedoring also is not a common carrier by water.

*Finding 2.* Agreements subject to section 15 must be between parties who are both subject to the Act as a common carrier by water or as an "other person." On this record only one party, Bunge, was subject to the Act as an "other person." Accordingly, Bunge was not required

to file immediately its agreements with Southern Stevedoring and has not violated section 15.

*Finding 3.* Before November 22, 1961, Bunge excluded stevedores other than Southern Stevedoring from the grain terminal facilities and dock by maintaining exclusionary policies and by responding to an inquiry with a denial of access to the dock. By adopting a policy of excluding all stevedores except Southern Stevedoring and by the application of the policy to a stevedore making inquiries, Bunge, acting alone and directly, gave an unreasonable advantage to Southern Stevedoring as a particular person and subjected other stevedores such as the inquiring stevedore as a particular person to an unreasonable disadvantage. The disadvantage was in the added difficulties and expenses involved in getting on the ship to perform services caused by not being allowed to use the dock available to everyone else.

*Finding 4.* Section 17 merely requires that every other person subject to the Act "shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivering of property." The "policies and practices" statement of Bunge is equivalent to regulations and practices. The promulgation to the public in memorandum form is equivalent to establishment thereof and subsequent actions showed the regulations were observed and enforced. The discharge of bulk grain and its loading into ships involve handling and delivering of property. The practice of compelling other stevedores, as Bunge's witness stated, to make whatever arrangements they could to do the job themselves and not look to Bunge for the customary access and facilities establishes an unjust and unreasonable practice related to the handling by directing the grain coming out of conveyors and spouts into the ship's hold and delivery of grain to the ship. The regulation was unjust and unreasonable, not only by virtue of the expensive interference the regulations cause stevedores by having to use launches, but because of the practical effect amounting to denial of the right of the ship to choose a stevedore in spite of a disclaimer of denial. The location of the real power is disclosed to some extent by the fact that Bunge by contract obligated Southern Stevedoring to invoice ships for services rendered. There is a variance between the words and actions of Bunge. The rhetoric of rights of other than Bunge-controlled ships to choose stevedores is preserved in the exclusive agreement and policy statement, but the accompanying actions make the right overly difficult and expensive to exercise. The right of ships to choose stevedores is there, but the power to use it is not. I believe protection of a shipowner's effective power to select stevedores

ought to be bedrock principle in administering the law. The power of the ship operator to select a stevedore he trusts to load his ship must never be interfered with as long as the law fixing the responsibility of operators for the safety of their ships at sea exists in its present form. Loading cargo in the holds vitally affects the safety of the ship. The responsibilities of the carrier under the Carriage of Goods by Sea Act are relatively exacting. The absolute right to choose the loading stevedore is based on these considerations. Anyone who interferes with the effective exercise of the choice is guilty of an unreasonable regulation or practice under section 17. The examiner mentions the time it takes to load as a possible justification for interference by making Bunge's stevedores work for everyone, but time is not everything. Quality and trust are important. Perhaps there isn't much room for quality in loading bulk grain, and perhaps trust is to be assumed; nevertheless, whatever quality or trust there is in loading should not be sacrificed and a decision should not be made which makes a sacrifice possible. It is noted that the charter contract is not only to load the ship, but the ship must be properly "trimmed," i.e., the ship must float evenly after loading (exhibit 41, par. 1). Loading is just as important as the "Grain Charter Party" warranty: "That the said ship being tight, staunch and strong, and in every way fitted for the voyage * * *" etc. (exhibit 41, par. 1). An improperly loaded ship is not in every way fitted for a voyage. For these reasons, I consider Bunge's regulations to make ineffective the stevedore selection process contrary to section 17 of the Act.

*Finding 5.* By its tariff revision of November 22, 1961, Bunge effectively severed any "connection" (the word used in the first section of th Act in defining "other person") between its dock and terminal facilities furnished and common carriers by water. Such ships are no longer furnished any facilities. If the words of the tariff and later acts of Respondents disclose a variance, another issue will be presented at such time. In the meantime, the tariff restriction must be accepted as a truthful commitment.

(Signed) THOMAS LISI,
*Secretary.*

# FEDERAL MARITIME COMMISSION

No. 1158

IN THE MATTER OF AGREEMENT NO. 134–21 GULF/MEDITERRANEAN PORTS CONFERENCE

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 16 First of Shipping Act, 1916.

Said amendment approved under section 15 of Shipping Act, 1916. and proceeding discontinued.

*Frank Gormley* Hearing Counsel.

*Edward S. Bagley* for respondents.

*T. R. Stetson* for Intervener United States Borax & Chemical Corporation.

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

The Commission, by order dated November 19, 1963, instituted this investigation to determine whether a proposed amendment to the Conference Agreement of the Gulf/Mediterranean Ports Conference may be in violation of sections 14 Fourth and 16 First of the Shipping Act, 1916 (the Act), and whether said amendment should be approved, disapproved or modified pursuant to section 15 of the Act.

The amendment, Agreement 134–21, would exempt from conference jurisdiction full shiploads of one commodity (except cotton and cotton linters) shipped by one shipper, under charter conditions.

The Conference and members thereof, which are engaged in common carriage in the Gulf and South Atlantic/Mediterranean trade, were named respondents. United States Borax & Chemical Corporation intervened as favoring the amendment, but offered no testimony at the hearing, held on June 8 and 9, 1964.

[1] This initial decision was adopted by the Commission March 15, 1965 and the Report is at page 459, Volume 8 FMC.

## THE CONTENTIONS

Hearing Counsel oppose approval of the amendment on the grounds that it would result in (1) discrimination between large and small shippers in violation of section 14 Fourth of the Act; (2) undue preference and prejudice to shippers or descriptions of traffic in violation of section 16 First of the Act; and (3) diversion of berth service offerings to tramp service contrary to the public interest—all three results being in contravention of section 15 of the Act.

Respondents contend (1) that the Commission is without jurisdiction to deny approval of the amendment. Assuming jurisdiction, respondents maintain (2) that no unjust discrimination or other illegal situations would result from approval of the amendment since any advantages obtained by a shipper of full-vessel loads is inherent in the movement itself rather than the identity of the carrier under the charter party; and (3) that failure to approve the amendment would result in detriment to the involved shippers, carriers, commerce and conference.

## THE FACTS

The testimony summarized below and a stipulation of facts are found to be the evidentiary facts of record.

The Vice President in charge of traffic for respondent Waterman Steamship Corporation testified that Waterman, a U.S.-flag nonsubsidized member of the Conference, owns 28 ships, most of which are in berth service; that it has a seasonal surplus of idle ships; that it has had to cancel sailings for lack of cargo, consolidating bookings on two sailings onto a single ship, but that it does not make it a practice to cancel a berth sailing when it has cargo booked thereon; and that when the berth service is not remunerative it charters ships out if it can break even or make a slight profit.

He testified that Waterman sponsored the amendment at a meeting of the Conference on January 15, 1963; that it was rejected whereupon Waterman submitted its resignation from the Conference effective February 14, 1963; but that the Conference on February 8, 1963, upon reconsideration adopted the amendment, and Waterman withdrew its resignation.

He testified also that Waterman's only interest in securing approval of the amendment is to be able to participate in the carriage of U.S. Government financed cargoes under Public Law (P.L.) 480,[2] primarily full shiploads of flour shipped from the Gulf to the Mediterranean area; that 50 percent of such cargo is allocated to U.S.-flag

[2] Shipped under U.S. Government export subsidy and aid programs.

ships, 90 percent of which is now being carried by U.S.-flag tramp ships; that Waterman would bid for these cargoes against such tramp vessels; that a small amount of such cargo moves in parcel lots on conference ships at liner rates; that 50 percent of P.L. 480 cargoes are carried by foreign tramps at rates about 50 percent below rates of U.S.-flag ships; that liner vessels cannot compete with tramps for full shiploads of either commercial or P.L. 480 cargo; that approval of the amendment will not create a new group of carriers competing for this bulk cargo, since U.S.-flag tramps have always and will continue to compete for such cargo; but that approval simply means that Waterman and other members of the Conference will be in a position to compete for such cargo, the U.S.-flag lines for a portion of the 50 percent allocated to U.S.-flag lines, and the foreign-flag lines for a portion of the 50 percent allocated to foreign-flag lines.

Furthermore, he testified that approval of the amendment would not in his opinion, affect the stability of liner rates on the commodities involved, or the participation of the members of the Conference in the liner movement since full cargoes shipped by one shipper under charter conditions will not become available for conference liner service, the only cargo available to them being the 10 percent of odd lot movements.

Finally, the Waterman official testified that the only alternatives left to it if the amendment is not approved either is to charter its surplus ships to others and/or put them in P.L. 480 trades outside the Mediterranean area, an unsatisfactory solution, or to resign from the Conference, which it indicates it will do.

The Secretary of the Conference testified that a unanimous vote is required to exempt any traffic from the jurisdiction of the Conference; that phosphate rock, grain and sulphur, in bulk, are so exempted; that the Conference tariff contains dual rates, volume discount rates and so-called "project" rates; that the cargoes which would be exempted under the amendment would still be subject to tariff rates if shipped on liner vessels; that he foresaw no serious effects on the stability of such rates if the amendment were approved; that no complaints have been received from shippers against the proposed amendment;[3] that both U.S.-flag and foreign-flag lines could take advantage of any benefits resulting from the amendment; and that both the Gulf/French Atlantic Hamburg Freight Conference and the Gulf/United Kingdom Conference, of which he is also Secretary, exempted full shipload cargoes in their basic conference agreements in 1930 and 1931 respectively, with the approval of the Commission's predecessor.

[3] No protests against approval of the amendment were received by the Commission following its publication in the Federal Register of March 15, 1963.

A Vice President of respondent Lykes Bros. Steampship Company, a member of the Conference, testified that the exemptions in the two conferences mentioned above were secured to enable the conference lines to participate in bulk movements to the United Kingdom and the Continent which would otherwise be carried by tramps. He states that it was used to considerable advantage in carrying tremendous amounts of flour and foodstuffs to the occupation forces in Germany after World War II, but that it has not been used to any great extent otherwise.

He also testified that Lykes voted for the proposed amendment the second time, but opposed it originally because, as a subsidized line, Lykes would have to obtain permission from the Commission to handle full shipload cargoes, by which time the cargo probably would be lost; that if it carried them it would forfeit the subsidy thereon; and, in any event, Lykes was not interested in full cargoes because the rates thereon were on the low side.

The stipulation of fact entered into between Hearing Counsel and respondents is as follows:

1. The Conference carriers have agreed that the reference to "full cargoes" in the proposed amendment is to be defined as follows: The Conference uses the term in the manner generally understood in the trade, although the cargo may not fill either the entire cubic or displacement capacity of the vessel, it would constitute a "full cargo" where it substantially occupied the vessel and did so to the exclusion of any other cargo carried on that vessel in the voyage.
2. The Amendment agreed upon by the Conference at the meeting of February 8, 1963, was the same amendment to the Conference Organic Agreement which had been considered and rejected by the carriers at the meeting of January 15, 1963.
3. The exclusion from Conference coverage proposed by the Amendment under consideration would apply equally to all carriers, cargoes and shippers similarly situated. All of the Conference members would be entitled to solicit for carriage of such "full cargoes" whether the cargoes were financed under the provisions of P.L. 480 or were otherwise subject to the Cargo Preference Laws, or were not in any manner subject to the Cargo Preference Laws. At the same time the Conference is not aware of any full cargo shipments moving in the trade which would involve nonbulk quantities other than those financed pursuant to P.L. 480.
4. There are no instances of such "full cargoes" of nonbulk commodities which have moved in the other trades employing

similar exceptions, the Gulf/French Atlantic Hamburg Range Freight Conference and the Gulf/United Kingdom Conference. This also applies to the present trade except for cargoes financed under P.L. 480 as here set forth.[4]

5. It is the intent of the carriers and of the Amendment under consideration that the charter vessels would be available to all shippers whether or not a particular cargo was financed under P.L. 480. At the same time, as indicated above, there have been no instances of such cargoes being offered in this trade other than the flour shipments under P.L. 480 previously referred to in these proceedings.

## DISCUSSION AND CONCLUSIONS

At the outset is the question of the Commission's jurisdiction which has been challenged by respondents. They point out that section 1 of the Act exempts from regulation "a cargo boat commonly called an ocean tramp," in which capacity the ships would be operating when carrying the exempted traffic. They analogize this movement to foreign-to-foreign trade which the Commission has held is properly excludable from section 15 agreements. *States Marine Lines, Inc.* v. *Trans-Pac. Freight Conf.* 7 F.M.C. 204, 213 (1962).

Admittedly, tramp operations as such are not subject to the Commission's jurisdiction. However, it is well settled that while a common carrier may engage in both common and contract (tramp) carriage, it—

> "may [not] so contrive its operations in such dual capacity as to work unwarranted discrimination against the shipper patrons of its common carrier service." *Transp. By Mendez & Co., Inc. Between U.S. and Puerto Rico* 2 U.S.M.C. 717, 721 (1944).

Certainly, respondents are engaged in common carrier service in the Gulf/Mediterranean trade under their basic conference agreement, and as such are subject to the Act and therefore the jurisdiction of the Commission. Hence the Commission is empowered to disapprove the amendment in question if it finds that the contract operations of the common carriers pursuant thereto would result in unlawful discrimination against their common carrier patrons. Exactly in point here is the statement of the Commission in *Agreements 6210 etc.* 2 U.S.M.C. 166, 170 (1939) that "where a carrier subject to our jurisdiction attempts to operate [dually as a common and contract carrier] we may order the removal of any violation of that section [16] resulting from the operation of the contract portion."

[4] That is, within the memory of those presently attending meetings of the conferences involved.

Hearing Counsel does not oppose an amendment exempting P.L. 480 traffic in full cargoes, because (1) such cargoes are not available to the berth operators, and (2) the carriage thereof would not violate either section 14 Fourth, or section 16 First, of the Act.

There is no question that such a limited amendment is approvable under section 15. The record shows as a fact that such cargoes are not available to the berth operators, and their participation in this traffic as tramp operators would not affect the stability of the rates or of the trade. On the other hand such participation would benefit Waterman and other carriers with idle ships. Moreover, since P.L. 480 cargo is not commercial cargo in the accepted sense, the prohibitions of section 14 Fourth and section 16 First do not come into play.

However, the amendment was framed to cover all cargoes in full shiploads, except as noted earlier, as a standby authority to afford an opportunity to all members of the conference to compete for tramp-ship offerings of full cargoes in the trade, as the conference carriers in the Gulf/United Kingdom and Gulf/Continent trades are permitted to do, and the amendment must be approved as it stands unless the Commission finds that it would contravene section 15 of the Act.

Hearing Counsel argue that the amendment cannot be approved because "a carrier cannot operate both as a common carrier and as a tramp in the same trade with respect to identical commodities", citing a number of familiar cases defining common carriers, stating their duties and obligations toward the public, and limiting their activities as contract carriers.

It is not unlawful *per se* for a common carrier to act as a contract carrier, or to discriminate in any other manner as between shippers in the legitimate furtherance of its business, so long as the discrimination or prejudice is not unjust or undue—a factual question. This is all that sections 14 Fourth and 16 First of the Act prohibit. Hence, all of the cases which deal with the question here necessarily hold that a carrier can be both common and contract *in the absence of* a finding of unjust or undue discrimination against shippers in the form of specific transportation evils, either existing or reasonably anticipated. Thus, in the most recent decision on the question, *Agreements 8492—Alaskan Trade*, 7 F.M.C. 511, 519 (1963), the Commission said:

> We are unwilling, from our review of the cases PSAVL cites [*Absorption or Equalization on Explosives*, 6 F.M.B. 138 (1960); *Transportation by Mendez & Co.*, 2 U.S.M.C. 717 (1944); cf. *Grace Line* v. *F.M.B.*, 280 F. 2d 790 (2d Cir. 1960); *Flota Mercante Grancolombiana, et al.* v. *F.M.C. & U.S.*, 302 F. 2d 887 (D.C. Cir. 1962).] to accept its contention that the agreement must be disapproved because a mixture of common and contract carriage on one vessel (or barge tow) on the same voyage would, without more, be unlawful. We think the better approach is that such a mixture of cargoes may not be used to evade regulation and must

not result in a carrier's avoidance of its common carrier obligations with respect to the fair, nonpreferential and nondiscriminatory treatment of shippers.

We have no evidence which would warrant our concluding that the parties will, or that they intend to handle contract and common carriage under Agreement 8492 in a manner which would violate the Shipping Act. We should not disapprove the agreement on the bare possibility that they could violate the Act. At the least there ought to be a substantial likelihood of such conduct. If it develops that the parties' actual operations entail rate or other practices of questionable legality, the provisions of the Shipping Act afford ample means for reaching and if necessary correcting same.

It is also a cardinal regulatory principle that a common carrier may compete for traffic; that the fact of such competition must be considered in determining whether there is undue preference or disadvantage (*Texas & Pacific Ry.* v. *I.C.C.* 162 US 197); and that because it engages in competition the carrier cannot be charged with creating unjust discrimination or undue prejudice unless it can be shown that the disfavored shipper suffers injury by reason of the discrimination, and that this injury will cease if the discrimination is removed, regardless of the manner of its removal. *Duluth Chamber of Commerce* v. *C., ST. P., M. & O. Ry. Co.* 122 ICC 739, 742 (1927).

These are the principles under which the legality of the proposed amendment must be judged.

The basic facts derived from the testimony bearing upon the question of discrimination are that respondent common carriers cannot compete with tramp operators for full shiploads of one commodity at liner rates; that such cargoes will move at tramp rates whether respondents bid for them or not; that any preference or advantage obtained by a shipper of vessel-load quantities is entirely inherent in the shipper's ability to enter upon the charter market and cannot be characterized as undue or unreasonable; that, likewise, the treatment obtained by such shipper will not be unfair or unjustly discriminatory; that a shipper of less-than-shipload cargoes via a common carrier would not suffer any more because such common carrier carried his competitors goods in full shiploads at a lower contract rate than if a tramp carried such full cargoes at a lower rate; and that a shipper of less-than-shipload cargoes via a common carrier would not benefit from the nonparticipation of such common carrier in tramp carriage of the same commodity.

The proposed amendment has been tested in the parallel trades of the Gulf-U.K. and Continent conferences without any evidence of resulting unlawful discrimination. No shipper has protested the

amendment; in fact the only shipper interested intervened in support thereof.[5]

For the foregoing reasons it is found and concluded that the proposed amendment will not be violative of section 14 Fourth or section 16 First of the Act.

Respondents maintain that denial of the amendment or adoption of the amendment modified to cover P.L. 480 cargo only would give rise to the following consequences. These carriers would be denied the right to compete for this movement, solely by reason of their conference membership, which, in turn, would serve to weaken, if not destroy, the Conference itself. Full-cargo shippers in the trade would be denied the lower rates which presumably would result from the increased competition on such full-cargo shipments where these carriers were free to offer their services. Shippers bound by dual-rate contracts, through being precluded during the existence of those contracts from trading in full-shipload lots under charter conditions, would be faced with the loss of sales to their foreign competitors. The shipper of a Government-sponsored cargo, under Hearing Counsel's proposal, would be accorded an advantage over the shipper of a cargo not so sponsored where the advantage properly lies in the full-carriage commitment rather than in the form of sponsorship under which the cargo moves.

Respondents also contend that failure to approve the amendment will result in detriment to the conference system where meaningful enforcement by the Commission is not possible. They argue that the rule reached through the denial of the proposed amendment would be completely unenforceable, leaving the following "loopholes" among others: (1) It would apply only to a Conference carrier, since quite obviously the Commission cannot dictate to the carriers in our foreign commerce (apart from those under U.S. subsidy commitments) the employment in which their vessels are to serve. (2) Even as to the Conference carriers, essentially the same reuslts could be obtained through chartering subsidiaries and/or the charter of an individual vessel to another carrier operating outside of the scope of the Conference. While it is not possible to fully evaluate these prophecies due consideration must be given to the consequences to the carriers involved if the amendment is not approved as presented.

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[5] In the *Texas Pacific case, supra,* the Supreme Court at page 239 said: "The mere fact that the disparity between the [rates] was considerable did not, of itself, warrant the court in finding that such disparity constituted an undue discrimination—much less did it justify the court in flinding the entire difference between the two rates was undue or unreasonable, *especially as there was no person, firm, or corporation complaining that he or they had been aggrieved by such disparity.*" (Emphasis supplied)

## ULTIMATE FINDINGS AND CONCLUSIONS

The proposed amendment will not be violative of sections 14 Fourth or 16 First of the Shipping Act, 1916. The said amendment should be approved under section 15 of said Act.

An appropriate order will be entered.

JULY 17, 1964.

(Signed) GUS O. BASHAM,
*Presiding Examiner.*

# FEDERAL MARITIME COMMISSION

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DOCKET NO. 1105 (SUB. 1)

AGREEMENT NO. 8900—RATE AGREEMENT

UNITED STATES/PERSIAN GULF TRADE

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*Decided April 14, 1965*

Agreement No. 8900 approved pursuant to section 15 of the Shipping Act, 1916, subject to compliance with General Order No. 7.

Agreement No. 8900 found not to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of the Shipping Act when there is no substantial competition between two groups making or conferring on rates in regard to ports served, shippers served, cargoes carried, or service offered.

