DECISIONS OF THE
FEDERAL MARITIME COMMISSION

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DECISIONS OF THE FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

No. 1166

IN THE MATTER OF AGREEMENT NOS. 6200–7, 6200–8 AND 6200–B—U.S. ATLANTIC & GULF/AUSTRALIA-NEW ZEALAND CONFERENCE

Decided August 26, 1965

Agreements modifying outbound conference agreement (1) to add U.S. Great Lakes and St. Lawrence River ports to trade from Atlantic and Gulf ports to Australia and New Zealand, with separate section to fix rates from the Great Lakes, and (2) to change voting requirement in ordinary conference actions from unanimity to two-thirds, approved pursuant to section 15 of the Shipping Act, 1916.

Agreement providing for veto by Atlantic and Gulf section of conference of rates set by Great Lakes section below those from the Atlantic and Gulf, disapproved pursuant to section 15 of the Shipping Act, 1916.

Permission to extend use of conference's approved dual rate contract to entire trade covered by conference agreement as expanded by approved amendment, denied pursuant to section 14b of the Shipping Act, 1916.

Elmer C. Maddy, *Paul F. McGuire*, and *Baldvin Einarson* for U.S. Atlantic & Gulf/Australia-New Zealand Conference, respondent.

Jerome H. Heckman, *Robert Tiernan*, and *Vincent D. Simmons* for the Dow Chemical Company and Dow Chemical International S.A., interveners.

James M. Henderson, *Arthur L. Winn, Jr.*, *Samuel H. Moerman*, and *J. Raymond Clark* for the Port of New York Authority and North Atlantic Ports Association, interveners (with *Sidney Goldstein*, General Council, and *F. A. Mulhern*, Attorney, for the Port of New York Authority).

Warren A. Jackman, *Stuart B. Bradley*, and *Daniel K. Schlorf* for Federal Commerce and Navigation Company Limited and Federal Commonwealth Line, interveners.

Robert Jorgensen for International Association of Great Lakes Ports, intervener, and *Ronald Parizek* for Port of Chicago, a member of said association.

J. Scot Provan and *Robert J. Blackwell*, Hearing Counsel.

Walter T. Southworth, Hearing Examiner.

REPORT

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

The Commission instituted this investigation to determine (1) whether three proposed amendments to Agreement No. 6200, the organic agreement of the U.S. Atlantic and Gulf/Australia-New Zealand Conference, should be approved under section 15 of the Shipping Act, 1916, and (2) whether the Conference should be permitted, pursuant to section 14b of the Shipping Act, to extend the coverage of its dual rate contract to include Great Lakes ports.

Agreement No. 6200 presently covers the establishment of agreed rates, charges, and practices for the carriage of cargo from Atlantic and Gulf ports of the United States to ports in Australia, New Zealand, and certain South Pacific Islands. The proposed amendments now before us would: [1]

1. Add Great Lakes and St. Lawrence River ports of the United States to the trade covered by the conference. Along with the request to extend the scope of the agreement, the conference requests permission to have its approved dual rate contract apply to shipments from these ports (Agreement No. 6200-8, par. 1);
2. Establish a separate "Great Lakes section" of the conference, composed of member lines operating regular services from Great Lakes ports, which would establish rates and conditions applicable to carriage from Great Lakes ports, subject to the consent of two-thirds of all conference members to any rate lower than the corresponding rate from any other conference area. A carrier would be eligible to participate in the Great Lakes section upon demonstrating satisfactory evidence of its intent to operate in the Great Lakes [2] (Agreement No. 6200-8, par. 2); and
3. Change the present requirement of unanimous assent to any action under the agreement to two-thirds assent, except as otherwise specifically provided and except that any modification of the basic agreement would require unanimous consent (Agreement No. 6200-7, par. 2).

[1] By order served December 28, 1964, in this proceeding, the Commission remanded the issues raised by Agreement 6200-7 (par. 1) to the Examiner for further hearings. Agreement 6200-B, also subject to the order of investigation in this proceeding has been withdrawn.

[2] As originally submitted, the consent of three-fourths of the conference members was required. The Examiner, however, while approving this provision in principle saw no reason for requiring a greater majority to ratify a lower rate from the Lakes than for ordinary conference action. Accordingly, his recommended approval was subject to the conference's modifying their agreement to require approval only by a two-thirds majority. The conference has indicated their assent to this modification.

In his initial decision, the presiding examiner recommended approval of the proposed modifications. Dow Chemical Company, a large producer of chemicals with a major plant in the Great Lakes area at Midland, Michigan, and Dow Chemical International, S.A., its export sales subsidiary; Federal Commerce and Navigation Company, limited, a Montreal-based corporation which proposed to operate a service between Australia and U.S. Great Lakes ports through its newly established Federal Commonwealth Line; and Hearing Counsel filed exceptions to the initial decision.

In substance these parties contend:

1. That the Examiner erred in approving the establishment of a separate Great Lakes section of the conference which was subject to the power of the conference as a whole to veto a rate established by the Great Lakes section below the corresponding rate from Atlantic and Gulf ports.

2. That the Examiner erred in approving the provision that membership in the Great Lakes section can be retained as long as a carrier produces satisfactory evidence of its intention and ability to operate a regular service from Lakes ports.

3. That the Examiner erred in approving the extension of the conference's dual rate contract from Atlantic and Gulf ports to the Great Lakes area.

4. That the Examiner erred in finding that the imposition by the conference of a $5–$6 per ton arbitrary or differential on shipments from Great Lakes ports, over corresponding rates from Atlantic and Gulf ports, was not unlawful.[3]

The conference, intervener Port of New York Authority, and intervener North Atlantic Ports Association replied to these exceptions.

FACTS

In the past, Great Lakes ports of the United States were a relatively unimportant shipping area because of adverse conditions inherent in the Lakes—inadequate port facilities, a short navigation season, and limited common carrier service. With the opening of the St. Lawrence Seaway in 1959, however, the Lakes become the fourth sea coast of the United States. Since the opening of the Seaway, the movement of cargo has steadily increased.

At present the Great Lakes are competitive with Atlantic and Gulf ports, and many shippers move their goods from both areas. Nevertheless, certain inherent disadvantages limit the ability of Lakes ports to attract cargo. Goods can move from Lakes ports only during a 6–7 month sailing season. Consequently when the Lakes are closed to navigation, all shippers, regardless of their loyalty to or preference for Lakes ports, must look to the Atlantic or Gulf for service. In

[3] Only Dow raises this exception.

addition, transit time from Atlantic ports to Australia and New Zealand varies, depending upon the ports involved, from 25 to 35 days, while transit time from Chicago to the first port in Australia is about 54 days, and from Detroit it is about 43 days. And the length of voyages from the Lakes may be increased by congestion in the locks. Where speed is essential, therefore, shippers must rely on the Atlantic or Gulf.

Despite these difficulties, however, Lakes ports have certain advantages over the Atlantic and Gulf. Shippers with plants on or near the Lakes find that common carrier service at their doorstep saves the cost of inland transportation to Atlantic or Gulf ports, a factor which is a strong inducement to ship from the Lakes despite the lengthy transit time and limited service.

At the close of the record in this proceeding, the conference had six members. Three of these—A/B Atlanttrafik, American and Australian Steamship Line-Joint Service (A. & A.), and Port and Associated Lines-Joint Service (Port)—would be eligible for membership in the proposed Great Lakes section according to the eligibility requirements set forth in Agreement 6200–8. The individual tariffs filed by these lines for transportation of cargo from the Lakes to Australia and New Zealand generally provide for a differential or arbitrary over conference rates applicable at Atlantic and Gulf ports of $5.00 per ton for ports in the Detroit-Toledo range and $6.00 for ports in the Chicago-Milwaukee range. If the conference is extended to the Lakes, the members will maintain some differential over Atlantic and Gulf rates to compensate for the additional steaming time and other costs incurred in serving the Lakes.

Of the three conference lines who have expressed an intent to serve the Lakes, only Atlanttrafik has actually made a sailing. During 1963, it made 11 sailings out the the Great Lakes port of Detroit. Of these, 8 also called at Chicago. Atlanttrafik, however, has not attracted sufficient cargo to fill its vessels from Lakes ports alone, and it has found it necessary to call at Montreal, other St. Lawrence River ports. and U.S. Atlantic Coast ports.

A. & A. and Port collectively propose to provide monthly service from the Lakes through a sailing arrangement pursuant to F.M.C. Agreement No. 7996–3.[4] In conjunction with this proposed Lakes service, A. & A. and Port will call at Montreal and Canadian ports east thereof but will not call at U.S. Atlantic or Gulf ports. A. & A. and Port would continue their present separate service from U.S. Atlantic and Gulf ports.

[4] This agreement provides for A. & A. and Port to alternate sailings from Lakes ports.

Although A. & A. and Port have filed tariffs covering the Great Lakes, and have solicited cargo, they have not as yet secured cargo sufficient to justify a sailing from the Lakes. Most of their solicitation has been directed to automobile shippers who account for about 70 percent of the revenue in the Great Lakes trade. Competition for this cargo is keen. A. & A. actually had a booking from Chrysler, a major shipper of automobiles, but Chrysler cancelled this booking when it determined that faster service from the Atlantic was needed. The loss of this booking forced A. & A. to cancel its scheduled sailing. A second vessel was offered by A. & A. to American Motors, but the cargo was shipped via Atlanttrafik.

Port Line has solicited Chrysler, American Motors, Willys, and Dow, but has not been successful in attracting cargo. Chrysler offered Port its entire 1964 shipments from the Lakes to Australia if it would reduce its rate from $36.50, the same rate offered by the conference from the Atlantic and Gulf, to $33.50 plus 5 percent. Port, feeling that such a reduction would disrupt the conference rate structure, declined and lost the cargo.

Much of the vigorous competition in the Lakes has come from independent carriers. In 1961, O.S.K. Line took a cargo away from Atlanttrafik by offering a cut rate to Chrysler, and in 1962 Orient Mid-East Lines did the same, forcing Atlanttrafik to cut its rate by eliminating the differential over the Atlantic Coast rate. Neither O.S.K. nor Orient Mid-East Lines has since reentered the Lakes trade. In 1964, Federal Commerce, which had never been in the trade before, took away Atlanttrafik's principal booking for its first sailing of the season by cutting rates on automobiles from Kenosha (American Motors). As a result, Atlanttrafik cancelled the sailing. Apparently Federal Commerce took the business at $33.50 per ton, against Atlanttrafik's rate of $36.50. The conference considered the $33.50 rate to be noncompensatory.

DISCUSSION

The Commission has recognized in the past that certain administrative economies can be effected by permitting separate trade areas to be brought under a single conference administration, thereby permitting the use of one office and one staff where several might otherwise be required.[5] We believe that the establishment of a single administration within the U.S. Atlantic and Gulf/Australia-New Zealand Conference to handle the Atlantic and Gulf trade and the Great Lakes trade is justified on the basis of savings in the cost of

[5] *The Dual Rate Cases,* dated Mar. 27, 1964, pp. 43–45.

conference administration. However, Agreement 6200-8 would go further and allow the Atlantic and Gulf section of the conference to exercise veto power over rates set by the Great Lakes section, albeit the power is a limited one and extends only to rates which are lower than those from the Atlantic and Gulf coasts.

The considerations which move us to permit the establishment of a single conference in these two trades for administrative purposes do not in our view justify the exercise of the proposed veto power over Great Lakes rates by the Atlantic and Gulf carriers.

It seems elemental that the carriers best able to establish fair and equitable rates for a given trade are those carriers which are actually serving the trade. It would seem equally clear that these carriers should be able to fix their rates free from any veto power vested in carriers whose primary purpose and motivation is the protection of their carryings in a competitive trade. We recognize that the increased expenses involved in carrying cargo out of Great Lakes ports would make the instance of a Lakes rate which is lower than an Atlantic or Gulf rate a relatively rare one. But if the carriers serving the Lakes feel that such a rate is needed they should be free to set it.

The conference fears that unlimited power in the Great Lakes section to set rates below those from the Atlantic and Gulf would lead to destructive rate competition between the two competing trades. However, we believe the vesting of rate-making decisions in carriers who do not serve the area in whose rates they have a voice to be far more dangerous to the commerce of the United States then the existence of rate competition between two competing areas. Moreover, we think that section 15 clearly requires that the carriers in the Great Lakes section be free to establish their rates independently.

Section 15 provides in relevant part:

> No . . . agreement shall be approved, nor, shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference retains the right of independent action.[6]

[6] In discussing this provision, the House Committee on Merchant Marine and Fisheries stated:

". . . One reason for the insertion of this provision is the present situation existing in the operation of the joint agreement between the Pacific Westbound and Far East Conference whereby each conference exercises, in effect, a veto power over action by the other conference on specific rate applications by shippers.

"This joint agreement has operated to the detriment of shippers by transferring the ultimate decision with respect to their rates from the carriers immediately serving them to the carriers on the other coasts who have no knowledge of or necessarily any interest in the welfare of the particular shipper. . . ." (House Report 498, 87th Cong., 1st sess. pp. 9-10.)

Although it is true that section 15 does not require the right of independent action on the part of the individual carriers within a single conference, the arrangement contemplated by Agreement 6200–8 is the same, in practice, as that which Congress sought to prohibit. The inclusion of two naturally competitive trades within the ambit of a single conference for administrative purposes cannot carry with it the power of carriers serving one of the trades to veto the rates of the carriers serving the other. For if it did the independent action requirement of section 15 would be a nullity.

We turn now to the question of eligibility for membership in the Great Lakes section. Agreement No. 6200–8 provides that a line is eligible for membership in the Lakes section if it maintains regular service from the Lakes. Regular service is defined as a minimum of two sailings during a navigation season. The controversial part of the membership requirement is as follows:

If a line fails to have a minimum of two sailings during a navigation season, it shall cease to have a vote in such Great Lakes conference section until it shall give a satisfactory evidence of its intention and ability to operate a regular service from United States Great Lakes ports.

In short, Agreement 6200–8 permits a carrier to retain its vote in the Great Lakes section despite the fact that it has not made a sailing during a season, as long as it maintains "satisfactory evidence" of its intention to serve the Lakes during the next season. Satisfactory evidence, according to the conference, would consist of the filing of tariffs, advertising a sailing, and similar activities which normally precede a sailing.

Hearing Counsel and Dow call attention to the experience of A. & A. and Port who presented what would be considered sufficient evidence under this standard, yet failed to sail from the Lakes. They fear that these liberal requirements for admission into the Lakes section will be used by lines who have no real intention of serving the Lakes, merely "to have a finger in the rate-making pie."

Although it is true that A. & A. and Port manifested their intention to serve, but were unable to carry out this intention, it appears from the record that their attempts were made in good faith, and not merely to influence rates from the Great Lakes.

Although a theoretical possibility exists that the liberal requirements for membership in the Great Lakes section could be abused by Atlantic and Gulf carriers who may desire to vote on Great Lakes rates without serving the Lakes, we believe the greater risk is in the possible harm to a carrier which has been unable to carry out its planned sailings, and must thereby be deprived of a voice in determining its rates for the

following season, although it intended in good faith to provide service. Should abuses occur, it is in the interests of those carriers providing regular service from the Lakes to bring them to our attention. Our power of continuing supervision over section 15 agreements would permit us at that time to take appropriate action.

The membership criteria of Agreement 6200–8 for the Great Lakes section are consistent with the Commission's General Order No. 9,[7] governing "Admission, Withdrawal, And Expulsion Provisions of Steamship Conference Agreements." The general order requires all conference agreements to contain a provision substantially as follows:

> Any common carrier by water which has been regularly engaged as a common carrier in the trade covered by this agreement, or who furnishes evidence of ability and intention in good faith to institute and maintain such a common carrier service between ports within the scope of this agreement, and who evidences an ability and intention in good faith to abide by all the terms and conditions of this agreement, may hereafter become a party to this agreement by affixing its signature thereto.

We, therefore, approve the membership clause of Agreement No. 6200–8.

Under the provisions of Agreement 6200–7 (par. 2), conference action, including the setting of rates, requires the assent of two-thirds of the conference members. Agreement 6200–8, however, requires that the members of the Great Lakes section must set their rates by a three-fourths vote of the members of that section.

At the close of the record, three carriers were eligible for membership in the Great Lakes section. Thus, any rate from the Lakes would require the unanimous assent of these three carriers. This voting procedure permits one carrier to exercise a practical veto over the ratemaking decisions of that section. We cannot approve such an arrangement. By modifying Agreement 6200–8 to require the same two-thirds majority in the setting of rates as is proposed from the Atlantic and Gulf, this danger would be substantially reduced.

We turn now to the issue of whether the approved dual rate contract system of the Atlantic and Gulf/Australia-New Zealand Conference should be extended to cover Great Lakes ports. Should we approve the extension of the system to the Lakes, a signatory to the extended dual rate contract would be obligated to ship on conference vessels not only from Atlantic and Gulf ports but from Great Lakes ports as well.

In urging approval of this extension the conference claims that the prevalence of nonconference competition in the Lakes justifies the extension of dual rates in order to combat nonconference rate competi-

[7] 29 Fed. Reg. 5797 (1964).

tion. Furthermore, they contend that the extension of the system will prevent signatories of the Atlantic and Gulf contract from avoiding their contract obligations by shipping from the Lakes.

We do not believe that the extension of the dual rate system to the Lakes is approvable under sections 14b and 15. Since the Great Lakes are closed to navigation during a five- or six-month period, it is rare that a shipper in that area can rely upon carriers from the Lakes for all his shipping requirements. At some time during the year, he will have no choice but to ship out of the Atlantic or Gulf. Therefore, a shipper in the Lakes area may elect to sign a dual rate contract from the Atlantic and Gulf range. If the shipper elects to sign a dual rate contract from the Atlantic and Gulf, he would be compelled, under the conference proposal, to be a dual rate shipper from the Lakes whether or not conference rates and service in the Lakes are satisfactory to him. One dual rate contract covering both the Atlantic and Gulf as well as the Lakes would also effectively lessen the bargaining power of Great Lakes shippers since they would be forced to accept conference rates from the Lakes or conference rates from the Atlantic and Gulf although satisfactory service could otherwise be obtained in the Lakes. This situation is harmful not only to the shipper, but to the development of the Great Lakes as a trading area. The extension would hinder Lakes development and would in fact contribute to the diversion of cargo from the Lakes. For example, a shipper might be required to use unsatisfactory conference service from the Lakes or move cargo overland to the Atlantic or Gulf, even though satisfactory nonconference service might be available in the Lakes. This is discriminatory to Lakes ports.

On this record we find that the extension to the Lakes of the same dual rate contract applicable at Atlantic and Gulf ports will be detrimental to the commerce of the United States, discriminatory against Great Lakes ports in favor of Atlantic and Gulf ports, and contrary to the public interest, in violation of sections 14b and 15 of the Act. In *The Dual Rate Cases*, *supra*, we disapproved a similar provision. Consequently, this provision is disapproved.

We recognize that one of the fundamental purposes of the dual rate law was to allow the steamship conference to compete effectively with the independent carrier. We think this end can be accomplished by the institution of a separate dual rate contract for the Great Lakes section, independent of the dual rate contract from the Atlantic and Gulf.

CONCLUSIONS

For the foregoing reasons, we find Agreement 6200–8 as submitted by the conference to be detrimental to the commerce of the United States and discriminatory as between ports, in violation of sections 14b and 15 of the Act. It is disapproved. The conference may submit a revised agreement, however, not inconsistent with the terms of this report, for our consideration.

As to Agreement 6200–7 (par. 2) nothing appears in the record to indicate that this agreement would be discriminatory, detrimental to the commerce of the United States, contrary to the public interest, or otherwise contrary to the Act. It is approved.

Commissioner JOHN S. PATTERSON, concurring and dissenting separately

In my opinion, Agreement No. 6200–7 should be approved for the reason that the agreement has not been found 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, 1916, as amended.

I agree that we should not approve Agreement No. 6200–8 insofar as it requires a tie-in of the Great Lakes dual rate contract with the Atlantic and Gulf dual rate contract.

I dissent from the refusal to approve the provisions of Agreement No. 6200–8 obligating the Great Lakes section members to establish rates and conditions by three-fourths vote of such members.

I would permit the use of a separate contract which is available to all consignees and shippers in the Great Lakes area on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or a fixed portion of his patronage to the Conference carriers pursuant to Sec. 14b of the Act.

Commissioner GEORGE H. HEARN dissenting in part

I believe that the Conference proposal for a single Dual Rate Contract covering Great Lakes ports as well as the Atlantic and Gulf should be approved. As the majority has noted the Lakes are closed to navigation during a five or six month period. The record also shows that some shippers in the area of the Lakes do, even during the Lakes' navigational season, ship out of Atlantic or Gulf ports particularly when time is of the essence. This indicates that a single

Dual Rate Contract for all three Coasts is not only desirable but, in this case, enhances the purposes and policy of the Shipping Act.

Unlike my colleagues, I do not find that the tie-in of the Lakes with the Atlantic and Gulf coasts in one Dual Rate Contract would be detrimental to shippers or to the development of the Great Lakes as a trading area. On the contrary, it is my view that established lines which have for years devoted themselves to the trade and who are now and have been pioneering the trade from the Great Lakes area are entitled to a fair share of the cargoes offered from the Lakes during the navigational season.

Under the spirit of loyalty it should not be too much to expect contract shippers in the Great Lakes area to use Conference vessels offered at their own door steps, particularly when the conference carriers provide year round service to these shippers at Atlantic and Gulf ports.

Finally I believe that these Conference carriers who offer services throughout the full range of ports should not be prejudiced with respect to Lakes' cargo which they have helped to develop and which they stand ready to carry twelve months a year.

DOCKET NO. 1166

IN THE MATTER OF AGREEMENT NOS. 6200-7, 6200-8, AND 6200-B
U.S. ATLANTIC & GULF/AUSTRALIA-NEW ZEALAND CONFERENCE

ORDER OF DISCONTINUANCE

Hearing Counsel have moved to dismiss this proceeding on the grounds that the issues remaining for decision are moot. Respondents agree.

Consequently, this proceeding is hereby discontinued. However, the conference is notified that contrary to their assumption, the Commission reserves the right to institute an investigation of all pending modifications to Agreement 6200 or related section 15 agreements as it may deem proper.

By the Commission.

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

FEDERAL MARITIME COMMISSION

No. 1086

STOCKTON PORT DISTRICT

v.

PACIFIC WESTBOUND CONFERENCE ET AL.

Decided September 28, 1965

Respondents' equalization rules, and practices in accordance therewith, found to be unjustly discriminatory and unfair to terminal ports of the San Francisco Bay area (which include Stockton), within the meaning of section 15 of the Shipping Act, 1916, to the extent that they provide for equalization of inland transportation against such ports on cargo loaded at Los Angeles and Long Beach, Calif.