*Marvin J. Coles*, *Stanley O. Sher*, *Armin U. Kuder*, for respondents Hellenic Lines, Ltd., Hansa Line, N. V. Nedlloyd Lijnen, and Constellation Line.

*Thomas K. Roche* and *Sanford C. Miller*, for respondent Concordia Line.

*Elmer C. Maddy*, *Paul F. McGuire*, and *Baldvin Einarson*, for intervener Persian Gulf Outward Freight Conference.

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

*E. Robert Seaver*, Hearing Examiner.

## REPORT

BY THE COMMISSION: (James V. Day, *Vice Chairman;* John S. Patterson, *Commissioner*)

On November 9, 1962, Concordia Line, Deutsche Dampschiffahrts-Gesellschaft "Hansa", Hellenic Lines, Ltd., Nedlloyd Line (now N. V. Nedlloyd Lijnen), Kulukundis Lines, Ltd., and Kulukundis Maritime Industries, Inc., filed with the Federal Maritime Commission (Commission) and applied for approval under section 15 of the Shipping

Act, 1916 (Act) of a proposed agreement for consultation on freight rates for service between U.S. Atlantic and Gulf ports and ports in the Persian Gulf and adjacent waters in the range west of Karachi and northeast of Aden, assigned Agreement No. 8900. Since the proceeding was instituted, both Kulukundis applicants ceased to participate in the proceeding, and Crescent Line, Ltd., was accepted as a party to Agreement No. 8900 and added as an applicant. Since the close of the record, the name of Crescent Line, Ltd., has been changed to Constellation Line. The applicant lines are now operating independently of the Conference and are referred to herein as either "applicants" or "independents". All signers of the Agreement are common carriers by water in foreign commerce as defined in the first section of the Act.

The Persian Gulf Outward Freight Conference (Conference or protestant) protested approval of Agreement No. 8900, and we instituted this proceeding by our Notice of June 4, 1963, naming applicant carriers as respondents. The Conference at the time of the institution of the proceeding consisted of Central Gulf Steamship Corp. and Isthmian Lines, Inc. Later, Stevenson Lines joined the Conference (Exhibit 2).

An examiner has decided, after hearings, that the proposed Agreement No. 8900 should be disapproved, and exceptions to his initial decision have been filed. We held oral argument.

The applicants, respondent Concordia Line, and hearing counsel submitted exceptions, summarized as follows:

1. The record does not support any of the statements, findings, or conclusions made by the examiner in regard to competition between the applicant and protestant carrier groups as to ports served, cargoes carried, rates charged, or services to shippers.
2. The record does not support, and it was error in the interpretation of the law to conclude that anything "that encourages ship lines to stay out of approved conferences is inimical to the public interest"; and that approval of Agreement No. 8900 will militate against the re-formation of a single conference.
3. The record does not support the findings that approval of Agreement No. 8900 and the creation of a second rate-regulating group would lead to increased strife and rate instability.

Exception was also taken to several statements as being contrary to the facts, such as that the applicants prevented their rejoining the Conference by refusing to negotiate a pooling agreement, that competition by the independents was "directed at the conference lines", and to the discussion of the *Oranje Line* case (infra) as being contrary to law, which do not control our decision and are disregarded as irrelevant.

For the reasons herein stated, the exceptions are sustained and the examiner's initial decision is reversed. Based on the findings and

reasoning herein, we conclude that Agreement No. 8900, regulating transportation rates and regulating competition, a true copy of which has been filed with the Commission, should be approved and the protest rejected.

## I. Facts

The following facts have been shown:

1. The five applicants are common carriers by water, engaged in transporting property between U.S. ports along the Atlantic and Gulf of Mexico coasts and ports in the Persian Gulf area. The ports called at in this area during the period between September 1, 1962, through August 31, 1963 (the period selected by the parties as providing a typical presentation of operations) by the five applicant carriers and the approximate number of calls were as follows:

| Port | Calls |
|---|---|
| Abadan, Iran | 23 |
| Abu Dhabi, Saudi Arabia | 6 |
| Ad Dammam, Saudi Arabia | 66 |
| Al Bahrayn, Bahrein Is | 49 |
| Al Basrah, Iraq | 81 |
| Al Kuwayt, Kuwait | 88 |
| Bandar-e Shapur, Iran | 6 |
| Busheir, Iran | 9 |
| Das Island (not located by country) | 2 |
| Dubayy, Trucial Coast (coastal sovereignty undefined) | 9 |
| Jabal Dana (not located by country) | 4 |
| Khor El Muffata, Neutral Zone | 19 |
| Khor al Ami (not located by country) | 1 |
| Khorramshahr, Iran | 87 |
| Mina al Ahmadi, Kuwait | 18 |
| Muscat, Saudi Arabia | 3 |
| Ras Al Khafgi (Neutral Zone) | 4 |
| Shatt El Arab (not located by country) | 1 |
| Um Said, Qatar | 12 |

(Figures compiled from Exhibits 3, 6, 8, 16, 38.)

2. The protestants are likewise common carriers by water engaged in transporting property between the same areas. The ports called at in this area in same period by the two carriers and the approximate number of calls were as follows:

| Carrier / Port | Calls |
|---|---|
| Central Gulf Steamship Corp. | |
| Ad Dammam, Saudi Arabia | 1 |
| Bandar-e Shahpur, Iran | 21 |

(Figures compiled from Exhibit 19, Schedule 2.)

Isthmian:

| | |
|---|---|
| Ad Dammam, Saudi Arabia | 14 |
| Al Basrah, Iraq | 1 |
| Al Kuwayt, Kuwait | 2 |
| Bandar Abbas, Iran | 2 |
| Bandar-e Shahpur, Iran | 17 |
| Bushehr, Iran | 2 |
| Khorramshahr, Iran | 14 |
| Ra's at Tannurah, Saudi Arabia | 9 |

(Figures compiled from Exhibit 22.) (Ships calling twice at one port on a single voyage—unloading outbound and loading inbound—counted as one call.) There are no facts in the record regarding calls by Stevenson Lines.

Of the foregoing ports, Ad Dammam is primarily a tanker port that is used by Isthmian ships working for Arabian American Oil Co. Ra's at Tannurah is called at when Ad Dammam is crowded. Bandar-e Shahpur is primarily a port for Iranian Army equipment cargo and is not a regular port of call for commercial cargo, except when Iranian authorities direct cargo there because of port congestion at Khorramshahr.

3. The ports called at in this area during the same period by both applicants and protestants herein were shown to be as follows:

| Ports | Conference | Independents |
|---|---|---|
| Al Basrah | 1 | 81 |
| Ad Dammam | 15 | 66 |
| Al Kuwayt | 2 | 88 |
| Bandar-e Shahpur | 38 | 6 |
| Busheir | 2 | 9 |
| Khorramshahr | 14 | 87 |

There were no overlapping calls at any of the other ports.

4. Central Gulf and Isthmian cargoes to the Persian Gulf and to non-Persian Gulf ports were as follows:

*Cargo carryings, Sept. 1, 1962–Aug. 31, 1963, in payable tons*

| Lines | To Persian Gulf | Other than to Persian Gulf | Percentage carried other than to Persian Gulf |
|---|---|---|---|
| Central Gulf | 79, 667 | 222, 141 | 73. 60 |
| Isthmian | 87, 456 | 140, 694 | 61. 67 |

(Exhibits 19, 23.)

5. The applicants' cargoes to the Persian Gulf were approximately 603,481 payable tons out of a total 803,794 payable tons (Exhibits 4, 6,

10, 14, 18, 45, 47, 48, Tr., 183). The balance of 200,313 payable tons went to non-Persian Gulf ports. Of applicants' total payable tons carried, 40% to 50% was estimated to be from automobiles and trucks.

Cargo carryings, Sept. 1, 1962–Aug. 31, 1963, in payable tons

| Lines | To Persian Gulf | Other than to Persian Gulf | Percentage carried other than to Persian Gulf |
|---|---|---|---|
| Concordia | 150,352 | 37,631 | 20.01 |
| Hansa | 148,905 | 35,852 | 19.40 |
| Nedlloyd [1] | 79,412 | 41,335 | 34.23 |
| Hellenic | 153,064 | 57,452 | 27.29 |
| Crescent [2] | 71,748 | 28,043 | 28.10 |

[1] See Tr. 317.
[2] Includes Kulukundis Lines, Ltd.

6. The protestants' cargoes to the Persian Gulf were estimated to be between 60% and 70% Government-"financed". Government-"financed" cargo is that portion of cargo reserved by law to U.S.-flag carriers under section 901(b) of the Merchant Marine Act of 1936,[1] Public Resolution No. 17, 48 Stat. 500,[2] and cargo of the Department of Defense (MSTS cargo), all of which must be carried under 10 U.S.C. section 2631[3] on American-flag ships. The Conference carriers cannot accurately determine the percentage of Government-sponsored cargo they carry as their records do not distinguish between cargo sponsored by the Agency for International Development ("AID"), other cargo, and commercial cargo. The applicants carry about 86.9% to 90.2% of the commercial cargo in this trade (Exhibits 4, 6, 10, 14, 18, 19, 23). The estimated 30% to 40% of the 167,000 pay-

[1] "(b) Whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such equipment, materials, or commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such equipment, materials or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers), which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas: . . ."

[2] Pub. Res. No. 17, 48 Stat. 500, Ch. 90—"Resolved . . . That it is the sense of Congress that in any loans made by . . . any . . . instrumentality of the government to foster the exporting of . . . products, provision shall be made that such products shall be carried exclusively in vessels of the United States . . ." unless the Maritime Administration certifies there are not enough vessels, or in sufficient capacity or "at reasonable rates".

[3] 10 U.S.C. 2631—"Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force or Marine Corps . . . Charges made for the transportation of those supplies by those vessels may not be higher than the charges for transporting like goods for private persons."

able tons of commercial cargo carried by the two Conference lines is 50,100 to 66,800 payable tons.

If MSTS or AID cargo to the Persian Gulf were discontinued, it would be extremely difficult for the protestants to continue in the trade. Central Gulf, moreover, has not been offered any commercial shippers' cargo.

7. The applicants' and protestants' rates on most commodities in tariff schedules show differentials from 15% to 25%. The rates of protestants on the commodities most frequently carried are from 25% to 100% higher than those of applicants. These rates are as follows:

*Rates quoted by foreig -flag lines on Persian Gulf commodities*

| Exhibit number<br>Lines | 46<br>Crescent | 42<br>Hasna | 43<br>Hellenic | 44<br>Nedlloyd | 55<br>Concordia |
|---|---|---|---|---|---|
| Principal commodities: | | | | | |
| Autos and trucks: | | | | | |
| Boxed | $26 | $26 | $26 | $26 | $26 |
| Unboxed | 30 | 30 | 30 | 30 | 30 |
| Lubricating oil or petroleum products packed | 28 | 28 | 28 | 28 | 28 |
| Bagged flour | 22 | 22 | 24 | 24 | 22 |
| Bagged rice | 22 | 22 | 24 | 22 | — |
| Air conditioners | 35 | 35 | 35 | — | 35 |
| Refrigerators | 31 | 31 | 31 | 31 | 31 |
| Oil production equipment | 34 | 34 | — | — | 34 |
| Machinery, industrial, road building, agricultural | 38 | 39.15 | 38 | 39.15 | 39.15 |
| Canned, bottled goods/foodstuffs | — | 40.50 | — | 40.50 | — |
| Iron and steel pipe | — | 29.25 | — | 29.25 | — |
| Tallow in drums | 25 | — | 22.50 | — | — |
| Vegetable oil | — | — | 22 | — | — |
| Tires | — | — | 100 | 100 | — |
| Auto parts | — | — | — | — | 26 |
| Tinplate | — | — | — | — | 22 |
| Steel sheets | — | — | — | — | 20 |

A comparison between the rates quoted by the applicants and the protestants on certain commodities shows the following:

*Rates guoted by independents and conference carriers on Persion Gulf commodities*

| Principal commodities | Applicants | Protestants | Percent Conference higher |
|---|---|---|---|
| Autos and trucks: | | | |
| Boxed | $26.00 | $33.00 | 27 |
| Unboxed | 30.00 | 44.00 | 47 |
| Lubricating oil or petroleum products, packed | 28.00 | 36.25 | 29 |
| Bagged flour [1] | 22.00 | 43.50 | 98 |
| Bagged rice [1] | 22.00 | 43.50 | 98 |
| Air conditioners | 35.00 | 46.75 | 34 |
| Refrigerators | 31.00 | 38.00 | 23 |
| Oil production equipment | 34.00 | 41.75 | 23 |
| Machinery, industrial | | | |
| Road building | 38.00 | 46.25 | 22 |
| Agricultural [1] | 38.00 | 50.00 | 32 |
| Canned, bottled goods/foodstuffs | 40.50 | 49.50 | 22 |
| Iron and steel pipe | 29.25 | 35.75 | 22 |
| Tallow in drums [1] | 25.00 | 35.75 | 43 |
| Vegetable oil | 22.00 | 44.00 | 100 |
| Tires | 100.00 | 133.00 | 33 |
| Auto parts | 26.00 | 33.00 | 27 |
| Tinplate | 22.00 | 30.25 | 37 |
| Steel sheets | 20.00 | 36.75 | 84 |

[1] Differences exist among the applicants on these commodities.

8. Four of the applicants resigned from the Conference in 1960 and became independent carriers for the purpose of protecting their steady shippers by meeting the rates of occasional competitors which enter the trade. The Conference had refused to reduce its high rates which had attracted such competition. Nedlloyd resigned in late 1959, and shortly afterwards Concordia, Hellenic, and Hansa resigned. Thereafter, wide rate fluctuations occurred as the result of competition between the resigned and now independent carriers.

Central Gulf and Isthmian remained in the Conference.

When Stevenson associated itself with the Conference, it considered only the Conference rates and gave no thought to what the non-Conference lines were charging. During the period of rate fluctuation, automobile rates went from $40 a ton to $19 a ton. A count of the applicants' rates shows that their rates vary between them on at least 360 tariff items (Exhibit 12), although it was estimated in testimony that their rates are presently somewhat similar. When rate changes are made, their effective dates are different (Tr. 340–341).

9. Most of the applicants' ships depart with free space (Exhibit 14; computations from Exhibits 6, 7, 10, 15, 18, 45, 47, 48). (Counsel's representations as to "free space", in the context of his arguments, and comparison with Conference ships were taken to mean the ships were not fully loaded in terms of weight or space and could take on additional cargo if available.) The Conference ships seldom depart from U.S. ports with any free space (Exhibits 19, 23).

10. Shippers many times have to call four and five carriers to make sure that all lines are quoting the same rates. The proposed Agreement provides that each party delivers to the others copies of its tariffs and changes therein (sec. 3).

11. The most frequently moving commodities, such as automobiles, bagged flour, lubricating oil, and others, are also imported into the Persian Gulf ports from foreign countries. Under the protestants' rate it costs $640 to ship an automobile (based on a standard-sized Chevrolet or Ford) and $450 under the applicants' rate. Hansa's witness stated his belief that if it were to adopt the Conference rate of $43.50 on flour in bags, its main cargo buyers would find other import sources (referred to in testimony as $44).

Arabian American Oil Co., a non-Government commercial shipper, ships approximately 6,000 payable tons each year on Isthmian for other reasons than the rates, and indicated the possibility of diverting purchases to foreign countries from the United States.

12. Meetings were held in the spring of 1963 to determine whether the applicants could be induced to join the Conference. It was de-

termined that they would not join because of the rate differential between the groups (Exhibit 11). The rate differential has increased since 1963. The applicants have remained out of the Conference since 1960 and there is no indication in the record that the now independent applicants will join the Conference in the future.

13. The proposed Agreement No. 8900 contains seven sections providing for: Consultation on rates, agreement thereon based on majority "assent" (including the right to take independent action), separate maintenance of tariffs, addition of parties to the agreement, effectiveness after Commission approval, furnishing of minutes of meetings to the Commission, and termination.

## II. Findings

Based on these facts, and as developed in the following discussion, we find:

1. Agreement No. 8900 is an agreement regulating rates and competition between common carriers by water in the foreign commerce of the United States between ports on the Atlantic and Gulf coasts and ports in the Persian Gulf and adjacent waters in the range west of Karachi (Pakistan) and northeast of Aden (Aden Protectorate), but excluding both Aden and Karachi.
2. The Persian Gulf Outward Freight Conference operates in the identical area under a Commission-approved agreement.
3. There is no substantial competition between applicants and the Conference in regard to either ports served, cargoes carried, rates charged, or services to shippers.
4. There is no record proof that refusal of common carriers by water in foreign commerce to join the Conference or that the existence of two rate-regulating agreements covering the same trade is contrary to public policy on the facts of this proceeding.
5. There is no record proof that approval of Agreement No. 8900 and the creation of a second rate-regulating group would lead to increased strife and rate instability.

## III. Discussion

Underlying the Examiner's disapproval of Agreement No. 8900 is the conclusion that relations between the applicant carriers and the existing Conference carriers in the event of approval will create destructive competition which will cause unfairness between carriers, exporters, and others, detriments to commerce, and injury to the public, and that applicants will be induced to rejoin or re-form in the existing Conference in the event of disapproval. It is argued that the law

favors only one conference in a trade, not two. The conclusion rests on treating future events that may never happen as though they had happened. Such use of unproven suppositions is not reasonable. Conclusions should be based on a comparison of what the record shows exists or is reasonably foreseeable based on past and present events and of the express terms of the Agreement with the conditions for disapproval stated in the second paragraph of section 15 of the Act.

The facts show there is substantially no present or foreseeable competitive relation between the parties in regard to either ports served, cargoes carried, rates charged, or service to shippers. Lacking any conflicting competitive conditions, the basic premises of the initial decision vanish. The existence of two ratemaking associations in a single trade, by itself, is not a valid test for disapproving agreements under section 15, and the suppositions as to re-formation of the presently approved Conference following disapproval, and of future strife and rate instability following approval, are not supported by fact or reason.

### *1. Competition between the parties*

#### *a. Ports served*

The facts showed that the applicant and protesting carriers call at only 6 out of 21 ports served by all of the carriers herein and that at the 6 ports where there are overlapping calls there are substantial differences in the number of calls and service. Ad Dammam is called at over four times as often by applicants with commercial cargoes. Bandar-e Shahpur is called at over six times as often by the protestants with Army equipment cargo and is not a regular port for commercial cargo, and Khorramshahr is called at over six times as often by applicants. At the remaining 3 ports protestants' service seems insignificant, not exceeding 2 in the period covered in comparison with 81, 88, and 9 calls by the applicants (Facts, Nos. 1–3). There is no basis for disapproval in regard to ports served.

#### *b. Cargoes carried*

The protestants' cargoes carried to ports covered by the proposed Agreement are from 26.40% to 38.33% of their total cargoes, the balance going to ports in other areas, and of area bound cargoes between 60% and 70% are not cargoes obtained in the open market, but are so-called Government cargoes which are reserved to U.S.-registered ships. Applicants carry from about 66% to 80% of their total cargoes to area ports, and obtain their cargoes from commercial shippers under competitive conditions. Protestants carry about 21% of the commercial

cargo carried (Facts, Nos. 4–6). These facts show that there is no basis for disapproval in regard to cargoes carried.

*c. Rates charged*

The present Conference is composed of only a minority of the carriers in the trade and has not been effective in serving or offering rates on commercial cargo which are attractive to shippers. Protestants' rates, varying from 22% to 100% higher than those of applicants, virtually preclude all competition for cargoes in the trade. Because of the presence of other carriers ready to transport at the same or lower rates, there is no practical basis for believing applicants will ever adopt present higher Conference rates. Nor is there any evidence that the Conference will lower its rates. The protestants have no competitive need to reduce their rates because they neither serve the same ports to any extent nor carry similar commodities as cargoes because Government cargo is carried on their ships (Facts, Nos. 7–9). In spite of lower rates, applicants' ships depart with free space, and in spite of higher rates, protestants depart with full ships, showing that rates are not a significant factor with respect to Conference cargoes and that other nonmarket factors influence relations between the carriers. The largest shipper in the trade already makes substantial purchases abroad and indicated it might increase such procurement if the applicants increased their rates (Tr. 291). As a result of the higher Conference rates and the absence of any market compulsion for the two sides to have similar rates, there is no unjust discrimination or unfairness to shippers or exporters in the proposed Agreement, nor is there any possibility of rate instability caused by competition between the two groups resulting in detriments to commerce.

*d. Service to shippers*

The applicants and protestants provide entirely different service to shippers, and to the extent applicants are allowed to agree, better service will be provided. It was shown some of their ships have greater lifting capacity. Protestants are engaged primarily in transporting Government-controlled cargo not available to applicants. Applicants will tend to provide shippers with uniform rate service through assurance of identical quotations and effective dates of rates. Exporters of commodities competitive with similar commodities shipped from foreign countries will have some assurance of more competitive rates (Facts, Nos. 8, 10, 11). Because of the differences in the quantity and quality of service by applicants, there is no basis for disapproval as to carriers, shippers, or exporters under Agreement No. 8900.

*2. Re-formation of present Conference*

The possibility of the independents rejoining the Conference is held to be enough to justify disapproval of Agreement No. 8900. Reformation of the single conference with the five applicants, on this record, assuming relevance to the possibility, is impossible at this time. We must approve or disapprove the Agreement on the facts we have before us. If the facts change and create other conditions affecting approval or disapproval, their effect can be adjudicated at the time they are claimed to create a need for other conclusions. Our task is not to approve for all time, but only to pass on what we have before us.