Filed equalization rules of respondents operating under approved conference agreements, and practices in accordance therewith, to the extent that they provide for equalization of inland transportation charges between San Francisco Bay area ports (which include Stockton), found not to be in violation of sections 15, 16 first, 17 or 18(b) of the Shipping Act, 1916, or to be unjustly discriminatory or unfair, detrimental to the commerce of the United States, or contrary to the public interest, within the meaning of section 15 of said act, if clarified as required; found not to violate the principles and policies of section 8 of the Merchant Marine Act, 1920; and not shown to be in violation of section 205 of the Merchant Marine Act, 1936.

Respondent Pacific Westbound Conference and its members found not to be in compliance with section 18(b) of the Shipping Act, 1916, by reason of so-called equalization on citrus fruit originating in southern California and shipped from San Francisco, which is not in accordance with or pursuant to filed equalization rule.

J. Richard Townsend and *Walter H. Meryman* for Stockton Port District, complainant.

Edward D. Ranson and *Gordon L. Poole* for Pacific Westbound Conference and members, respondents.

Leonard G. James, Robert L. Harmon and F. Conger Fawcett for Pacific Straits Conference, Pacific/Indonesian Conference, and their members, respondents.

Stanley Mosk and *Miriam E. Wolff* for San Francisco Port Authority intervener.

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

REPORT

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

This proceeding arose upon the complaint of Stockton Port District against the Pacific Westbound Conference, the Pacific Straits Conference, and the Pacific/Indonesian Conference. The complaint alleges, in general, that the agreements of these conferences and the conference tariffs, which permit port equalization, are prejudicial to the port of Stockton and contrary to various statutory provisions. Stockton urges the Commission to order the respondent conferences to delete the port equalization rules from the conference tariffs and to cease and desist from the practice of port equalization.

Port equalization, under the respondent conferences' tariffs, permits conference carriers to equalize inland transportation costs between terminal ports. Thus, under the tariff rules, a carrier may reimburse a shipper for the difference between the shipper's inland transportation costs to the nearest terminal port and the shipper's inland transportation costs to the terminal port of loading. For example, if from the point of origin of the cargo it will cost the shipper 34 cents per hundred pounds to ship overland by common carrier to the port of Stockton and 42 cents per hundred pounds to ship overland by common carrier to the port of San Francisco, the ocean carrier may take the shipment at San Francisco and "equalize" the added inland cost by reimbursing the shipper for the excess of 8 cents per hundred pounds which it has cost him to ship via San Francisco instead of Stockton.

Stockton alleges that the port equalization rule results in diversion of volumes of cargo normally tributary to Stockton. This is allegedly contrary to the purposes and policies of section 8, Merchant Marine Act, 1920, and section 205, Merchant Marine Act, 1936. Furthermore, Stockton asserts that the rule and its implementation are agreements unapprovable under section 15, Shipping Act, 1916; that the rule is discriminatory and unreasonable in violation of sections 16 and 17 of the Shipping Act; and Stockton urges that the conferences have violated section 18(b) of the Shipping Act by departing from their conference tariffs.

FACTS

The conference and the port equalization rule

The Pacific Westbound Conference (PWC), organized in 1923, has at present a membership of 28 common carriers. PWC serves the

trade outbound from the Pacific coast of the United States to destinations in the Orient, principally Japan, the Philippines, and Hong Kong. In 1962, PWC members made 1,240 sailings, each representing a vessel calling at one or more Pacific coast ports and clearing for a destination in the Orient.

The Pacific Straits Conference operates from Pacific coast ports to Singapore, Malaya, Sarawak, North Borneo, and Brunei. The Pacific/Indonesian Conference operates from Pacific coast ports to Indonesia.

PWC sets ocean rates which apply without reservation from terminal ports. Terminal ports are those at which PWC members accept cargo for loading at the base rates named in the PWC tariff. Terminal ports in California are Stockton, Richmond, Oakland, Alameda, San Francisco, Los Angeles, Long Beach, San Diego, and Sacramento.[1]

The port equalization rules apply to terminal ports only and the rules presently in effect for respondents are set forth in the attached appendix.

Whenever cargo is equalized, the shipper must submit to the member booking the cargo the transportation bill covering the movement from point of origin. In turn, the carrier must submit the information to the conference for certification of the basis for the equalization. Although the tariff requires use of an approved form, only one of the PWC members uses the form at present; the others provide the actual source documents. The documents include information sufficient to disclose the point of origin, date of shipment, commodity, nearest terminal port, port of loading, information regarding the inland freight rates, and the inland freight bill. The conference office endeavors to check the rates contained in the source documents. This check is particularly necessary on the constructive leg of the equalization; i.e., the rate from the point of origin to the nearest terminal port. For the actual leg of the equalization, the conference uses the inland transportation bill for the actual routing of the cargo.

The conference is familiar with the rates involved in the equalization of the more important cargoes and it checks to see if the rates and equalization are reasonable. Upon encountering a questionable item, the conference refers to an inland freight tariff or telephones a trucking company or railroad. The conference is aware of the trucking company that actually carried the cargo, and they use the actual transportation costs.

[1] Sacramento is not a terminal port in the Pacific Straits or Pacific/Indonesian Conferences. Service at Sacramento in these conferences is subject to a tonnage restriction of a minimum of 500 tons from 1 shipper.

For the constructive leg of the equalization, the conference uses the lowest common carrier rates to the nearest loading port. In this context, nearest means cheapest.

The claims for equalization and the supporting documents are generally submitted to the conference fairly soon after the vessel has sailed, but certain of the conference members may accumulate equalization claims for a week to 2 weeks. There is no conference rule regarding the time within which claims must be presented. Equalization cannot be paid until approved by the conference.

In addition to the privilege to equalize, the PWC tariff permits transshipment. Under transshipment, the shipper delivers the cargo to Stockton, the carrier accepts the cargo and issues a negotiable document, and thereafter for its convenience and at its own expense the carrier may move the cargo to San Francisco for loading on the vessel. The cargo may be handled by truck, rail, or barge; however, it is predominantly moved via truck. Generally, only commercial general cargo is transshipped from Stockton. In the case of transshipment the steamship carrier is obliged to pay the inland freight as well as the terminal charges at both Stockton and San Francisco. Usually transshipment is limited to smaller tonnages, particularly where there is insufficient cargo at Stockton to justify a call, or some operational reasons make it impossible to make an intended call. There is no cost to the shipper for transshipment.

The port of Stockton

The Stockton Port District is a public corporation formed pursuant to the Harbors and Navigation Code of California. The port district operates terminal facilities owned by the port district or the city of Stockton. The port consists of 10 general cargo berths, one of which is open with two 30-ton gantry cranes, two bulk docks, and one bulk grain dock. The general cargo berths are marginal-type wharves on concrete pilings with corrugated steel transit sheds. Adjoining the transit shed area, are warehouse facilities, a cotton compress, cotton warehouse, a bulk wine terminal, and a grain elevator. Stockton also leases from the Navy two berths and one transit shed on Rough and Ready Island. In the immediate area is a basin in which vessels calling at Stockton turnaround, after discharging or loading cargo, to proceed downstream. At the beginning of 1964, a total of $23 million had been invested in the Stockton facilities. The port of Stockton is reached via the Stockton ship channel, a journey of some 75 nautical miles (or 84 statute miles) from the Golden Gate. The channel, a congressional project, was approved August 26, 1937. The average transit time from San Francisco Bay to Stockton via the channel is

7½ to 8 hours not taking into account delays due to fog or bridge liftings. The channel is at least 30 feet deep at mean low water. Although there are occasional groundings and delays due to fog, the conditions of the channel are satisfactory and not a serious factor in preventing a vessel from calling at Stockton. The largest cargo vessels of PWC can call at Stockton without unusual difficulty.

On August 1, 1957, PWC made Stockton a full terminal port, and since this time Stockton has had a phenomenal growth. Equalization did not affect Stockton until it became a full terminal port.

Impact of equalization on Stockton

Stockton claims a loss of revenue to the port by virtue of equalization during 1962 of $232,000. The port lost revenue from its terminal charges—service and facilities charge, wharfage, truck unloading, dockage, and prepalletization. Very little additional labor would be needed to accommodate this cargo insofar as wharfage and dockage are concerned, but the service and facilities charge has a considerable amount of labor. Most of the charge for truck unloading, line handling, and prepalletization is labor costs.

Service at Stockton

During 1962, 85 vessels of respondent conferences made actual calls at Stockton and many of these lifted general cargo. In contrast, vessels of members of the Pacific Coast European Conference made 227 calls at Stockton in 1962 and lifted 260,000 tons of cargo. Of the lines calling at Stockton, only OSK makes Stockton its last port of loading outbound. "K" Line made its first call at Stockton in June 1962 and made fairly regular calls thereafter. Pacific Far East Line (PFEL) operates nine vessels in the PWC trade and practically all sailings have Stockton calls. PFEL discharges cargo at Stockton on all voyages, but export cargo is ordinarily not available at the time of the inbound call. About one-half of PFEL's outbound vessels call at Stockton, principally for bulk bottom cargoes in parcel lots. These bulk cargoes are at least 75 percent safflower seed, but from time to time include wheat and barley. They are loaded at Stockton elevators. When the vessel calls for bulk, if there is sufficient general cargo available, the vessel will shift to a general cargo berth to load. PFEL made 30 calls at Stockton in 1962; however, Stockton is not the final port of loading in the PWC trade for PFEL. PFEL does consider itself to have a regular outward service at Stockton.

American President Lines (APL) had 24 calls at Stockton in 1962, 5 discharged cargo only and 12 loaded bulk only. In the first half of 1963, APL guaranteed shippers that vessels would call at Stockton regardless of the amount of cargo offered, but the plan proved to be

uneconomical and was dropped. APL's service at Stockton definitely depends upon the availability of bottom cargoes, and Stockton is not the last loading port for APL vessels.

NYK Line provides no regular service at Stockton. Diado Line had four calls at Stockton in 1962 and United Philippine Lines had none. States Steamship Co. had four calls in 1963 which loaded bulk rice and some general cargo.

Of the PWC members, 15 made at least 1 call at Stockton during 1962; 13 made no calls. PWC made a total of 133 calls, but of those no commercial general cargo [2] was loaded on 90 calls.

Vessels loading at Stockton generally can load commercial and military cargo at the same berth, but vessels loading bulk must shift to a different facility to load other cargo. The shift costs about $300 for pilot and tug.

Steamship costs and operational factors pertaining to calls at Stockton

As noted above, it is an 8-hour trip in each direction to reach Stockton from the bay area. Thus, a carrier incurs additional expenses in steaming to Stockton, including transiting time, pilotage, tugs, and other incidental expenses. Estimates of the total of these costs range from $3,000 to $4,000.

There may be insufficient cargo to justify a call, and that cargó, for operational reasons, would be equalized or transshipped. It depends on the commodity as well as the volume to determine whether a Stockton call is justifiable. Amounts ranging from 250 to 750 tons might justify a call dependent on the nature of the cargo.

It is also not operationally feasible to call at every terminal port. This is particularly so of lines that have European or east coast cargo aboard and merely top-off on the west coast before proceeding to the Orient. Such lines would usually call at one terminal for relatively small amounts of cargo. There is an operational saving by consolidating cargo at one terminal.

Equilization gives the vessel latitude in loading and scheduling and the flexibility to avoid uneconomical calls. Equalization rather than transshipment is the better way to achieve this latitude and flexibility. Equalization, which averages about $2 to $2.50 per ton, is substantially cheaper than transshipment. Transshipment is roughly three times more expensive.

Impact of equalization on carriers and shippers

In spite of the operational factors encouraging equalization, certain carriers and shippers are opposed to the rule as presently practiced.

[2] In this context, commercial general cargo means packaged, high-rated items, not bagged fertilizer and other low-rated items.

PFEL feels the rule is detrimental to its interest since it is one of the few PWC members calling regularly at Stockton, and equalization dilutes cargo tributary to Stockton. Without equalization much of the cargo would move through Stockton and, of course, PFEL would have vessels available. PFEL feels that equalization should only expedite vessel operations, but a carrier with no intention of calling at Stockton should not be permitted to equalize. If a carrier does not call regularly at Stockton and has no intention of serving the port, then PFEL feels it should not be able to equalize. Although equalization is optional under the tariff, carriers find that competition compels them to equalize.

Some shippers also wish to have the port of Stockton continue with adequate service. Some shippers believe that if they can ship cheaper via Stockton, then they should be permitted to do so, and feel that without equalization there would likely be enough cargo to generate sufficient service. Certain shippers also feel if the steamship companies were not burdened with equalization expenses, they might adjust the rates. At any rate, shippers like to have Stockton available for use if convenient. Some shippers apparently experience some difficulty with equalization by virtue of delay in being paid and by additional clerical expense.

Other shippers, however, for several reasons, strongly favor port equalization. To them regularity of service is highly important as is the intransit time of the shipment, and these shippers prefer to put their cargo aboard at the last loading port. The shorter the intransit time, the quicker the shipper is paid by his customer. Minimum intransit time is also critical when the commodity is perishable.[3] By equalizing, shippers have access to more frequent service at no additional expense. Of course, some shippers do not care whether Stockton is the last loading port.

Service is unquestionably adequate at San Francisco. However, adequacy of service at Stockton is dependent upon the needs of particular shippers. Some shippers consider the Stockton service inadequate to meet overseas commitments.

Transshipment, from a shipper's point of view, is no substitute for equalization because of delay and damage occasioned by rehandling.

Shippers in the PWC are confronted with one reality: the Japanese are insistent upon nominating vessels upon which many consignments are to be shipped and, thus, if the nominated vessel is not calling at Stockton, then the shipment is equalized against Stockton and ex-

[3] If there were no equalization, many perishable commodities would still move through San Francisco rather than Stockton.

ported through some other terminal port. One raisin supplier indicated that service at Stockton was adequate and that many shipments would move from Stockton but for the foreign nomination of vessels.

PWC fidelity to the equalization rule

The record discloses a number of departures from strict adherence to the equalization rule. However, the only substantial disregard for the rule involves equalization on citrus fruit. On citrus fruit the conference approves equalization of $0.15 per carton irrespective of the point of origin, the nearest terminal port, or the inland transportation costs. The $0.15 per carton equalization is the excess of the quoted base price at the dock in San Francisco over the dockside price in Los Angeles. This is not in accord with the PWC tariff.

Citrus fruit originates in central and southern California. Some of the citrus originates in areas tributary to Stockton on the basis of inland transportation costs. However, no citrus is equalized against Stockton, although the $0.15 payment is made on shipments originating in an area tributary to Stockton.

Discussion and Conclusions

Examiner Walter T. Southworth concluded that equalization as practiced by respondents against Stockton was lawful under the Shipping Act, 1916, but that respondents' equalization on cargo loaded at Long Beach and Los Angeles was unjustly discriminatory and unfair to terminal ports in the San Francisco Bay area (including Stockton). The Examiner further found that the so-called equalization on citrus fruit failed to comply with the requirements of section 18(b) of the act. The proceeding is before us on exceptions to the Initial Decision.

Stockton contends that insofar as the Examiner found respondents' equalization against the port of Stockton lawful he was in error. Exception is taken to each and every finding and conclusion upon which this portion of the Initial Decision is based and, in actuality, Stockton's exceptions on this issue constitute nothing less than a reargument of its position before the Examiner. For the reasons set forth herein we agree with the conclusions of the Examiner and, if in stating those reasons we fail to treat any "specific exception," it has nevertheless been considered and found not justified.

The equalization here in question is said to (1) discourage the use of the port of Stockton in violation of the principles and policies of

section 8 of the Merchant Marine Act, 1920,[4] with resultant violations of sections 15 and 17 of the Shipping Act,[5] (2) result in unjust discrimination and undue prejudice against Stockton, and grant undue preference to the ports where cargo is loaded (particularly San Francisco, Wilmington, and Long Beach) in violation of sections 15, 16, and 17 of the Shipping Act. In addition, Stockton urges so-called other grounds of unlawfulness. These "other grounds" will be treated after disposal of what we consider to be the principal issues.

The Examiner concluded (1) that the ports of San Francisco and Stockton were of the same harbor complex or geographical area and that equalization between ports in the same geographical area was not contrary to the principles and policies of section 8 of the 1920 act, thus no violation of sections 15 and 17 of the Shipping Act resulted therefrom, and (2) that the territory which was naturally tributary to Stockton was also naturally tributary to San Francisco, and that under the applicable precedents the absorption of inland freight differentials is unlawful only if it destroys the rights of ports to traffic originating in the areas naturally tributary to them, and (3) that respondents' equalization as practiced against Stockton was lawful under the applicable precedents. Stockton argues that the Examiner was wrong on all three counts.

Port equalization is not unlawful in principle. *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 2 U.S.M.C. 500, 504 (1941). Equalization may be unlawful, however, if it draws from ports traffic which originates in areas naturally tributary to those ports, *City of Mobile* v. *Baltimore Insular Line, Inc.*, 2 U.S.M.C. 474, 486–487 (1941); *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 FMB 48, 55, 56 (1960), and if the port losing the diverted traffic can offer adequate service to shippers diverting to the favored port, *City of Portland* v. *Pacific Westbound Conference*, 4 FMB 664, 679 (1955). Equalization may also be unlawful if it is practiced between ports located in different or separate harbors or geographic areas. *Beau-*

[4] Section 8 of the 1920 act directs the Secretary of Commerce in conjunction with the Secretary of the Army—

". . . with the object of promoting, encouraging and developing ports and transportation facilities in connection with water commerce . . . to investigate territories, regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water and highway and the natural flow of commerce, and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally flow through such ports."

[5] Stockton has apparently abandoned its contention that respondents' equalization constituted an unjust and unreasonable regulation and practice related to or connected with the receiving, handling, storing or delivery of property within the meaning of section 17. In any event, as the Examiner correctly pointed out, respondents' equalization rules and practices had nothing to do with the receiving, handling, storing or delivering of property. *Beaumont Port Commission* v. *Seatrain Lines*, 3 FMB 556 (1951).

mont Port Commission v. *Seatrain Lines, Inc.*, 2 U.S.M.C. 699, 703 (1943).

With these principles in mind, we can now examine more closely the Examiner's findings and conclusions.

The Examiner treated Stockton as an integral part of the San Francisco Bay "harbor complex" and thus as being within the same "geographical area" which has access to the open sea through the Golden Gate. Stockton contends that the Examiner erred because Stockton is not on the San Francisco Bay and it is 84 miles and 5 waterways removed from San Francisco Bay. Secondly, the Examiner concluded that the areas naturally tributary to Stockton were equally so to San Francisco. Stockton argues that here again the Examiner fell into error because inland rates from the relevant area are lower to Stockton than they are to San Francisco. It is in this latter contention that we find the essential ingredient in Stockton's attack on respondents' equalization. In Stockton's view naturally tributary territory means simply "the area from which the inland transportation rates and mileages are less to a particular port than to any other port."

We agree with the Examiner's conclusion that the ports of Stockton and San Francisco do not represent separate and distinct geographical areas. They are both "bay area" ports and have been uniformly treated as such for a variety of purposes. Thus, the California Legislature in a comprehensive report on the San Francisco ports issued in 1951 consistently referred to Stockton as a bay area port. In setting up the bay area protection and promotion program, now contained in Harbors and Navigation Code, section 1980, et seq., the San Francisco Bay area is defined by the California Legislature as—

> . . . that region served by commercial shipping and transportation passing through the Golden Gate, including tributary areas of central and nothern California. . . .

In seeking to bring itself within the protection of section 8 of the 1920 act, Stockton relies on its physical separation from San Francisco Bay proper. But other factors must be considered in making determinations under section 8. Thus, the "economies of transportation" and the "natural flow of commerce" are relevant:

> . . . section [8] requires, all other factors being substantially equal, that a given geographical area and its ports receive the benefits of or be subject to the burdens naturally incident to its proximity or lack of proximity to another geographical area. (*City of Portland* v. *Pacific Westbound*, 4 FMB 664.)

The delineation of a "given geographical area" will almost always of necessity involve the inclusion of ports whose location from specified inland points will vary in distance or mileage. Thus, mileage alone

is not the determinative factor. In *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 2 U.S.M.C. 699 (1943) our predecessor permitted a carrier to equalize Texas City with Houston and Galveston, but not with Beaumont, Tex., where the geographical situation was quite similar to the one under consideration in this case—the geographical relation of Texas City, Houston and Galveston is comparable to that of San Francisco, Stockton and other bay area ports, and the position of Los Angeles is comparable to that of Beaumont:

> The geographical relationship of the ports involved, together with the peculiar characteristics of Seatrain's operation were emphasized at the further hearing. Texas City and Gavleston are situated on Galveston Bay which is also the approach to Houston. Entrance to the bay from the gulf is through Galveston Harbor which is connected by ship channels with Texas City and Houston. In a geographical sense, the three ports may be described as Galveston Bay ports. Rail distances from Texas City to Galveston and Houston are 14.2 and 42.2 miles respectively. Rail rates on long haul export traffic are the same for the three ports which in Rate Structure Investigation, part 3, Cotton, 165 ICC 595, 660, were described as "one terminal district or port." Beaumont is an inland port situated on the Neches River and having access to the gulf several miles east of the Galveston Bay ports. It is approximately 126 miles by rail from Texas City. (2 U.S.M.C. at 701.)

The natural direction of the flow of traffic from the San Joaquin Valley, which Stockton seeks to have declared its exclusive preserve, is through the Golden Gate to the Pacific Ocean. For almost a hundred years before Stockton was made accessible to oceangoing vessels, San Francisco was the principal port through which freight from the San Joaquin Valley would and did pass. It did not cease to be such a port merely upon the creation of an additional port at Stockton.

As we have already noted, equalization, while lawful in principle, may be unlawful in practice if the effect of the equalization is to draw from ports traffic which originates in areas naturally tributary to those ports. *City of Mobile* v. *Baltimore Insular Lines Inc.*, 2 U.S.M.C. 474 (1941; *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 FMB 48 (1960). The Examiner concluded that respondents' equalization practices did not violate sections 16 and 17 on this ground because the territory which is naturally tributary to Stockton is also naturally tributary to San Francisco. It should be kept in mind that the discrimination and prejudice which is prohibited by sections 16 and 17 is that which is unjust and unreasonable. *West Indies Fruit Company et al.* v. *Flota Mercante Gran-colombiana S.A.*, 7 FMC 66 (1962).

Stockton claims to have lost $232,000 in potential revenue on equalized cargo on the theory that all the equalized cargo would have moved through Stockton and that 50 additional ships would have called at

Stockton to pick up 800 tons each. Stockton concedes that it would have had additional labor costs, but says that they would not have exceeded $35,000. Actually these lost revenue figures are not valid because, as Stockton argues elsewhere, not all the equalized cargo would have gone to Stockton but for equalization, and the number of additional vessels which would have gone to Stockton is highly speculative.

On the other hand, at an average additional cost of $3,600 to send a vessel to Stockton it would have cost respondents some $180,000 to send 50 ships to Stockton, or about $67,000 more than the $113,030 it cost them to equalize. Thus, there is ample economic and cost justification for the discrimination against Stockton such as it is. But even this would not save respondents' equalization under the applicable precedents were it established that the practice drew cargo away from territory which was exclusively and naturally tributary to Stockton.

Stockton's argument for recognition of most of central California, including the great San Joaquin Valley, as its naturally tributary territory is based entirely upon minimum trucking rates to Stockton, which in turn are based upon the "constructive mileage" between points of origin and Stockton.[6] Stockton contends that the Examiner misconstrued the applicable precedents in finding that Stockton's tributary territory was also San Francisco's. As Stockton reads the cases "tributary territory" is that area from which the inland transportation rates and mileages are less to a particular port than some other port. But Stockton's theory is only deceptively simple and does not comport with the principles laid down in prior cases. Under this "constructive mileage" theory the naturally tributary territory expands and contracts with every new highway innovation because constructive mileage changes with new bridges, traffic lights and the like. Under Stockton's theory the territory is dependent upon which ports are named "terminal ports" by the carriers practicing the equalization. Thus, when the respondent Pacific Westbound Conference, but not the Straits or Indonesian Conferences, named Sacramento as a terminal port, Stockton's own witness, Mr. Phelps, stated that Stockton's tributary territory for the Pacific Westbound Conference was thereupon cut in half because "that is the way the arithmetic comes out."

In the *Beaumont* decision, *supra*, when it permitted Seatrain to absorb the difference between the cost of delivering cargo to Texas City and the cost of delivering to Houston and Galveston, the Board said at page 703:

[6] "Constructive mileage" is actual mileage weighed by such factors as the number of traffic lights and bridges, the presence or absence of mountainous terrain, the condition of the highways and other factors affecting truck traffic.

Our decision in the previous report condemned practices which permit a carrier to attract to its line traffic which is not naturally tributary to the port it serves, thus depriving other ports of their local tributary traffic. The testimony and argument on further hearing emphasize the question which we think is decisive in this case, whether the traffic in question can be considered as tributary to Seatrain (at Texas City) as well as to the break-bulk lines involved. Upon the facts stated in three above, we conclude that the area comprising the ports of Galveston, Houston, and the surrounding territory is centrally served by Seatrain's facilities at Texas City. No reason appears therefore why that carrier may not effectively compete for the traffic through such ports. Beaumont is not within the Galveston Bay group and the traffic through such port is not naturally tributary to Texas City.

Although Stockton urges that the Examiner's reliance on the *Beaumont* decision is misplaced we think it reasonable, well founded and proper. Moreover, the Maritime Administration, Department of Commerce, and the Corps of Engineers, Department of the Army, the governmental agencies charged with administering section 8, in their joint publication [7] covering the port of San Francisco, describe San Francisco as "one of the most important ports for the vast inland territory of the central and Pacific coast area and the intermountain States," under the heading "tributary territory." In their publication covering Stockton, the "tributary territory" designated as that of Stockton is wholly within the territory attributed to San Francisco, and largely within the territory attributed to Oakland-Alameda in the publication covering those ports. It is obvious that these studies dictate a rejection of any "constructive mileage" theory for determining "naturally tributary territory."

We conclude, that for the purposes of this proceeding, the territory naturally tributary to Stockton should properly be considered naturally tributary to San Francisco and other San Francisco Bay area ports. To paraphrase the *Beaumont* decision, *supra*, the territory surrounding Stockton and the entire bay area is centrally, economically and naturally served by the conference facilities at San Francisco.

Stockton further urges that respondents' equalization rule is unlawful, because the actual amounts to be absorbed under it cannot be determined from respondents' tariffs, but requires access to an examination of the overland tariffs. Stockton cites several cases construing the provisions of section 2 of the Intercoastal Shipping Act, 1933.[8] Section 18(b)(1) expressly provides for the inclusion in tariffs filed by

[7] "The Ports of San Francisco and Redwood City, Calif." Port Series, No. 30, Rev. 1951.

[8] Cases cited by Stockton are *Intercoastal Rates of Nelson Steamship Co.* 1 U.S.S.B. 326 (1934); *Intercoastal Investigation, 1935*, 1 U.S.S.B. 400 (1935); *Puerto Rican Rates*, 2 U.S.M.C. 117 (1939); *City of Mobile v. Baltimore Insular Line, Inc.* 2 U.S.M.C. 474 (1941); and *Matson Navigation Co.—Container Freight Tariffs*, 7 FMC 480 (1963).

the Commission of "rules and regulations" which change or affect the aggregate filed rate:

> Such tariffs . . . shall also state separately such terminal or other charge, privilege, or facility under the control of the carriers which is granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates or charges, . . .

The basic philosophy behind the tariff filing requirements of both the Intercoastal Act and the Shipping Act is that the shipper can assure himself of the actual cost of transportation to not only himself but to his competitor as well, *Matson Navigation Co.—Container Freight Tariffs*, 7 F.M.C. 480 (1963). We do not think respondents' tariffs run counter to this proposition. As the examiner stated, "the present rule, in practice, neither adds to nor detracts from the shippers ability to 'see for himself the exact price of transportation.' "

The ocean rate is, of course, specified in the respondents' tariffs. What the respondents' tariffs do not show is the difference between the cost of overland transportation from the shipper's point of origin to Stockton versus San Francisco. For that the shipper (or his competitor) has to go to the tariffs of inland carriers. But he would have to do so whether or not the equalization rule existed. With the equalization rule, his problem is really simplified; he need only ascertain the common carrier rate to Stockton, and he is assured by the ocean carrier's rule that he may ship via San Francisco for the same amount, with the carrier absorbing any excess. If he wants to get into further refinements, such as the comparative cost of shipping by common carrier versus his own truck or contract carrier, his problem is no more complicated than it would be if there were no equalization rule.

Stockton argues that the failure to set forth the actual amounts absorbed makes the equalization rule unlawful under section 18(b)(1) and detrimental to commerce and contrary to the public interest under section 15. But consider the form respondents' tariff would take if the actual amounts absorbed were included. The record does not contain even an estimate as to the number of "points of origin" for which equalization is made nor does it contain the number of commodities covered by equalization. But it is not difficult to imagine that requirement that each and every possible absorption be published would soon render the tariff impossibly voluminous.

We are of the view that respondents' equalization rules are not unlawful under the "rules and regulations" portion of 18(b)(1).

Stockton contends that the determination of equalization payments under respondents' rules is, as a practical matter, impossible; and that therefore the rules (1) permit undue preference and prejudice between

shippers, in violation of section 16 first, (2) constitute improper tariff publication, in violation of section 18(b) (1), and (3) violate section 15 of the act, in that they are contrary to the public interest, detrimental to U.S. commerce, and unjustly discriminatory between shippers and exporters.

The Pacific Westbound Conference equalization rule provides that "equalization shall only be paid on the basis of the lowest applicable common carrier or contract carrier rates." The rules of the Pacific Straits and Pacific/Indonesian Conferences are substantially the same—that "equalization shall only be paid on the basis of the lowest applicable rates."

In practice, the freight bill showing the amount actually paid by the shipper to an overland carrier to transport the shipment from point of origin to San Francisco (or other port of loading) is used in determining the amount of equalization to be paid; however, the bill is checked against carriers' tariffs to make sure it is the lowest rate. From this amount is deducted the "constructive" cost of transportation of the same shipment from point of origin to Stockton (or other port equalized "against"), determined from the same tariff. The difference is the amount of the equalization payment. The result is that the shipper pays, for overland transportation, a net amount equal to the cost of carriage at the lowest common carrier rate from point of origin to Stockton. As noted above there are exceptions where the shipper uses a contract carrier or his own truck. If the contract carrier's rate cannot be ascertained and in the case where a shipper uses his own truck the lowest common carrier rate is used.

Respondents submitted to complainant schedules showing details of all shipments in 1962 on which there was equalization against Stockton. These were examined by a tariff expert in Stockton's employ, over a period of about 9 months in which he spent an estimated 5 to 6 months in preparing exhibits based on the data. According to his research on the PWC figures, out of 1,116 shipments involving a total of $107,272 in equalization payments, there were 314 instances of overpayment for a total of $8,254, and 322 instances of underpayment for a total of $2,810.

A substantial part of the $8,254 in alleged overpayments arose out of a practice, discontinued during 1962, of allowing the principal shipper of raisins to equalize on the basis of the rate for his less-than-truck-load shipments to San Francisco against the rate for truckload shipments to Stockton. This was done on the theory that if the shipper had shipped via Stockton, the LTL shipments would have been consolidated with shipments destined for Europe, to form truckload shipments at a substantially lower rate. The shipper complained of the

cessation of this palpably improper practice and testified on behalf of complainant as the sole malcontent shipper.

The Examiner concluded that:

> The inland rate situation was indeed shown to be complicated. The inland transportation industry manages to operate under it, however, and the conferences appear to have mastered its mysteries so as to operate their equalization rule fairly as a matter of practical procedure. With the single exception mentioned above—which was concerned with a well-defined dispute, with the conference ultimately taking the proper course—no shipper testified to any dissatisfaction with the theory or practice of calculating equalization under respondents' rule. There is no other evidence of any differences or possible preferences in the treatment of shippers similarly situated. Had there been any such pattern it may safely be assumed that complainant's expert, in the course of his meticulous examination, would have found it.

Stockton's exceptions to this conclusion amount to nothing more than a reargument of the contentions urged before the Examiner and we find his conclusion well founded and proper.

Stockton further argues that respondents' equalization practices result in unjust discrimination between shippers, in violation of sections 15 and 16 first of the 1916 act, because varying equalization payments under the rules result in different charges for the same ocean transportation, because respondents ultimately collect varying amounts for transporting the same commodity between the same ports, depending on the inland transportation charges, which determine the amount of the equalization payment. Varying charges for identical services are prima facie discriminatory and thus unreasonable unless justified. *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 FMB 48, 55 (1960).

Discrimination against a shipper is necessarily measured by what the shipper pays, not by what the carrier ultimately collects. Shippers who receive equalization allowances pay the same amount for through transportation, whether they ship via Stockton or San Francisco. No shipper has complained of discrimination, and there is no evidence of any differentiation among shippers similarly situated. Under similar circumstances, no evidence of discrimination against shippers was found in *Beaumont Port Commission* v. *Seatrain Lines*, 2 U.S.M.C. 693, 703, where, as we have already noted, Houston, Galveston, and Texas City may be considered the respective equivalents of Stockton, San Francisco and Oakland-Alameda, and Havana the equivalent of conference destinations in the Far East:

> Complainants' contention that Seatrain's practice unjustly discriminates against Galveston and Houston will not bear analysis. The port-to-port rates to Havana from these ports and Texas City are the same. The shippers served by Seatrain pay the same through transportation charges, whether they ship from

Galveston, Houston or Texas City. There is no complaint of, or evidence to show, discrimination against shippers by Seatrain.

Moreover, any prima facie discrimination based upon ocean carriage alone—as between, say, a shipper located at San Francisco who receives no equalization allowance and one located at Fresno who receives equalization against Stockton when he ships via San Francisco—is justified by the facts of record. The record is clear that the fewer loading ports in the normal itinerary, the better operating results the carrier will have. To eliminate equalization, thereby requiring carriers either to call at Stockton or abandon some of the cargo in that area, would be beneficial to the port of Stockton and perhaps some of the shippers in that area. But the public interest is much larger than the needs or desires in the Stockton area. The equalization under consideration here reflects an overall economic good, tangible benefit to the public at large, and an important transportation justification.

We conclude that no unjust discrimination between shippers, or undue or unreasonable preference or advantage to any particular person, within the meaning of sections 15 and 16 first of the 1916 act, may be found in respondents' equalization rules or their practices pursuant thereto.

Stockton also argues that the respondents unnecessarily dissipate their revenues through their equalization allowances, since (1) the most economical way to move cargo is to load it aboard a vessel which is at Stockton, and (2) in some cases cargo which is equalized against Stockton would be shipped via San Francisco anyway. Such dissipation is alleged to be contrary to the public interest and detrimental to the commerce of the United States, in violation of section 15 of the 1916 act.

The record does not support Stockton's contentions. The most economical way to move cargo was shown not always to be to load equalized cargo aboard a vessel at Stockton which was there to load other cargo. PFEL frequently transships cargo by truck (at its own expense) to San Francisco for loading aboard a vessel which has called at Stockton, because it is cheaper to do that than to move the vessel, at a cost of some $300, from a bulk cargo berth to another berth at Stockton. Transshipment costs the carrier a great deal more than equalization, since it not only pays the full cost of truck transportation from Stockton to San Francisco, but also pays handling and loading charges to both ports.

Even if it is more economical for a carrier whose vessel is already at Stockton to load there rather than equalize, it does not follow that it

will be cheaper for a competitor that does not have a ship at Stockton and does not have bulk cargo contracts which make it economical to send a ship there.[9] For the carrier that actually equalizes, there is no dissipation of revenue through equalizing as against sending a ship to Stockton. In this respect, equalization is self-correcting. If there is sufficient cargo available to a carrier to make it more economical to call at Stockton, the carrier will normally do so rather than equalize.

There is no evidence that equalization is not profitable, overall, to any carrier that equalizes, nor is there any evidence that the public interest or commerce of the United States has been adversely affected by any dissipation of carriers' revenues. The evidence indicates, rather, that equalization is financially beneficial to the equalizing carrier.

Moreover, it should be noted that even with equalization, Stockton's growth since 1957 has put it ahead of the ports of San Francisco, Oakland, and Alameda combined, in export tonnage. General cargo (via conference and nonconference vessels) to conference destinations increased by over 50 percent in 1962 over 1961, although total cargo to conference destinations declined from 1,308,558 to 1,108,726 tons. Thus, equalization has not seriously affected Stockton's competitive position. Stockton also argues that there is a violation of section 205 of the Merchant Marine Act, 1936, which provides:

SEC. 205. Without limiting the power and authority otherwise vested in the [U.S. Maritime] Commission, it shall be unlawful for any common carrier by water, either directly or indirectly, through the medium of an agreement, conference, association, understanding, or otherwise to prevent or attempt to prevent any other such carrier from serving any port designed for the accommodation of oceangoing vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government, lying within the continental limits of the United States, at the same rates which it charges at the nearest port already regularly served by it.

No functions with respect to this section of the 1936 act were transferred to the Federal Maritime Commission by Reorganization Plan No. 7 of 1961, which established the Commission. However, complainant suggests that section 205 remains the law of the land, and must be considered by the Commission in exercising its delegated functions. Stockton is a port designed for the accommodation of oceangoing vessels, located on an improvement authorized by the Congress, and is therefore entitled to the protection of section 205, as our pred-

[9] Respondent PFEL, the only carrier that was critical of equalization against Stockton, frankly considers its position to be "more advantageous than others insofar as calling at the port of Stockton . . . we have contracts for bulk cargoes for justification to put us up to the port of Stockton which other lines do not have." Thus PFEL feels it could get "the lion's share" of any additional tonnage going through Stockton. Still, PFEL now transships cargo from Stockton by truck and also equalizes against Stockton.

ecessor said of the port of Stockton and other bay area ports in *Encinal Terminals* v. *Pacific Westbound Conference*, 5 FMB 316, 320 (1957). But section 205 is not violated by respondents' equalization rules as observed in practice; i.e., with the elimination from the rules of the phrase purporting to restrict its operation to cargo "which would normally move" from a given point. This apparent restriction has no practical relation to the theory or operation of the rule. Perhaps it was originally intended to make it clear that cargo may be equalized even though it might "normally" move from another port, thus anticipating any objection on that ground. The rule should be drafted to exclude what is clearly not intended as a restriction. The rules, as applied, permit equalization in favor of Stockton to exactly the same extent as against it. Respondents comply literally with the statute by serving Stockton at the same rates which they charge at the nearest port regularly served by them, since rates are the same for all bay area terminal ports. If equalization is considered to change the base rates from any such port, respondents are in compliance with the statute because they offer the same equalization to shippers who wish to load at Stockton.

Finally, Stockton argues that equalization "serves as a cloak for malpractice." In support of this proposition PFEL's representative referred to one case of unidentified "malpractice" which he said had resulted in a Commission investigation. The representative further testified that upon two occasions PFEL had been offered a shipment if it would equalize on the basis of a trucker's bill of lading showing a point of origin more remote from the loading port than the actual point of origin. As respondents suggest, it would appear that if a shipper and carrier conspire to engage in crime, they can find simpler and safer methods than getting a third party to produce a false bill of lading. Giving full credence to PFEL's testimony, however, it cannot be concluded that respondents' equalization rules and practices offer such a peculiar temptation or facility for malpractice as to make it desirable to eradicate equalization completely. There was no evidence in the record of any malpractice affecting Stockton.

Stockton also points to a practice of the PWC respondents with respect to citrus fruit, allegedly affecting Stockton. For a number of years it has been the practice of respondent PWC and its members to allow an "equalization" payment of 15 cents per carton on citrus fruit shipped from San Francisco if it originated in "southern California." Southern California is defined as the territory south of a line drawn east from Santa Barbara, south of the area in which constructive mileage, and carrier rates, are lower to Stockton than to San Fran-

cisco. This 15-cent allowance is not based upon any excess overland transportation cost as such, but rather on the fact that citrus shippers located south of the Santa Barbara line quote exporters a price delivered to a dock in "northern California"—particularly San Francisco—which is 15 cents per carton higher than their price delivered to dock in Los Angeles Harbor. For reasons not apparent from the record the ocean carrier allows the exporter (the shipper from the standpoint of ocean carriage) an amount equal to this difference in the price of fruit delivered f.a.s. San Francisco as against f.a.s. Los Angeles. There is in practice no other equalization with respect to citrus fruits. The conference is not asked to equalize against Stockton or otherwise on fruit originating north of the Santa Barbara line, and in practice citrus fruit is never shipped from Stockton.

Thus, there is an allowance against ocean freight on citrus fruit shipped from "northern California" ports as against shipments from "southern California" ports at the rate of 15 cents per carton, based upon an arbitrary price differential of 15 cents, with respect to fruit originating south of the Santa Barbara line.

The PWC chairman necessarily conceded that this "equalization" is not found in the PWC equalization rule, but PWC argues that it accords with the principle of equalization, which it contends is the absorption by the carrier of the difference between the shipper's cost at the nearest terminal port and the loading port. But this is too loose and inaccurate a definition. As the rule itself states, equalization is the absorption by the carrier of the shipper's excess cost of delivery to the loading port. That is quite different from absorbing a differential in the shipper's (exporter's) purchase price, resulting from a sort of basing-point system used by the grower-seller. The exporter, who is the shipper as far as the ocean carrier is concerned and the one who bills the conference for equalization, in fact has no cost of delivery to ship's tackle; he buys at a flat price f.a.s.

The conference has reported to the Commission data with respect to citrus fruit equalization, purportedly as equalization under its tariff rule, showing point of origin as "southern California" and rate of equalization at 15 cents per carton. This does not validate the practice, but neither does it invalidate respondents' published rule, nor contaminate the rule so as to require its disapproval.

However, this so-called equalization on citrus fruit is not in accordance with or pursuant to respondents' filed tariff. Thus, respondents PWC and its members have failed to comply with paragraphs (1) and (3) of section 18(b) of the 1916 act, in that they have not filed a rule or regulation which affects a part or the aggregate of their filed rates,

and have charged a different compensation for transportation from their rates and charges on file. Moreover, in our view, the absorption of an arbitrary amount based upon a differential in delivered "price" of a commodity is unjustly discriminatory between ports within the meaning of section 15, since the amount absorbed has no transportation basis or justification. It is further found, however, that such practices have not diverted cargo from, and do not affect, the port of Stockton.

While the Examiner concluded that the rules and practices with respect to equalization between terminal ports within the San Francisco Bay area were not unlawful, he found that:

> . . . to the extent that they permit general equalization upon cargo loaded at the ports of Los Angeles and Long Beach, Calif., based upon the excess cost of inland transportation from point of origin to such ports over such cost to San Francisco, Stockton or any other port within the San Francisco Bay harbor complex, are unjustly discriminatory and unfair between ports, within the meaning of section 15 of the 1916 act; and to such extent the said rules, and practices pursuant thereto, are disapproved.

PWC excepts to this holding on the grounds that the Examiner made no findings to support this conclusion contrary to the requirements of section 8(a) of the Administrative Procedure Act (5 U.S.C. 1007) and that there is no evidence in the record, not to say substantial evidence, on which this finding could be premised.

We hold that the Examiner decided this issue correctly and on the basis of adequate proof. The Initial Decision correctly set forth the legal test to be used: If the absorption of inland rate differentials destroys the right of ports to traffic originating in the areas naturally tributary to them, the absorption is unduly prejudicial to such ports where service from the port equalized against is adequate. The Examiner noted that the number of shipments equalized against Stockton in favor of southern California ports in 1962 was small, but of substantial tonnage. The Examiner found that the Golden Gate is 423 statute miles north of Los Angeles and that the territory tributary to the southern California area is not tributary to San Francisco Bay area ports. He further found that service from bay area ports was adequate.

The record shows details of shipments equalized against Stockton where the cargo actually moved from Los Angeles and Long Beach. The record also shows details of inland transportation costs between interior points and terminal ports, including Los Angeles and Long Beach, and the adequacy of service at Stockton and other bay area ports.

Therefore, we agree with the Examiner that equalization of cargo via southern California ports destroys the right of bay area ports to traffic originating in the area naturally tributary to them. It is obvious that this type of equalization diverts traffic away from the natural direction of the flow of traffic. This situation is, as found by the Examiner, contrary to our decisions in *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 FMB 48 (1960), and *City of Portland* v. *Pacific Westbound Conference*, 4 FMB 664 and 5 FMB 118 (1956).

The Examiner made those findings, supported by evidence, which are prerequisite to the application of the legal test of equalization. We, therefore, reject this exception of PWC.