Agreements must be approved "unless we find them contrary to the provisions of that section", *Alcoa Steamship Co.* v. *CAVN*, 7 FMC 345 (1962) aff'd 321 F. 756 (D.C. Cir. 1963). Full conference participation may be more desirable, but such a value judgment is not a basis for disapproving an agreement. Agreement No. 8765, *Gulf Mediterranean Trade*, 7 FMC 495, 499 (1963).

This record does not support any predictable possibility that approval of the applicants' contract will be detrimental to commerce later on. Neither will disapproval encourage re-formation of a single large conference, assuming further public interest in such an objective, in view of the proven market situation which has nothing to offer either group by way of incentives to agree in the absence of a common area of economic interest. Existing rate differentials shown by applicants' tariffs and the Conference's tariffs are dictated by market forces and are not capable of being eliminated under the existing Conference Agreement. About 90% of commercial cargo tonnage controlled by shippers and carriers is not available in the market for commercial cargoes represented by Conference carriers at their rates, nor does it go in any volume to the same ports. The Government or noncommercial market as seen by the Conference dictates a level of rates which the majority of shippers will not pay. The threat of competition as well as the demands of shippers as seen by the applicants, on the other hand, dictates a lower level of rates which shippers will pay. Testimony in the record shows that disapproval of the proposed Agreement will not induce membership, but will deter membership. A history of 4 years' operations outside the Conference is more convincing than unsupported speculations that there is a possibility of rejoining the Conference. Market influences reenforce the intention not to join to the point where the possibility of a single conference is not a real factor in this case.

We do not find that entrance of another conference in the trade will result in instability of rates with a consequent detriment to commerce or injury to the public interest. The proposed new conference members are concerned with commercial cargoes while the existing Conference is dedicated almost exclusively to Government-sponsored cargoes.

We would not foreclose opportunities to independents to form what might well prove to be an effective conference and by such foreclosure prompt them (even if such prompting were possible) to join the present high-rate Conference; thereby insuring its existence, thereby having only high rates available to commercial exporters from the United States, and thereby reducing the opportunities for U.S. exporters to participate in the trade in competition with foreign competing shippers who possibly might have lower rates available to them.

*3. Increased strife and rate instability*

Record support for a supposition of future "increased strife between the two competing camps and to increased instability" is entirely missing because all the evidence is to the effect that approval will decrease "strife" and instability. The only present competition is between applicants themselves, and the possibility of conflict is here, not with the protesting Conference.

The record shows further that if rate wars and instability are a factor they will be diminished by approval because all the incentives to reduce rates opportunistically exist between the applicant carriers rather than between applicants and protestants. There is a potentially destructive competitive relationship among the independent applicant carriers which compete in regard to rates and serve many ports in common.

The competitive relationships among the five applicants is such as (a) to create unstable rate conditions, with no remedy, (b) to deprive shippers of a central source of rate information, and (c) to cause a possible loss of markets for American exporters if rates are induced to go to Conference levels. Approval of Agreement No. 8900 will remove these three detriments to our commerce.

The Commission has stated: "We and our predecessors consistently have based approval of agreements at least partly on the anticipated rate stability which would result therefrom." *Oranje Line et al.* v. *Anchor Line, Limited, et al.*, 5 FMB 714, 731 (1959). Where rate stability exists, as at present in this trade, "the threat of rate disorganization cannot be overlooked." *Contract Rates—North Atlantic Con'l Frt. Conf.*, 4 FMB 353, 367 (1953). There have been fluctua-

tions in rates in the past harmful to shippers, and rapid changes may occur again unless applicants confer on rates. Instability in rates is harmful to shippers because it injects a speculative risk in the closing of future sales contracts. This risk would be reduced. The Commission, by favoring "anticipated rate stability" where rate stability exists, accepts the theory that predictability of rates over a forward term is desirable, and by approving rate-fixing agreements, on such ground, agrees that some limitations on market forces are essential for this purpose. The rate agreement is supposd to provide the latter. The facts here show that a market level of rates has been achieved after a period of intense competition and extreme changes in rates. Having achieved a relative stability dictated by economic realities, it seems sensible to take the next step which is to stabilize the present situation by approving the proposed Agreement. This action would not be a detriment to commerce.

The Commission has held that the duties imposed on conferences by section 15 "are intended, in furtherance of the policies of the Shipping Act, . . . and . . . place upon Conference members the duty to consider shippers' needs and problems, and to provide for the orderly receipt and careful consideration of shippers' requests with full opportunity for exchange of views." *Pacific Coast—European Rates and Practices*, 2 U.S.M.C. 58, 61 (1939). The inconvenience of checking five sources for prevailing freight rates may be eliminated, because each carrier will be able to provide the prevailing rate for all signatories. Disapproval of Agreement No. 8900 would leave six entities (the five applicants and one Conference) shippers have to deal with and approval would leave only two.

The legislative history of section 15 indicates that the approval of conference agreements thereunder would:

(1) assure exporters fixed rates and regular sailing opportunities which place all merchants "on the same basis as regards their estimates on contracts," thus producing stability of rates over long periods of time and "much better results for the exporter."

(2) permit shipowners who "depend for success upon the good will of shippers" to build up business by establishing rates "which will enable their American clients to compete successfully with foreign merchants engaged in the same trade."

*Investigation of Shipping Conferences Under House Res. 587*, 63d Cong., 2d sess., 1914—Report vol. 4, p. 298, and see pp. 295–303.

The findings herein show that Agreement No. 8900 will assist in achieving the objective of enabling U.S. merchants to compete better in the Persian Gulf area, particularly in regard to automobiles and bagged flour. The testimony regarding Arabian American Oil Co. operations lends further support to the possibilities of diversion of

trade. Such factors outweigh any conceivable detriments to our commerce as a ground for disapproval.

With regard to the *Oranje Line* case, the two groups had numerous rates which were the same (pp. 726–727), served the same ports (pp. 725–726) and were presently as well as in the immediate past in rate competition. One of the findings was that the parties "agree" that "rate wars" would result (p. 731). None of these findings can be made here. The case is not applicable.

The applicants' proposed Agreement does not contain provisions covering policing of obligations under it, as required by the third paragraph of section 15 and General Order 7. If such provisions are provided, further consideration will be given to final approval.

## IV. Conclusions

It is concluded:

1. The existence of another ratemaking group in the same trade on the facts of this proceeding will not destroy rate stability, nor subvert the existing Conference.

2. Approval of Agreement No. 8900 would not undermine the entire Conference system.

3. Approval of Agreement No. 8900 will not operate to the detriment of the commerce of the United States nor be contrary to the public interest.

The proceeding is dismissed.

John Harllee, *Chairman*, concurring

This proceeding comes before us upon the application of five presently independent lines for approval under section 15 of Agreement No. 8900, Rate Agreement—United States/Persian Gulf Trade. The proposed agreement provides for discussions of freight rates and other tariff matters and for the establishment of uniform rates by the members with a reservation of independent action by any member upon 48 hours notice to other members. Each member must file its tariff with the Commission and provide copies to other participating carriers.

In this proceeding we must decide whether the Commission should sanction two conferences, with general ratemaking authority, in the same trade. The question arises upon the protest of the Persian Gulf Outward Freight Conference, Agreement No. 7700, a conference already established in this trade. Underlying this issue, however, is the ever present judgment: how shall we regulate this trade to insure the greatest benefit to the shipping public.

The filing of Agreement No. 8900 is the culmination of a bitter rate war which commenced with the entry into the trade of a strong inde-

pendent line, followed by the partial breakup of the Conference because of the need of some Conference members for greater flexibility in combating the independent competition, and ending in all-out fight between the independent lines for the available cargo, which was accompanied by a rapid deterioration of rates. At present, the trade languishes in a precarious stability. The Conference remains, now made up of Isthmian Lines, Central Gulf Steamship Co., and Stevenson Lines, all U.S.-flag lines catering almost exclusively to Government-sponsored cargo. In addition, five independent lines, Nedlloyd Lines, Hellenic Lines, Hansa Lines, Concordia Lines, and Constellation Line —the parties to proposed Agreement No. 8900, serve the trade.

There is no question that the Commission must take steps to provide the public with the service it requires in this trade and to protect the carriers serving the trade from the threat of future rate wars. But what is the most practical way to stabilize the trade?

On this record, there are two alternatives: (1) We can disapprove proposed Agreement No. 8900, thereby strengthening the Conference, with the expectation that the five independent lines would reenter the Conference in order to end the destructive competition among themselves or (2) we can approve proposed Agreement No. 8900 with the assurance of a cessation of ratecutting among the independents but with the possibility of future rate competition between the Conference group and the independent group.

In his initial decision, the Examiner concluded that approval of Agreement No. 8900 would result in a fundamentally unstable situation with two ratemaking groups in the same trade. He surmised that this inherent instability would probably deteriorate eventually into a serious rate war between the two groups. Thus, the Presiding Examiner chose to disapprove the agreement. In doing so he relied heavily on a policy favoring strong conferences—the traditional vehicle of dependable service at fair, stable rates. In addition, the Presiding Examiner sought to follow the rationale of *Oranje Line* v. *Anchor Line*, 5 F.M.B. 714 (1959) in which the Board concluded that approval of agreements setting up two competing ratefixing groups in the same trade in all likelihood would engender rate instability and rate wars.

While the Presiding Examiner correctly delineated existing policy, I cannot agree that his is the best, immediate solution. In judging the alternatives presented to him, the Presiding Examiner concluded that the ideal solution—one strong conference made up of the important carriers in the trade—should be our goal. Thus, he found Agreement No. 8900, which was incompatible with that goal, to be unapprovable as detrimental to our commerce and contrary to the public interest. But in my view, his ideal solution is precarious. The disapproval of

the Agreement might simply rekindle the previous hostility in the trade. However, if we approve Agreement No. 8900, we will insure at the very least short term stability. In light of the history of drastic, disruptive competition in this trade, this is a meritorious, even if temporary, objective. Since we have continuing responsibility to supervise competitive conditions in our foreign trades, we may accept a pragmatic, and somewhat less than ideal, solution in order to effect stability. The rate stabilizing influence of Agreement No. 8900 is, therefore, in the public interest.

At present, the Conference and the independents do not compete for the same cargoes. As noted, the Conference, since they were priced out of the general cargo market by the rate war, are substantially limited to Government cargo; the independents carry commercial cargo. So long as the Conference is unable or unwilling to meet the prevailing independent rates, no conflict will exist between the two groups. Thus, the *Oranje* decision is distinguished. At the same time, the competitive relationship between the independents, upon approval of this Agreement, will be ameliorated. Currently, our approval of Agreement No. 8900 will serve the immediate needs of the trade. Later on, if conditions warrant, we may reexamine the practical justification for continued approval of the Agreement.

COMMISSIONER BARRETT dissents. Neither the record nor the majority report has convinced him that the Initial Decision served was not correct. He therefore concurs with the Examiner and upholds his decision.

By the Commission.

(SEAL) (Signed) THOMAS LISI,
*Secretary.*

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**AGREEMENTS UNDER SECTION 15.** See also Jurisdiction; Ports; Terminal Leases.

***—In general***

An agreement between U.S.-flag carriers establishing rates and conditions of carriage of commercial cargoes in a foreign interport trade was not brought within the purview of section 15 because the organization used the machinery of two organizations set up to administer other agreements filed with and approved by the Commission. The subject matter of the agreement was not set forth in the approved agreements, it was not intimately related to our foreign commerce, and it did not directly or materially affect our foreign commerce. Pacific Seafarers, Inc. *v.* American & Gulf American-Flag Berth Operators, 461 (465,466).

The scope of section 15 goes beyond the formally executed, legally enforceable contract. Its provisions apply with equal force to meetings of minds, tacit understandings, and other informal arrangements, whether oral or written. An undertsanding between carriers, establishing a uniform level of rates and commissions to which each line would "more or less conform . . . if they could do so", was required to be filed with the maritime agency. Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 596 (607–608).

Sound enforcement of the Shipping Act of necessity demands that those subject to its terms be held to a strict standard of accountability for the acts of agents representing them. Carriers which had delegated most of their ratemaking authority to agents who entered into a rate agreement, could not successfully claim that the agreement, carried out without Commission approval, did not constitute a violation of section 15 because it was not authorized. A purported repudiation was insufficient because it was merely an intra-company communication, and there was no indication that the sentiments expressed were communicated to the other carriers. Id. (609–610).

Conclusion that an agreement establishing a second ratemaking conference in a single trade should be disapproved because it would create destructive competition which will cause unfairness between carriers, exporters, and others, detriment to commerce, and injury to the public, and because applicant would be induced to rejoin or re-form in the existing conference rests on treating future events that may never happen as though they had happened. Such use of unproven suppositions is not reasonable. Conclusions should be based on a comparison of what the record shows exists or is reasonably foreseeable based on

past and present events and of the express terms of the agreement with the conditions for disapproval stated in the second paragraph of section 15 of the Shipping Act. The record showed there was substantially no present or foreseeable competitive relation between the parties in regard to ports served, cargoes carried, rates charged, or service to shippers. The existence of two ratemaking associations in a single trade, by itself, is not a valid test for disapproving agreements under section 15, and suppositions as to reformation of the presently approved conference following disapproval and of future strife and rate instability following approval, were not supported by the facts or reason. Agreement No. 8900—Rate Agreement United States/Persian Gulf Trade, 712 (719, 720).

*—Administrative estoppel*

The fact that minutes of meetings and memoranda of decisions taken by conferences were filed with the Commission, and that Commission officials were aware of ratemaking agreements between the conferences, did not mean that the agreements, which were outside the scope of the basic approved agreement, were approved. The doctrine of administrative estoppel was not applicable. The conferences had continually been aware of the regulations with respect to the filing of agreements and of the proper manner in which to file them, but they had not filed any memoranda in accordance with the regulations. Agreements were not approved merely because the agency was silent. Joint Agreement Between Member Lines of the Far East Conference and of the Pacific Westbound Conference, 553 (558–559).

*—Agreements required to be filed*

The fact that "contingent agreements," for example, an agreement to raise rates if other carriers raised their rates, were never implemented, would not excuse the failure to file such agreements. Unapproved Section 15 Agreements—Japan, Korea, Okinawa Trade, 503 (515).

The fact that an agreement would probably have been approved is no excuse for failure to file and obtain the required approval. Id (515).

Respondents which agreed to narrow the differentials between their rates and those of another carrier in the trade by approximately 50%, and failed to file their agreement, violated section 15 of the Shipping Act, 1916. Id. (515).

Respondents which agreed to charge a certain rate to carry raw silk for one month, and failed to file their agreement, violated section 15 of the Shipping Act, 1916. Id. (515).

A supplementary agreement between conferences, concerning maintenance of rate differentials for commodities from the overland territory could not be approved or disapproved, since the approvability was not at issue in the proceeding, and the record did not indicate what the complete agreement might be Respondents were required to file their overland rate agreements to permit their lawfulness to be determined separately. Joint Agreement Between Member Lines of the Far East Conference and of the Pacific Westbound Conference, 553 (565).

Section 15 is violated by a failure to file agreements between carriers. A showing that unfiled agreements were carried out is not necessary. Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 596 (614).

*—Approval of agreements*

Possible contrariness to the statute alone is not sufficient reason to disapprove an agreement under section 15. There must be substantial likelihood of conduct

in violation of the Shipping Act. Agreement No. 134–21, Gulf/Mediterranean Ports Conference, 459 (460).

Amendment to conference agreement to exempt from conference jurisdiction full shiploads of one commodity shipped by one shipper, under charter conditions, would not violate section 14 Fourth or 16 First or be contrary to the standards of section 15 of the Shipping Act, 1916. An agreement should not be disapproved on the ground of possible contrariness to the statute. There must be a substantial likelihood of conduct in violation of the Act. Id. (460).

Carriers engaged in common carrier service in a trade under their basic conference agreement are subject as such to the Shipping Act and therefore to the jurisdiction of the Commission. Hence the Commission is empowered to disapprove an amendment to the basic agreement which would exempt from conference jurisdiction full shiploads of one commodity shipped by one shipper, under charter conditions, if it finds that the contract operations of the common carriers pursuant thereto would result in unlawful discrimination against their common carrier patrons. Id. (707).

The legality of a proposed amendment to a conference agreement which would exempt from conference jurisdiction full shiploads of one commodity shipped by one shipper, under charter conditions, must be judged by the following principles: It is not unlawful per se for a common carrier to act as a contract carrier, or to discriminate in any other manner as between shippers in the legitimate furtherance of its business, so long as the discrimination or prejudice is not unjust or undue. A common carrier may compete for traffic and the fact of such competition must be considered in determining whether there is undue preference or disadvantage. Merely because it engages in competition the carrier cannot be charged with creating unjust discrimination or undue prejudice unless it can be shown that the disfavored shipper suffers injury by reason of the discrimination, and this injury will cease if the discrimination is removed, regardless of the manner of its removal. Id. (708, 709).

Proposed amendment to conference agreement which would exempt from conference jurisdiction full shiploads of one commodity (not limited to P.L. 480 cargo) shipped by one shipper, under charter conditions, would not violate section 14 Fourth or section 16 First, where the conference carriers cannot compete with tramp operators for full shiploads of one commodity at liner rates; such cargoes will move at tramp rates whether the conference carriers bid for them or not; any preference or advantage obtained by a shipper of vessel-load quantities is entirely inherent in the shipper's ability to enter upon the charter market and cannot be characterized as undue or unreasonable; the treatment obtained by such shipper will not be unfair or unjustly discriminatory; a shipper of less-than-shipload cargoes via a common carrier would not suffer any more because such common carrier carried his competitors' goods in full shiploads at a lower contract rate than if a tramp carried such full cargoes at a lower rate; and a shipper of less-than-shipload cargoes via common carrier would not benefit from the nonparticipation of such common carrier in tramp carriage of the same commodity. Id. (709, 710).

One instance of discrimination against a shipper, which involved competitive detriment to West Coast ports versus East Coast ports, was not of sufficient magnitude to warrant disapproval of the basic agreement between two conferences, pursuant to which agreement the discrimination had occured. Joint Agreement Between Member Lines of the Far East Conference and of the Pacific Westbound Conference, 553 (566).

Where supplementary agreements between two conferences, relating to ratemaking initiative, overland rates and concurrence procedures, were before the Commission in the form of exhibits and could not be treated as filed agreements; and it was not possible on the record to determine the scope of the agreements, the precise subjects covered, the objectives to be acheived, and whether or not the agreements were approvable under section 15 standards, the Commission would not guarantee reapproval of the basic agreement if the supplementary agreements were filed in accordance with Commission regulations. The conferences were ordered to cease and desist from carrying out their supplementary agreements until filed and approved. Id. (566).

Where applicants for approval of a second ratemaking conference in a single trade and protesting carriers, members of the existing conference, called at only 6 out of 21 ports served by all of the carriers, and at the 6 ports where there were overlapping calls, there were substantial differences in the number of calls and service, there was no basis for disapproval in regard to ports served. Agreement No. 8900—Rate Agreement United States/Persian Gulf Trade, 712 (720).

Where the carrier members of an existing conference carried from 26.40% to 38.33% of their total cargoes to ports covered by a proposed agreement to establish a second ratemaking conference in the trade, and of area bound cargoes between 60% and 70% were government-sponsored cargoes, whereas the carriers who would constitute the second conference carried from 66% to 80% of their total cargoes to area ports, and obtained their cargoes from commercial shippers under competitive conditions. There was no basis for disapproval of the second conference agreement in regard to cargoes carried. Id. (720, 721).

Where the rates charged by members of an existing conference in the trade were from 22% to 100% higher than those of applicants for approval of a second conference in the trade, thus virtually precluding competition for cargoes in the trade; there was no reason for believing that applicants would ever adopt the higher conference rates, since there were other carriers ready to transport at the same or lower rates; there was no evidence the conference would lower its rates; the conference members had no competitive need to lower rates because they did not serve the same ports to any extent and did not carry similar commodities as cargo since government cargo was carried on their ships; applicants' ships departed with free space, whereas the conference carriers departed with full ships; and the largest shipper in the trade made substantial purchases abroad and indicated it might increase such procurement if the applicants increased their rates, the applicants' agreement could not be disapproved on the basis of unjust discrimination or unfairness to shippers or exporters, or on the basis of any possibility of rate instability caused by competition between the two groups of carriers resulting in detriment to commerce. Id. (721).

Where applicants for approval of a second conference in a trade provided entirely different service to shippers, and if the agreement were approved, would provide better service; members of the existing conference carried primarily government-controlled cargo not available to applicants; applicants would tend to provide shippers with uniform rate service and exporters of commodities competitive with similar commodities shipped from foreign countries would have some assurance of more competitive rates, there was no basis for disapproval of the second conference agreement as to carriers, shippers or exporters. Id. (721).

The possibility that applicants for approval of a second conference in a single trade might rejoin the existing conference was not ground for disapproval. On the record, re-formation of the single conference with the applicants was impossible. Approval or disapproval had to be given on the facts. If the facts

changed and created other conditions affecting approval or disapproval, their effect could be adjudicated at the time they were claimed to create a need for other conclusions. Full conference participation may be more desirable, but such a value judgment is not a basis for disapproving an agreement. Id. (722).