PWC contends further that the equalization against bay area ports where cargo moved through a southern California port is not pertinent to the issues in this proceeding. We reject this argument. We will not ignore unjust discrimination even though it was not raised with respect to bay area ports other than Stockton in the complaint. We disposed of a similar argument in *City of Portland* v. *Pacific Westbound Conference*, 5 FMB 118, 129 (1956), where we stated:

> PFEL's view appears to require a conclusion that we are rigidly limited in our findings and conclusions by the precise language of a complaint or order of remand, regardless of the facts which may be developed and argued by the parties to the proceeding.
>
> We do not share this view of our duties under the Shipping Act, 1916 (the act). In our view, we would be remiss in our duties if, assuming actual direct service by Java Pacific, we did not, acting on this record, prevent continued unlimited equalization on dynamite by PFEL. As stated in *Chesapeake & O. Ry. Co.* v. *United States*, 11 F. Supp. 588, 592 (1935), in discussing an Interstate Commerce Act provision similar to our section 22:
>
> . . . after a complaint is filed before the Commission, it becomes the duty of the Commission, to investigate the complaint and take proper action upon its own motion . . . its power is not restricted by the issues raised on the complaint, provided . . . that the (respondent) . . . had full opportunity to make (its) defense.
>
> It is the duty of the Commission to look to the substance of the complaint rather than its form and it is not limited in its action by the strict rules of pleading and practice which govern courts of law.
>
> This Board, like other administrative agencies, has an affirmative duty to investigate as well as to decide, in consonance with its position as trustee of the public interest in matters within its jurisdiction.

The conference further argues that the Examiner's finding in this respect should be qualified to take into consideration which of the San Francisco Bay area ports have adequate service. In fact, PWC contends that equalization should be proper where service at San Francisco Bay area ports is unsatisfactory in any respect. We reject this

test of equalization in favor of that previously expounded—that equalization is unlawful if it destroys the right of ports to traffic originating in the area naturally tributary to them where service from the San Francisco Bay area is adequate. And the likelihood of inadequacy at San Francisco Bay area ports is remote indeed. We, therefore, will not qualify the Examiner's holding.

We reaffirm that respondents' equalization rules to the extent that they permit equalization upon cargo loaded at the ports of Los Angeles and Long Beach, Calif., based upon the excess costs of inland transportation from point of origin to such ports over the cost of inland transportation to bay area ports, are unjustly discriminatory and unfair between ports within the meaning of section 15. We will disapprove the equalization rules to this extent.

An appropriate order will be entered.

REPORT OF COMMISSIONER JOHN S. PATTERSON:

The reasons for a separate report of my decision are that the majority, in my opinion:

(1) Has gone beyond the Commission's functions assigned under section 103 of Reorganization Plan No. 7 of 1961 by interpreting section 8 of the Merchant Marine Act, 1920, and section 205 of the Merchant Marine Act, 1936; and

(2) Did not make the record show the ruling on each exception presented.

Functions relative to the authorizations in sections 8 and 205 were not transferred to us by the President with the approval of Congress pursuant to the Reorganization Act of 1949 but were vested in the Secretary of Commerce. The Secretary of Commerce is the federal official responsible for deciding what these sections mean under various circumstances, and we should not, in my opinion, prejudice his decisions nor create the possibility of unwarranted conflicting decisions among Government agencies.

Section 8(b) of the Administrative Procedure Act directs agencies to make their records show the ruling upon each exception presented prior to decisions upon agency review. The subsequent decisions must also include a statement of the reasons or basis for all conclusions upon all the material issues of fact, law, or discretion presented on the record. This report of my decision is believed to comply with these mandates. My colleagues' report states: "If in stating those reasons we fail to treat any 'specific exception,' it has nevertheless been considered and found not justified." It seems to me an adjudicator should not relieve himself of a responsibility to pass on complainant's well-thought-out exceptions with such general statements.

The statements are only unsupported assertions without basis or reason.

The facts stated in the majority report are accepted for the purposes of this report.

Complainant Stockton made eight requested findings and conclusions with respect to sections 15, 16, 17, and 18(b) of the act. The findings are summarized in the next paragraph as items 1 through 8, and the conclusions of Stockton are stated with respect to each section as noted.

Section 15. The equalization rules require disapproval as agreements because:

1. The amount of the payment cannot be determined by examination of the tariff in detriment to the commerce and contrary to the public interest.

2. The determination of the correct payment is impossible, also involving unjust discrimination between shippers and exporters.

3. Use of the port of Stockton for freight "which would naturally pass through that port" is discouraged and decreased in detriment to the commerce and in conflict with public interest.

4. The rules result in discrimination and prejudice to the port of Stockton and preference to other California ports.

5. Different shippers are treated differently in making equalization payments, causing detriment to the commerce and contrariety with public interest.

6. Carriers' revenues are unnecessarily dissipated in detriment to the commerce and contrary to the public interest.

7. Carriers serving Stockton are deprived of cargo against the public interest and in detriment to the commerce.

8. Improper equalization practices are concealed, contrary to the public interest and in detriment to the commerce.

Section 16. The equalization rules are unlawful because the same acts enumerated with respect to section 15 in items 2, 5, and 8 above also permit undue preference and prejudice or unjust "discrimination" (section 16 does not use the word) between shippers; and in item 4 result in undue prejudice to Stockton and undue preference to other California ports in violation of section 16, second paragraph, subparagraph "first".

Section 17. The equalization rules are prohibited because the same actions enumerated with respect to section 15 in items 1, 2, 3, 5, 6, 7, and 8 above constitute unjust and unreasonable regulations connected with the receiving, handling, and storing or delivering of property.

Section 18. The equalization rules violate subsection (b)(1) be-

cause the same actions with respect to section 15 in item 1 fail to meet the tariff filing requirements, and in item 2 above constitute an improper tariff publication.

For the reason that the Commission has no authority to administer sections 8 and 205, these laws are not discussed.

The Examiner made a decision on each request, found none of the claims proven, and rejected all of the requested findings and conclusions. Exceptions followed.

The exceptions of A. Stockton Port District and B. Pacific Westbound to which we must address ourselves are as follows:

A. Stockton Port District. Complainant excepts:

1. To all of the Examiner's ultimate findings and conclusions contained in the second paragraph on page 31 of the Initial Decision. The Examiner's ultimate conclusions and findings require subdivision for the purpose of rational discussion about the distinct provisions of law which he finds not to be violated, so the exception becomes one to the conclusion that the equalization rules and practices pursuant thereto:

a. Are not in violation of section 15;
b. Are not in violation of section 16, second paragraph, subparagraph first;
c. Are not in violation of section 17; and
d. Are not in violation of section 18(b).

For the reasons noted above, references to section 8 of the Merchant Marine Act, 1920, and section 205 of the Merchant Marine Act, 1936, also referred to by the Examiner, are disregarded as not within our functions.

2. To statements regarding the geographical location of the ports of Stockton and San Francisco.

3. To statements regarding the geographical relationship of Texas City, Houston, and Galveston, Tex., in comparison with San Francisco, Stockton, and other bay ports, and to the position of Beaumont, Tex., in relation to that of Los Angeles, Calif.

4. To a statement regarding the territory naturally tributary to Stockton.

5. To a statement that under existing decisions the conclusions regarding naturally tributary territory are determinative of the question as to whether equalization as between Stockton and other San Francisco Bay ports should be disapproved.

6. To the conclusion that the filed equalization rules comply with section 18(b)(1) without filing any inland carrier rates.

7. To the conclusion that the record does not support a finding and conclusion that as a practical matter the determination of payments is impossible.

8. To the statement that the rules as applied do not discourage or decrease the aggregate use of Stockton and other bay area ports or divert traffic from its natural direction of flow.

9. To the statement that Stockton does not provide adequate service for general cargo shipments to which equalization is applicable.

10. To the statement that the rules and practices are not found to be unjustly discriminatory or unfair between ports.

11. To the statement that there is no unjust discrimination between shippers or undue or unreasonable preference or advantage to any particular person under sections 15 and 16 (first) of the Act.

12. To the statement that there is no evidence equalization is not profitable to any equalizing carrier, nor any evidence that the public interest or commerce of the United States has been adversely affected by any dissipation of carriers' revenues.

13. To the statement it can not be concluded that the rules are a facility for malpractice.

14. To the findings and conclusions with respect to citrus fruit insofar as they approve equalization practices with respect to such commodity if a rule is put in the tariff.

An exception as to the violation of section 205 has been disregarded.

B. Pacific Westbound Conference. Respondent excepts to the conclusion that the rules, to the extent that they permit general equalization upon cargo loaded at the ports of Los Angeles and Long Beach based upon the excess cost of inland transportation from point of origin to such ports over such cost to San Francisco, Stockton, "or any other port within the San Francisco Bay harbor complex," are unjustly discriminatory and unfair between ports under section 15 and to such extent the rules and practices are disapproved.

The Examiner's ultimate findings and conclusions "contained in paragraph 2 on page 31 of the Initial Decision" are that no provision of the Act has been violated by respondents as a result of the facts summarized in the eight requested findings and conclusions in complainant's opening brief. The generalized nature of Stockton's first exception requires going back over complainant's eight requested findings, particularly in response to Stockton's further request that "our opening brief and our reply be considered in connection with our argument in support of our exceptions."

My rulings would be as follows:

The rules and practices are authorized by agreements filed pursuant

to section 15. These agreements have heretofore been approved as a result of the approval of agreements Nos. 57, 5680, and 6060. The authorized rules and practices are those in rule No. 2 in Tariff No. 1-X of Pacific Westbound; rule No. 1(b) in Tariff No. 6 of Pacific Straits; and rule No. 1 in Tariff No. 7 of Pacific Indonesia. There is no issue that the agreements relate to the subjects listed in the first paragraph of section 15. We have held that an equalization rule is one of such subjects and must be filed unless the practice set forth in the rule is authorized by the basic conference agreements. *Pacific Coast Port Equalization Rule*, 7 FMC 623 (1963) (see pages 630, 631). Our order was affirmed and found valid in *American Export & Isbrandtsen Lines et al* v. *Federal Maritime Commission et al*, 336 F. 2d, 650 (C.A. 9th 1964). The tariff rules are an implementation of the filed agreements Nos. 57, 5680, and 6060 provisions forbidding payment in respect of freight and absorption at loading ports of rail freights or other charges except as "agreed to by two-thirds of the parties" and thereafter shown in tariffs. Two-thirds of the members have bound all the members to perform the equalization absorption rules.

The issues are whether (i) past approval should be withdrawn and disapproval substituted as authorized by section 15 because of the eight reasons presented, (ii) misdmeanors should be found for violation of section 16, or (iii) unlawful acts halted for violation of section 17, or (iv) penalties imposed for violation of section 18(b).

A. Stockton's exceptions:

1. The ultimate conclusions and findings.

(a) Exceptions related to approval of agreements under section 15.

(1) The amount to be absorbed by a carrier through payments equalizing inland shipping costs to Stockton and San Francisco is as determinable as any general rule can make it in view of the various situations to be covered. The amount is measured "on the basis of the lowest applicable" rates, must be substantiated by "a copy of transportation bill covering movement from point of origin," and by a statement of "applicable interior rates and/or the basis of equalization". These requirements are preceded by a definition of what equalization is, such as the definition in rule 2 appended to the Examiner's decision. In other respects, pages 7 and 8 of the Examiner's decision explain adequately how the absorption is a separate transaction after the established ocean freight is paid, and is computed on the basis of tariff-established inland transportation costs. This agency's precedents cited in opposition all concerned cases where the ocean freight rate was subject to adjustment depending on inland costs. Here there is a separate payment in response to shipper application after objectively establishing inland costs and a public record is kept of all

payments. The rule and computation of all amounts are known to everyone. No detriment to commerce nor contrariety with public interest has been proven.

(2) For the reasons given above showing the amount is ascertainable and known, the payments pursuant to the rule are equally easy to establish "on the basis of the lowest applicable common carrier or contract carrier rates" (or "lowest applicable rates" under the Pacific/Indonesia rule) and may not exceed "35 percent of the ocean freight." An established trade practice was shown involving inspection of the shipper's freight bill showing the amount actually paid to the inland carrier. From such amount the calculated cost of shipment to Stockton is subtracted and the difference is paid. Variations are reflected in appropriate revisions, as described by the Examiner. The determination of the "lowest" amount was shown in some cases to be difficult, or complicated, but not impossible. Complainant illustrated these circumstances, but never showed exactly how discrimination between shippers and exporters resulted from the difficulties or complexities, and no discrimination is discerned from inspecting the record. Detriment to commerce or contrariety with public interest are not proven by the fact of difficulty or complexity alone.

(3) The freight that would "naturally" pass through Stockton mostly would be freight that exporters could send to Stockton cheaper than to any other port since ocean freight rates are the same as from San Francisco; consequently, "naturally" is taken to be a euphemism for more cheaply or at less cost. Use of Stockton is unquestionably discouraged or decreased if any economic advantages in using Stockton are canceled by paying shippers their added expenses of shipping somewhere else. If the issue were the effect of equalization payments on Stockton alone, the case would end right here, but the effect on shippers and carriers must be considered too. The record showed that the effect of the expenses absorbed by the carriers and payments to shippers pursuant to the rule were for their mutual economic advantage. Shippers benefit from access to frequent, regular, and reliable service at San Francisco. Many are put on competitively more equal terms with shippers of similar products who are closer to San Francisco. Necessary services such as government inspections required for export are available at San Francisco but not at Stockton. Inspections by the Department of Agriculture related to the Public Law 480 program involving primarily bulk cargoes are undertaken, however. For 1961, for example, 200,357 tons of commercial bulk cargo were loaded to or transshipped for conference ships as compared with 51,045 tons of commercial general cargo. Carriers benefit by not

having to make the extra 75 nautical mile journey to Stockton for amounts of cargo insufficient to support regular berth service. The trip costs from $3,200 to $5,000 a round trip. The journey is to some extent hazardous, involving delays for bridge lifting at several points, fogs, turns in the river impeding radar perception, and there have been through September 1961 a total of 110 groundings since the opening of the channel, of which 44 have occurred since December 1947. Stevedoring is more efficient at San Francisco. Stockton is principally a bulk-cargo port, and ships loading parcel cargoes in some cases must move from a bulk loading berth to a general cargo loading berth at extra expense. (Note: The illustration accompanying my dissent in Docket No. 1084 makes clear how such ship movement is made necessary.) The Examiner correctly analyzed this evidence as establishing, on balance between Stockton's interests and those of carriers and shippers, no detriments to commerce or conflict with public interest.

(4) Undue, unjust or unreasonable discrimination, prejudice, and preference involve choices creating inequality of treatment of similarly situated persons for no reason. There are legitimate economic reasons for the carriers' rule based on the different situations at the two ports. The carriers' choice of making equalization payments to avoid a trip to Stockton and the shippers' choices in sending merchandise to San Francisco and having part of the inland transportation costs paid by the carriers involve legitimate business advantage to each. The advantages and disadvantages are described in (3) above. The rights of Stockton to be used as a port do not transcend these mutual advantages. Invalidation of the rule to advantage Stockton would leave the carriers three other choices: (i) to go to Stockton and load available cargo regardless of expense, (ii) transship from Stockton by land or intermediate water transportation and pay the entire cost including terminal and handling costs, or (iii) give up the cargo and not serve Stockton. The first two would not disadvantage the shipper but would cause the carrier expenses which would have to be recovered in higher rates. The third choice would harm shippers who could transport overland more cheaply to Stockton than to San Francisco. The situations of the parties are in no respects comparable. As long as the purpose and effect of the rule are mutual economic advantage of the carriers and shippers, ports and localities are not unreasonably disadvantaged. If the rule diverted traffic from Stockton with no advantage to shippers or carriers, the situation would be different from what this record shows. This record shows economies in carrier operations and more efficient service as a result of equalization. I concur in the Examiner's discussion of this evidence.

(5) There was no evidence that the rule inevitably causes different shippers to be treated differently in making equalization payments. The point is made largely by argument that variations in payments were inevitable because of variations in the inland transportation charges caused by variations in weight and origin of shipments. It was also shown that raisin growers do not receive payments equal to the different costs to ports, because of the application of less-than-truckload rates or of regular truck tariff rates where the shipper uses his own truck, and citrus fruit is not dealt with under the rule. These facts do not invalidate the rule, but may show violation of the law in the administration of the rule. If there is cheating by discriminatory administration of the rule or by disregard of the rule for favored shippers, another case is presented not capable of resolution on this record. The rule itself is not at fault in such a case, but rather the conduct of carrier officials.

(6) Dissipation of carrier revenues is not evidence of illegal conduct. Those carriers which spend more money to serve Stockton do so for reasons of self-interest, but voluntary expenditures do not invalidate the rule merely by describing them by the pejorative "dissipation". On the whole, the record showed that for most of the carriers it was less expensive to absorb part of the inland shipper costs than to make the trip to Stockton. No detriment to commerce or contrariety with public interest is shown by these facts.

(7) Carriers serving Stockton are deprived of Stockton cargo as a result of the absorption of the excess inland freight to San Francisco over Stockton, but, equally, carriers serving San Francisco would be deprived of cargo under any other arrangement, and Stockton has not established any superior right to offset the conveniences of the shipping public and carriers. No detriment to commerce or contrariety with public interest is shown by these facts.

(8) Concealment of improper practices by the rule presupposes the existence of improper practices being concealed, but none was proven. All that was produced were speculative possibilities and testimony of what one witness called "improper practices". Opinions are not proof. There has been no adjudication of the illegality asserted by the opinions, even assuming the rule itself were proven inevitably to cause illegal conduct. If conduct is shown to be illegal, it will have to be punished by some other means than invalidation of the rule which will harm all carriers following the rule, but leave the guilty party unpunished.

The exceptions related to section 15 should be overruled.

(b) Exceptions related to violations of section 16.

(1) The determination of the correct amount of the equalization payment under the rules was found as a practical matter to be possible and no individual carrier's guilt in cheating on computations was proven. Complainant, by inference and argument, has only sought to prove that "it leaves the door open to undue preference and prejudice between shippers" and has argued that the possibility is inevitable. Complainant treats the rules themselves as the malefactor. (See par. XIII, subparagraphs 3 and 4, Complaint.) Section 16 applies to common carriers either alone or in conjunction with any other person directly or indirectly, and the prohibited acts in specific instances by named persons must be proven to establish a misdemeanor. No such acts have been linked up with any respondent on this record. If the instances involving the raisin growers, or truckers using their own trucks, or citrus fruit shippers are thought to prove misdemeanors, the testimony without documentary proof in this record is inadequate. We should have exhibits showing similar transactions and disparate treatment deviating from what the rule purports to do.

(2) For the same reasons the testimony regarding different treatment of shippers was inadequate because not connected with any instances of specific wrongdoing.

(3) The charges that improper equalization practices are "concealed" or that the rule serves as a "cloak" for improper practices are innuendoes and equally faulty as substitutes for proof of misdemeanors.

No violation of any provision of section 16 has been proven, and the exceptions related thereto should be overruled.

(c) Exceptions related to violations of section 17.

Under the first paragraph of section 17, complainant, after stating it is "in competition as a port and a terminal with San Francisco . . ." (Complaint, par. XII), alleges the rule causes "charging and collecting . . . rates and charges that are unjustly discriminatory between shippers and ports . . ." (Complaint, par. XII (5)).

The preceding report answers, first, on precedent such payments were authorized in *Beaumont Port Commission* v. *Seatrain Lines*, 2 U.S.M.C. 699 (1943) and, second, on definition the "natural" flow of overseas traffic from the San Joaquin Valley has always been through the Golden Gate. Neither precedent nor definition, however, explains why the standards of the statue are not disregarded by charging the same ocean transportation rates from both ports, and then by paying those shippers who might otherwise choose Stockton a part of their inland transportaiton cost as an inducement to choose San Francisco instead. There is no doubt Stockton is going to be discriminated

against by this practice and is entitled to a reasonable explanation of why any discrimination is or is not unjust other than that the act has been done before in Texas or that, before Stockton spent its money for a port, traffic went through the Golden Gate anyway, and that traffic is just as "naturally tributary" to San Francisco as to Stockton.

Stockton makes the very reasonable and compelling argument that if a port invests millions of dollars in development largely with public money, it is entitled to all the cargo that may be sent to the port cheaper than to any other port. Certain formulas using constructive mileages to delineate areas are used to establish inland transportation costs. The cargo that may be sent to the port easier than to any other port is then called local tributary traffic, as I understand the argument. Stockton says other ports may not take away this local tributary traffic, nor take away the advantages of getting cargo to Stockton by equalization payments to shippers. My answer is Stockton has no such rights by virtue of expenditures or the existence of a "natural" flow or local tributary traffic and, absent such rights, the discrimination induced by the carriers' refunds and exercised by shippers is not unjust.

The justification for public investment in port construction comes before, not after, the investment. The investment depends on commercial potentialities, not on future rights. Once made, the investment does not thereafter create legal rights to a flow of business or entitle anyone to anything, but only creates opportunities to exploit. The only creator of opportunity or business values now claimed by Stockton as a matter of right or entitlement is the peculiarity of the same ocean freight rates from Stockton as from San Francisco in spite of longer travel time and distances. The peculiarity of such rates from Stockton was created by the carriers, not by Stockton. It is not unjust that the rate equality is eliminated by the absorption of partial inland transporting costs because the carriers have only eliminated what they created in the first place. Nothing is taken away that Stockton was entitled to, such as values it created. The consequences to public investment in ports are the consequences of past decisions to locate a port where business potentialities may never be fully realized rather than by denial of rights resulting in unjust discrimination.

Natural flow of traffic and local tributary traffic arguments are equally unfounded, being based on a supposition of vested rights to traffic based on mileages to ports regardless of economic considerations. Such rights have no relation to commerce which, as I see it, may not exclude monetary factors. Shipper choices and port and carrier benefits depend on savings to shippers. There is no such thing as a local tributary measure based on mileage formulas alone translated into

rights to certain business regardless of cost. A local tributary measure must be related to transportation costs and there is no unjustness in offering shippers a saving in choosing one port over another, the geography of this case being what it is, as long as all are treated equally.

There is no unjust discrimination between shippers and ports, and the exception as to a violation of the first paragraph of section 17 should be overruled.

No consequence of the rule on the absorption of part of inland freight costs relates to a regulation or practice connected with the receiving, handling, storing, or delivering of property within the meaning of the second paragraph of section 17. *Beaumont Port Com'n* v. *Seatrain Lines*, 3 FMB 556 (1951). Neither the payment to the shipper measured by inland freight nor a reduction in rates involves receiving, handling, or storing of property, but involves transportation. The exception as to a violation of the second paragraph of section 17 should be overruled.

(d) Exceptions related to violations of section 18(b) (1).

(1) The amount of the payment was found above to be determinable from a reading of the rule and this is all that section 18(b)(1) requires. Section 18(b) (1) requires filing only of "rates and charges . . . for transportation to and from U.S. ports and foreign ports and between all points on its own route . . . ".

(2) Determination of payments, while difficult, is possible. The objective of the rule and the guiding measures are stated and testimony disclosed precisely how payments were calculated in given instances. The unworkability of the rule was not proven. Three situations were alleged where payments may not have followed the rule, but there was no specific evidence. As noted earlier, if specific instances of discriminatory treatment or dishonesty in the application of the rule are shown, adjudication and punishment, if guilt is found, may be undertaken in separate proceedings.

The exceptions related to section 18(b) (1) should be overruled.

2. The statements regarding geographical location.

The Examiner's statements regarding the geographical location of Stockton and San Francisco are that we are dealing "with a single port as against another port in the same geographical area—in fact in the same harbor complex" and that ". . . both ports . . . may be described as San Francisco Bay ports . . .". Stockton is up the Sacramento River and a long way from San Francisco Bay. The statement may be inaccurate, but the entire statement concluding with "Stockton simply does not exist as an ocean port separate from the Golden Gate" serves the useful purpose of highlighting the dominating

geographical fact of this case, and of recognizing the geographical fact which prevents Stockton from having superior rights over San Francisco. The fact is that, to serve Stockton once, a carrier must go through the Golden Gate and pass San Francisco at least twice. If Stockton is served, so inevitably is San Francisco. Both carrier and shipper efficiency result by one stop and a shorter ocean journey. The total journey by land and sea is the same for the shipper in either case. The port in this journey at which commerce is best served on the facts of this case is, partly at least, where there is a concentration of services, particularly if it is a large port that has to be passed in any event. Arguments about "natural" flow of commerce or tributary territory prove little because success of the arguments depends on from where you measure the flow. I understand the Examiner to be saying in effect that detriments to commerce have to take this dominating fact into consideration, and the measuring point for territory "naturally" tributary or the point where the "natural" flow ends is not Stockton, but the Golden Gate. Unless carriers and shippers can avoid San Francisco by going to Los Angeles or somewhere else on the Pacific coast, they should be able to make the most efficient arrangements possible to get cargo past the Golden Gate. Any inaccuracy in the statement does not negative the correctness of the essential point. The second exception should be overruled.

3. The statements regarding geographical relationships.

The statement regarding Texas City, Houston, Galveston, and Beaumont, Tex., is appropriate because ships serving Texas City and Houston must pass Galveston coming in or going out to sea or may avoid Galveston by going to Beaumont north up the Gulf coast to obtain inland shipments. The comparison with San Francisco and Galveston and Beaumont and Los Angeles is accurate. The third exception should be overruled.

4. The statement regarding naturally tributary territory.

The fourth exception should be overruled for the reasons given in 2 above.

5. The statement that existing decisions determine disapproval.

The existing decisions held that Beaumont, Tex., not being "within the Galveston Bay group" and Texas City being in such group, a carrier might compete for traffic by means of an absorption of inland freight without violating the law because traffic through Beaumont was not "naturally tributary to Texas City" which was served by the absorbing carrier. *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 2 U.S.M.C. 699 (1943). The precedent is applicable and supports the ruling in 3 above. The fifth exception should be overruled.

6. The conclusion that the rules comply without filing inland rates.

The conclusion that the filed equalization rules comply with section 18(b)(1) without filing any inland carrier rates is supported by the reasoning that the amount of the payment is determinable from a reading of the rule. Section 18(b)(1) applies to "the rates and charges" of a carrier "for transportation to and from U.S. ports and foreign ports." Respondents fixed their ocean rates and the same rate applies from every terminal port. The equalization is another transaction involving a payment based on inland costs pursuant to a prescribed formula. The sixth exception should be overruled.

7. The conclusion that the record does not support findings.

For the foregoing reasons the record supports a finding and conclusion that as a practical matter the determination of payments is possible. The seventh exception should be overruled.

8. The statement that the rules do not discourage use of Stockton.

The Examiner's statements that the application of the equalization rules does not discourage use of Stockton or divert traffic from its natural flow are not determinative of the issues. The rules undoubtedly discourage use of Stockton by those nearer Stockton who have lower inland transportation costs to a port, but can ship just as cheaply from San Francisco as a result of the rule. Such discouragement, however, does not establish violation of any laws giving Stockton any protected rights to be used instead of San Francisco. Diversion of traffic from "natural flow" supposes a predetermined natural flow which does not exist. The direction of traffic is determined from moment to moment and operates in the future as each shipper decides where his self-interest is best served. The so-called natural flow is something only seen in retrospect as the collective results of decisions, not a preordained condition that dictates rights to have business. Complainant's reliance on diversion of a natural flow as a violation of rights apart from other malpractices is misplaced on the facts of this case, regardless of the Examiner's statements. The eighth exception should be overruled.

9. The statement that Stockton does not provide adequate service.

The facts showed that at Stockton certain general cargo operations were inconvenient and involved added expense, transit and berthing difficulties exist, and government inspections required for export were not available, substantiating the statement that Stockton does not provide adequate service for some general cargo shipments. The uneconomic nature of cargo available at Stockton is shown by the fact that the commodities affected by equalization rules average 40 tons per shipment, and in 1961 71 percent of all Trans-Pacific Conference ships calling at Stockton loaded as little as from 0 to 50 tons of general cargo per departure (Exhibit 52). The commodities

concerned are largely condensed milk, raisins, instant coffee, hides, and lumber (Exhibit 11). Witnesses agreed there was not enough cargo to support regular berth service.

The ninth exception should be overruled.

10. The statement that the rules are not discriminatory.

The statement that the rules and practices are not discriminatory is substantiated by the reasoning in support of the conclusion there has been no violation of section 16. The 10th exception should be overruled.

11. The statement that there is no discrimination between shippers.

The 11th exception concerning unjust discrimination should be overruled for the reasons given in 10 preceding.

12. The statements regarding the profitability of equalization.

The statements regarding the profitability of equalization are not determinative of any issues. The claims regarding "dissipation" of carrier revenues as having an adverse effect on commerce were not substantiated by fact any more than the Examiner's statement.

The 12th exception should be overruled.

13. The statement that the rules do not facilitate malpractices.

Each malpractice occurring as a result of the rules must be adjudicated by proof of specific acts with guilt individually assessed. Any malpractices are the results of actions by people, not the rules. The rules equally permit legitimate practices. If the rules facilitate malpractices, the perpetrators of the malpractice, not the enactors of the rule, must be blamed. The diversion-of-cargo part of the statement excepted to has been discussed above and ruled not controlling.

The 13th exception should be overruled.

14. The findings and conclusions with respect to citrus fruit.

The Examiner's findings and conclusions with respect to citrus fruit are that certain allowances are made at the rate of 15 cents per carton for fruit originating in "southern California" and shipped from San Francisco. This allowance has nothing to do with Stockton and is not pursuant to the rule, but is simply a practice which is not in accordance with or pursuant to the tariff. The Examiner correctly found section 18(b) of the Act was being violated, but the violation is outside the scope of the complaint. Neither the Examiner's nor the majority's report herein contains any express recognition of the provision of law that whoever violates any provision of section 18(b) shall be liable to a penalty for each day a violation continues. The omission, however, does not mean that there is approval of the "equalization practice" with respect to such commodity even if a rule is put in the tariff. The finding of law violation is enough. The issue of

future validity will still have to be passed on, but in the meantime past lawbreaking is not validated. The 14th exception should be overruled.

B. Pacific Westbound's exception:

The basis of the respondent's exception is that the Examiner made no findings to support his conclusion as he is required to do under section 8(b) of the Administrative Procedure Act, and there is no evidence on which to base the conclusion. Other than a factual statement that the number of shipments was small but the tonnage substantial and that the Golden Gate is 423 miles north of Los Angeles, there are no findings. These particular facts are neither analyzed as findings nor connected by any reasoning whatever with the abrupt conclusion that the record does not support a conclusion the territory tributary to Los Angeles (Wilmington and Long Beach) overlaps "that of the San Francisco Bay area ports". It does not "follow", nor do the findings support the announced conclusion. Statements of fact followed by the announcement of conclusions are not enough. Reasoning is needed to connect the two. Accordingly, the exception might have been sustained. My colleagues, however, supplied the reasoning by stating that (a) where the "absorption destroys the right of ports to traffic originating in naturally tributary areas," (b) where service at the ports equalized against is adequate, and (c) where the record shows the substantiating details, there is an unlawful diversion. Neither this reasoning nor the factors in (b) and (c) were in the Examiner's decision, and it is not supplied by any correct setting forth of "the legal test." Accordingly, the deficiency is adequately remedied and the exception may be ruled no longer material to the decision.

Based on the foregoing rulings, I would conclude on the issues:

1. Past approval of agreements filed by respondents should not be withdrawn and disapproval substituted pursuant to section 15. The agreements should remain approved.

2. No misdemeanors should be found for violation of section 16 because of lack of proof.

3. No violation of section 17 has been proven.

4. No violation of section 18(b), as charged in the complaint herein, has been proven.

COMMISSIONER HEARN dissenting:

I agree with the majority opinion in that the implementation of respondents' equalization rules in favor of Los Angeles and Long Beach are unjustly discriminatory and unfair. I find the discrmination so far as it relates to cargo which is naturally tributary to

Stockton to be a discrimination against Stockton only, which for reasons given below can in no way be considered a San Francisco Bay area port.

I disagree, however, with the results reached by the majority and am convinced that the subject equalization rules against Stockton [10] are violative of section 16 first of the Shipping Act, contrary to the public interest standard of section 15, and in contravention of the principles and policies of section 8 of the Merchant Marine Act, 1920, and section 205 of the Merchant Marine Act, 1936.

I read the majority's action today as (1) frustrating the will of Congress in developing new and modern ports and (2) turning over to conference carriers, the right to determine which of our ports shall prosper and which shall suffer. Further, the establishment of Stockton as a "terminal port" by all of the conferences, in 1957 by the Pacific Westbound Conference, becomes insofar as the port of Stockton is concerned, a meaningless gesture.[11] The majority has recognized that the port of Stockton "has had phenomenal growth" since the port of Stockton attained "terminal port" status. I fear that the majority decision here will seriously impair that growth. Millions of dollars, both public and private, have been invested in the port.[12]

At least one conference carrier has provided substantial scheduled service at the port of Stockton. The majority's action today will bless the efforts of those carriers who have no intention of giving direct service to the port, and those carriers who have traditionally bypassed the port, with the opportunity to drain its general cargo. As the Commission stated recently "*In the Matter of Agreement Nos. 6200-7 etc.*," Docket 1166 (served June 24, 1965):

> "It seems elemental that the carriers best able to establish fair and equitable rates for a given trade are those carriers which are actually serving the trade . . . we believe the vesting of ratemaking decisions in carriers who do not serve the area in whose rates they have a voice to be far more dangerous to the commerce of the United States than the existence of rate competition between two competing areas."

The majority notes at page 8, reasons why shippers favor equalization; regularity of service and shorter intransit time. It goes without

[10] The statement at page 23 of the majority opinion that "the rules, as applied, permit equalization in favor of Stockton to exactly the same extent as against it" betrays a certain naïvete in coming to grips with the issue. While the word "permit" lends authenticity to the statement, in the nature of things, the equalization must always work against Stockton vis-a-vis San Francisco Bay area ports.

[11] This status was accorded as a result of *Encinal Terminals* v. *Pacific Westbound Conference*, 5 FMB 316 (1957).

[12] At the beginning of 1964 the capital outlay in the port of Stockton was $23 million. This investment included $9,800,000 by the port district; $3,200,000 by the city of Stockton; $3,800,000 by the Federal Government; $500,000 by the State of California; and $5,700,000 by private investors.

saying, I think, that shippers universally favor superior service and shorter transit time where these benefits can be secured without additional cost to them.[13]

In my view, the majority's reference that:

"For almost a hundred years before Stockton was made accessible to ocean-going vssels, San Francisco was the principal port through which freight from the San Joaquin Valley would and did pass. It did not cease to be such a port merely upon the creation of an additional port at Stockton."

belies an unconscious adherence to the "fundamentally entitled" theory which has ceased to have any value since *Pacific Far East Lines, Inc.* v. *Federal Maritime Board*, 275 F. 2d 184 (1960).

My dissent, however, need not be placed upon such broad generalities.

The central point here is conference tariff rules which "permit" carriers to equalize against Stockton. The majority has correctly assessed the thrust of the "permissiveness" of these rules: ". . . carriers find that competition compels them to equalize." Thus a conference carrier is not free to serve or not serve Stockton as its sound managerial judgment dictates; consequently the effect of the equalization rules is to restrict competition between the ports.

In reaching its ultimate conclusion, the majority found that (1) the port of Stockton is a port in the San Francisco Bay area, and (2) cargoes naturally tributary to Stockton are also naturally tributary to San Francisco. While I think neither of these findings is correct, I believe they skirt and confuse the central issue, which is: Do these tariff rules result in an unjust discrimination to the port of Stockton? The findings, moreover, are not supported by the facts, and have no valid basis in law.

First, the port of Stockton is not a San Francisco Bay port within the meaning of any statute administered by this Commission, and the cited "comprehensive report" of the California Legislature in 1951 referring to Stockton as a bay area port certainly is not controlling here, if indeed it has any relevance at all. The incontrovertible facts are that Stockton is some 107 constructive miles and several distinct waterways removed from San Francisco Bay. It is unthinkable that the port of Stockton should be considered as juxtaposed to San Fran-

[13] A curious statement appears on page 8: "If there were no equalization many perishable commodities would still move through San Francisco rather than Stockton" The majority, of course, do not state why any of the overland costs to San Francisco on commodities shipped through San Francisco for the convenience of the cargo should be absorbed by the carriers. This particular instance reveals the chink in the majority's decision: equalization is permitted against Stockton, as an economy to the carrier where the cargo would be shipped ex-Stockton, and having permitted this, a rebate measured by the difference by the overland cost to Stockton and overland cost to San Francisco on cargoes ordinarily and traditionally shipped ex-San Francisco follows because the cargoes intended for the different terminal ports cannot be separated.

cisco, Oakland, Alameda, and Richmond. The finding that Stockton should be treated as a San Francisco Bay port must hang as an unwarranted fiction upon which no legal conclusion can be based.

Secondly, to say, as does the majority, that the "natural direction of the flow of traffic from the San Joaquin Valley . . . is through the Golden Gate to the Pacific Ocean" begs the question. The point at issue is whether the "natural direction of the flow of traffic from the San Joaquin Valley . . . through the Golden Gate . . ." is through San Francisco or through Stockton. I hold to the belief that this natural flow is through Stockton, and succinctly stated, but for the equalization, an admittedly artificial device, San Joaquin exports would normally flow through the Golden Gate via Stockton, except where, for the convenience of the cargo, shippers are not only willing to but should pay their fair share of costs of the premium service offered at San Francisco.

The majority places some reliance upon 1951 Port Series [14] reports to show that the San Joaquin cargoes are as "naturally" tributary to San Francisco as they are "naturally" tributary to Stockton. A perusal of the cited works fails to uncover the adverb "naturally". Hence the "obviousness" that "these studies dictate a rejection of any 'constructive mileage' theory for determining 'naturally tributary territory' " is indeed wanting.

The only valid test, in this case, for determining whether or not the effectuation of the equalization rule, and consequently for determining whether respondents are giving "any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic" or subjecting "any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage" in violation of section 16 first, is whether the traffic would move via San Francisco but for the equalization. Here, certainly, most of it would not and to the extent that the artificial device draws traffic from Stockton it is unlawful.[15]

In this vein, I am convinced that the precedents support my view. There can be no doubt here that the equalized cargoes originate in areas "naturally and geographically tributary [to Stockton] because of inland transportation rates favorable to [Stockton] as well as through closer proximity." *City of Portland* v. *Pacific Westbound*

[14] "The Ports of San Francisco and Redwood City, Calif." Port Series No. 30, Rev. 1951, and a similar study covering Stockton, also in 1951, prepared by the Corps of Engineers and the Maritime Administration.

[15] An unforeseen consequence, perhaps, of the majority's decision, as I read it, would permit respondents to later equalize against Oakland, Alameda, Richmond, and Redwood City in favor of San Francisco: They are all within the same "geographical area"; their traffic must move through the Golden Gate; carrier economies would be established; and, since the user shippers do not pay for it, directly, they would be satisfied.

Conference, 4 FMB 664 (1955). Similarily, what was said in *City of Mobile* v. *Baltimore Insular Line, Inc.*, 2 U.S.M.C. 474 (1941), is appropriate here:

> To permit continuation of unrestricted solicitation by carriers for business through condonation of a practice whereby unfavorable inland rates are overcome would wholly ignore the right of a port to traffic which it may be entitled by reason of its geographical location. Such right appears fundamental under statutes designed to establish and maintain ports.[16]

Again, in the *Portland* case, *supra*, our predecessors interpreted section 8 of the Merchant Marine Act, 1920, as requiring:

> ". . . that a given geographical area and its ports should receive the benefits of or be subject to the burdens naturally incident to its proximity or lack of proximity to another geographical area."

Moreover, the second *Beaumont* case at 2 U.S.M.C. 699 (1943), so heavily relied upon by the majority, is inappropriate here. As complainant aptly pointed out, the second *Beaumont* case turned, in large measure, on the peculiar characteristics of the equalizing carrier's operation. There the carrier, Seatrain, required, in addition to railroad tracks on the pier, "a supporting yard for sorting and holding cars, and car lifting facilities for transferring cars from the pier tracks to its vessels" which were not available at the ports equalized against. Such is not the case here. Stockton, the record shows, can accommodate all of the vessels of respondent conferences.

The striking down of the instant equalization rules, I am convinced, would be in furtherance of the will of Congress expressed by the Shipping Acts, section 205 of the Merchant Marine Act, 1936, and its several enactments respecting the port of Stockton itself. The absence of the equalization rules, moreover, would leave carriers free to serve or not serve Stockton as they desire, unencumbered by artificial devices designed to frustrate the growth of the port and calculated to checkmate the establishment of any carrier giving Stockton regular scheduled service.

AMENDED ORDER

This amended order is to be attached to the report in this proceeding in lieu of the order served September 24, 1965, in this proceeding.

Full investigation of the matters and things involved in this proceeding has been had, and the Commission on September 24, 1965, has made and entered of record a report stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof. The Commission found in said report, *inter alia:*

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[16] Cited favorably as recently as 1960 in *Proportional Rates on Cigarettes and Tobacco*, 6 FMB 48 (1960).

1. That the equalization rules of the respondents (Pacific Westbound Conference, Pacific Straits Conference and Pacific/Indonesian Conference, and the members of these conferences), to the extent that they provide for or permit equalization of inland transportation from shipper's point of origin to any terminal port located on the harbor of San Francisco Bay and its connecting waters (the existing ports so designated and described being the ports of San Francisco, Oakland, Alameda, Richmond, Stockton, Sacramento), on cargo loaded at Los Angeles or Long Beach, Calif., are violative of section 15 of the Shipping Act, 1916;

2. That the equalization rules of the above conferences and their members providing for or permitting equalization of inland transportation from shipper's point of origin to any of the said terminal ports located in the harbor of San Francisco Bay and its connecting waters on cargo loaded at any other of said terminal ports are unclear in their references to cargo "which would normally move"; and

3. That Pacific Westbound Conference and its member lines have engaged in practices with respect to payment of purported "equalization" in connection with citrus fruit not provided for in their tariff in violation of section 18b) of the Shipping Act, 1916.

Therefore, it is ordered:

1. That the respondents cease and desist from applying their equalization rules to cargo loaded at Los Angeles or Long Beach, and that modifications of their equalization rules to exclude their application to cargo loaded at such ports be filed within 30 days of service of this order;

2. That the respondents, in so modifying their rules, omit the characterization of cargo as that "which would normally move" from certain ports; and

3. That respondent, Pacific Westbound Conference and its member lines cease and desist from their present practices with respect to payment of purported "equalization" in connection with citrus fruit in violation of their tariff.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

Appendix A

Rule No. 2 of Pacific Westbound Conference

(The "equalization rule," so far as it relates particularly to the port of Stockton, is *italicized.*)

Subject to rules 5, 7, and 9, rates are based on direct loading at conference terminal loading ports or docks. However, individual member lines may, in lieu of a direct call, absorb the cost of transshipment between terminal ports; or between terminal ports and nonterminal ports; also between nonterminal ports. Reference to nonterminal port absorption applies only if the nonterminal ports have the required minimum tonnage as specified in rule No. 9, or elsewhere in this tariff. *Carriers may equalize between terminal ports only from point of origin, as provided and subject to the limitations set forth herein.*[17] *Equalization is the absorption by the carrier of the difference between shipper's cost of delivery to ship's tackle at terminal dock at nearest conference terminal port and the cost of delivery to ship's tackle at terminal dock and port of equalizing line. Conference terminal ports and docks are those named in rule No. 5. Conditions and limitations as to equalization follow:*

(*a*) *Equalization shall not exceed an absorption in excess of 35 percent of the ocean freight, including handling charges and wharfage.*

(b) A carrier may not equalize between terminal ports and nonterminal ports, or between nonterminal ports or between docks within a port.

(c) When the inland cost of transportation from point of origin is lower to terminal ports in Oregon, Washington, or British Columbia than via California terminal ports, equalization may be applied via California terminal ports only on shipments of deciduous fruits and dairy products (see note below covering explosives) and such equalization shall be permitted only so long as there is not adequate service from the terminal port in Oregon, Washington, or British Columbia,

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[17] In the Pacific Straits Conference rule and the Pacific/Indonesian Conference rule, the following appears in lieu of the foregoing 4 sentences:

Rates are based on direct loading at loading ports or docks, but the individual member line carriers may meet the competition of other member lines loading direct at terminal ports or docks, either by transshipment or by equalization from point of origin.

Otherwise the rules of the three conferences are substantially the same, insofar as they relate to the port of Stockton.

to which the cargo is tributary, to meet the needs of shippers of these commodities.

NOTE: Equalization on explosives is not permitted except that in the event a shipper is unable to obtain space for a specific shipment of explosives by a direct sailing from a terminal through which explosives would normally move at a date which reasonably will meet the needs of such shipper or his consignee, equalization shall be permitted on such shipment, *Provided*, that the shipper certifies to the conference the need for space on such date and allows 48 hours after receipt of such certification for the conference to indicate the conference carriers who can provide space on a direct sailing which reasonably will meet the shipper's needs.

(d) Equalization is permitted on shipments of fresh fruits, which would normally be shipped via California terminal ports when shipped via terminal ports in Oregon, Washington, or British Columbia, when there is not adequate service from the California port, to which the cargo is tributary, to meet the needs of shippers of these commodities.