The record did not support any predictable possibility that approval of applicants' agreement for a second conference in a single trade would be detrimental to commerce. Disapproval would not encourage re-formation of a single conference—rate differentials were dictated by market forces and were not capable of being eliminated under the existing conference agreement and about 90% of commercial cargo tonnage controlled by shippers and carriers was not available in the market for commercial cargoes represented by conference carriers at their rates and did not go in any volume to the same ports. Disapproval of the proposed agreement would not induce membership, but would deter membership. A history of 4 years' operations outside the conference was more convincing than unsupported speculations about the possibility of rejoining the conference. Id. (722).

Entrance of another conference in the same trade would not result in instability of rates with a consequent detriment to commerce or injury to the public interest. The proposed new conference members were concerned with commercial cargoes, while the existing conference was dedicated almost exclusively to government-sponsored cargoes. The Commission would not foreclose opportunities to independents to form an effective conference and by such foreclosure prompt them, if possible, to join the high-rate conference, with the result that commercial exporters would have only high rates available and would have reduced opportunities to compete with foreign competing shippers who might have lower rates available to them. Id. (723).

Approval of second conference in a trade would not be withheld on the ground there would be "increased strife between the two competing camps and . . . increased instability" of rates. All of the evidence was to the contrary. Applicants for approval were competing between themselves, not with existing conference members. Approval would, if anything, diminish rate wars and instability because all the incentives to reduce rates opportunistically existed between the applicant carriers rather than between applicants and existing conference members. The competitive relationships among the five applicants was such as to create unstable rate conditions with no remedy, deprive shippers of a central source of rate information, and cause a possible loss of markets for American exporters if rates were induced to go to conference levels. Approval would remove these detriments to our commerce. Id. (723).

Where rate stability exists in a trade, the threat of rate disorganization cannot be overlooked. Thus, where applicants for approval of a second conference in a trade had managed to achieve a market level of rates after a period of intense competition and extreme change in rates, it would be sensible to take the next step which would be to stabilize the situation by approving the agreement for a second conference. Such action would not be a detriment to commerce. Id. (724).

***—Conference membership***

Any provision in a conference agreement, establishing criteria for conference membership, must meet two statutory tests: (1) the terms of membership must be reasonable and equal; and (2) they must not be unjustly discriminatory, contrary to the public interest, detrimental to United States commerce or otherwise in violation of the Shipping Act. Agreement No. 9218 Between the Member

Lines of the North Atlantic Continental Freight Conference and the Continental North Atlantic Westbound Freight Conference, 170 (172).

While the "reasonable and equal" provision of section 15 relating to admission to conference membership constitutes legislative recognition of the prior administrative policy of "open" conference membership, the statute permits "reasonable and equal" conditions to be imposed. The determination that a particular condition of membership is reasonable or unreasonable is necessarily a factual one. Id. (172).

Agreement between eastbound and westbound conferences operating between certain United States ports and ports in Germany, Holland and Belgium, which provides that where a member line of either conference operates within the scope or range of the other conference it must be a member of both conferences, does not violate section 15 and should be approved. As a practical matter the trades must be considered as a single trade. Membership in the conferences is common; the same vessels are used eastbound and westbound; accounts are kept on a round voyage basis; and rates charged are based on profit and loss figures computed on a round voyage basis. Under such circumstances it would be excessive deference to formality to say that what is acceptable conduct for a single two-day conference becomes unreasonable, and detrimental to commerce when practiced by two conferences. It is not unreasonable for the conferences to protect themselves against the possibility of a line, operating conference outbound and nonconference the other way, offering reduced rates inbound to induce the exporter-importer to ship with it both ways. The existence of strong nonconference competition in the trades involved is an important factor, since the agreement is not likely to drive nonconference competition from the trade. Moreover, the trade is overtonnaged and there does not appear to be any likelihood that the agreement will restrict the movement of goods. Id. (172).

A reasonable term and condition of admission to conference membership may be one which facilitates the elimination of differentials in rates for transporting the same goods over the same routes but in a different direction as well as one which promotes rate stability. Agreement between conferences operating eastbound and westbound, respectively, between United States and European ports, which provides that where a member line of either conference operates within the scope or range of the other conference it must be a member of both conferences, would be a very limited step in this direction by facilitating discussion of ways and means to eliminate differentials and still maintain rates at levels that will produce a reasonable profit on a round voyage basis. The agreement is reasonable according to the terms of section 15. Id. (174, 175).

The statutory mandate that provisions governing conference membership be "equal" is satisfied if an outsider is granted membership on the same terms as those already in the conference, and on the same terms as other applicants. Agreement between eastbound and westbound conferences providing that in all instances where a member line of either conference operates any vessel within the scope or range of the other conference, it must be a member of both conferences, is "equal" within the meaning of the provisions of section 15. Id. (175, 176).

***—Evidence of existence***

As to a carrier's contention that rate uniformity was the product of "conscious parallelism" rather than agreements between carriers, and that mere proof of "conscious parallelism" is not proof of an agreement, "conscious parallelism" is an antitrust term of "uncertain meaning and legal significance", and is a label for

one type of evidence which may or may not be relevant if proof of conspiracy under the antitrust laws. Whatever the relevance of this antitrust doctrine may be to a section 15 Shipping Act case, the record established far more than proof of mere parallel business behavior. It established agreements between the parties which were entered into in violation of section 15. Unapproved Section 15 Agreements—Japan, Korea, Okinawa Trade, 503 (514–515).

*—Pooling agreements*

A pooling agreement which grants preferred status to "national flag" carriers (carriers flying the flag of the country of origin or destination of the cargo) is contrary to the policy of the Shipping Act which seeks to insure that all carriers operating in our foreign commerce regardless of flag do so as equals. The Commission is prohibited from approving such an agreement (covering coffee imported from Brazil) just as it would be prohibited from using its regulatory powers to attempt to insure that U.S.-flag carriers received a given percentage of this country's export trade. A pooling agreement which allocates percentages or any portions thereof on the basis of flag or national interest is discriminatory as between carriers within the meaning of section 15. Nopal Line v. Moore-McCormack Lines, Inc., 213 (229).

While the mere fact that a party's carryings under a pooling agreement result in its paying large sums to other pool members would not in and of itself render the agreement discriminatory and thus compel Commission disapproval, other factors must exist which justify the payments, and these factors must be consonant with the policies and purposes of the Shipping Act. Id. (218).

Use of "pioneering efforts", as distinguished from carryings, as a factor in allocating percentages under a coffee pooling agreement was improper where the record contained no indication of what value was assigned to the pioneering efforts of pool members who had entered the trade several decades ago, and the junior member had given regular and dependable service for 14 years. Id. (230).

Nopal's Line's share of revenues from the carriage of coffee from Brazil to U.S. Gulf ports under Agreement 9040 is unjustly discriminatory and unfair as between carriers within the meaning of section 15 because the factors of national interest and so-called pioneering efforts were improperly given weight in making the allocations between the carriers. Id. (231).

Where factors other than past carryings are used in allocating pool quotas, they must be acceptable ones under the Shipping Act. A section 15 agreement is not a private contract and the rights of the parties are restricted to those which the Commission authorizes when, guided by and subject to the requirements of section 15, it approves the agreement. Where, in fixing pool quotas, the parties gave consideration to factors which were contrary to the standards of section 15, the Commission would not fix specific quotas but would grant the parties an opportunity to make adjustments in the quotas in a manner not inconsistent with the decision. Id. (231).

Freezing of pool quotas so that members would not receive increased quotas on the basis of increased carryings is not justified on the ground that malpractices and alleged rebates would be curtailed and stability in the trade assured. An effective system of selfpolicing rather than complete elimination of all competition is the solution to rumored malpractices and alleged rebates. Id. (232).

Pooling agreement between an American-flag and a Brazilian-flag carrier (entered into primarily to solve difficulties created by a Brazilian decree relating to Brazilian government-controlled cargoes), and providing for the pooling of revenues on commercial as well as U.S. and Brazilian government-sponsored

cargoes transported by the carriers from U.S. Atlantic ports to Brazil and for strict cooperation in solicitation of cargoes, the result of which would be that each carrier would do everything possible to insure routing of commercial cargo via the other when it could not accommodate the cargo and that the services of third-flag lines would be lessened or abandoned, would be contrary to the public interest, unjustly discriminatory and unfair as between carriers, and detrimental to the commerce of the United States, within the meaning of section 15. In addition, complaining carriers and shippers of commercial cargo would be subject to undue and unreasonable disadvantage in violation of section 16. The agreement would be approved if all references to commercial cargoes, as well as the provision for cooperation in soliciting cargo were eliminated from the agreement. River Plate & Brazil Conferences *v.* Lloyd Brasileiro and Moore-McCormack Lines, Inc., 476 (489, 490, 492).

Agreement between an American-flag and a Brazilian-flag carrier, providing for pooling of revenues on U.S. and Brazilian government-controlled cargoes transported by the carriers from U.S. Atlantic ports to Brazil, would not be disapproved on the ground that cargo would be diverted from Gulf ports. The volume of Brazilian-controlled cargo was much larger than that of U.S.-controlled cargo and the routing could be dictated without help of the agreement. Diversion from the Gulf was not the purpose of the agreement; the Brazilian-flag carrier did not normally influence traffic to one coast or the other; and the Gulf U.S.-flag carrier intervenor's interest in Brazilian-controlled cargo was about 4 percent in 1962 and 1963. Id. (490, 491).

***—Rates and tariffs***

Rates, charges, etc. agreed on by terminals pursuant to an approved agreement providing for discussion and agreement on rates, charges, etc. need not be filed with and approved by the Commission before being put into effect. While section 18(b) requires the filing of tariffs only by carriers or conference of carriers, so that the exception to the filing requirements under section 15 might be said to refer only to rates, charges, etc. of approved conferences of common carriers, there is 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. Agreement No. 9025: Middle Atlantic Ports Dockage Agreement, 381 (384).

***—Right of independent action***

Where an agreement between two conferences provided that both conferences must concur in matters voted on, and further provided for the right of independent action by each conference, the concurrence provision was not illegal as not meeting the tests of the "independent action" provision of P.L. 87–346. The agreement met the statutory requirement in specific terms. If, later, it was found that the agreement was being carried out in a manner detrimental to commerce or contrary to the public interest, disapproval would be in order. Joint Agreement Between Member Lines of the Far East Conference and of the Pacific Westbound Conference, 553 (560–561).

Where a conference refused to take independent action, under its agreement with another conference, to act on rate change requests of a shipper with respect to a particular commodity because the latter conference would not concur in the placing of the commodity on the initiative list of the former, although under the agreed-upon rule for giving ratemaking initiative, concurrence should have been given, both conferences subjected the shipper, certain ports, as localities, and the commodity to unreasonable disadvantage in violation of

section 16. The failure to abide by commitments when it suited the interests of the parties, without satisfactory reason, made the disadvantage "unreasonable". One conference violated section 16 by not taking independent action when it clearly had the right to do so; the other conference violated the section by failing to fully implement the terms of supplemental agreements between the conferences. It was immaterial that this failure related to unfiled and unapproved agreements. Id. (562–564).

***—Scope of approved agreement***

The test of whether arrangements are routine, and thus exempt from the filing requirements of section 15 is whether or not the basic agreement as filed with the Commission and as approved sets out in adequate detail the procedures and arrangements under which the concerted activity permitted by the agreement is to take place. Any interested party should be able, by a reading of the agreement, to ascertain how it is to work, without resort to inquiries of the parties or an investigation by the Commission. Where an agreement was nothing more than evidence of a general intention of the parties to enter into concerted ratemaking, supplementary agreements relating to ratemaking initiative, overland rates, rate differentials and concurrence procedures (except for placement of items on the agenda of the initial meeting) were without sanction in the basic agreement and were required to be filed for approval. Joint Agreement Between Member Lines of the Far East Conference and of the Pacific Westbound Conference, 553 (558).

Where an approved agreement between the conferences provided for concurrence as to all matters coming before the initial meeting held pursuant to the agreement, before such matters could be placed on the agenda of the initial meeting and, thereafter, the parties extended the concurrence procedure to other matters (assignment of items to the initiative list, rate changes on competitive items, and rate changes on initiative items where the conference requesting a change did not have the initiative) which went far beyond an agreement to concur in matters voted on, the conferences were required to file their concurrence procedures for approval by the Commission. Id. (559, 560).

Where two carriers, parties to an approved olive agreement, included a third carrier, the inclusion was an action beyond the scope of the approved agreement and was a material modification required to be filed for approval. The failure to inform the agency of the modification was a violation of the Act on the part of all three carriers. Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 596 (603).

***—Self-policing***

In view of the voluntary inclusion in a ratemaking agreement between terminals of self-policing provisions and of procedures for handling shippers' requests and complaints, the Commission will not decide whether such provisions should be required in agreements of terminals to establish dockage rates and charges. Agreement No. 9025: Middle Atlantic Ports Dockage Agreement, 381 (383).

***—Shippers' requests and complaints***

Although the requirements of section 15 are not satisfied by a mere statement of procedure for handling shippers' requests and complaints, investigation to determine whether a conference has violated the section by failing or refusing to adopt and maintain reasonable procedures for promptly and fairly hearing and considering requests and complaints, will be dismissed in the light of court action affirming the section 21 orders in the case, as well as the pendency of

proposed rules dealing generally with the subject. Pacific Coast European Conference—Shippers' Requests and Complaints, 371 (373, 374).

In view of the voluntary inclusion in a ratemaking agreement between terminals of self-policing provisions and of procedures for handling shippers' requests and complaints, the Commission will not decide whether such provisions should be required in agreements of terminals to establish dockage rates and charges. Agreement No. 9025: Middle Atlantic Ports Dockage Agreement, 381 (383).

**ARBITRATION.** See Dual Rates.

**AUTHORTY OF COMMISSION.** See Freight Forwarders; Jurisdiction; Ports.

**BILL OF LADING.** See Misclassification of Goods; Surcharges; Tariffs.

**BROKERAGE.** See Freight Forwarders.

**COMMON CARRIERS.** See also Ports.

The owner of a water-front terminal grain elevator which maintained a continuity of service of individual vessels, regularity of service in its overall operation, carriage on a single voyage for a variety of cargo owners on a CIF basis, and solicitation through its sales office, was not itself a common carrier. The essential missing ingredient was an undertaking to carry for hire for those seeking to employ the carrier. With respect to sales made under CIF terms, the elevator owner had the right to decide within five days after the vessel put to sea which buyer's contract it would fulfill. Such an arrangement could not be called a sale of space. All of the shipments were in fulfillment of contracts for the sale of grain. The owner did not undertake to carry for anyone; it did not sell ocean transportation; and it merely delivered grain in chartered vessels to its customers. Where a merchant, as in the present case, also regularly sells on an FOB basis and does not undertake to carry for anyone or sell ocean transportation, it cannot be held to be a common carrier. New Orleans Steamship Assn. *v.* Bunge Corp., 687 (693, 694).

**CONTRACT RATES.** See Dual Rates.

**DEMURRAGE.** See Free Time.

**DETRIMENT TO COMMERCE.** See Agreements under Section 15; Ports; Surcharges; Terminal Leases.

**DEVICES TO DEFEAT APPLICABLE RATES.**

The term "obtain" in the introductory paragraph of section 16 of the Shipping Act is not synonymous with "receipt" or "accepting". Mere acceptance of wharfage at less than the applicable rate is not obtaining transportation at less than the rate otherwise applicable. Certain Practices of Stockton Elevators, 181 (199).

Assuming that a single instance of accepting wharfage at less than the applicable rate could be designated as a "device or means", or the instance of "arranging" for reduced wharfage or five instances of granting allowances on grain shipments could be considered as "practices", no violations of section 16 or 17 were shown under circumstances where the reduced wharfage and allowances were granted to a grain trading company by a corporation operating grain elevators in order to promote the sale of surplus wheat in the Orient and to free up space for the elevators. No one suffered a disadvantage, and the fact that the allowances represented only the differences between the prices paid by the ultimate purchasers of the grain and the costs to the grain trading company to obtain the grain from government stocks stored with the elevator operator, negated a finding that the trading company benefited. There may have been

inequality, but there was no unjustness, unfairness, or unreasonableness. As to the charge that the elevator engaged in a "practice", the essence of a practice is uniformity, and only occasional transactions were involved; in any event there was no unjustness or unreasonableness. Id. (199–201).

Forwarder and non-vessel-owning common carrier violated section 16 when they obtained transportation by water of property at less than rates and charges which would have been otherwise applicable, by knowingly and wilfully falsely stating that certain leather weighed 6,481 pounds, whereas it weighed some 25,000 pounds. The leather was not containerized when received by the forwarder and the forwarder had actual knowledge of the contents of the van in which the leather was transported. Hasman & Baxt, Inc.—Misclassification of Goods in Containerized Trailer Vans, 453 (457).

Carrier's practice of unloading at its own cost shipments in rail cars moving under a tariff which required the consignee to unload, allowed persons to obtain transportation at less than the regular rates by unjust means in violation of section 16, and was contrary to the tariff provision under which the cargo was rated and carried in violation of section 18(a) of the Shipping Act and section 2 of the Intercoastal Shipping Act. Since the carrier was operating in domestic offshore commerce only, section 17 was not applicable. Seatrain Lines, Inc.—Rates on Shipments in Railroad Cars, 516 (517, 519–520).

Where, during a period when rates to United States ports were not required to be filed, carriers stated their inbound rates in terms of a given figure less a given percentage refund; and whenever a shipper was given a lower rate on any commodity all shippers of that commodity were given identical concessions, so that the newly negotiated rate became the "regular rate" for all shippers of that commodity, the rates quoted could not be found to be other than the "regular" rates for any commodity, and thus no violation of section 16, Second could be found. Section 18(b) now requires that all inbound rates be filed. The "regular rate" for the transportation of a commodity is the rate appearing in the carrier's tariff. Any discounts or absorptions must appear in the filed tariff. Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 596 (615–616).

**DISCRIMINATION.** See also Agreements under Section 15; Rates and Rate Making; Reparation; Surcharges; Terminal Facilities; Terminal Leases.

The Commission's duty under section 17 is to remove all unlawful discriminations whether there is an intent to discriminate or not. The same harm flows from an unintended discrimination as from fully intended. It is the consequence of, not the motive behind the discrimination which produces the harm. California Stevedore & Ballast Co. *v.* Stockton Elevators, Inc., 97 (103).

Respondents' rate on natural rubber sold and shipped by the government to foreign purchasers, which rate was substantially higher than the rate on synthetic rubber, was not unduly or unreasonably preferential, prejudicial or disadvantageous in violation of section 16 First, or unjustly discriminatory or preferential in violation of section 17, where the government in comparing the rates failed to show the character and intensity of the competition, that the difference in rates had operated to the shipper's disadvantage in marketing the commodity, that one person had been deferred or preferred to another, and that there had been unequal treatment between competing shippers or ports. It was necessary for the government to prove that an effective competitive relationship existed between itself and U.S. exporters of synthetic rubber. Congress had directed that the excess natural rubber program be carried out with due regard to the protection of producers and others against avoidable disruption of their

usual markets. The government could not enter into an effective competition since it had been limited in selling, and had sold, on the basis that "the quantities actually released from time to time may vary considerably in order to avoid undue disruption of markets". A rate differential is not unreasonable and there is no unjust discrimination or undue preference in the absence of proof that the differential is not justified by the costs of the services rendered, by their values, or by other transportation conditions. United States, by General Services Administration *v.* American Export Lines, Inc., 280 (290, 291).

The crux of sections 16, First and 17 (first paragraph) is found in the words "advantage", "disadvantage", and "discriminatory". Their provisions were designed to prevent sellers of goods from gaining a larger share of the market, for their product than they would normally attract because of cost advantages resulting from other goods being shipped at lower rates than those of competitors. There was insufficient evidence to find any violation of these sections by carriers which, under unfiled agreements, paid uniform "refunds", "commission", etc. to shippers, forwarders and custom house brokers. Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 596 (615).

**DUAL RATES.** See also Terminal Facilities.

***—In general***

Dual rate contracts may include Canada and/or Mexico where these areas are included in the service offered by the conference, and also such areas as Communist China and Cuba in order to facilitate resumption of service when conditions permit. The River Plate Brazil Conferences (Dkt. No. 1043) will not be permitted to include Great Lakes ports when only one conference member serves those ports and then with only one sailing per month. Dual Rate Cases, 16 (43, 44).

A dual rate contract may contain a provision that contracts of carriage must be made with the individual conference carrier and that the other conference carriers have no liability under such contracts. Id. (45).

Consolidation of ten conferences in the Pacific Coast/Latin American Trade was approved where the effect would be to create five new conferences under a single administrative office, with only those carriers providing service in the particular trade area voting on rates and practices applicable to that area, and, where it did not appear that there would be an undue increase in competitive strength by reason of the arrangement. A dual rate contract would be approved for each area, with merchants having the option to execute a contract for any or all of the areas. It would be contrary to the public interest and detrimental to commerce for the conference to require that a merchant obligate himself to exclusive patronage in all of the areas in order to obtain contracts in a single trade. Id. (49, 50).

A conference is not required to demonstrate a positive need for a dual rate system as a prerequisite for approval. The statute authorizes use of the system if certain safeguards are met. Id. (50).

Conference may at its option, rather than mandatorily, provide in dual rate contract the contract is to be carried out in accordance with the provisions of the Shipping Act and the Rules of the Commission. Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (296, 304).