(*e*) *Cargo which would normally move from one terminal port in Oregon, Washington, or British Columbia, may be shipped under equalization through another terminal port in Oregon, Washington, or British Columbia, and cargo which would normally move from one California terminal port, may be shipped under equalization via another California terminal port.*

(*f*) *Equalization shall only be paid on the basis of the lowest applicable common carrier or contract carrier rates.*

(*g*) *In support of each claim for equalization the shipper must furnish the carrier a copy of transportation bill covering movement from point of origin.*

(*h*) *Prior to payment of equalization bills, carriers must submit to the conference on prescribed form a certified statement for confirmation and approval of applicable interior rates and/or the basis for equalization.*

FEDERAL MARITIME COMMISSION

No. 1216

ACTIVITIES, TARIFF FILING PRACTICES AND CARRIER STATUS OF CONTAINERSHIPS, INC.

Decided September 28, 1965

Containerships, by operating between fixed termini on a regular schedule and by soliciting major shippers of wheeled vehicles, held to be a common carrier by water in interstate commerce subject to section 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933.

The Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, shall be construed to fulfill the remedial purposes thereof.

Gerald A. Malia, for respondent Containerships, Inc.

George F. Galland and *Amy Scupi*, for American Union Transport, Inc; *Carl H. Wheeler*, for Sea-Land Service, Inc.; and *Alan F. Wohlstetter* and *Ernest H. Land*, for Motorships of Puerto Rico, Inc., interveners.

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

REPORT

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

PROCEEDINGS

The Federal Maritime Commission instituted this investigation to determine whether respondent Containerships, Inc. has operated in violation of section 18(a) of the Shipping Act, 1916 (46 U.S.C. 817), and section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844). These statutory provisions require common carriers by water in domestic offshore commerce to establish reasonable rates and to file these rates with the Commission. Therefore, the question to be determined in this proceeding is whether Containerships has been operating as a

common carrier by water in interstate commerce as defined in section 1 of the Shipping Act, 1916 (46 U.S.C. 801); if so, Containerships, by not having appropriate tariffs on file with the Commission, has operated unlawfully.

In February 1965, Containerships ceased operations because its vessel was placed in the custody of the mortgagee.

FACTS

Respondent Containerships began service, utilizing its vessel, the *New Yorker*,[1] in the southbound trade from the U.S. North Atlantic ports to Puerto Rico in October 1963.

For its southbound service, Containerships filed two tariffs with the Commission. Tariff No. 1 covered wheeled vehicles, and Tariff No. 2 covered numerous general commodities. Northbound, Containerships time chartered the *New Yorker* to American Seatraders, Inc. for the transportation of refined sugar for the account of the time charterer from Puerto Rico to U.S. North Atlantic ports.[2]

During this period the *New Yorker* made two to three sailings per month from Port Newark to Puerto Rico. Containerships, however, carried no general cargo, only wheeled vehicles.[3] About 100 vehicles can be carried on the main deck, but with the planned installation of racks similar to those used by over-the-road motor carriers of automobiles, the capacity of the main deck can be doubled to 200 vehicles. These racks would be on hinges and would swing flush to the main-deck ceiling when sugar is carried northbound.

On October 29, 1964, Containerships notified the Commission that it would withdraw its tariffs and cease common carrier operations, effective October 30, 1964, although the cancellation of Tariffs No. 1 and 2 was made effective November 28, 1964. Beginning with Voyage No. 32, which sailed from New York on October 30, 1964, Containerships, considering itself to be a "contract" carrier exempt from tariff-filing requirements, operated without reference to a common carrier tariff on file with the Commission.

During the 30-day period between filing and effective date of the tariff cancellation, the *New Yorker* made three voyages. Although a tariff was still in effect, Containerships carried tractors and other units for International Harvester at rates other than the tariff rates.

[1] The *New Yorker* cost $4,100,000 in 1960, is a twin-screw diesel, has a 16-knot surface speed, a crew of 24, and uses roll-on/roll-off loading and unloading through stern doors to its main deck which is unobstructed by bulkheads. Cargo can be handled to and from its upper or weather deck by the lift-on/lift-off method.

[2] The northbound operations were not alleged to be in violation of law.

[3] The *New Yorker* was designed to handle containers and pallets. Consequently, it is more suitable for carrying trucks and automobiles than break-bulk cargo.

However, automobiles shipped on these voyages, as well as on the remaining voyages in 1964, were transported at the former tariff rates. Despite cancellation of its tariffs, Containerships continued to apply its former tariff rates on automobiles throughout the period that its legal status was pending before the Commission, so that shippers would receive equitable treatment regardless of the change in operation.

Since October 29, 1964, Containerships has transported wheeled vehicles (automobiles and trucks), cranes, and tractors. It has also unsuccessfully solicited liquid cargo for the *New Yorker's* unused tank space below the main deck.[4]

Containerships' expressed policy since October 29 has been to limit service to three or four shippers per voyage southbound, in the belief that such a limitation constitutes contract, exempt carriage. In order to preserve its image as a contract carrier, Containerships has rejected offerings of cargo from small shippers. Instead, it has executed a contract with one major shipper and negotiated with several others who, it hopes, will sign similar contracts. In this connection, Containerships has solicited General Motors, Chrysler, American Motors, and other important automobile shippers, who account for an estimated 95 percent of all new automobiles shipped to Puerto Rico, in an attempt to fill the capacity of its vessel without serving more than three shippers. Again, this number was selected because of its supposed relation to contract carriage. Containerships will turn to smaller shippers only if it is unable to sign the major manufacturers. Containerships' solicitation is limited primarily to wheeled vehicles, and it does not need to solicit the vast number of automobile dealers who sell Chrysler, General Motors, and American Motors products in Puerto Rico, because these companies maintain a single dealer who distributes to various dealers under his distributorship. Containerships has solicited roughly eight or nine potential customers, but shippers do not appear to be eager to sign contracts, particularly General Motors, which has shown reluctance to enter into a long-term commitment.

As of January 5, 1965, only one shipper had executed such a contract, the Hull-Dobbs Co. of Puerto Rico, a Ford dealer in San Juan. Pursuant to this agreement, Containerships undertakes to provide 30 voyages per year and 1 million cubic feet of under-deck space on the *New Yorker* for the carriage of vehicles. Port of loading will be Port Newark, N.J., with discharge at San Juan or Ponce, Puerto Rico. The shipper agrees to pay $340,000 over the 30-voyage year, with pro rata payments on completion of each voyage. This actually represents $0.32 per cubic-foot plus $0.02 arrimo (port charge) multiplied by

[4] Below the main deck, the *New Yorker* has considerable tank space suitable for liquid cargo.

1 million cubic feet, which corresponds to the rate in the withdrawn tariff.[5] The shipper may utilize more than 1 million cubic feet and the contract permits Containerships to provide less than 30 voyages. Under such circumstances, the annual amount of compensation will be adjusted upward or downward. Efforts to sign Chrysler, General Motors, and International Harvester have been unsuccessful. Although additional contracts with other Ford dealers have been drafted, efforts to execute them have ceased since these dealers are permitted to utilize the space provided to Hull-Dobbs.

Shippers other than Hull-Dobbs have negotiated with Containerships, but none has finalized a long-term agreement. The unexecuted contracts with these shippers are almost identical with the Hull-Dobbs agreement. The International Harvester agreement provides for 100,000 cubic feet of space on deck for 30 voyages. The shipper pays various rates per cubic foot on motor trucks, station wagons, ambulances, tractors, etc., for each voyage. A contract with Boricua Motors Corp. grants the shipper 1 million cubic feet of space for 30 voyages rated at $0.32 per cubic-foot for vehicles plus $0.02 arrimo.

Contract with Mayaguez Motors provides 100,000 cubic feet at $0.32 per cubic foot plus $0.02 arrimo for 30 voyages. A contract with Southern Auto Sales Corp. provides 200,000 cubic feet at the same rate. A similar contract with Caribe Motors, Inc., follows the same form, but the amount of space and rate per cubic foot have not been inserted. All are made subject to the same 13 paragraphs of the contract of affreightment. The contracts provide 30 sailings annually for each shipper. This represents the approximate number of sailings made by the *New Yorker* during the 12-month period prior to October 30, 1964. The shipper cannot exercise control over the number of sailings and the contracts impose no penalty if the carrier provides less than 30 voyages per year. The shipper likewise cannot arrange sailings per month or week to suit his convenience.

The amount of space assigned to each shipper by the contracts represents an estimate of the particular shipper's requirements based on the previous year's experience. However, the contracts provide for additional space should the shipper so require. On the other hand, the shipper cannot control the number of automobiles to be carried on any one voyage.

Containerships attempted to provide an amount of space which would most nearly approximate the estimated requirements of its shippers. With respect to the automobile dealers other than Hull-Dobbs, such an estimate was sometimes difficult. If the estimate was wrong

[5] This represents the approximate space requirements for 2,000 automobiles.

and the shipper failed to furnish the number of automobiles required to fill his assigned space, Containerships could theoretically bring legal action, but Containerships does not really intend to insist upon this right. The carrier and shipper will operate very flexibly under these contracts. Thus, if Hull-Dobbs fails to use its space, it can assign the space to another Ford dealer despite the fact that paragraph 12 of the contract of affreightment incorporated into the main contracts forbids such assignment. On the other hand, Containerships can utilize any unused portion of the shipper's space for its own use.

With respect to on-deck space, Containerships is perhaps even more flexible. The International Harvester contract provides for a minimum of 100,000 cubic feet on deck, although Containerships fully expects the shipper to use more space. If so, he will be granted as much space as he requires. Containerships' contracts are instruments by which it can guarantee to shippers a long-term rate; in this case, for 1 year. Under its tariff, of course, the carrier could alter its rate on 30 days' notice. However, the shipper is not bound to ship via Containerships exclusively during the year.

Containerships does not advertise its service nor does it publish sailing schedules, and it has withdrawn its tariff. It conducts its solicitation in the form of negotiation of long-term contracts with desirable shippers.

Containerships maintains a schedule of two or three sailings per month similar to that which existed prior to October 30, 1964, between Newark and ports in Puerto Rico. Containerships must expedite sailings of the *New Yorker* in order to meet its sugar commitments northbound from Puerto Rico; it has little interest in serving a large number of shippers. Sometimes these commitments require fast turnaround; at other times, the charterer of the vessel on the northbound leg will delay the vessel due to sugar shortages in Puerto Rico. Consequently, service southbound operates without precise sailing dates.

In place of bills of lading previously issued, Containerships now issues cargo receipts; its most important shipping documents, however, are contracts of affreightment between Containerships and particular shippers. Among its provisions are those which subject the carrier's liability to the Harter Act, allow alterations of voyage itineraries, grant the carrier the right to utilize the unused portions of the shipper's space for its own use, and forbid a shipper from assigning his space.

We will briefly compare the essential characteristics of Containerships' operations before and after October 1964.

The variety and type of cargo and the number and identity of shippers did not basically change. The number of voyages and schedule of the *New Yorker* remained the same. The voyage itineraries are identical. Insurance is essentially unaltered. The rates on automobiles have not changed. The physical structure of the *New Yorker* is the same as are the handling and delivering methods employed by Containerships.

Some changes did occur. Containerships now calls itself a "contract carrier" and disclaims the obligations of common carriage. It has withdrawn its tariffs. It now solicits preferred shippers and guarantees them long-term rates pursuant to contracts instead of tariffs. It rejects shipments of small volume and announces that it will limit the number of shippers to three or four. It issues "cargo receipts" instead of bills of lading, and entitles itself "contract carrier" on these documents.

Discussion and Conclusions

The question to be determined by this Commission is whether Containerships, in light of the facts describing its operations, is a common carrier by water in interstate commerce.

In his initial decision, Examiner Charles E. Morgan found Containerships' operations to be that of a common carrier. Noting that no single factor by itself is determinative of the status of a carrier, he found several factors to be pertinent: The respondent is clearly not a private carrier nor a tramp operator. It has only one executed contract which is with a consignee, not with the shipper who pays the freight charges. Respondent's executed contract and its unexecuted contracts generally are contracts of "intent" only, as may be concluded not only from the use of the word "intend" in most contracts, but also from respondent's own description of them as not being subject to a legal claim. There is no penalty in the contracts if the shipper uses the services of other carriers in the trade. The shipper cannot control the number of vehicles to be carried or the space used on any one voyage.

The Presiding Examiner found in general that the contracts seem not to have changed respondent's former relationship with its shippers. Respondent's operations since October 30, 1964, are little different than before. The same number of voyages, the same insurance, the same regular routes, the same ports served, the same physical services, are characteristics of both respondent's early operations and of its recent operations. The main difference in its recent operations is that respondent has refused to accept a few shipments from small-volume shippers, but considering the overall picture, this is insignificant. Ac-

cordingly, the Examiner concludes that Containerships has been and remains in its recent operations from October 30, 1964 and since, a common carrier in the trade from North Atlantic ports to ports in Puerto Rico.

The Commission's jurisdiction over carriers is set forth in section 1 of the Shipping Act, 1916.[6] That section provides:

> The term common carrier by water in interstate commerce means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

This decision hinges upon Containerships' amenability to this provision. This definition is descriptive, not categorical. Part of it describes the legal word of art, common carrier—"transportation by water of * * * property on the high seas * * * on regular routes from port to port;" part of the definition describes another legal word of art, interstate commerce—"transportation by water * * * between one State * * * of the United States and any other State, territory, district, or possession of the United States * * *." Since common carrier is defined in terms of common carrier, we must look elsewhere to ascertain its meaning pertinent to Containerships' operations.

Thus, the term "common carrier" in section 1 of the Shipping Act means a "common carrier at common law." *Philip R. Consolo* v. *Grace Line Inc.*, 4 F.M.B. 293, 300 (1953); *Galveston Chamber of Com. v. Saguenay Terminals et al.*, 4 F.M.B. 375, 378 (1954); *Agreement No. 7620*, 2 U.S.M.C. 749, 752 (1945); *Bernhard Ulmann Co., Inc.* v. *Porto Rican Express Co.*, 3 F.M.B. 771, 775 (1952). The Commission has examined the indicia of "common carrier at common law" on numerous occasions. The most frequently mentioned characteristic is that a common carrier by a course of conduct holds himself out to accept goods from whomever offered to the extent of his ability to carry,[7] *Transportation by Southeastern Terminals & S.S. Co.*, 2 U.S.M.C. 795, 797 (1946). In *Philip R. Consolo* v. *Grace Line, Inc.*, 4 F.M.B. 293, 300 (1953), the Commission cited *The Wildenfels*, 161 Fed. 864, 866 (1908) as follows:

> The essential characteristics of the common carrier at common law are that he holds himself out to the world as such; that he undertakes generally and for all persons indifferently to carry goods for hire . . .

[6] Section 5 of the Intercoastal Act provides:

"The provisions of this Act are extended and shall apply to every common carrier by water in interstate commerce, as defined in section 1 of the Shipping Act, 1916."

[7] Included in the concept of holding out are such factors as solicitation, advertising, tariff filing, and contractual limitations.

Elsewhere the Commission defined a common carrier as, "one transporting goods from place to place for hire, for such as see fit to employ him . . . ," *Transportation—U.S. Pacific Coast and Hawaii*, 3 U.S. M.C. 190, 197 (1950).

However, the Commission has held that it is not necessary for a carrier to hold himself out to transport all commodities for all shippers. "A line may be a common carrier of certain commodities as long as it is willing to carry those commodities for all who wish to ship them." *Investigation of Tariff Filing Practices*, 7 F.M.C. 305, 318 (1962). In addition to the "holding out" criterion, multiple other factors may create or obviate common carrier status. Thus, in some instances the common carrier may advertise sailings, solicit freight, and issue bills of lading. *In Re Coast S.S. Co.*, 1 U.S.S.B.B. 230 (1931) ; *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 440, 445 (1935). But common carrier status is not lost by the carrier's failure to publish sailing schedules or advertise. *Transportation—U.S. Pacific Coast and Hawaii*, 3 U.S.M.C. 190, 196, (1950).

Certainly an important factor is the regularity of service between ports. Section 1 defines common carrier as a common carrier engaged in transportation "on regular routes from port to port." While the fixed termini test is a most important one, it is not absolutely controlling. The language was also inserted to exempt from regulation tramps, which has been described by the Commission to be a "free lance" with a "gypsy like existence;" it has "no regular time of sailing and no fixed route and is ever seeking those ports where profitable cargo is most likely to be found." *Rates of General Atlantic S.S. Corp.*, 2 U.S.M.C. 681, 683 (1943).[8]

For that matter, the Commission has held that common carrier status can be acquired without regular calls at ports or regular sailings and even without sailing schedules. *Alaskan Rates*, 2 U.S.M.C. 558, 580 (1941) ; *Rates of General Atlantic S.S. Corp.*, 2 U.S.M.C. 681, 683, 684 (1943). Moreover, common carrier status may survive even if the carrier chooses not to solicit cargo. *Transp. by Mendez & Co., Inc., Between U.S. and Puerto Rico*, 2 U.S.M.C. 717, 720 (1944).

The number of shippers, either per voyage or otherwise, is not determinative of status. The Commission has indicated that two shippers per voyage creates a presumption of common carriage. *Transp. by Mendez & Co. Between U.S. and Puerto Rico*, 2 U.S.M.C. 717, 720 (1944) ; *D. L. Piazza Company* v. *West Coast Line, Inc., et al.*, 3 F.M.B.

[8] As the Commission has stated :

The primary purpose for the insertion in the statute of the phrase "on regular routes from port to port" was to exclude from regulation traffic transported by tramp vessels. *Alaskan Rates*, 2 U.S.M.C. 558, 580 (1941) ; *Transportation—U.S. Pacific Coast and Hawaii*, 3 U.S.M.C. 190, 198 (1950).

608, 612 (1951). However, other cases hold that a carrier is not common though considerably more than two shippers are served. *New York Marine Co.* v. *Buffalo Barge Towing Corp.*, 2 U.S.M.C. 216, 219 (1939).

The carriage of cargo pursuant to special contracts also is not determinative of status. Every movement of cargo is subject to some contract or agreement of transportation. Nor does a common carrier lose that status if he uses shipping contracts other than bills of lading or even if he attempts to disclaim liability for the cargo by express exemptions in the bills of lading or other contracts of affreightment. *Transportation—U.S. Pacific Coast to Hawaii*, 3 U.S.M.C. 190, 196 (1950). In *Investigation of Tariff Filing Practices*, 7 F.M.C. 305, 320 (1962), a carrier contended that it was not offering common carrier service since it did not advertise, solicit, or publish a sailing schedule and carried cargo only after it had secured a negotiated written transportation agreement with the shipper. The Commission rejected all these contentions and stated with respect to the last:

> "It cannot be successfully contended at this late date that a carrier may avoid common carrier status by insisting on a transportation agreement with each shipper. All cargo carried for compensation moves on some form of transportation agreement, express or implied." 7 F.M.C. at page 321.

In *General Increases in Rates (1961)*, 7 F.M.C. 260, 280 (1962), the Commission stated that a special arrangement to secure the business of a shipper did not of itself convert the arrangement into one of contract carriage.[9]

The Commission has recognized that under some circumstances, a common carrier may execute contracts with particular shippers for the carriage of large volumes of cargo. This system does not abrogate common carrier status. The contracts are actually forward booking agreements.[10]

While the Commission has expressed general guidelines, the question in final analysis requires *ad hoc* resolution. In *Bernhard Uhlmann Co., Inc.* v. *Puerto Rican Express Co.*, 3 F.M.B. 771, 775 (1952), the Commission aptly stated that a carrier's status is determined by the nature of its service offered to the public and not upon its own declarations. A close look at its activities is necessary.

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[9] Other cases hold that contractual arrangements are not incompatible with common carriage. See *D. L. Piazza Co.* v. *West Coast Line, Inc., et al.*, 3 F.M.B. 608, 612 (1951); *Transportation—U.S. Pacific Coast and Hawaii*, 3 U.S.M.C. 190, 196 (1950).

[10] In *Banana Distributors Inc.* v. *Grace Line, Inc.*, 5 F.M.B. 615 (1959), affirmed 280 F. 2d 790 (1960), the Commission ordered the carrier to execute 2-year agreements with banana shippers which would constitute forward booking and relieve a shortage of space for this cargo. The Commission stated that "forward booking is not new to common carriage." 5 F.M.B. at page 626. See also *Philip R. Consolo* v. *Grace Line, Inc.*, 4 F.M.B. 293 (1953).

The determination of a carrier's status cannot be made with reference to any particular aspect of its carriage. The regulatory significance of a carrier's operation may be determined by considering a variety of factors—the variety and type of cargo carried, number of shippers, type of solicitation utilized, regularity of service and port coverage, responsibility of the carrier towards the cargo, issuance of bills of lading or other standardized contracts of carriage, and method of establishing and charging rates. The absence of one or more of these factors does not render the carrier noncommon, and common carriers may partake of some or all of these enumerated characteristics in varying combinations. A carrier may be clothed with one or more of the characteristics mentioned and still not be classified a common carrier. It is important to consider all the factors present in each case and to determine their combined effect.

As the Commission has previously stated: " 'common carrier,' however, is not a rigid and unyielding dictionary definition, but a regulatory concept sufficiently flexible to accommodate itself to efforts to secure the benefits of common carrier status while remaining free to operate independent of common carriers' burdens." *Puget Sound Tug and Barge* v. *Foss Launch and Tug Co.*, 7 F.M.C. 43, 48 (1962).

Considering Containerships' operations in terms of the foregoing precedents, we believe Containerships to be a common carrier. Containerships operates between fixed termini on a regular schedule. Consequently, it meets the initial and most important prerequisite of Commission jurisdiction: the one explicitly set forth in section 1—"on regular routes from port to port."

Furthermore, we find that Containerships sufficiently meets the common law notion of "holding out." Initially we agree as mentioned above that a carrier may be a common carrier of one or a few commodities. Thus, the fact that Containerships' solicitation of shippers or consignees of wheeled vehicles does not oust the Commission of jurisdiction. To be sure, Containerships limits itself to carriage of one type of commodity—wheeled vehicles. The shippers they solicited admittedly are small in number, but they constitute the major producers of automobiles and account for 95 percent of the new cars shipped to Puerto Rico. In other words, Containerships has held itself out as a carrier of a type of cargo (wheeled vehicles) for all who wish to ship them. The fact that they refused service to a few small shippers is inconsequential. "The public does not mean everybody all the time." *Terminal Taxicab Co.* v. *Kutz*, 241 U.S. 252 (1916).

In our view, Containerships' self-assumed status as a contract car-

rier is legally meaningless. Substitution of contracts of affreightment for bills of lading, particularly where no substantative change results, is no more than a transparent attempt to avoid regulation. We will look beyond documentary labels. It is clear that Containerships has not altered its documentation substantially. Moreover, it is the status of the carrier, common or otherwise, that dictates the ingredients of shipping documents; it is not the documentation that determines carrier status.

Neither do forward booking contracts somehow convert the regulated carrier to the unregulated. A closer look at the "contracts" Containerships has with its shippers shows that they are merely contracts of intent. It is evident that both Containerships and the individual shippers are willing to allow great flexibility in adherence to the terms of the contract. This being true, it follows that Containerships is not less a common carrier by reason of having these "contracts." It is still free to solicit other customers to use the cargo space supposedly "contracted" to specific shippers. Consequently, we hold that Containerships is and has been a common carrier by water amenable to the proscriptions of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933.

We consider now Containerships' exceptions to the initial decision. It is impractical to consider the exceptions *seriatim* for they simply reiterate, through various facets of the same argument, the claim that Containerships' operations are consistent only with contract carriage and that to find otherwise is to overlook the facts and the applicable case law.

First of all, we consider the concept of contract carriage itself. The term "contract carrier" appears nowhere in the Shipping Act, which mentions only common carriers and tramps. The Intercoastal Shipping Act, 1933, originally conferred jurisdiction over "every common and contract carrier by water engaged in the transportation for hire of passengers or property between one State of the United States and any other State of the United States by way of the Panama Canal." (46 U.S.C. 843.)

Prior to 1940, the Commission pursuant to this authority asserted jurisdiction over intercoastal contract carriers. *Intercoastal Charters*, 2 U.S.M.C. 154 (1939); *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 458, 461, 468 (1935).

The Transportation Act of 1940 (49 U.S.C. 901–923) considerably altered the jurisdictional scheme set forth above. The 1940 Act transferred to the Interstate Commerce Commission regulatory control over rates and practices of both contract and common carriers by water in

some but not all of the domestic trades, and the jurisdiction remaining in the Commission was limited to "common carriers." Consequently, "contract carrier" as a legal entity has no significance before the Commission.[11] Under the circumstances, Containerships' attempt to clothe itself with the ICC concept of "contract carrier" is meaningless.[12] Thus, Containerships is either a common carrier or something else. The cases showing what may or may not constitute contract carriage are inapposite.

For that matter, the cases relied upon by Containerships are distinguishable. Principally, *U.S.* v. *Contract Steel Carriers*, 350 U.S. 409 (1956) and *Home Ins. Co.* v. *Riddell*, 252 F. 2d 1 (1958), are cited as authority for the conclusion that Containerships is a contract, exempt carrier.

The *Contract Steel* case involved a motor carrier who held licenses from the ICC covering contract carriage of steel articles to and from three major cities over irregular routes. The carrier secured many new contracts with shippers as a result of active solicitation. In spite of the solicitation, the Supreme Court held the carrier was a contract carrier.

The case stands for the proposition that a contract carrier licensed by the ICC may solicit new business within the limits of its license without changing its carrier status. It does not stand for the proposition that solicitation is not an indication of common carrier status. Other factors—that the carrier was licensed as a contract carrier and the fact that it operated over irregular routes—outweighed the solicitation factor in *Contract Steel.* In this case, however, these two factors are absent, and the solicitation factor becomes very weighty with little to counterbalance it.

The *Riddell* case involved a motor carrier in a proceeding unrelated

[11] Section 320(a) of the Interstate Commerce Act (49 U.S.C. 920) (part of the Transportation Act of 1940 states that:

> "The Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, are hereby repealed insofar as they are inconsistent with any provision of this part and insofar as they provide for the regulation of, or the making of agreements relating to, transportation of persons or property by water in commerce which is within the jurisdiction of the Commission under the provisions of this part; and any other provisions of law are hereby repealed insofar as they are inconsistent with any provision of this part."

[12] Actually, Containerships cannot qualify as a contract carrier as the term was previously construed by the Commission's predecessors which defined contract carrier as follows:

> "Although the act does not define contract carriers, this term includes every carrier by water which under a charter, contract, agreement, arrangement, or understanding, operates an entire ship, or some principal part thereof, for the specified purposes of the charterer during a specified term, or for a specified voyage, in consideration of a certain sum of money generally per unit of time, or weight, or both, or for the whole period or adventure described." *Intercoastal Investigation,* 1935, 1 U.S.S.B.B. 400, 458 (1935); *Intercoastal Charters,* 2 U.S.M.C. 154, 162 (1939).

Containerships and their contract shippers cannot meet this test.

to regulation. The carrier was held to be a contract carrier on the basis of a peculiar factual situation, in which among other things, the carrier continuously negotiated rates with shippers which could differ from day to day even with the same shipper. Containerships does not resemble this motor carrier. Containerships' policy was to establish and maintain a long-term rate with each shipper pursuant to contract. And the court in the *Riddell* case was not concerned with regulatory problems.

Containerships excepts further to the fact that the Examiner placed reliance on the fact that the "contracts" did not bind shippers to use its vessel; and also excepts to the fact that the Examiner indicated that serving two large-volume shippers and one or two others on regular routes constituted common carriage.

Citing *Transp. by Mendez & Co. Inc., Between U.S. and Puerto Rico*, 2 U.S.M.C. 717 (1944), a case in which a carrier, operating between regular ports of call, was labeled not to be a common carrier, respondent seeks to belittle the value of the "fixed termini" criterion. As already noted, "regular routes from port to port" explicitly stated in section 1 is a most important factor in deciding carrier status. We do not say it is the only factor; it may be outweighed by other facts. Here it is not. The continuing argument is made that "fixed termini" are consistent with contract carriage and that Containerships' other activities are consistent only with contract carriage. But Containerships' activities in whole are merely consistent with Containerships' failure to live up to its common carrier duty, nothing more.

The contracts are simply devices to guarantee long-term rates to the extent selected, large-volume shippers may wish to use them. And the fact that Containerships transported cargo for no more than two shippers per voyage is also not of controlling consequence, for Containerships actively solicited all major shippers of wheeled vehicles.

Containerships contends that the Examiner erred in stating that it would turn to smaller shippers if it were unable to fill its vessel from cargo from major shippers. Perhaps Containerships would not, but this decision does not rest on this finding. Containerships is a common carrier irrespective of whether it would attempt to fill out its vessel with offerings from low-volume shippers.[13]

This conslusion is more easily reached and becomes especially important if it is considered in light of the purposes of the shipping acts and the Commission's responsibility for regulation in this area.

[13] Respondent excepts in other respects. In such cases we either have not relied upon the material in the Examiner's decision to which exception was taken or we have not ruled because the exception was superficial. Each substantive exception was directed to the Examiner's conclusion and is discussed above.

In general, those purposes are to regulate carriers by water in foreign or domestic offshore commerce. One of the purposes of the Shipping and Intercoastal Acts was to remedy various discriminatory practices prevalent in the shipping industry concerning establishment and and maintenance of rates and fares. The acts, however, limit the Commission's regulatory jurisdiction in this matter to "common carriers." In order to effectuate the remedies intended by the enactment of a regulatory statute such as these, it is necessary to allow flexible and liberal interpretation of the statute. In this respect the court, in *I.C.C.* v. *A. W. Stickle and Co.*, 41 F. Supp. 268, 271 (1961) (a case involving applicability of the term "common carrier" as used in the Interstate Commerce Act, § 201–227, 49 U.S.C. 301–327), stated:

> "[I]n determining the true nature of the transportation, it is necessary to have in mind the purpose of the Act. . . . In addition, the court should have in mind the fact that this legislation is remedial and should be liberally interpreted to effect its evident purpose and that exemption from the operation of the act should be limited to effect the remedy intended."

Consequently, in addition to commonlaw concepts, this case contains an important practical question of Commission responsibility. If Containerships is exempt from regulation by the Commission, the remedial purposes of the Shipping and Intercoastal Acts will not be fulfilled. In the Puerto Rican trade, unregulated operations of carriers may be particularly harmful. Thus the Commission may also examine its jurisdiction in terms of its statutory responsibility—to regulate rates in the Puerto Rican trade. Containership may ship wheeled vehicles at a rate advantage against other carriers in this trade who are subject to the Commission's rate order, if Containerships is found not to be a common carrier. This would effectively stultify the Commission's efforts to stabilize the Puerto Rican trade.

To decide that Containerships is not a common carrier would result in giving it an advantage enjoyed by none of its competitors. It would be free to monopolize the vehicle trade to Puerto Rico at whatever price it desired to set. Its competitors, meanwhile, would be bound by the minimum rate announced in tariffs on file with the Commission. Such a result would be totally contrary to the previously-mentioned purpose of the shipping acts.

In a similar case involving the Interstate Commerce Act, in which a towing company claimed exemption from the Act's provision on the grounds that is was not a common carrier, *Cornell Steamboat Co.* v. *United States*, 321 U.S. 634, 637 (1944), the Supreme Court stated:

> The act in which Congress has included this definition is designed, not to determine the legal status of vessels for all purposes, but to provide for reg-

ulation of the rates and services of competing interstate water carriers as part of a broad plan of regulation for all types of competing interstate transportation facilities. Cornell is in active competition with other types of interstate water carriers as well as with trucks and railroads. Therefore, if Cornell's particular method of providing water transportation facilities for others is not subject to regulation under the act, it would appear to present an anomalous exception to the congressional plan for regulation of competing transportation activities. We conclude that the language of the act brings Cornell's business within its coverage, and that to construe the act otherwise would frustrate the purpose of Congress.

In *California* v. *United States*, 320 U.S. 577, 584 (1944), this responsibility was discussed in terms of terminal operators. The Court stated:

> The crucial question is whether the statute, read in the light of the circumstances that gave rise to its enactment and for which it was designed, applies also to public owners of wharves and piers. California and Oakland furnished precisely the facilities subject to regulation under the Act, and with so large a portion of the nations dock facilities, as Congress knew (53 Cong. Rec. 8276), owned or controlled by public instrumentalities, it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental facilities.

This rationale—that niceties of State or municipal control are not disqualifying to regulation—is even more persuasive in light of patent attempts of a carrier confronted with the prospect of being ordered to conform along with its competitors to a fair, uniform rate on automobiles. As we found in Docket No. 1145,1167; *Reduced Rates on Automobiles—Atlantic Coast Ports to Puerto Rico*, the automobile movement makes up a sizable portion of all shipments to Puerto Rico. We can, therefore, expect that a loss of automobiles by the regulated carriers as a result of a rate advantage in favor Containerships will have a resultant chaotic impact on the overall Puerto Rican rate structure. Under these circumstances, regulation of the Puerto Rican automobile trade without the inclusion of Containerships would be difficult, not to say unfair to the other carriers in the trade. Consequently, we feel that to construe the shipping acts not to include Containerships within the definition of common carrier would frustrate the purpose of Congress.

It is concluded that respondent, Containerships, Inc., as evidenced through its activities, was, both prior to revocation of its tariffs and after that date, a common carrier in the trade from North Atlantic ports to ports in Puerto Rico. As a common carrier without a tariff on file, the respondent was in violation of section 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933.

An order will be entered requiring respondent to cease and desist hereafter from operating unlawfully, and requiring it to file an appropriate tariff before resuming operations.

ORDER

The Federal Maritime Commission instituted this proceeding to determine whether Containerships, Inc., has operated in violation of section 18(a) of the Shipping Act, 1916 (46 U.S.C. 817) and section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844). The Commission has this date entered its Report stating its findings and conclusions, which Report is made a part hereof by reference, and the Commission has found that Containerships, Inc., operated as a common carrier in interstate commerce as defined in section 1 of the Shipping Act, 1916 (46 U.S.C. 801) without a tariff on file with the Commission in violation of section 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933.

Therefore, it is ordered, That Containerships, Inc., cease and desist hereafter from operating in violation of section 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933, as found herein, and that Containerships, Inc., shall file an appropriate tariff as required by these provisions before resuming operations.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1203

APPLICATION FOR FREIGHT FORWARDING LICENSE YORK SHIPPING CORPORATION

Decided October 5, 1965

Application for freight forwarding license denied.

An employee in a firm, a confirming house and a shipper in the foreign commerce of the United States, does not qualify as an independent ocean freight forwarder as defined in Public Law 87–254.

There is *no* proviso in Public Law 87–254 exempting from the ban on licensing shipper-controlled forwarders who do not forward shipments for their shipper-employers or where the control is present but not yet exercised.

Arnold Kronish, for applicant.

J. Scot Provan and *Robert J. Blackwell*, as Hearing Counsel.

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 is before us on exceptions of Hearing Counsel to the initial decision of Examiner Edward C. Johnson in which he concluded that the applicant York Shipping Corp. (York) should be granted a license as an independent ocean freight forwarder.[1]

Hearing Counsel excepts to the Examiner's conclusion on the ground that because of its relationship with American & Foreign Trade Corp. (A. & F.), York cannot qualify as an "independent ocean freight forwarder." It is Hearing Counsel's position that there exists the possibility of control over the operations of York by A. & F. because

[1] Section 1 of the Shipping Act, 1916, in part states:

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

York's sole owner, M. H. Nozik, is an office manager of A. & F., and that this possibility of control disqualifies York as an "independent ocean freight forwarder." Hearing Counsel's position is grounded on the premise that Nozick is completely dependent upon A. & F. for his livelihood and is therefore completly subject to the latter's control. York on the other hand contends that although its sole owner, Nozick, is an employee of a shipper to foreign countries, neither the existence or the exercise of any control over York by A. & F. has been shown in the record. York argues that the mere inference or possibility of control does not disqualify York as an "independent ocean freight forwarder" under section 1.

FACTS

A. & F. is defined in the record as a confirming house which represents importers in the trade of South Africa. It pays for the orders placed by South African importers (finances the shipments) and ships the merchandise, and it appears as shipper on the bills of lading and on the import documents. A. & F. therefore is a shipper and seller of shipments in foreign countries within the meaning of the act and does its own freight forwarding.

York was issued FMB Registration No. 438 on July 13, 1950, and ever since has been located on the same premises with A. & F. at 225 West 34th Street, in Suites 1118 and 1119, New York City. Mr. M. H. Nozick is director and officer and sole stockholder of York; is a full-time salaried employee of A. & F. as office manager and supervises the daily activities of A. & F. and has been closely associated with A. & F. since 1946 and derives his primary source of income from A. & F. which in 1963 was approximately $9,000 as contrasted with some $1,500 from York in its freight forwarding activities. As employee and office manager of A. & F., Mr. Nozick uses some of the office equipment to conduct the business activities of York, which requires about 3 hours a week of his time for the purpose of engaging in his freight forwarding activities. His wife, although not active in the business, is president of York and Mr. Nozick is the secretary-treasurer. York is located in the same suite of rooms with some four other businesses including Wall & Co., Inc. (Wall), and York pays $250 per year to Wall for the use of the space plus telephone service. Herbert Wall is president of A. & F. and also a director of Wall & Co., Inc. Both York and Wall & Co., Inc., have the same phone and the same address (although York maintains other listings naming York as a freight forwarder) and occupies the same office space. York, A. & F., and Wall & Co., use the same legal firm, the same bankers, and at the present time and since May 1963 have not provided any forwarding services for A. & F., although prior to May 1963 York serviced the

accounts of A. & F. and handled numerous shipments for A. & F. York receives business from clients of A. & F. and others and maintains records and bank accounts separate from those of A. & F. It bills its clients for freight forwarding services on its own invoices and serves a limited number of clients involving service for some 50 to 60 shipments a year. York usually pays the ocean freight on the shipments out of its own funds and is later reimbursed by its clients. York apparently has never appeared as a shipper on any bill of lading.

For the reasons set forth below, we disagree with the conclusion of the Examiner. Exceptions not discussed herein nor reflected in our findings have been considered by us and are denied as unsupported by reliable and probative evidence or as irrelevant to this decision.

Discussion and Conclusion

The issue before us here is whether York "directly or indirectly . . . is controlled by . . . ." A. & F. which control could disqualify it for a license as an "independent ocean freight forwarder" as defined in section 1, by virtue of Nozick's employment as the office manager of A. & F. It has been established in the record that York is "carrying on the business of forwarding" and A. & F. is a ". . . a shipper of shipments to foreign countries . . ." as defined in section 1.

The Examiner recommended granting applicant a license because Hearing Counsel failed "to show persuasively and by a preponderance of the evidence that York is either controlled, or the power to control is exercised by someone else." Hearing Counsel excepts to the Examiner's conclusion primarily on the ground that it is the existence of control and not the actual exercise thereof that is determinative of an applicant's ability to qualify as "independent" freight forwarder.

We have, in the past, disapproved shipper-forwarder connections when it has been shown that these "connections" would have resulted in the operations of the forwarder being subject to the actual control of a shipper, thus perpetuating the existence of the type of "relationships" condemned by the Congress.

In our decision in *Application for Freight Forwarding License—William V. Cady*, decided September 22, 1964, we denied applicant a license because he failed to qualify as an "independent" freight forwarder.

The essential facts in both the *Cady* case, *supra*, and the present proceeding are for all practical purposes exactly similar. Both William V. Cady and M. H. Nozick:

1. Are employed full-time by shippers of goods in the U.S.-foreign commerce;

2. Utilize their employers' offices and equipment to conduct their forwarding activities;

3. Perform forwarding for their employers in their capacity of employees;

4. Do not charge forwarding fees or "compensation" on employers' shipments;

5. Are subject to the complete control of their employers;

6. Receive forwarding business from clients of their employers:

7. At one time, in their capacity as "freight forwarders," did forward shipments for their employers;

8. Are completely dependent upon their employers for their main livelihood;

9. Operate their freight forwarding activities on a part-time basis; and

10. Are able to operate *only* through the continued generosity and benevolence of their employers.

On the basis of these facts, we stated in *Cady* at 8 FMC 359:

> On its face, the master and servant relationship between a shipper and licensed forwarder is inconsistent with the purpose of the act that forwarders eligible to receive compensation from carriers be neither shippers nor sellers nor controlled by either. . . . (Footnote omitted.)
>
> . . . The present intentions of Cady and his employer are immaterial, since the statute makes licensing depend upon the existence of control and not upon its exercise or nonexercise. Public Law 87–254 does not allow licensing upon condition that the forwarder refrain from collecting compensation from carriers with respect to shipments made by the forwarder or someone controlled by or controlling him. . . .

Faced with the same essential facts in this proceeding we cannot agree that Nozick was not subject to the control of his employer. Therefore he is not qualified for a license under section 1. We do not read the freight forwarder definition in section 1 to mean that a shipper must actively exercise control over the operations of a freight forwarder to disqualify the latter from being licensed. There is no sound distinction that would render the *Cady* decision inapplicable here. What was said in *Cady*, *supra*, is applicable here, "The present intentions of [Nozick] and his employer are immaterial . . ." and Nozick's present intention to cease forwarding for A. & F. cannot qualify him for a license. We think it clear that our decision in the *Cady* case is dispositive of this proceeding.

Public Law 87–254 is aimed at preventing payment of "compensation" in the form of brokerage in situations where it may amount to rebating. Thus, the congressional aim was that no forwarder be licensed who is subject to the control of a shipper in foreign commerce, an association which in the past had been conducive to rebating.

There is no proviso in Public Law 87–254 exempting from the ban on licensing shipper-controlled forwarders who do not forward shipments for their shipper-employers or where the control is present but not as yet exercised.

Conclusion

Applicant, as an employee in a firm, a confirming house and a shipper in the foreign trade of the United States, does not qualify as an independent ocean freight forwarder as defined in Public Law 87–254 and cannot be licensed.

An appropriate order denying the application will be entered.

Order

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

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

By the Commission.

(Signed) Thomas Lisi
Secretary.

FEDERAL MARITIME COMMISSION

No. 1089

VOLKSWAGENWERK AKTIENGESELLSCHAFT

v.

MARINE TERMINALS CORPORATION, ET AL.

Decided October 12, 1965

Agreement between members of Pacific Marine Association, including respondents, establishing the method of assessing and collecting contributions to pay their obligation under an agreement with the International Longshoremen's and Warehousemen's Union found not subject to section 15 of the Shipping Act, 1916.

Respondents' having included the assessment in its entirety in their rate to Volkswagen for discharging automobiles found not to have violated sections 16 and 17 of the Act.

Stanley S. Madden and *Walter Herzfeld*, attorneys for Volkswagenwerk Aktiengesellschaft, complainant.

Bryant K. Zimmerman, attorney for Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles), respondents.

Edward D. Ransom and *Gary J. Torre*, attorneys for Pacific Marine Association, intervener.

REPORT

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

This proceeding arises out of a complaint filed by Volkswagenwerk Aktiengesellschaft (Volkswagen or VW) involving the payment of certain charges imposed by respondents Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles), for services rendered in discharging complainant's automobiles at respondents' terminals in San Francisco and Los Angeles.

Pacific Marine Association (PMA), a corporation composed of carriers, marine terminal operators and stevedore contractors on the Pacific Coast, which acted as collective bargaining unit for these groups

in their negotiations with the International Longshoremen's and Warehousemen's Union (ILWU), intervened. Respondents are members of PMA.

An Initial Decision was issued by Examiner Benjamin A. Theeman, exceptions and replies thereto were filed, and oral argument was heard.

FACTS

Beginning in 1957 ILWU and PMA entered into a series of negotiations in an attempt to correct some of the inefficient practices that were prevalent in stevedoring on the Pacific coast and to allow for the introduction by employers of labor saving devices in connection with the work of cargo handling. In return for this concession to management, the workers were to share in the savings made possible by the reduction in wage costs.

On August 10, 1959, PMA entered into an agreement with ILWU to raise a $1½ million fund for the benefit of the work force. The agreement did not state how the sum was to be raised, but it was accumulated by PMA's assessing its members on a man-hour basis. The fund, called "Mechanization and Modernization" fund (hereinafter "Mech" fund) was subsequently expanded to $29 million to be accumulated over a 5½-year period by an agreement entered into between ILWU and PMA, subject to ratification by their respective memberships, on October 18, 1960. The method of collecting the fund from the PMA membership was reserved to PMA.

In January 1961, a committee of PMA studied alternative methods of assessing members for collection of the "Mech" fund. The majority of the committee recommended that all members be assessed on a straight percentage of tonnage carried with bulk cargoes assessed at one-fifth the general cargo rate as was the practice with respect to the assessment of a part of the PMA dues. This determination was based upon the feeling that an assessment geared to "man-hours" would unfairly result in least assessing those who had profited most from new and improved cargo handling methods. A minority report recommended a combined man-hour/tonnage method of assessment, as was made with respect to PMA dues. The minority reasoned that such a formula would not unduly favor those who would save most in man-hours. At the same time it would not unduly penalize those who would benefit most from the elimination of restrictive work practices. The majority position was adopted by PMA.

On November 15, 1961, a "Supplemental Agreement" effective January 1, 1961, was executed by ILWU and PMA ratifying the agreement of October 18, 1960.

The tonnage formula has remained in effect since January 16, 1961, when payment to the fund began, although the amounts were increased in December 1961, from 27½¢/ton to 28½¢/ton on general cargo and 5½¢/ton to 9¢/ton on bulk cargo. An additional assessment of members based on 15 cents per clerk-man-hour was made at this December meeting and was added by respondents to their charges against VW which bore it without protest.