The Commission will not summarily (in a show cause proceeding) order the Atlantic and Gulf/Australia-New Zealand Freight Conference to delete Canadian rates from its tariff and restrict the coverage of the dual rate system to the United States, after expiration of an agreement between the conference and a

carrier which served Canada, under which parity of rates between the conference lines and the carrier was established and provision made for the carrier to be included in the conference dual rate system insofar as its Canadian operations were concerned. The rights of the conference members opposing the relief sought and of certain shippers might be substantially affected. Complainants, conference members, were free to file a complaint pursuant to section 22 of the Shipping Act and Rule 5(b) of the Commission's Rules. American & Australian Steamship Line *v.* Blue Star Line, Ltd., 433 (434).

***—Affiliates of merchant***

Conferences which desire to bind a merchant's affiliates by a single contract must use a uniform clause which binds only those affiliated companies over which the signatory merchant regularly exercises direction and working control in relation to shipping matters. All companies over which the merchant exercises such control must be listed in the contract. Desire of conferences to bind all affiliates to ease sales efforts, and to make it less easy for the merchant to evade his obligations through the subterfuge of using an affiliated company, is not sufficient to permit a clause which would bind all affiliated companies without regard to the merchant's control. Dual Rate Cases, 16 (32, 33).

A conference will not be permitted to have a clause in its dual rate contract binding all affiliates of the signatory shipper and not merely those over whom the merchant regularly exercises working control in relation to shipping matters. The easing of carrier sales effort and the aiding of strict observance of the contract offered by an all inclusive clause is far outweighed by the legitimate business interests of autonomous subsidiaries or affiliates. Japan-Atlantic and Gulf Freight Conference Dual Rate Contract, 337 (340).

***—Arbitration***

Arbitration clauses in dual rate contracts are not objectionable if they provide that "nothing herein shall deprive the Federal Maritime Commission of its jurisdiction" Dual Rate Cases, 16 (44).

In view of the holding in the *Swift* case [306 F. 2d 277], that the Commission may upset the decision of the arbitrators where their decision is not in conformity with the Shipping Act, notwithstanding the absence of any provision to that effect in the dual rate contract, deletion of the phrase "nothing herein shall deprive the Federal Maritime Commission of its jurisdiction" from the "arbitration" clauses of dual rate contracts is approved. Deletion would not change in any fashion the exercise of jurisdiction by the Commission in the proper case. Dual Rate Cases, 267 (268).

Clause in arbitration provision of dual rate contract, namely, "which does not be within the jurisdiction of the Federal Maritime Commission" was disapproved. Instead, the conference may optionally use: "Nothing herein shall deprive the Federal Maritime Commission of its jurisdiction." Persian Gulf Outward Conference Dual Rate Contract, 293 (296, 304).

***—Breach of contract; burden of proof***

No clause in a dual rate contract which places the burden of proof on the merchant, where a breach of contract is alleged, will be approved. Dual Rate Cases, 16 (42).

Dual rate contract may not flatly require that the merchant supply documents at the conference office with respect to questioned nonconference shipments. The merchant's option of furnishing data to the conference or permitting the conference to inspect data at the merchant's place of business will serve as a brake

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upon the possibility of groundless fishing expeditions by the conference. Japan-Atlantic and Gulf Freight Conference Dual Rate Contract, 337 (341).

*—Cargoes excluded from contract*

All dual rate contracts must exclude liquid bulk petroleum in less-than-full-shipload lots. The same factors which prompted the exclusion of liquid chemicals would serve also to exclude liquid petroleum. Dual Rate Cases, 16 (39, 40).

Provision of conference dual rate contract which excludes all "bulk cargoes without mark or count" satisfies the requirements of section 14b(8) and will be approved, in lieu of a clause specifically excluding chemical products, as provided by the section, and petroleum products which the Commission had excluded from contract coverage. Approval is based on the peculiar facts of the trade and does not detract from the principle of uniformity. North Atlantic Westbound Freight Association—Dual Rate Contract, 387 (388, 393).

*—Consignee contracts*

The intent of the language of section 14b, that the Commission shall permit contracts which are "available to all shippers and consignees on equal terms and conditions", is to permit the continuation of so-called consignee contracts rather than to demand that if a contract is used it must be offered both to the exporter in one country and to the importer in the other country. The decision whether to solicit signatures on both sides of the ocean, like the decision of whether to use a dual rate system at all, will be left to the conference. Dual Rate Cases, 16 (24, 25).

*—Damages*

Clauses in dual rate contracts which permit the carriers to suspend or terminate the merchant's right to contract rates prior to any adjudication that the merchant has breached his contract, and which would keep the merchant bound to exclusive patronage at the noncontract rates during the pendency of arbitration or adjudication, are not permissible. The limits of the merchant's punishment for violation of his contract are the damages provided by the statute and nothing more. However, provisions which would suspend the merchant's obligations and his rights if he does not promptly dispute or deny alleged breaches, or which would suspend his obligations and rights during a period that he fails to pay damages adjudged are not contrary to section 14b as being punitive. Such provisions may be included in the contract at the option of the conference. Where a liquidated damage provision is used the deduction from the contract rate shall be the "cost of loading and unloading". Dual Rate Cases, 16 (36–38).

*—Disclosure of information*

Optional deletion of the reference to section 20 of the Shipping Act in the "disclosure" clause of dual rate contracts is approved, provided that language is inserted to limit the use of information obtained from the merchant. Dual Rate Cases, 267; Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (296).

The disclosure of information and notice of shipment via nonconference carrier clauses of a dual rate contract, as approved in the Dual Rate Cases, will be approved for the dual rate contract of the Persian Gulf Outward Freight Conference. Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (294, 295).

*—Fixed portion of shipments*

The legislative history shows that intent underlying the phrase "all or any fixed portion" in section 14b was not to require that under all dual rate contracts

lower rates had to be offered for a fixed percentage of the merchant's cargo. The phrase was intended rather to make it clear that if such fixed portion contracts were offered they would be subject to the same safeguards as "exclusive patronage" contracts. Therefore, conferences will not be required to permit shippers the option of offering only a fixed portion of their shipments in exchange for lower rates. Dual Rate Cases, 16 (25, 26).

Dual rate contract would not be modified to permit less than full shipper commitment on the ground that the exclusive patronage aspect of the contract was detrimental to the commerce of the United States. No rationale for such a finding was provided. No suggestion was made as to what percentage would be appropriate. Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (294).

*—Legal right to select carrier*

Section 14b does not permit a conclusive presumption that the 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. A dual rate contract may, at the option of the carriers, contain a provision which will raise a rebuttable presumption that the merchant possessed the legal right at the time of shipment to select the ocean carrier if he participated in the arrangement for ocean transportation or if his name appears on a bill of lading or export declaration as shipper or consignee. All contracts must contain a provision that the merchant is not required to refuse to purchase, sell or transfer any goods on terms which vest the legal right to select the carrier in any other person; and a provision that if the merchant's vendor or vendee fails to exercise his legal right to select the carrier (if he has such right), or otherwise permits the merchant to have the legal right, the merchant shall be deemed to have the right. Dual Rate Cases, 16 (30–32).

The legal right clause of a dual rate contract will not be approved if it contains a conclusive, rather than a prima facie, presumption that the shipper has the legal right to select the carrier when his name appears on the bill of lading or when he participates in the arrangements for selection of a carrier. Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (294).

Language in a dual rate contract which would raise a conclusive presumption that the merchant had the legal right to select the carrier if his name appeared on certain shipped documents, or if he otherwise participated in the ocean routing or the selection of the ocean carrier, is not permitted by section 14b. A prima facie presumption is permissible. Japan-Atlantic and Gulf Freight Conference Dual Rate Contract, 337 (340).

*—Merchant's right to use owned or chartered vessels*

All dual rate contracts, whether or not they previously did so, must permit merchants to transport cargoes on their owned vessels, or on vessels chartered by the merchant provided the term of the charter is six months or more. Dual Rate Cases, 16 (42, 43).

Article in dual rate contract excluding shipments on vessels owned by the merchant or chartered solely by the merchant where the term of the charter is for six months or longer, and the chartered vessels are used exclusively for the carriage of the merchant's commodities, was approved as according conference reasonable protection from spot raiding of cargoes and according merchants the right to engage in bona fide proprietary carriage under reasonable conditions. Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (295).

In view of the fact that there had been no past usage of chartered or owned vessels by dual rate contract signatories in the trade, and interested shippers had stated that they did not desire a charter exclusion provision, the Commission will approve deletion of a chartered or owned vessels clause from the conference dual rate contract. Approval is based on the peculiar facts of the trade and does not detract from the principle of uniformity. North Atlantic Westbound Freight Association Dual Rate Contract, 387 (388, 393).

***—Modifications of contract***

All dual rate contracts must contain a provision specifically stating that all modifications are subject to the Commission's approval, and that interpretations of the contracts must be made in the light of the Shipping Act and the rules and regulations of the Commission. Dual Rate Cases, 16 (44, 45).

Provision of dual rate contracts, providing that contracts must state that all modifications are subject to Commission approval and that interpretations must be made in accordance with the Shipping Act and the rules of the Commission, is made optional rather than mandatory. Dual Rate Cases, 267 (269).

Conference may at its option, rather than mandatorily, provide in dual rate contract that the contract may be amended subject to the permission of the Commission. Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (296, 305).

***—Natural routing***

As to natural routing, dual rate contracts must uniformly provide for notice to the conference of the merchant's desire or need for service on the direct route and for an opportunity for the conference to provide such service. The contracts must also require shipment on conference vessels unless this would constitute unnatural or indirect routing. Thus the merchant would not be permitted to escape his obligations when nonconference service was no more natural than that of the conference. Dual Rate Cases, 16 (34, 35).

A natural routing clause of a dual rate contract which contains a more exact description of a "natural route" than that previously approved by the Commission, and which is acceptable to the principal contract shippers in the trade, will be approved. Approval is based on the peculiar facts of the trade and does not detract from the principal of uniformity. North Atlantic Westbound Freight Association—Dual Rate Contract, 387 (388, 393).

***—Opening of rates***

Conferences may provide for the opening of rates without advance notice but the individual carrier members would not be permitted to charge rates in excess of the last published conference contract rate for a period of 90 days after the rate has been opened. The conference would have to give 90 days' notice of the return of the rate to the conference dual rate system. The Commission's interpretative ruling to the contrary will be withdrawn. Dual Rate Cases, 16 (45, 46).

Open rate clause of dual rate contract, identical with that approved in the *Dual Rate Cases*, was approved for minority conference in trade. The clause provided flexibility to the conference, which was particularly important in the instant case, and protected merchants by requiring notice of a return of a commodity, to the contract rate system. Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (295).

***—Prompt release***

With respect to the requirement of section 14b for prompt release of the contract shipper, all dual rate contracts must, by their terms, fix the time period by which the conference must respond to a request for space and the time by which the conference must furnish space. Some variation in these times is permissible among the various trades depending upon what appears to be the reasonable commercial needs in the particular trade. Dual Rate Cases, 16 (27).

In view of the fact that the conference was composed of only a minority of carriers in the trade and therefore the occasions upon which the carriers would be unable to accommodate the contract shippers might arise, more frequently than in other trades, the prompt release clause of the conference's dual rate contract must be more favorable to shippers, and a prompt release period of 10 days, rather than 15, was approved. Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (295).

***—Rate increases; suspension of rates***

The overriding intent of the section 14b language, which read literally would simply require that rates not be increased more than once every 90 days, and the reasonable requirements of our foreign commerce demand that merchants be given a minimum of 90 days' advance notice of increases in rates. All dual rate contracts must include clauses providing for (1) 90 days' advance notice, (2) 30 days thereafter in which the merchant may decide to terminate the contract, (3) 30 additional days for the carrier to decide to continue existing rates, (4) conformance of rate changes with section 18(b)(2) and the Rules of the Commission, (5) offer by the conference to the merchant of a subscription to its tariffs, (6) rates and notices of proposed rate increases to become effective on their original effective dates through filing with the Commission rather than with the signing of an individual contract, and (7) notice by tariff publication. Dual Rate Cases, 16 (27–29).

Dual rate contracts may provide for suspension in case of war or other governmental action interfering with the carriers' service, and for resumption on 15 days' notice, or for rate increases on 15 days' notice if the conference desires to continue its contract system notwithstanding war or other governmental action. The approved clause would also permit continuation of the contract system at higher rates imposed in compliance with section 18(b) of the Shipping Act in other extraordinary circumstances which unduly impede or delay the carrier's service. Id. (47, 48).

Provision in the rate increases clause of dual rate contracts, providing for no changes in rates, etc. which result in an increase or decrease in cost to the merchant except as provided by section 18(b)(2) and the Rules of the Commission, is made optional rather than mandatory. Dual Rate Cases, 267 (268); Persian Gulf Outward Freight Conference Dual Rate Contract, 293 (296).

Clause in rate increases provision of dual rate contracts, namely, "through filing with the Federal Maritime Commission," (with reference to effective date of rates initially applicable under the contract), is made optional rather than mandatory. Id. (269); Id. (296).

A force majeure clause of a dual rate contract which allowed rate increases on less than 90 days' notice in certain circumstances not under the control of the carrier but not stemming from war or hostilities, may be deleted. The provision was for the benefit of the carriers and if they are willing to forego the additional privilege accorded them by the Commission, the Commission has no objection to deletion of the clause. Approval is based on the peculiar facts of

the trade and does not detract from the principle of uniformity. North Atlantic Westbound Freight Association—Dual Rate Contract, 387 (388, 393).

*—Shipment via nonconference vessel*

Dual rate contracts may contain a provision requiring the merchant to notify the conference of a shipment via nonconference vessel within 10 days after the shipment, if practical, or as promptly as possible, in cases where the merchant is party to a transaction and the legal right to select the carrier is vested in someone else. Only the bare essentials of the transaction need to be included in the notice and hence the burden on the merchant should be slight. Dual Rate Cases, 16 (40, 41).

Dual rate contracts may contain a provision requiring the merchant to disclose the facts concerning shipments via nonconference vessels, with the merchant having the option to furnish information or copies of documents, or allowing conference representatives to examine documents on the premises of the merchant, and a provision that pricing data and similar information may be deleted from documents at the option of the merchant and there be no disclosure of any information in violation of section 20 of the Shipping Act, 1916. Id. (41, 42).

*—Single carrier contracts*

Single carrier dual rate contracts are permissible under section 14b, even though the carrier may be in competition with a conference. Dual Rate Cases, 16 (48, 49).

*—Spread between contract and noncontract rates*

A 15 percent spread in dual rate contracts is reasonable. Provision for the statement of rates in the highest multiple of 5 cents, or 25 cents, which does not result in a spread greater than 15 percent is reasonable and will be permitted. Dual Rate Cases, 16 (38–39).

**ELEVATORS.** See Devices to Defeat Applicable Rates; Jurisdiction; Terminal Facilities; Wharfage.

**EVIDENCE.** See also Agreements under Section 15.

Photostatic copies of documents taken from carriers' files were properly admitted in evidence where copies were given to the carriers long before the opening of hearings, officers of the carriers or their agents testified that the documents were from their files, and despite repeated urgings by Hearing Counsel and the Examiner, the carriers did not challenge the authenticity of any particular document or claim that any single document was not a true photostat of the original from their files. The identifying witnesses were given an opportunity to read through each document. At very least Hearing Counsel had made a prima facie showing of authenticity. Unapproved Section 15 Agreements—Japan, Korea, Okinawa Trade, 503 (510–511).

As to contention of carriers that the Examiner's findings that the carriers entered into agreements were not supported by reliable and probative evidence but by hearsay, the "hearsay" question was laid to rest in *Unapproved Section 15 Agreements—South African Trade,* 7 FMC 159. The record contained ample reliable and probative evidence to demonstrate that the carriers entered into the agreements in question. Id. (514).

Hearsay evidence is admissible in investigatory proceedings before the Commission. The evidentiary value of a particular document admitted in evidence depends on the entire record. A given document, standing alone, may not be of sufficient weight to sustain a finding. However, the document may be supported by other related evidence; together these items of evidence may form the

basis for a rational and dependable conclusion. In this case, the Commission rejected several of the Examiner's findings as unsupported by reliable, probative and substantial evidence. Where the Commission found violations of section 15, there was a reliable, probative and substantial combination of documentary evidence and oral testimony. In each case, the oral testimony amply corroborated the documentary evidence. Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 596 (612).

**EXCLUSIVE PATRONAGE CONTRACTS.** See Dual Rates.

**FAIR RETURN.** See Rates and Rate Making.

**FOREIGN COMMERCE OF THE UNITED STATES.**

Where the General Services Administation sold natural rubber to foreign purchasers for a consideration and shipped the commodity sold from United States ports to foreign ports, the transactions were commercial in nature and within the category of foreign commerce of the United States, regardless of whether the United States accepted payment in cash or diverted the proceeds of the sale to an aid program. United States, by General Services Administration *v.* American Export Lines, Inc., 280 (287).

**FREE TIME.**

Where respondent unjustly discriminated against complainants in the matter of storage charges and free time allowances in comparison with treatment accorded complainants' competitor; the commodity, cement, was imported through the same terminal, at the same time for sale in the same general market area; and cement was a thoroughly standardized product and in a normal market the price would undoubtedly approach uniformity so that complainants could not increase prices to compensate for the prejudicial charges, complainants were entitled to reparation on the basis of the difference between the storage charges and free time allowance unlawfully assessed against them over and above those charges assessed against complainants' competitor. *Eden Mining*, 1 USSB 41, is not to the contrary, since there was no contention that the business of complainants was competitive with those of contract shippers, and a showing of charging of different rates from shippers receiving the same service did not, as a matter of course, establish the fact of injury and the amount of damages. International Trading Corp. of Va., Inc. *v.* Fall River Pier, Inc., 145 (148–150).

Neither the Commission's Order in the matter of free time and demurrage charges at the port of New York, nor the decision in *American President Lines, Ltd.* v. *FMB* [317 F. 2d 887], require that "first period" rates be applied after the expiration of the "free time" period to cargo shipped to New York by the Austrian Trade Delegate for use in constructing the Austrian Pavilion at the World's Fair, and left on the pier until it could be used in constructing the pavilion. However, the terminal would be authorized to accept an amount approximately equivalent to a "first period" rate as full payment since the cargo was destined to the World's Fair, an essentially noncommercial endeavor from the standpoint of foreign governments; the cargo was owned by the Austrian Government; and other consignees were not prejudiced in the matter of storage space because of the delay of Austrade in picking up its cargo. Austrian Trade Delegate *v.* Universal Terminal & Stevedoring Corp., 278.

**FREIGHT FORWARDERS.** See also Misclassification of Goods.

***—In general***

While licensing statutes should be liberally construed and past violations of law are not an absolute bar to approval under a licensing statute, it is equally

clear that violations of law can and should be taken into consideration in determining the fitness of an applicant for a license, such as a freight forwarder license. Dixie Forwarding Co., Inc.—Freight Forwarding License Application, 109 (112). See p. 167, supra.

Where an applicant for a freight forwarder license knew that a license was required, but failed to file a timely application and operated in violation of section 44; knowingly filed a falsely dated balance sheet with the name of certified public accountants improperly placed thereon in an effort to mislead the Commission; falsely certified with intent to deceive that it was licensed by the Commission as an independent ocean freight forwarder in order to collect brokerage from carriers in violation of section 44, and when specifically appraised of the falseness of the certification failed to cause its removal from invoices; and demonstrated a lack of that kind of financial responsibility compatible with the duties and responsibilities of an independent ocean freight forwarder, the applicant was not fit to receive a license from the Commission. Applicant's assurances of good behavior in the future and his demeanor on the witness stand could be given little weight in view of his past conduct. A freight forwarder occupies a position of enormous competitive and economic power as to carriers and enjoys a fiduciary relationship with shippers and his business integrity must be above reproach. The philosophy of section 44 is that the shipping public should be entitled to rely on the responsibility and integrity as well as the technical ability of a freight forwarder. Id. (115–118). See p. 167, supra.

Section 44 of the Shipping Act places upon the Commission the duty of determining that an applicant for a freight forwarding license is fit, willing and able to properly carry on a forwarding business, and further, that he is willing and able to conform with the Act and the Commission's requirements, rules, and regulations. The determination must be made by application of the Commission's sound discretion. Discretion may not be exercised in an arbitrary or capricious manner and in licensing or refusal to license, consideration must be given to constitutional and lawful safeguards of individuals and their right to make a living. Carlos H. Cabezas—Freight Forwarding License Application, 130 (131).

An application for a freight forwarding license must be denied where the applicant failed to respond to the Commission's proper inquiries, thus foreclosing an affirmative finding that he is willing and able to conform with the freight forwarder law and requirements, rules, and regulations of the Commission; and where the applicant failed to furnish documentary evidence of his financial status, Hearing Counsel presented evidence of lack of financial ability, and a federal court had determined that applicant's financial status was marginal and had appointed an attorney for his defense in a matter involving violation of the Shipping Act. Id. (131, 132).

In view of the commitment of applicants for freight forwarding licenses to adhere scrupulously to requirements of the law in the future, applicants will be given the opportunity, under close supervision, to continue to offer their services on condition that they submit to the Commission every six months an independently certified audit of their financial status, with such requirement to remain in effect for two years. Dixie Forwarding Co., Inc.—Freight Forwarding License Application, 167.

The Commission is not the proper forum for determination of the constitutionality of Public Law 87–254 (the freight forwarder law). The Commission has no authority to consider the constitutionality of a statute under which it operates. Louis Applebaum—Freight Forwarding License Application, 306 (309).

*—Grandfather rights*

Section 44(b) does not, in the true sense, set forth a "grandfather clause" and the holder of a certificate issued prior to P.L. 87–254 has no vested rights. The section specifically permits *independent* ocean freight forwarders to continue their operation for a limited period of time during which an application must be presented together with evidence to prove qualification in accordance with statutory requirements. A license holder not qualifying as an independent freight forwarder has no statutory authority to continue a temporary operation. Louis Applebaum—Freight Forwarding License Application, 306 (307).

*—Independence of forwarder*

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 within the meaning of section 1 of the Shipping Act and cannot be licensed under section 44. If there were any doubt that the law eliminated any connection between shippers and forwarders, the legislative history resolves the doubt. Louis Applebaum—Freight Forwarding License Application, 306 (310).

The freight forwarder law, like other licensing statutes, should be approached with a liberal attitude to the end that permits may be granted to qualified applicants. Nevertheless if the applicant is not fairly within the definition of "independent ocean freight forwarder", there is no room for liberality. Wm. V. Cady—Freight Forwarding License Application, 352 (357).

One of the principal purposes of Public Law 87–254 (freight forwarder law) was to authorize payment of brokerage by ocean carriers to freight forwarders but only if no benefit to a shipper would result such as to constitute a rebate. The definition of independent ocean freight forwarder was intended to exclude indirect as well as direct interests, including so-called "dummy forwarders", concerns organized solely to collect compensation from carriers which would find its way back to the shipper. Id. (358).

An employee of a firm shipping goods abroad did not qualify as an independent ocean freight forwarder. The employee had in the past been in the usual master-servant relationship, and the employer had exercised actual control over the employee with respect to his carrying on the business of forwarding as a registrant and had received and retained the forwarder fees earned by the employee in his allegedly personal forwarding business. As to the future, the employee was dependent on his job and such dependence left no doubt as to the affirmative as well as negative control which his employer would have, regardless of any present understanding. Thus it was unimportant that the employer now permitted the employee to retain brokerage and forwarder fees, that he was permitted to carry on his "personal" business during his regular office hours, and that the employee would reimburse his employer for the use of its facilities. Reimbursement might well constitute a method of transmitting a rebate in violation of the Act. The freight forwarder law makes licensing depend on the existence of control and not on its exercise or non-exercise. The law does not allow licensing on 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. Id. (358–360).

Where an applicant for a freight forwarding license had changed her operations in several respects to free and divest herself of any control by or over her brother's shipping companies, the application would be granted subject to the condition that applicant move her offices out of the space occupied by her brother's enterprises. Morse Shipping Co.—Freight Forwarding License Application, 473.

A freight forwarder which has 50% of its stock owned by an exporting firm is not an independent ocean freight forwarder. The intention of the exporter not to exercise control and the intention of other 50% owner of the freight forwarder company not to let the exporter exercise control are immaterial. However, fairness requires that the exporter be given an opportunity to divest himself of his stock in the freight forwarder license applicant. Such divestiture could result in granting of the application and saving the jobs of employees. Effective date of denial of application is deferred to permit exporter to divest himself of his interest in the applicant. Del Mar Shipping Corp.—Freight Forwarding License Application, 493 (497).

***—Revocation of license***

The legislative history of Public Law 87–254 shows that Congress sought, among other things, to protect the shipping public against certain abuses then prevalent in the forwarding business, such as financial irresponsibility inconsistent with the "fiduciary relationship which such business necessitates". Therefore, the phrase "fit, willing, and able to properly carry on the business of forwarding" appearing in the law, concerning initial licensing, means that a forwarder is unfit and unable to perform his duties when he misuses funds entrusted to him for purposes not otherwise intended and thereafter fails to pay bills incurred in connection with his forwarding activities. Aetna Forwarding Co., Inc.—Revocation of Freight Forwarder License, 545 (550–551).

Where a licensed freight forwarder had accepted freight monies from exporters for the express purpose of paying ocean freight charges on their shipments, and had failed to pay such charges; and had executed due bills with steamship companies to pay the charges, and the due bills were not honored, the licensee was not financially responsible and, therefore, was unfit to carry on the business of freight forwarding, and revocation of license was required. Id. (551).

Failure of a freight forwarder to furnish a bond was ground for revocation of license. Id. (551–552).

Freight forwarder which was not dispatching shipments was no longer carrying on the business of forwarding, and revocation of license was therefore required. Id. (552).

**GRAIN TERMINAL.** See Terminal Facilities.

**INITIAL OR RECOMMENDED DECISIONS.** See Practice and Procedure.

**JURISDICTION.**

The existence of a state court suit by complainant against respondent would not bar complainant from bringing a complaint before the Commission. Pendency of such a suit cannot defeat Commission jurisdiction even if the suit and complaint were predicated on the identical matter. Respondent, by virtue of its carrying on the business of "furnishing wharfage, dock, warehouse, or other facilities . . ." was an "other person" subject to the Shipping Act and thus subject to the Commission's jurisdiction. International Trading Corp. of Va., Inc. *v.* Fall River Line Pier, Inc., 150 (151, 152).

The Commission has no jurisdiction over an agreement between U.S.-flag carriers establishing rates and conditions of carriage of commercial cargoes in a foreign interport trade, where the cargoes are of foreign origin and destination, shipping arrangements and sales of the commodities are made between foreign principals, and the Agency for International Development participates only to the extent of financing the transactions. The lending of funds by a government

agency to finance wholly foreign transactions, including ocean freight, does not convert foreign-to-foreign commerce into United States foreign commerce, nor does the mere operation foreign of U.S.-flag vessels constitute a "part of the commerce of the United States". Pacific Seafarers, Inc. *v.* American & Gulf American-Flag Berth Operators, 461 (462–464).

The Commission's jursdiction over agreements executed abroad by foreign nationals, fixing rates in United States commerce, was not defeated by the alleged circumstances that "no American interest was prejudiced, and there is not the slightest evidence of those substantial effects within the United States necessary to support the extraterritorial application of American laws". The agreements were clearly of the kind covered by section 15 and failure to file such agreements results in a violation of section 15. Congress itself determined that such agreements have an "effect" on our foreign commerce. The nature and degree of that effect is irrelevant to a determination of whether the filing requirements of section 15 are applicable. It is, however, important to a determination of whether or not a given agreement should be approved. Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 596 (600–601).

The Commission has consistently held that while the storage operation of grain elevators is not subject to its jurisdiction, the operation of loading the grain into common carrier vessel is. Wharfage Charges on Bulk Grain at Pacific Coast Ports, 653 (656).

Commission jurisdiction over a terminal grain elevator operator which served common carriers did not continue after the operator refused to serve common carriers, on the basis that the refusal was illegal, since the operator had an obligation under its warehouse license and the United States Warehouse Act to load grain on any "transportation conveyance" specified by the owner of the grain in a non-discriminatory manner. Jurisdiction residing in the Secretary of Agriculture over the storage portion of facilities in no way affects the Commission's jurisdiction over the terminal portion of those facilities. Assuming that the Commission's deliberations are to be influenced by the policy relating to the obligations of a public warehouseman, the operator had not discriminated between users of its facilities, since it had refused to furnish terminal facilities in connection with common carriers with reference to all of the grain in its elevator, regardless of ownership. If any user of the storage facility demanded a common carrier as a "transportation conveyance", the operator would have the alternative of surrendering its license rather than opening its facilities to common carriers. New Orleans Steamship Assn. *v.* Bunge Corp., 687 (694–695).

The fact that the owner of a water-front terminal grain elevator on the Mississippi River was an "other person" subject to Commission jurisdiction in connection with an elevator operation elsewhere, did not mean that the Commission had jurisdiction over the operation on the Mississippi River. While a person manifestly subject to the Commission's jurisdiction may not so segment its operation to make part of it subject and part of it exempt when this segmentation is unjustly discriminatory, there was no showing that the other operation had in any manner affected the facility on the Mississippi River. Id. (695).

**MISCLASSIFICATION OF GOODS.** See also Devices to Defeat Applicable Rates.

On the record, the Commission would not conclude that a forwarder knowingly and wilfully presented a false bill of lading in violation of section 16, where the conclusion depended on a holding equivalent to a rule that the mere presentation of a bill of lading to the carrier carried with it the implied repre-

sentation that the bill accurately described the contents of containers even when the containers were received by the forwarder under seal and regardless of whether the forwarder had any knowledge of the container's contents. Such a rule should be made only on thorough investigation of the terms and conditions surrounding the handling of containerized shipments, and 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. Hasman & Baxt, Inc.—Misclassification of Goods in Containerized Trailer Vans, 453 (456).

Where a freight forwarder presented to carriers bills of lading showing that vans in the aggregate contained quantities of yarn substantially in excess of the quantities shown by certain of the exporter's waybills to have been intended for shipment on the vessels carrying the vans, falsification of the bills of lading was not shown. The record did not show that the waybills represented all of the yarn presented to the forwarder for shipment. Other exporters may have made up the excess of the bills of lading over the waybills. Id. (457, 458).

**OTHER PERSONS SUBJECT TO THE ACT.** See Jurisdiction; Terminal Leases.

**OVERCHARGES.** See Reparation.

**POOLING AGREEMENTS.** See Agreements under Section 15.

**PORTS.**

In *San Diego Harbor Commission* v. *Matson Navigation Co.* [7 FMC 394], the Commission did not attempt to define the extent of its authority under section 16 First of the Shipping Act to require common carrier service to a port in order to prevent undue or unreasonable prejudice to that port or prejudice to another port. It found that the estimated volume of cargo in the trade between San Diego and Hawaii was quite small compared to the volume offered at the competing port at Los Angeles. Therefore, the Commission found no reason to interfere with the carrier's managerial decision not to serve San Diego based on the carrier's judgment of the economics of serving the port. Practices in the Great Lakes/Japan Trade, 270 (274).

Failure of carrier to serve a particular Great Lakes port inbound from Japan while serving the port outbound was not a violation of section 16 First. In view of the relatively small amount of inbound cargo offered and the fact that the carriers were not aware that their vessels would call at Duluth until after their inbound itineraries were fixed and the vessels had sailed, it could not be concluded that their decision resulted in undue or unreasonable prejudice to the port within the meaning of the section. There was no suggestion of a design to prefer another Great Lakes port where one of the carriers discharged cargo destined for the allegedly prejudiced port area. Id. (275).

Where two carriers, acting under an approved agreement, decided not to include inbound calls from Japan to a particular Great Lakes port (while serving other Great Lakes ports) in their joint tariff, and each carrier would have taken the same action independently if there had been no agreement, it could not be concluded that the Commission-approved agreement was in any part the basis for the carriers' action or that the carriers effectuated an agreement not to serve the port in violation of section 15. Id. (275).

Agreement between terminals at the ports of Philadelphia, Baltimore and Hampton Roads to establish dockage charges was not contrary to the public interest, detrimental to commerce or unjustly discriminatory and unfair as between ports, on the ground that imposition of such charges at Hampton Roads

where there had never been such charges would add to the burdens already borne by carriers serving Hampton Roads, and would cause still further diversion of cargo from Hampton Roads ports. The right of independent action reserved by the parties provided a safety valve to insure that the interests of each port area would be served. Since the agreement itself did not impose any charges, it was impossible to assess its effect on carriers, ports and United States commerce with any real degree of accuracy. If in the future rates, charges, etc., established under the agreement violated the fair and reasonable standards of the Shipping Act, the Commission could withdraw approval of the basic agreement or require modification. Agreement No. 9025: Middle Atlantic Ports Dockage Agreement, 381 (385, 386).

**PRACTICE AND PROCEDURE.** See also Evidence.

***—Complaints***

Procedure of joining another party as party complainant by means of an amended complaint was proper where no new issues were introduced requiring that respondent be given an opportunity to reply. International Trading Corp. of Va., Inc. *v.* Fall River Line Pier, Inc., 145 (147, 148).

Where a complaint had been amended to join a subsidiary of the original complainant as a party complainant, evidence of ownership of the subsidiary was immaterial. In any event, adequate evidence of ownership had been offered at the original hearing. Id. (148).

Motion by respondent to dismiss on the ground that a complainant was not properly added as a party because a formal motion to amend the complaint should have been filed instead of the amended complaint which was offered and accepted at the hearing in remand, was denied. Such a motion to amend had been made and denied at the original hearing, and after argument on exception to the Examiner's action, the Commission had ruled with complainant and directed that the amendment be allowed. Therefore, respondent had the opportunity to argue the matter to the Commission and no basis existed for requiring the filing of a second motion to amend at the hearing on remand. The facts and issues remained unchanged. Id. (151).

***—Cross-examination***

Where respondents were aware at all times of the matters of fact and law to be asserted by Hearing Counsel, and were in possession of the exhibits on which Hearing Counsel would rely, respondents were not deprived of their right of cross-examination because the exhibits were not formally offered and accepted in evidence until the close of Hearing Counsel's case. Practically all of the witnesses called by Hearing Counsel were present or former officials or agents of the respondents, but not one of them was recalled to the stand. If, in fact, these witnesses could have contributed any facts to respondent's case, the lack of any such evidence had to be attributed to respondents' own neglect, rather than to any procedural unfairness. Unapproved Section 15 Agreements—Spanish/Portuguese Trade, 596 (612–613).

The fact that most of the evidence with respect to unfiled agreements between respondents came from the files of one respondent did not mean that only that respondent was effectively investigated, and therefore the brunt of any adverse findings must fall on its shoulders, since the decision was that the Act was violated by all three respondents. The very nature of a section 15 violation is such that evidence of an unlawful agreement will normally be sufficient not only against the line from whose files it originates, but against the other parties. Id. (613).

A contention that denial of a respondent's motion to obtain discovery and inspection of documents from the files of the other two respondents prevented acquisition of evidence which would have demonstrated that no section 15 violations existed, could not be sustained. The evidence showed that all three respondents were parties to unlawful agreements, and if any material from the files of the other respondents tended to show that agreements between respondents did not exist, it was not unreasonable to assume that the other respondents would have produced such evidence. Id. (613, 614).

*—Initial or recommended decisions*

While entitled to weight, any recommended or initial decision which comes before the Commission for review remains only a recommendation. In reviewing an initial decision, the Commission is not under the same restrictions as a court in its review of a final decision of the Commission, but rather exercises all the powers it would have in making the initial decision itself. Dixie Forwarding Co., Inc.—Freight Forwarding License Application, 109 (112). See p. 167, supra.

Where a carrier charged that the proceeding was discriminatory, in violation of its right to equal protection of the laws under the 14th Amendment, in that other carriers similarly situated were not being investigated, the Examiner should have treated the "issue" or stated his reason for failing to do so. Insofar as the initial decision failed to treat the question, it was not in compliance with the requirements of section 8(b) of the Administrative Procedure Act or Rule 13(f) of the Commission's Rules. As to the merits of the contention, even if some form of discrimination had crept into the administration of section 15, the remedy would not be dismissal of the instant proceeding, but broader enforcement. However, the carrier would be allowed to treat this portion of the Commission's decision as an initial decision by the Commission, and would be permitted to file exceptions within 15 days from date of service of the opinion. Unapproved Section 15 Agreements—Japan, Korea, Okinawa Trade, 503 (512–513).

*—Issues*

In a complaint case, the issues before the Commission are those framed by the pleadings. Thus, findings of the Examiner that a shipper and a carrier violated section 16 in certain respects were not adopted, since the matters were not in issue. Jordan International Co. *v.* Flota Mercante Grancolombiana, 537 (540).

*—Special docket cases*

The Special docket proceeding is designed to relieve applicants of the time and expense of litigating formal proceedings. No hearings are contemplated since all relevant facts are admitted by the carrier and the shipper. Thus, the application must set forth all the facts relevant and material to a decision on the merits. The Commission's authority in an informal proceeding is no greater than its authority in a formal proceeding. While Examiners should freely utilize their authority to obtain any additional information deemed necessary to insure that approval of applications will not result in discrimination, the extent to which an Examiner will go in trying an applicant's case for him is essentially within the discretion of the Examiner. Chave Ramirez *v.* South Atlantic & Caribbean Line, Inc., 203 (204).

The Commission's application form for Rule 6(b) applications prescribes the manner in which all 6(b) applications must be made, and the information called for therein represents the minimum upon which a decision on the merits could

be made. In some cases additional information may be required to be submitted to prevent discriminations or preferences. Applicants seeking relief should exercise the greatest of care to insure that all relevant facts are in the application. The Commission will accept supplementary material offered in exceptions to the initial decision in the instant case in order to avoid any unnecessary prejudice to the merits of the application. Id. (204).

**PREFERENCE AND PREJUDICE.** See also Free Time; Ports; Reparation; Surcharges.

Respondents' rate on natural rubber sold and shipped by the government to foreign purchasers, which rate was substantially higher than the rate on synthetic rubber, was not unduly or unreasonably preferential, prejudicial or disadvantageous in violation of section 16 First, or unjustly discriminatory or preferential in violation of section 17, where the government in comparing the rates failed to show the character and intensity of the competition, that the difference in rates had operated to the shipper's disadvantage in marketing the commodity, that one person had been deferred or preferred to another, and that there had been unequal treatment between competing shippers or ports. It was necessary for the government to prove that an effective competitive relationship existed between itself and U.S. exporters of synthetic rubber. Congress had directed that the excess natural rubber program be carried out with due regard to the protection of producers and others against avoidable disruption of their usual markets. The government could not enter into an effective competition since it had been limited in selling, and had sold, on the basis that "the quantities actually released from time to time may vary considerably in order to avoid undue disruption of markets". A rate differential is not unreasonable and there is no unjust discrimination or undue preference in the absence of proof that the differential is not justified by the costs of the services rendered, by their values, or by other transportation conditions. United Sates, by General Services Administration *v.* American Export Lines, Inc., 280 (290, 291).

**PUBLIC INTEREST.** See Agreements under Section 15; Ports; Terminal Leases.

**RATES AND RATE MAKING.**

***—In general***

Rates in the Alaskan seasonal service should be tested by the results of operation in the "seasonal trade" and not by the overall operations of the carrier. The rate increases applied to commodities moving principally in the "seasonal trade". The carrier enjoyed a virtual monopoly in the "seasonal trade" and had reduced its rates in the scheduled trade where it faced keen competition. Shippers in the "seasonal trade" should not be burdened with the carrier's losses in the scheduled trade. The separation of services and construction of a partial rate base, while perhaps subject to some infirmities regarding exactitude of allocations, was the fairest method of testing the increases. Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska, 1 (2, 3).

Where a carrier presented all the information required for a separation of seasonal and scheduled services in the Alaskan trade, sufficient for construction of a partial rate base for the seasonal service, the fact that the carrier did not present a computation of a partial rate base could not be equated with a failure to meet its burden of proof. Id. (3).

Since a proposal to reconsider the Commission's decision in the proceeding to investigate the lawfulness of respondent Alaska Steamship Company's increased rates in the Alaska trade failed to obtain the necessary three votes, the proceeding was discontinued as to the respondent and petitions to reconsider and set aside the increased rates were dismissed. Chairman Harllee and Vice Chairman Day voted to reverse on the ground that the record supported higher tonnage projections and that, therefore, the increased rates provided an excessive rate of return. Commissioners Barrett and Patterson voted to affirm on the ground that respondent had met its burden of furnishing the facts necessary to estimate its future carryings and of providing reasonably supportable estimates establishing the reasonableness of its rates, and that, while some extra-record information had been introduced by respondent, the Commission's findings were supported without reference thereto. General Increases in Alaskan Rates and Charges, 314.

No time period will be imposed during which minimum rates prescribed by the Commission for carriage of automobiles from Atlantic and Gulf ports to Puerto Rico must remain in effect. It would be impracticable to attempt to freeze rates for a specific period in so dynamic a trade. Reduction in Freight Rates on Automobiles—North Atlantic Coast Ports to Puerto Rico, 404 (413).

Carrier's rates, charges and practices applying to interstate transportation between Seattle-Tacoma, Washington, and points in Alaska were not unjust, unreasonable, or otherwise unlawful. In three of the past five years, the carrier had lost money and, in the other two years, its rate of return was 7.8 and 2.4 percent. Traffic to certain points bore a significantly larger burden than shipments to other points, based on the distances involved, but the consignees at the more distant points were unable to bear further increases due to their substandard economic condition. Rates on salmon outbound were promotional in nature, but the carrier operated a salt-curing plant and hired fishermen and purchased their entire catch, and the fishing industry provided a substantial part of the livelihood of the native population, which in turn contributed to the merchandising activities of the carrier. Increased Freight Rates—Alaska Lower Yukon River Area, 467 (469–471).

Where a shipper presented no evidence to demonstrate the unjustness or unreasonableness of a minimum rate per trailer-load for transportation of glass bottles from Jacksonville to Puerto Rico with transshipment at Port Newark, and the carrier showed that the rate was insufficient to cover the cost of transportation, the rate was not shown to be unjust or unreasonable within the meaning of section 18 of the Shipping Act, and of sections 3 and 4 of the Intercoastal Shipping Act. Thatcher Glass Mfg. Co., Inc. *v.* Sea-Land Service, Inc., 645 (647).

Where a carrier's minimum rate of $500 per trailerload of glass bottles from Jacksonville to Puerto Rico, with transshipment at Port Newark, was higher that the rate from Port Newark; the fact of transshipment plus its attendant costs warranted a higher rate absent a direct service from Jacksonville; transportation conditions in the two trades were not shown to be similar; alternate carriers were available which offered direct service from Florida; and, over a three-year period while the minimum rate was in effect, complainant shipper had greatly increased its shipments of glass bottles to Puerto Rico via the carrier's indirect service, the existence of the carrier's minimum charge could not and did not subject shippers to undue prejudice or discrimination in violation of the Shipping Act. By its express terms section 16, First provides that only these preferences or advantages which are undue or unreasonable are deemed to be unlawful. A discrimination in rates, resulting from a substantial difference

in cost of operation, in the services performed, or in the transportation conditions, may not be unreasonable. Id. (648–651).

*—Affiliates of carrier*

The profits of Alaska Terminal and Stevedoring Company were properly included in the income account of Alaska Steamship Company for rate base purposes. Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska, 1 (5).

*—Allocations*

Allocation of administrative and general expenses according to the proportion that total vessel operating expense in the carrier's seasonal and scheduled Alaskan service bears to the total vessel operating expense, was proper rather than an allocation according to "vessel days" computed pursuant to Maritime Administration General Order 60 premised on the proposition that, since the carrier has considerable pre-season and post-season activity in regard to its seasonal operation, use of the formula under General Order 60 is more fair. While the carrier may comply with General Order 60 in its accountings to the Administration, the Commission is not prevented from prescribing a different allocation procedure. Since administrative and general expenses are a mixture of salaries and expenses that pertain to the overall management and operation of the carrier, logical reasoning dictates that their allocation should follow those expenses (i.e. vessel operating expenses) that management must control to profitably operate the business. Alaska Steamship Co.—General Increase in Rates in the Peinsula and Bering Sea Areas of Alaska, 1 (4).

Allocation of depreciation, inactive expenses, vessel values, and working capital attributable to the carrier's seasonal and scheduled Alaskan services, on the assumption that the asset was available for use in the regulated trade for 365 days, so that in allocating the value of an asset, the numerator would be days in service and the denominator would be 365, was proper. The asset was available for use in the regulated trade for 365 days each year, and this fact should be accorded weight in the allocation of inactive expenses, vessel values, depreciation, and working capital. Id. (5).

Where the carrier's actual tax liability for its seasonal and scheduled operations in the pertinent year was less than hypothetical liability of 52% on its seasonal service profits (the carrier lost money on its scheduled service), it was proper, for rate base purposes, to allow as tax against the income of the seasonal service only that amount of federal income taxes which the carrier incurred on its overall operation. Otherwise, the carrier would be allowed to subsidize its scheduled service at the expense of the seasonal rate payers, and would receive a return over and above that shown to be just and reasonable in the seasonal service. The carrier had a virtual monopoly in its seasonal service, whereas it was subject to competition in its scheduled service; the Commission's duty was to protect the rate payers of both services. Id. (6, 7).

Allocation of administrative and general expenses as between subsidized and unsubsidized service on the basis of voyage expense is the fairest of the "doctrinal bases" on which overhead expense may be allocated. General Increases in Rates Pacific-Atlantic/Guam Trade, 498 (499).

Allocation of administrative and general expenses as between subsidized and unsubsidized service on the basis of voyage expense was reasonable, in view of data showing the close relationship between the allocation of 31.5 percent of overhead expense to the unsubsidized service to the ratio of the number (12) of completed voyages in the unsubsidized service (32.4 percent) to the number (25)

of completed voyages in the subsidized operations (68.6 percent). That proportion of overhead was also closely comparable to the ratio of revenue in the unsubsidized trade (30 percent) to total revenue. Id. (499).

Use of voyage expense prorate in allocating administrative and general expenses as between subsidized and unsubsidized service is amply justified by equitable considerations. A subsidized carrier, for subsidy accounting purposes, is required to compute overhead expense pursuant to Maritime Administration General Order 31, using the voyage expense prorate. To require use of another formula, producing a lower figure for overhead expense, would result in a failure to charge to any service part of the carrier's actually incurred overhead expenses. Because of the limitations imposed on the carrier's return in each of the services, the carrier would thus be precluded from recovering from its revenues the full expense incurred by it in serving the public. Id. (499, 500).

The Commission will not use a revenue prorate method of allocating administrative and general expense as between a carrier's subsidized and unsubsidized service. Id. (500).

***—Commodity rates***

A barge carrier's rates for lumber and paperboard from the Pacific Coast to Hawaii were justified and lawful where they were established to meet competition with a noncommon carrier, and the barge carrier showed that it could make a profit after fully distributed costs if it carried nothing but those commodities to Hawaii and returned the barges empty. Evidence that the rates were 16% to 17% below those of the dominant carrier which operated fast self-propelled ships was not sufficient to overcome the barge carrier's estimates, and that carrier's managerial judgment should be allowed a chance to prove itself. There is no rule of law which says that the barge carrier must charge as much as the dominant carrier. Reduction in Rates—Pacific Coast-Hawaii—Oliver J. Olson & Co., 258 (265).

***—Noncompensatory rates***

Where, as to increased rates on certain commodities under investigation, the carriers' revenues were less than their fully distributed costs on all but a few of the commodities, the increased rates were just and reasonable. Atlantic/Gulf Puerto Rico Trade Increased Rates, 94 (96).

A carrier's revised noncompensatory rates in a new service should be allowed to stand until the carrier has had the opportunity to experiment and discover the rates at which traffic will be attracted and provide a profit. A carrier does not have to charge compensatory rates during the preliminary period of its operations in a new service. Reduction in Rates—Pacific Coast-Hawaii—Oliver J. Olson & Co., 258 (263).

Where the Commission has held a rate structure to be unlawful because it was not noncompensatory it has been on a finding that rate reductions were adopted by carriers in order to fight competition or take unfair advantage of other carriers in the trade through rate levels not based on costs of operation. The compensatory test was designed primarily to test a carrier's good faith motives in establishing reduced rates. Id. (263).

Where a carrier's noncompensatory rates for a new service were not shown to have been adopted in furtherance of unfair competition, and the evidence pointed to the fact that the rates could one day be compensatory, if the carrier were successful in attracting additional cargo, the rate structure was not unlawful. If new transportation experiments are to be adequately tested, they must be given sufficient time to realize their inherent advantages. To compel them to

fully compensate the owner from the beginning would doom many promising services to the shipping public to an early death. Id. (264, 265).

In determining the propriety of a rate, the Commission must consider more than whether it is compensatory to the carrier. Rates which may be compensatory to some carriers may not be compensatory to all. It is to prevent the forcing of rates to unremunerative levels that the Commission has set minimum rate levels, even though the rates of all carriers in the relevant trade were not shown to be noncompensatory. Reduction in Freight Rates on Automobiles—North Atlantic Coast Ports to Puerto Rico, 404 (408).

***—Operating ratio test***

The operating ratio test will not be used to test rate increases of the carrier in the Alaska seasonal trade. The carrier has a substantial investment in property used and useful in providing service, and even though it charters vessels to round out its seasonal fleet, the owned equipment used in the service is not so unsubstantial as to warrant departure from the prudent investment standard. Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bearing Sea Areas of Alaska, 1 (9).

***—Property devoted to service***

The fact that non-owned property consists of chartered vessels, which the carrier claims to be indispensable to its Alaskan seasonal service, does not alter the principle that such property is not included in the rate base. The rate of return is essentially a return on invested capital, and non-owned property does not represent an investment of the owner's capital. Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska, 1 (4).

***—Public interest***

Even if all carriers in the North Atlantic-Puerto Rican trade could operate profitably at the 35-cent automobile rate proposed, the Commission would be compelled to disapprove the rate because of its concern for the public interest. The overall needs of the economy of Puerto Rico require that carriers be permitted to maintain rates on certain commodities basic to the economy of Puerto Rico at levels which may not be fully compensatory. A 37-cent rate plus an arrimo charge of 2 cents would be compensatory and would 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 would not endanger the health of the overall Puerto Rican economy. The 35-cent rate is unjust and unreasonable because it is noncompensatory to a majority of the carriers and operates in a manner adverse to the overall economy of Puerto Rico. The minimum rate for carriers from the Gulf ports should be the same. The Gulf carrier did not participate and automobile rates from the Gulf had traditionally been the same as from North Atlantic ports. Reduction in Freight Rates on Automobiles—North Atlantic Coast Ports to Puerto Rico, 404 (408–410).

While present rates of South Atlantic carriers of automobiles to Puerto Rico, which rates were differentially lower by 7 cents than the rates of North Atlantic carriers, did not appear to be noncompensatory, they were unjust and unreasonable. To allow them to remain in effect would thwart the Commission's 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 re-

quired to support the low-rated commodities basic to the economy of Puerto Rico. A differential of approximately 4 cents would be 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. A 1-cent differential below the rate of one of the South Atlantic carriers was justified for the carrier with slower transit time. Id. (412, 413).

A carrier would not be allowed a 12.5 percent allowance for automobiles carried on deck to Puerto Rico, since to permit such a device would be to give unfair advantage to one carrier over the others who do not utilize such a device in the attraction of cargo. More significantly, it would defeat the whole purpose of fixing a minimum rate by permitting one carrier to contribute less than the amount which would flow from the minimum rate to the welfare of the overall economy of Puerto Rico. Id. (413).

***—Rate of return***

Considering the nature of the seasonal operations of the carrier in the Alaskan trade, the possible higher degree of risk involved than in other steamship operations, and, on the other hand, its efficiency of operation and its monopolistic position in the seasonal service, and the well settled criteria to be employed in determining a rate of return, rate increases are unjust and unreasonable to the extent that they allow the carrier a rate of return in its seasonal service in excess of 10%. A return of 20 to 25%, claimed by the carrier to be needed, would be allowed only on a showing of the most exceptional circumstances, which were not shown. It is not necessary for the Commission to make a finding as to what would be a reasonable maximum rate of return. Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska, 1 (10, 11).

***—Test period***

Use of 1962 as the test period for rate increases in the carrier's seasonal Alaskan service, rather than a period of 3 to 4 years to take into account the red salmon run cycle, was proper. The record did not contain adequate information on seasonal operations over a 3 to 4 year period to support the use of such a period as the test period. Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska, 1 (9).

Where the year 1960 had been used throughout the rate proceeding as the test year for revenues and expenses, it would be unjustifiable to arbitrarily shift to 1957 because its use would produce the lowest allocation of overhead expenses to the carrier's unsubsidized service of any year covered by the record. 1957 had no more to recommend it as a test year than years following when more overhead was allocated to the carrier's unsubsidized service. General Increases in Rates Pacific-Atlantic/Guam Trade, 498 (500).

***—Vessel values***

The Commission will not depart from the use of net book value, utilized in several previous rate cases, in valuing ships for rate base purposes. Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska, 1 (3).

Where a carrier's seasonal ships were used in its scheduled Alaskan service when necessary, it was proper not to include the entire net book value of all vessels used in the seasonal service in the partial rate base for that service inasmuch as the ships also generated revenue for the scheduled service. Id. (3).

***—Working capital***

Exception to non-inclusion in a rate base of investment in deferred charges and expenses, and of a specific amount for working capital of related companies, were rejected. Allowance as working capital of an amount approximately equal to one round voyage expense for each ship in the service was sufficient to provide not only for current operating expenses of the carrier, including the costs of services performed for it by related companies, but also for deferred charges and expenses. Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska, 1 (3).

Allowance as working capital of an amount approximately equal to one round voyage expense for each ship in the carrier's Alaskan seasonal service, rather than an allowance based on the difference between current assets and liabilities on the carrier's balance sheet at a given time plus an additional sum for contingencies, was proper. The allowance must be realistic. In the light of the carrier's need to maintain a year-round staff to insure that its seasonal operations go smoothly, inactive vessel expenses attributable to the seasonal service, administrative and general expenses attributable to the service, and cash requirements to meet other expenses when revenues do not cover costs, the allowance was realistic and fully justified. A reduction of the allowance by five-twelfths on the ground that the carrier's seasonal services cover only 7 months of the year would not be warranted and might impede the seasonal operations. Id. (7–9).

An allowance for working capital in the rate base of an amount equal to one round average voyage expense for each vessel in the trade was proper, notwithstanding that the allowance was 47 percent of the total rate base. Vessels and working capital made up over 95 percent of the carrier's total rate base, and the carrier's vessels were nearing the end of their depreciable life. However, the low value of the carrier's owned fixed assets did not diminish its total requirements for a fund to meet current operating expenses. The carrier's allowable working capital under the round voyage formula was 19 percent of its annual cash operating expenses, and this compared favorably with ratios allowed by the ICC. As to the contention that, to the extent freight charges were prepaid, the carrier was not required to supply working capital from its own funds, working capital was needed for reasons other than to meet a "revenue lag," such as expenses caused by vessel layups, repairs, and strikes. The practice of other agencies was in accord with the Commission's approach. General Increases in Rates Pacific-Atlantic/Guam Trade, 498 (500, 501).

## RATES IN FOREIGN COMMERCE.

The government failed to meet its burden under section 18(b)(5) of the Shipping Act of showing that respondents' rate on natural rubber from New York to Turkey and Morocco was unreasonably high where it relied on the similar composition and use characteristics of natural and synthetic rubber, the fact that other carriers apply the same rates to both commodities, the fact that a foreign-to-foreign rate on natural rubber is substantially lower than respondents' rate, as is their rate on synthetic rubber in the same trade; and respondents showed that costs in domestic-to-foreign commerce exceed like costs in foreign-to-foreign commerce and that there is a substantial difference in the shipping characteristics of natural and synthetic rubber in the New York/Istanbul trade. Respondents had cast doubt on any inference which might have been raised by complainant's evidence and complainant did not produce evidence sufficient to erase that doubt. Any remaining inference would be

founded on conjecture or speculation and would not be sufficient to support complainant's allegations. United States, by General Services Administration *v.* American Export Lines, Inc., 280 (289, 290).

**REBATES.** See Devices to Defeat Applicable Rates.

**REPARATION.** See also Free Time.

***—In general***

Settlement of claims for reparation, with the amounts calculated on the basis of the difference between the noncontract rate paid and the contract rate sought, plus a nominal amount of interest, was approved and the complaint dismissed with prejudice. H. Kempner *v.* Lykes Bros. Steamship Co., Inc., 126 (129); 209 (211, 212).

The Commission does not have authority to correct "any" shipper misunderstanding of law or regulation by permitting freight adjustments. Rule 6(b) does not provide a panacea for every wrong or misunderstanding arising from the business relations between carriers and shippers. Rule 6(b) does not provide a loophole for escape from the prohibitions of section 18(b)(3) of the Shipping Act, 1916. Bernard Bowman Corp. *v.* American Export Lines, Inc., 155 (158, 159).

Neither "inadvertent clerical error" on the part of a carrier in filing a tariff, 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," are sufficient to overcome the clear obligation imposed by section 18(b)(3) that no common carrier in foreign commerce "shall charge or demand or collect or receive a greater or less compensation . . . than the rates and charges which are specified in its tariffs on file with the Commission." The *Swedish American Line* case is overruled. An unintentional failure to file a particular rate, a bona fide rate mistake, a hardship visited upon an innocent shipper by inadvertence of a carrier, or a stenographic omission are not sufficient reasons for departing from the requirements of section 18(b)(3). Strict adherence to filed tariffs is mandatory. Ludwig Mueller Co., Inc. *v.* Peralta Shipping Corp., 361.

In construing the requirements of section 18(b)(3), the Commission is bound to follow the long established judicial interpretation of section 6 of the Interstate Commerce Act, a similar law which has been held to require that a carrier must charge the rate on a commodity as duly filed. In the absence of some other statutory basis for relief, the construction placed on section 18(b)(3) is dispositive of special docket application grounded on rate or tariff deviations in our foreign trades. Id. (365).

The Commission's special docket procedure 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. Therefore, the procedure is available only in those cases within the purview of section 18(a) of the Shipping Act and the provisions of the Intercoastal Shipping Act, 1933. Such cases relate only to the Commission's jurisdiction over common carriers in the so-called noncontiguous domestic trades. Id. (366).

Section 18(b)(5) of the Shipping Act which requires the Commission to disapprove any rate filed by a common carrier in United States foreign commerce which it finds to be so unreasonably high or low as to be detrimental to United States commerce, does not give the Commission any power to set a "reasonable" rate. This lack of authority is fatal to special docket cases in the foreign trades,

since special dockets require the fixing by the Commission of damages and the lack of power to prescribe a "reasonable" rate forecloses the ability to arrive at the measure of damages which, in unreasonable rate incidents, is the difference between the "reasonable" and the "unreasonable". Id. (366).

While the special docket procedure is not available in cases involving foreign commerce, parties may achieve the same results by requesting, in the cases of new and initial rates, special permission to make such rates effective almost immediately, and, in the case of reduced rates, by filing and making public the rates. The Commission will receive changes in rates by telegram or cable, even after the close of business at 5 p.m. on Fridays. A person may always 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. Id. (367).

Where a carrier received payment from a forwarder for a shipment of lumber from New York to the Virgin Islands, strictly in accordance with the tariff rate; and the shipper discovered that the commodity could have been shipped for less via another carrier and refused to reimburse the forwarder for the amount in excess, there was no basis for permitting the carrier to refund the difference to the forwarder. There was no showing that the rate charged was unreasonable and unjust, and the carrier was required to collect the tariff rate pursuant to section 2 of the Intercoastal Shipping Act. Barr Shipping Co., Inc. *v.* Atlantic Lines, Ltd., 638 (640).

*—Overcharges*

Application to refund a portion of freight charges collected in accordance with the carrier's applicable N.O.S. rate was granted, where the shipments of jute rags which had originated in Bombay were tied up at Suez and were transferred to the carrier's vessels for shipment to New York and Philadelphia; due probably to mutual mistake the carrier was not aware that jute rags were included in the transferred cargo and, if it had known, it would have amended the applicable tariff to provide the same rate as from Bombay; the rate charged was more than 175 percent greater than the rate to move the same goods all the way from Bombay; although it was not necessary to show unjustness or unreasonableness, the rate charged appeared to be prima facie unjust and unreasonable; and since the commodity did not move normally in the Red Sea/USA trade, there could be no discrimination by reason of granting the application. Midwest Export & Import Co. *v.* F. W. Hartmann & Co., Inc., 87 (90–92).

Where a carrier inadvertently omitted a rate on binder twine from a new tariff, and it was the intent and understanding of the carrier and the shipper that the equivalent of the rate in the old tariff would apply to the shipment involved as had been the case in the past, the carrier would be authorized to make a refund on a shipment on which freight had been computed at the higher N.O.S. rate. An innocent shipper would be relieved of the carrier's failure to file a proper rate. Swedish American Line—Refund of Freight Charges, 142 (143).

Where the carrier transported a used automobile from Puerto Rico to the Dominican Republic at its N.O.S. rate, and the shipment was connected in some way with a U.S. government agency and moved under a government bill of lading, the shipment did not come within the purview of section 18(b) (3) or (5) of the Shipping Act, since it was not that type of "commerce of the United States" which could be detrimentally affected by the level of the rate; it was not a commercial movement. The carrier was required to assess the N.O.S. rate in the absence of a commodity rate, but since the shipment moved on a government bill of lading and since it did not appear that a lower rate sought to be collected by

the carrier was unduly preferential or prejudicial, waiver of collection of a portion of the charges assessed would be permitted. Department of State, AID *v.* Lykes Bros. S.S. Co., Inc., 153 (154).

*—Retroactive rate reduction*

Where the shipper knew or was charged with knowledge that a particular rate was the only rate the carrier could legally charge; there was no evidence that the shipper believed or had reason to believe that the rate would be reduced prior to the shipment made; there was no evidence that the shipper believed that the rate would be reduced retroactively, and when the conference undertook to reduce the rate it did not attempt to bring the shipment involved within the scope of the reduction; and, most importantly, the conference could not make the rate effective retroactively and the shipper knew this, there was no basis for an order authorizing payment to the shipper of the difference between the amount actually collected and the amount sought to be applied retroactively. L'Aluminium Francais *v.* American Export Lines, Inc., 83 (85, 86).

Where a carrier charged the applicable tariff rate on a shipment of goatskins and later discovered that the rate was far higher than that being charged by its competitor; the carrier agreed that its rate should have been at the same level as its competitor's and explained that the rate had been carried over inadvertently from an older tariff and had not been detected because no shipments of the commodity had been offered to it; the carrier reduced its rate but not in time to affect the shipment involved; and the consignor and consignee knew or should have known what the tariff was, the carrier's application to refund a portion of the charges collected was denied. The case was not one for the application of the doctrine that innocent shippers should not have to bear the consequences of a carrier's neglect in filing a tariff rate that the parties, acting in good faith, had agreed would apply. Retroactive application of rates is forbidden. E. Mahlab *v.* Concordia Line, 133 (135, 136).

Application to refund a portion of freight charges imposed in accordance with the carrier's tariff on file with the Commission must be denied where the refund is to be effected by the device of granting retroactive effect to a dual rate contract between the carrier and the shipper. Granting the application would be in direct contradiction to the prohibitions in section 18(b)(3). The Commission has permitted relief only when a carrier or conference has failed to file a new rate in accordance with section 18(b)(2), although the shipper had been led to believe such rate would become the lawful rate. As to the application of principles of equity and justice, the shipper had taken it for granted that a rate it had been paying on shipments to Israel would apply to shipments to Turkey, but the carrier had not misled the shipper, and unilateral assumptions by shippers, unrelated to a misleading act of a carrier, will not support equitable relief. Bernard Bowman Corp. *v.* American Export Lines, Inc., 155 (158).

*—Undercharges*

Where the carrier's failure to extend a special rate on milk powder from New York to Israel was due to an oversight and the result of events of which the shipper was innocent (longshoremen's strike and disruption of the carrier's normal clerical procedures when its office employees honored the picket lines at the carrier's office premises), the carrier was authorized to waive collection of that portion of the charges on two shipments, which was the difference between the charges based on the tariff rate and the special rate. Government of Israel Supply Mission *v.* American Export Lines, Inc., 14.

Where the conference secretary, through oversight, failed to file a corrected tariff page which would have prevented a higher rate from becoming effective, and carriers, their agents and shippers believed the lower rate was effective, permission to waive collection of undercharges on shipments of pineapple products from Hawaii to Japan during the time involved was granted. Granting of the relief sought would not result in discrimination and would relieve innocent shippers from the consequences of the carrier's failure to effectuate the intended tariff filing. California Packing Corp. *v.* Hawaii/Orient Rate Agreement, 78 (81, 82).

Where the carrier expressed its willingness to transport unboxed automobiles to Puerto Rico at flat rates ($115, $150, and $175, depending on the cubic footage of the automobile), and to charge $150 for "dead freight" during any month in which an agreed minimum of units was not shipped; the carrier later directed its agents to charge not less than $150 per car for the ocean freight on an "open account" basis; the carrier filed two tariffs covering the rates, except the dead freight rate, but one was rejected and the other withdrawn; the cargo was billed at the applicable tariff rate for automobiles, and on payment of $150, the carrier issued a due bill for the balance; and the shipper never questioned the bills of lading as rated by the carrier or the additional freight charges due under the due bills, the shipper knew or should have known that the tariff rate was still in effect. Complainant was never entitled to rely on a flat $150 rate for all automobiles shipped with the carrier and application for permission to waive collection of undercharges was denied. Chave Ramirez *v.* South Atlantic & Caribbean Line, Inc., 203 (205–208).

Where a carrier applied for permission to waive numerous undercharges, averaging $1.85, the requirement that a shipper's certificate be filed as to each shipment was waived. The requirement would cause the carrier undue hardship in that it would be compelled to incur excessive cost in relation to the amount of the undercharge, undergo considerable inconvenience and expend a disproportionate amount of time. Such a requirement would not further the purpose of the special docket proceeding. Sea-Land Service, Inc.—Application to Waive Undercharges, 641 (643).

Where a carrier increased its pickup and delivery rates for shipments between New York and Puerto Rico, in the expectation that the motor carriers were about to increase their charges to the carrier; the carrier inadvertently failed to file a revised tariff with the Commission, restoring the old rates, after it had secured special permission to cancel the increased rates, on learning that the motor carriers were not increasing their rates; and the result was that the carrier undercharged shippers for a period of four days, permission to waive the undercharges was granted. It was inequitable for the burden of the failure to file to fall on the innocent shippers. The lower rate which had been in existence for two years was presumptively reasonable; the advanced rate was presumptively unreasonable in view of the short period it was in effect, the reduction to the former level, and the fact that the increase was put into effect to compensate for a cost which did not materialize. Id. (642–644).

**SHIPPERS' REQUESTS AND COMPLAINTS.** See Agreements under Section 15.

**STEVEDORING.** See Terminal Facilities.

**STORAGE CHARGES.** See Free Time.

SURCHARGES.

A fixed dollar form of surcharge on cargo to Manila based on tonnage (otherwise justified by abnormal vessel delays due to a Manila Arrastre strike), was proper. The form of surcharge did not place an undue share of the cost of delay on low-value, low-rated commodities. The charge was constructed on the most basic characteristic of cargo weight or cube. 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, the fixed dollar per ton charge was fair. Surcharge on Cargo to Manila, 395 (400).

A fixed dollar form of surcharge on cargo to Manila based on tonnage was not violative of section 16 First, since the requisite competitive relationship between high- and low-rated cargo was not shown. Likewise, the form of surcharge was not contrary to section 17. There was no showing that American exporters had been discriminated against in favor of foreign exporters, or that the surcharge, in general, was unjustly discriminatory between shippers and ports. Id. (400, 401).

Carriers which imposed a surcharge on newsprint to Manila from a Maine port, while not imposing a surcharge from Canadian ports, violated section 17 in circumstances where a shipper of newsprint, who ordinarily shipped from the Maine port and who was in competition with Canadian exporters of newsprint to the Philippines, was forced to divert the newsprint to a Canadian port in an attempt to maintain its competitive position. A sufficient competitive relationship existed between the shippers and the ports concerned, the American shipper and the Maine port had suffered pecuniary harm, and transportation conditions were similar at the ports concerned. The carriers had demanded and collected a charge which was unjustly prejudicial to United States exporters as compared with their foreign competitors and unjustly discriminatory between shippers and ports. Id. (401, 402).

The reasonableness, under section 18(b) (5), of a surcharge imposed on cargo because of a delay in unloading due to a longshoremen's strike was not placed in issue by the order of investigation, and, in any event no facts were shown to demonstrate that the rate was so unreasonably high as to be detrimental to the commerce of the United States. Overseas Freight and Terminal Corp.—Extra Charges Caused by Longshoremen Strike, 435 (444).

Surcharge imposed by carrier when longshoremen's strike prevented unloading of vessel did not raise any questions of section 16 or 17 violations, where the same charge was assessed against all consignees equally and handling of property at terminals was not involved. Section 17 had never been construed to apply to a common carrier's ocean freight rates. Id. (444).

Additional charge assessed against consignees of cargo, arising out of delay due to longshoremen's strike and made without advance 30-day filing, was not a violation of section 18(b) (2) of the Shipping Act. Section 18(b) (2) was inapplicable. Once the cargo was loaded, the voyage begun, and the contractual relations of the parties fixed, no time remained for obtaining special permission for a change in rates on short notice. Furthermore, the rate was not changed. The carrier's tariff provisions were the same as those that had existed for at least 30 days previously and the tariff was properly filed. Id. (444, 445).

Where a carrier imposed a surcharge when a longshoremen's strike prevented unloading of the vessel, in reliance on a clause in the bill of lading attached to the tariff on file with the Commission, the carrier did not violate section 18(b) of the 1916 Shipping Act by charging a greater or different amount than the charges

and rates specified in its filed tariff. In prior cases relied on to support a contrary conclusion the carrier's bill of lading had not been attached to the tariff on file, and the cases were decided under the Intercoastal Act when that Act did not require that the bill of lading be incorporated in the tariff. When section 2 of the Intercoastal Act was amended in 1958 so as to require incorporation of the bill of lading in the tariff, Congress intended that the rule of the cases requiring certain bill of lading clauses to be included in the tariff be superseded. Since section 18(b) of the Shipping Act, enacted three years later, 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. Id. (445–448).

Surcharge imposed when a longshoremen's strike prevented unloading of the vessel was not illegal under section 18(b) because the applicable provision of the carrier's bill of lading did not specify the amount of the charge (the carrier had apportioned 50% of the expenses caused by the delay in unloading equally among the consignees and had absorbed the remaining 50%. Tariff provisions which are applicable to regular, determinable voyage charges can be, as a practical matter, more exact than clauses whose purpose is to provide for the unknown, unforeseeable complexities of ocean transportation. Prior agency cases which support the proposition that tariffs must state the specific sum that will be charged for special services rendered, were concerned with regular, determinable voyage charges. Such cases involved domestic commerce and thus were of limited applicability, since section 18(a) delegates jurisdiction to the Commission over "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. Id. (448–450).

Carrier which imposed a surcharge when a longshoremen's strike delayed unloading, in accordance with its bill of lading clause which did not specify the sum to be charged, did not violate section 18(b)(3) by charging a rate greater than that shown in its tariff because the admiralty courts would not impose liability on shippers in such circumstances. Since no court had held that a charge could not be assessed under such a bill of lading clause for delay due to a strike when the goods were held on board the vessel at the port of delivery, it had not been demonstrated that the surcharge would not be allowable by the courts and that for this reason it violated section 18(b)(3) as a greater charge than that shown in the tariff. Id. (450, 451).

**TARIFFS.** See also Devices to Defeat Applicable Rates; Surcharges; Terminal Facilities.

A carrier's tariff must provide a certain and unvarying method of weighing and measuring cargo and of calculating proper freight charges. This can be accomplished only by taking the weight and measurement as the cargo is received on the dock by the carrier. The applicability and reasonableness of the charges cannot be determined after loading in the vessel; or by determining how much the shipment would measure or how it would stow, on the assumption that it was disassembled into its component parts. Orleans Materials and Equipment Co. *v.* Matson Navigation Co., 160 (165).

Charges assessed on shipments of structural steel from New Orleans to Honolulu based on measurement (with outside measurement governing) of the cargo as received from the shipper, taking depth, width and length in such manner that the cubage was determined through ascertainment of the smallest rectangular

container into which the piece or package would fit, were not unreasonable or otherwise unlawful. The carrier's measurements were taken in accordance with the usual practices pertaining to cargo freighted on a measurement or alternative weight-or-measurement basis, and the carrier's method of "rectangularizing" is generally followed in ocean trades according to recognized authority in the field. While, in some instances and where practicable other cargo was "nested" in a part of the space not occupied by the the steel, it would have been highly speculative to say, on the basis of the evidence, how much of the alleged cubic feet of unused space was occupied by "nested" cargo and how much was actually occupied by the shipments together with the timber and other material required to secure them safely. Id. (165, 166).

Any ambiguity of a tariff provision which in reasonableness permits misunderstanding and doubt by shippers must be resolved against the carrier. Where a tariff made no distinction as to size or use but applied a higher rate to marble slabs than to tiles, there was a wide variety of opinion in the trade as to the difference between a slab and a tile, and one of the carrier respondents had applied the higher rate and described its shipment as slabs while the other applied the lower rate and described its shipment as tiles, there was a definite ambiguity in the tariff. While a shipper, if he has doubt as to the proper tariff designation of his commodity, has the duty to make diligent inquiry, the shipper in the instant case was not in doubt and had inquired of a reputable forwarder as to the rate on floor tiles. Peter Bratti Associates, Inc. *v.* Prudential Lines, Inc., 375 (379).

Where carriers had on file tariffs showing a rate on marble slabs and a lower rate on marble tiles, and the application of the rates to marble depended on whether the marble pieces were more or less than 60 x 60 centimeters, a limitation not published in the tariffs, the carriers violated section 18(b) (3) when they demanded and collected the higher rate on marble to be used as flooring on the basis that the pieces shipped exceeded 60 x 60 centimeters in area. Id. (380).

Retention of goods on board during a longshoremen's strike and ultimate discharge at the port of destination was a "service rendered to the goods", and the carrier was entitled to extra compensation for the service in accordance with a clause in its bill of lading calling for extra compensation in such circumstances. Overseas Freight and Terminal Corp.—Extra Charges Caused by Longshoremen Strike, 435 (451).

Tariff rate on logs from Colombia to New Orleans was not shown to be unduly prejudicial, unjustly discriminatory, detrimental to commerce, or in contravention of the Shipping Act. The rate was duly filed with the Commission and the shipper was charged with knowledge of it. There was no justification for the claim that the log rate would be one which, when the log is reduced to recovered lumber, should approach the rate for loose or bundled lumber. The logs had inherent properties which made them far less attractive than lumber to carriers. The requisite showing of substantial similarity of transportation conditions between the lumber and logs to rule that the dissimilarity in rates was unlawful, was not made. Jordan International Co. *v.* Flota Mercante Grancolombiana, 537 (541).

**TERMINAL FACILITIES.** See also Terminal Leases; Wharfage.

The employment of one stevedoring subcontractor by a grain terminal in preference to another or even to the exclusion of another does not necessarily constitute an unreasonable regulation or practice under section 17. California Stevedore & Ballast Co. *v.* Stockton Elevators, 97 (103).

A grain terminal's tariff item naming a rental charge for use of equipment in loading cargoes is ambiguous in not stating who is to pay the charge. Therefore, the grain terminal could place the charge against the stevedore, the vessel or the cargo and could make the charge against some stevedores and not others, and as here could bury the charge in a lump-sum "mark-up" which includes its profits. This is an unreasonable practice which may be a source of potential discrimination. Id. (104).

The passing on to the vessel of a rental charge, for use of loading equipment, by means of a mark-up, would place a grain terminal and its subcontractor which performs the terminal's stevedoring under an exclusive contract on a competitive parity with other stevedoring firms which are assessed the rental charge. However, there is no compulsion on the terminal to include all or any part of the rental charge in the mark-up. The flaw in the arrangement, from a regulatory standpoint, is that the so-called rental mark-up is mixed up with profit mark-up, and no one but the terminal knows which is which. In burying the rental charge in a lump-sum mark-up which also includes profit, the terminal has opened the door for discrimination of a most invidious nature. Id. (104, 105). Not only potential discrimination in unequal application of a tariff but the mere possibility of a variance between regulation and practice render both the regulation and practice unreasonable. Id. (105).

A grain terminal's practices of (1) passing on to the ship its established rental charge, for the use of loading equipment, in the form of a lump-sum mark-up which also includes its profit on stevedoring; (2) failing to publish the charge specifically to apply against the ship, or the cargo, or against all stevedores alike; (3) failing to assess the charge against its subcontractor, which performs the terminal's stevedoring under an exclusive contract; and (4) assessing the charge exclusively against competing stevedores—are unreasonable in violation of section 17. By tariff rule the charge may be assessed against the ship, or the cargo, or all stevedores, including the subcontractor. Id. (106).

Tariffs providing for different handling charges for woodpulp, in bales, in units under 1,000 pounds and in units 1,000 pounds or over, must be given a fair and reasonable construction. The terms must be construed in the sense in which they are generally understood and accepted, and shippers cannot be permitted to avail themselves of strained or unnatural construction (unless a number of bales were bound together to facilitate movement as a single unit, the individual weight of each would govern under the tariff). Bulkley Dunton Overseas, S. A. *v.* Blue Star Shipping Corp., 137 (140).

Where an exporter shipped woodpulp in bales weighing about 500 pounds each which were not bound together but were usually handled in stacks of five bales, and the terminal tariff provided for a handling charge of 69¢ per ton for woodpulp in bales of 1,000 pounds and over and of 95¢ per ton for woodpulp in "units" under 1,000 pounds, the terminal properly charged the 95¢ rate. The units moved were the bales not the stacks. The number of the units that were stacked on a conveyance was irrelevant and could not be seized upon to sustain a claim of tariff ambiguity or confusion. Id. (140).

Provision in a terminal tariff for the stevedore to receive one third of the applicable tariff rate for handling cargo, need not have been in the tariff and was a matter strictly between the stevedore and the terminal. The Stevedore was at liberty to waive payments and the shipper was not entitled to a refund of that portion of a handling charge waived by the stevedore, on the ground that the terminal was engaging in an unreasonable practice under section 17. Id. (140, 141).

Dockage charges imposed on the vessel for berthing at a wharf, pier, etc., or for mooring to a vessel so berthed would not result in a "double charge" for terminal facilities, where other charges imposed by the terminal operators on railroad shippers were for such services as loading, unloading, bracing, and blocking of freight. Agreement No. 9025: Middle Atlantic Ports Dockage Agreement, 381.

## TERMINAL LEASES.

Municipal corporations which own and lease terminal facilities and retain wharfage and dockage charges at the facilities are furnishing terminal facilities within the meaning of section 1 of the Shipping Act, and are, therefore, other persons subject to the Act. Terminal Lease Agreements—Oakland-Long Beach, Calif., 521 (527).

A "pier" lease and a "truck terminal" lease covering areas in the same locale, with the activities accomplished on the property being essential to the lessee's related carrier's integrated containerized operations, will be considered as a composite arrangement for section 15 purposes. Id. (528).

Where an agreement is strongly protested, the Commission must examine not only its terms, but also the competitive consequences which may be expected to flow from it and other facts which show the objectives and results of the agreement, in order to determined whether the agreement is subject to section 15. Id. (529).

Municipal corporations, in granting via terminal leases, the exclusive use of a berth for a consideration which substantially deviated from tariff charges applicable to others, gave a special rate which brought the leases within the purview of section 15. Id. (530).

Contention that only agreements which are intended to restrain competition in per se violation of the Sherman Act need be filed under section 15 must be rejected. The effect of the agreement, not its intent, is the basis for inclusion or exclusion from the requirements of section 15. Section 15 is not ambiguous. It is not explicitly limited to agreements that are per se violative of the Sherman Act. Id. (531).

Terminal leases were not unjustly discriminatory because the lessee paid a flat rental while others had to pay tariff rates, and because the rents were allegedly noncompensatory. The record demonstrated that the leases would provide adequate revenue on their investment, and there was no evidence of any unlawful discrimination against any carrier, port or terminal. The lessee had the legal duty to establish and enforce just and reasonable regulations concerning the handling of cargo, and there was no evidence that it would do otherwise. Id. (531–533).

While the Commission might consider state or local law in determining what the public interest may be, it cannot disapprove terminal lease agreements as contrary to state law, where there is no showing that any adverse ramifications will ensue on approval. Since the Commission cannot anticipate any consequences which might be contrary to the public interest, the legality of the terms of the leases under state law is a matter for the state, not for the Commission, in a section 15 proceeding. Id. (533, 534).

Terminal leases on a flat-rental basis were not contrary to an agreement between port authorities. The agreement permitted uniform, stable terminal rates as far as might be practicable; it did not require uniformity. The terminal operators were justified in departing from the concept of uniformity. Id. (533).

In the absence of evidence to warrant a finding that terminal leases would have an unlawful impact or would be detrimental to commerce or would be

contrary to the public interest, the Commission would not disapprove them on the basis of speculation alone. In fact, the leases were beneficial to the ports, the carrier and the shipping public. It was in the public interest to preserve the traditional system of terminal charges on the Pacific Coast, but the leases (flat-rental type) were not endangering the system. Id. (534).

**UNDERCHARGES.** See Reparation.

**VESSEL VALUES.** See Rate and Rate Making.

**WHARFAGE.** See also Devices to Defeat Applicable Rates; Jurisdiction.

Wharfage is a charge against cargo for the use of terminal facilities, not for physical services rendered to the cargo; owners of marine terminal facilities are entitled as a matter of law to compensation for their facilities; use of facilities is made by the cargo even though it does not touch the wharf; wharfage is justified on the Pacific Coast from an historical standpoint; and wharfage on bulk grain has been assessed at marine terminal elevators on the Pacific Coast since the inception of such movement. Wharfage Charges on Bulk Grain at Pacific Coast Ports, 653 (657).

Marine terminal elevators handling bulk grain are engaged in wharfinger operations, and under the principles of the Freas formula the assessment of wharfage on bulk grain at such facilities is justified. Id. (659).

Marine terminal elevators have an investment in facilities which pertain to the terminal aspects of their operations, and there is an economic justification for their assessment of wharfage in order to recoup the investment in such facilities. Id. (661).

In view of the facts that rates paid for handling and storing grain, under the Department of Agriculture's Uniform Grain Storage Agreement, are the same for marine terminal elevators and for country elevators which do not have terminal facilities and that the Agreement provides for customary or mandatory wharfage charges where grain is received at port locations, the logical conclusion is that handling and storage charges were not intended to cover compensation for the additional facilities of a terminal nature which are not found at a country elevator. The UGSA handling and storage charges are not a duplication of the wharfage charge and do not provide any compensation for wharfage. Id. (663).

In view of the fact that the Department of Agriculture's Uniform Grain Storage Agreement provides for payment of customary and mandatory wharfage at port locations, and that the rates for storing and handling do not compensate for wharfage, the Agreement is not relevant to the question of whether the practice of assessing wharfage on CCC-owned bulk grain at marine terminal elevators on the Pacific Coast is lawful. Id. (664).

Wharfage is a user charge and does not contemplate the performance of a physical handling service. Marine terminal elevators which charge for storage and handling of bulk grain under an agreement with the Department of Agriculture, are entitled to assess wharfage for the use of the elevators' facilities for transferring CCC-owned bulk grain from elevator to ocean-going vessels. Contentions that the conveyor and spout, also the berthing facilities are necessary to the operation of the elevator and to a degree are part of the investment in the elevator, and that whatever benefit the ship receives from use of the wharf is compensated for by dockage and in some cases service charges paid to the marine terminal elevator, cannot be sustained under the principle of the Freas formula. Id. (664, 665).

Evidence relating to wharfage practices of marine terminal operators at Gulf and Atlantic ports is not relevant to the question of the lawfulness of wharfage charges on bulk grain at Pacific ports. The terminal rate structure on the Pacific Coast is patterned after decisions of the Commission which is not true as to the terminal situation elsewhere, and conditions at Gulf and Atlantic ports are different from those at Pacific ports. Nonrailroad terminals on the East Coast cannot assess wharfage on rail traffic because to do so would result in double charges and consequent loss of business to the nonrail terminals. Id. (665, 666).

Practice of assessing wharfage charges on grain moving through marine terminal elevators on the Pacfic Coast pursuant to the Department of Agriculture's Uniform Grain Storage Agreement does not constitute an unjust or unreasonable practice within the meaning of section 17 of the Shipping Act. Id (666).

**WORKING CAPITAL.** See Rates and Rate Making.