Subsequently, in July 1962, the rate of assessment of coastwise lumber was reduced to 5¢/ton on the theory that such cargo was already subjected to penalty handling rates of $1.00/hr. straight time and $1.50/hr. overtime.

Volkswagen had persistently refused to pay respondents "Mech" fund assessments which they here found necessary to pass on to it in order to carry on their operations on a profitable basis. The vast majority of the carryings of Volkswagen on the Pacific coast (75 percent) are by vessels chartered by VW, and at the terminals of respondents 90 percent of all autos unloaded are those of complainant. A common carrier carrying complainant's autos, Wallenius Line, also protested and refused to pay the "Mech" fund assessments passed on to it.

Respondents and other terminal operators sought to have the form of assessment on automobiles modified. PMA had required the automobile tonnage assessment to be based upon measurement tons, rather than weight tons, regardless of how manifested. There is no uniform way of manifesting automobiles. In the foreign trades they are manifested on a unit basis on chartered ships, but weight and sometimes measurement is shown. On common carriers both weight and measurement are shown. Tariffs are on a unit basis but dependent upon measurement. In the coastwise trades, autos are manifested and freighted by weight. General cargo is assessed as manifested. This form of assessment increased Volkswagen's cost of discharge some 25 percent. The tonnage portion of the dues of respondents on automobiles had, since 1958, been assessed on a measurement ton basis.

At the PMA meetings of January 1961, respondents expressed their opinion that it would be impossible for them to absorb the "Mech" fund assessments, and it appears that the stevedore members of the PMA in general felt that they could not absorb the whole assessment. Although some stevedores indicated that it might be necessary to pass on the assessment in the stevedoring rate to their customers, several witnesses, both for respondents and PMA, testified that there was no understanding among the PMA members as to whether the assessment would be passed on to the customers or absorbed by the members themselves.

The Funding Committee of PMA in February 1961, reaffirmed its position with respect to automobiles, and this was adopted by the Board of Directors in March of 1961.

Several stevedores, including respondents, attacked the method of assessing automobiles as arbitrary and suggested a unit method of assessment. The Funding Committee rejected the proposal in December 1961, and the rejection was affirmed by PMA in March 1962.

Respondents concede that the method of assessment against automobiles on a tonnage basis is unfair, as stevedoring of cars has always been an efficient and economical operation, and testimony in the record shows that there is little likelihood of mechanical improvement in the method of unloading automobiles, and auto shippers will probably receive only general benefits from the fund plan, such as freedom from strikes or slowdown.

Aware of Volkswagen's dissatifaction, respondents some time afterward offered Volkswagen a lower rate whereby respondents would absorb an amount equal to that if the assessment had been made on a weight ton basis. Volkswagen rejected this offer and stated it would not pay the "Mech" fund charge in the rate if it were based on a measurement ton basis. Since Volkswagen was satisfied with respondents' discharging operations, Volkswagen continued to use them.

Testimony indicates that stevedore members of PMA passed on the "Mech" fund assessments to common carrier members of PMA. The record also indicates that these carriers in turn absorbed the increases as it was stated that there was no increase in ocean freight rates due to the passing on to the carriers of the "Mech" fund assessments.

Some terminal operators may have absorbed the assessments in whole or in part, rather than pass them on to shippers when the services were performed directly for the shippers rather than for the common carriers. There is no showing as to the level of rates for terminal services charged by PMA members either before or after the establishment of the "Mech" fund.

PMA filed a libel against respondents in the United States District Court for the Northern District of California, Southern Division, demanding payment of unpaid "Mech" fund contributions from each respondent as a PMA member. By respondents' interpleader, Volkswagen was made a party to the Court action. Upon Volkswagen's request the Court stayed the proceedings therein, pending submission of the following issues to the Commission for determination:

1. Whether the assessments claimed from [Volkswagen] are being claimed pursuant to an agreement or understanding which is required to be filed with and approved by the Federal Maritime Commission under Section 15 of the Shipping

Act, 1916, as amended, 46 U.S.C. 814 (1961), before it is lawful to take any action thereunder, which agreement has not been so filed and approved.

2. Whether the assessments claimed from [Volkswagen] result in subjecting the automobile cargoes of [Volkswagen] to undue or unreasonable prejudice or disadvantage in violation of Section 16 of the Shipping Act, 1916, as amended, 46 U.S.C. 815 (1961).

3. Whether the assessments claimed from [Volkswagen] constitute an unjust and unreasonable practice in violation of Section 17 of the Shipping Act, 1916, as amended, 46 U.S.C. 816 (1961).

Thereafter Volkswagen filed the complaint in this proceeding alleging that respondents, other PMA members and PMA had conspired or agreed to impose an extra charge on Volkswagen for terminal services in discharging VW's in violation of sections, 15, 16, and 17 of the Act.

THE EXAMINER'S DECISION

The Examiner found that respondents, as parties to carloading conferences approved by the Commission and operators of terminal facilities were "other persons" subject to the Shipping Act, 1916. He further found that the "Mech" fund agreement which respondents had entered into with the other members of PMA, all of whom he found to be common carriers or "other persons" subject to the Act, was a "cooperative working arrangement." He concluded, however, that as the agreement contained no obligation upon the members of PMA to pass the "Mech" fund assessments on to shippers, the agreement was not the type of "cooperative working arrangement" intended to be included within section 15 as it did not "deal with" or "pertain to" "ocean transportation" and was not one of "the same general class" as the six categories of agreements specifically enumerated in section 15.[1] He therefore found no violation of section 15 in PMA's failure to file its "Mech" fund agreement.

The Examiner found no violation of section 16 as no "prejudice or disadvantage" to VW was shown by the method of assessment as all cars were assessed by the measurement formula.

The Examiner found no "unreasonable practice" under section 17 to exist with reference to the respondents' handling of Volkswagens as all autos were assessed on the same basis, Volkswagen never objected to the portion of the dues which was assessed on a measurement basis, and passed on to it, and respondents had offered to compromise the matter by absorbing a part of the assessment.

[1] These are agreements "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried. . . ."

Discussion and Conclusions

We have reviewed the exceptions of Volkswagen to the Initial Decision of the Examiner. Even if we assume all of the members of PMA are "other persons" within the meaning of the Shipping Act, 1916, we find nothing in the agreements of record in this proceeding which brings them within the purview of section 15.

Although the literal language of section 15 is broad enough to encompass any "cooperative working arrangement" entered into by persons subject to the Act, the legislative history is clear that the statute was intended by Congress to apply only to those agreements involving practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or traveling public or their representatives.[2] *D. J. Roach Inc.* v. *Albany Port District et al.*, 5 FMB 333, 335.

Thus, for example, while agreements of persons subject to the Act to pool secretarial workers or share office space may literally be "cooperative working arrangements," they are not the type of agreements which affect competition by the parties in vying to serve outsiders and hence are not subject to section 15. On the other hand, agreements relating to the method of fixing or determining the levels of rates, fares, charges or commissions paid to or by shippers, passengers, forwarders, brokers, agents, etc., have the type of competitive relationship to bring them within the scope of section 15.

As the courts have pointed out, our statute ". . . In its general scope and purpose, as well as its terms, . . . closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect. It follows that settled construction in respect of the earlier act must be applied to the later one, unless, in particular instances, there be something peculiar in the questions under consideration, or disimilarity in the terms of the act relating thereto, requiring a different conclusion." *United States Navigation Company, Inc.* v. *Cunard Steamship Co., Ltd.*, 284 U.S. 474.

Section 5(1) of the Interstate Commerce Act (49 U.S.C. 5) provides for jurisdiction of the ICC over "Combinations and consolidations of carriers" establishing "Pooling, division of traffic, service, or earnings."

The courts, in construing this section, have determined that agreements which affect only labor-management relations do not come

[2] Recommendations of the "Alexander Committee," Proceedings of the Committee on the Merchant Marine and Fisheries in the Investigation of Shipping Combinations under H. Res. 587, p. 415, *et seq.* See also Hearings before the Special Subcommittee on Steamship Conferences of the Committee on Merchant Marine and Fisheries, on H.R. 4299, 87th Cong., 1st Sess. (1961) at page 428.

within its scope. A showing has been required, before labor-management agreements have been held to be subject to the jurisdiction of the ICC, that they have some impact upon the competitive relationship of those entering into them. "Section 5(1) empowers the Commission to exempt pools from the prohibition of the statute which it determines will not unduly restrain competition and will result in better service to the public or economy in operation, the broad sweep of the section does not encompass pools whose sole concern is labor-management relations." *Kennedy* v. *Long Island Railroad*, 211 F. Supp. 478, 489 (1962), affd. 319 F. 2d 366 (2d Cir. 1962).

It is not contested that the membership of PMA entered into an agreement as to the manner of assessing its own membership for the collection of the "Mech" fund. Such an agreement, however, does not fall within the confines of section 15 as, standing by itself, it has no impact upon outsiders. What must be demonstrated before a section 15 agreement may be said to exist is that there was an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators.

The record is devoid of evidence showing the existence of such an additional agreement. The record at most shows that some stevedores expressed the opinion that it might be necessary to pass on the assessment in the stevedoring rate to their customers. That these opinions were the basis for an agreement as to the manner of assessing their customers is denied by statements of witnesses for both PMA and respondents. Such conclusion is further vitiated by the actions of respondent and perhaps other terminal operators, who were willing to absorb a part of the assessment.

To hold that a section 15 agreement existed on this record would require us to disregard explicit statements to the contrary as well as actions on the part of both the common carrier members of PMA and respondents inconsistent with the existence of such an agreement. We would moreover, be obliged to reach the anomalous result of finding an agreement in spite of both testimony and conduct negating such an agreement, and then finding that such conduct was a breach of the agreement. It seems much more logical and less contrived simply to conclude that there was no agreement on the part of PMA members to pass on the "Mech" fund assessments.

We conclude, therefore, that no violation of section 15 has been shown.

Volkswagen itself admits that all of the relevant case law requires a showing that competitive cargo has been preferred to sustain an allegation of a violation of section 16. It further admits that its

automobiles have not been subjected to "prejudice or disadvantage" as compared to other automobiles, and that "there is no other cargo classification in competition with automobiles." We therefore uphold the Examiner in finding no violation of section 16.

Complainant's allegation of a violation of section 17 is that the passing on by respondents of the "Mech" fund assessment on automobiles on a measurement rather than a weight basis constituted an "unreasonable practice . . . relating to . . . the handling of property." It does not contest the propriety of the passing on of the assessment to it and states that the alleged discrimination would be removed if the assessment were made on a weight or unit basis.

It is true that the assessing of automobiles on a measurement basis results in an assessment ten times as great as would result from a weight basis, and that although other cargo is assessed as manifested, automobiles are always assessed on a measurement basis. It is further true that although the assessment on a measurement basis for some general cargo items exceeds the amount computed on a weight basis, in no instance is the difference as great as on automobiles, and that as there is little likelihood of mechanical improvement in the method of unloading automobiles, auto shippers will probably receive only general benefits from the fund plan, such as freedom from strikes or slowdown.

However, as complainant admits, there is no statutory requirement that all users of a facility be assessed equally. As long as "substantial benefits" are provided for one against whom a charge is levied, we will not normally declare the charge unlawful. *Evans Cooperage Co., Inc.* v. *Board of Commissioners*, 6 F.M.C. 415. The fact that the benefits may differ to some extent in both kind and degree is not material. An exception to the above principle might arise if it could be shown that the leviers of a charge imposed it in an unequal fashion because of a design deliberately to burden one of the users of its service more than another.

The assessment here, however, has been levied in its present form because it was necessary in the business judgment of respondents to do so. The reasonableness of respondents' activities is attested to by the additional facts that they have sought to change the method of "Mech" fund assessment on automobiles, have offered to pass on only a part of the assessment, and have levied a part of their dues assessment against Volkswagen for several years upon the same measurement basis without protest.

We agree with the Examiner that there has been no showing that the assessment against Volkswagen is an "unreasonable practice" within the meaning of section 17.

The complaint is dismissed.

COMMISSIONER JOHN S. PATTERSON, *dissenting:*

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

1. Respondents Marine Terminals have failed to file immediately (a) an agreement with common carriers by water and other persons regulating transportation rates and controlling and regulating competition among each other and (b) any memorandum of a cooperative working arrangement on the aforesaid subjects in violation of section 15 of the Act (Findings 1, 2, 3, 4, and 5).

2. Respondents Marine Terminals in conjunction with common carriers by water and other persons indirectly have subjected property and persons to undue and unreasonable prejudice and disadvantage in violation of section 16 of the Act (Findings 1, 2, and 6).

3. Respondents Marine Terminals have failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property contrary to section 17 of the Act (Findings 1, 2, and 7).

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

INTRODUCTION

This proceeding was initiated by a complaint by Volkswagenwerk Aktiengesellschaft (VW) against Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles) (both referred to as "Marine Terminals"), alleging that Respondents Marine Terminals were parties to an agreement with certain persons identified as both common carriers by water and other operators of terminal facilities to impose an "extra charge" for terminal facilities, including stevedoring and other terminal services. The "extra charge" was for the purpose of collecting "an assessment" imposed on Respondents by Pacific Maritime Association, of which Respondents are members, for contributions pursuant to a Supplemental Agreement on Modernization and Mechanization as hereinafter described.

The agreement to collect the extra charge was claimed to be subject to section 15 of the Shipping Act, 1916 (Act), providing:

> That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; . . . controlling, regulating, preventing, or destroying competition; . . . or

in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

Even after the agreement is filed pursuant to the first paragraph of section 15, it is further claimed it may not be approved pursuant to the second paragraph of section 15 because the agreement is "unjustly discriminating and unfair as between shippers and importers, operates to the detriment of the commerce of the United States, is contrary to the public interest," (Complaint, VI), "subjects complainant and its automobile cargoes to undue and unreasonable prejudice and disadvantage," (Complaint, VII), and "by establishing regulations and practices which are not just and reasonable" (Complaint, X. (5)), is contrary to law in violation of sections 15, 16, and 17 of the Act.

The complaint originated in response to an order of November 29, 1962, by the District Court for the Northern District of California, Southern Division, No. 28599 in Admiralty, granting a motion for a "Stay of Proceedings" on a libel petition on condition that there be a "submission to the Federal Maritime Commission and final determination by it, or by a court of last resort upon appeal from such Commission action" of the following issues:

1. Whether the assessments claimed from respondent impleaded are being claimed pursuant to an agreement or understanding which is required to be filed with and approved by the Federal Maritime Commission under Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. 814 (1961), before it is lawful to take any action thereunder, which agreement has not been so filed and approved.

2. Whether the assessments claimed from respondent impleaded result in subjecting the automobile cargoes of respondent impleaded to undue or unreasonable prejudice or disadvantage in violation of Section 16 of the Shipping Act, 1916, as amended, 46 U.S.C. 815 (1961).

3. Whether the assessments claimed from respondent impleaded constitute an unjust and unreasonable practice in violation of Section 17 of the Shipping Act, 1916, as amended, 46 U.S.C. 816 (1961).

The Admiralty proceeding was initiated by the Pacific Maritime Association as a Libelant against Marine Terminals as one of the Respondents for refusal to pay $67,004.27 assessments of contributions to a Mechanization and Modernization Fund created pursuant to the Supplemental Modernization Agreement. Marine Terminals petitioned to implead Volkswagen, stating the reason Marine Terminals had not made the assessed contributions was that VW contends that assessments under the Supplemental Agreement on Modernization and Mechanization "are unlawful and that neither libelant nor respondents can lawfully collect assessments pursuant to

said Agreement." VW was impleaded and thereafter filed its complaint with us.

Pacific Maritime Association (PMA), which describes itself as "a non-profit association existing under the laws of the State of California," filed a petition to intervene in opposition to the complaint. The petition was granted.

The majority has dismissed the complaint and decided the Examiner should be upheld in finding no violation of sections 16 and 17 of the Act.

My dissent to the dismissal is set forth in the following facts, findings, and discussion in support of the findings and conclusions.

FACTS

Because the content of facts as stated in the majority report are considered to be too meager a basis for decision, it is deemed essential to expand the scope of facts by advancing from the record before me the following 29 adequate statements of fact upon which my findings and ultimate conclusions are grounded.

1. Complainant VW is a shipper of automobiles from the Federal Republic of Germany through United States Pacific Coast ports. Automobiles are shipped on both chartered ships in private carriage and on "liners" which are the same as common carriage. The number of VW automobiles imported through Pacific coast ports during 1961 and 1962 were as follows:

	Common carrier (liners)	Private carrier (charter)
1961	9,363	29,111
1962	13,672	28,296

(Exh. 52.)

2. Respondents Marine Terminals are in the business of furnishing ship loading and unloading and storage activities in their terminal facilities located at San Francisco and Long Beach, California (Tr., 202–206). Facilities are available and furnished to both common and private carriers (Tr., 203–204), but about 90 percent of Respondents' work is in connection with common carriers (Tr., 236). Marine Terminals have provided facilities for VW since 1954 at both San Francisco and Long Beach (Tr., 203–204).

3. a. Marine Terminals furnish the following to VW in connection with both common and private carrier by water shipments:

(1) unlashing and unchecking cars;

(2) removal of cars from ship to pier by means of a patent bridle device to pick up vehicles from the hold;

(3) removal from shipside to storage area by means of tractors which push or pull, using special hooks, vehicles to the point of rest in the storage area; (Tr., 229–231)

(4) guard service, cleaning, lighting, heating, and maintenance of the terminal area; (Tr., 251–252)

(5) fenced-in storage areas where vehicles are surveyed, sorted into dealer lots, and made available for inland transportation by trucks (Tr., 207, 231) (Exh. 51).

The unloading services are performed by groups of laborers called "gangs" composed of ILWU members working both aboard the ship and on terminal property (Tr., 207–208, 211). The men working on the docks are called the "dock gangs." They haul automobiles from the ship's side and sort the automobiles. The gangs working exclusively aboard the ships perform what is called the "function of the ship" (Tr., 206–207). Marine Terminals charged VW $10.45 per vehicle for the above services, regardless of model, size, or weight, during the period covered by the record (Tr., 205, 207, 210, 214, 279).

b. A typical "work order" called for the following to be covered by charges:

(1) Opening and closing of hatches, rigging and unrigging, opening of cardeck hatches.

(2) Unlashing and unchocking of cars (Hercules round-lashings not to be cut but to be collected on board for further use).

(3) Waiting time of 30 minutes or less whether in stevedores' control or not, but breakdown of ship's gear excepted.

(4) Travel-time and transportation of longshoremen and equipment to and from vessel.

(5) Supply of discharging gear in accordance with Volkswagenwerk instructions.

(6) 10 days free storage.

(7) The stevedores will provide all necessary stevedoring labor including winchmen, hatch tenders, tractor operators, also foremen and such other stevedore supervision as is needed for the proper and efficient conduct of work.

(8) Checking, clerking and supercargo.

(9) Public liability and property damage insurance, including third party risk, in respect of injuries arising from stevedoring operations, also taxes and Pacific Maritime Association assessments.

(10) For handling cars from ship's tackle to place of rest $6—per car are to be collected from consignees and credited to vessel within the disbursements account.

Remarks:

Wharfage on cars at $3—per 2,000 lbs for uncrated cars to be for consignees' account. (Exh. 51.)

4. a. Marine Terminals is a member of PMA, intervenor herein, an association incorporated June 3, 1949, composed of members meeting

the following qualifications as shown in its Bylaws as amended to April 1960 (Exh. 3), Article IV, Section 1:

Section 1. Any firm, person, association or corporation engaged in the business of carrying passengers or cargo by water to or from any port on the Pacific Coast of the United States (except Alaskan ports), or any agent of any such firm, person, association or corporation, and any firm, person, association or corporation employing longshoremen or other shoreside emplyees in operations at docks or marine terminals at any such port and any association or corporation composed of employers of such longshoremen or other shoreside employees shall be eligible for membership in this corporation.

The record shows 116 members meeting these qualifications for the year 1961 (Exh. 47—"Membership Roster").

b. Intervenor PMA includes in its membership several common carriers by water such as American President Lines, Ltd., American Mail Line, Ltd., Matson Navigation Company, Pacific Far East Line, Inc., States Steamship Company, and United States Lines Company as American-flag carriers and many foreign-flag common carriers by water (Exh. 47).

5. The corporate powers of PMA are "vested in and exercised, conducted and controlled by a Board of twenty-one (21) Directors, who need not be members of the corporation" (Art. I). Among PMA's powers is the power to "levy and assess and collect . . . dues or assessments . . ." not in excess of a maximum rate to be fixed at a regular or special meeting (Art. III, Sec. 1(e)).

6. A Memorandum of Agreement on Mechanization and Modernization of October 18, 1960 (Exh. 1, sub B) between PMA and the ILWU provided that PMA would "establish a jointly trusteed Fund" (par. 38) to include specified amounts to be accumulated (par. 39). The purposes for which accumulations in the fund were to be used were stated (pars. 40–42). The terms of the Memorandum of Agreement were incorporated in a superseding "ILWU-PMA Supplemental Agreement on Mechanization and Modernization" (Modernization Agreement entered into as of the 1st day of January 1961, signed for the Union on November 15, 1961, by Harry Bridges and for the Association by J. Paul St. Sure. The Fund provisions are as follows:

1. *Amount and Rate of Accumulation.* Commencing January 1, 1961, and continuing for a period of five and one-half years ending June 30, 1966, a Mechanization Fund shall be established, subject to the provisions of Section 3 of Article V hereof, at the rate of Six Million Five Hundred Thousand Dollars ($6,500,000) during the first year, Five Million Dollars ($5,000,000) during each of the next four years, and Two Million Five Hundred Thousand Dollars ($2,500,000) during the next succeeding six months, for a total of but not exceeding Twenty-nine Million Dollars ($29,000,000) (Exh. I, Sub C, Art. II, par. 1).

7. The Modernization Agreement provides, with regard to contributions to raise the above amounts, "Principals who are Member Companies shall be responsible therefor to the extent the Association determines pursuant to its by-laws and in its sole discretion" (Id., Art. II, par. 2). Member Companies are defined in Article I as companies who are members of the Association and are subject to several specified collective bargaining agreements "respecting employment of Employees." The "Association" referred to is PMA (Id., Art. I, pars. 2 and 3). "Principals" are member companies "who do not employ directly Employees but who obtain stevedoring, terminal or similar related services under contracts . . ." (Id., Art. I, par. 6). "Contributions" are assessments required under "arrangements adopted by the Association, pursuant to its by-laws . . ." (Id., Art. I, par. 8).

8. For the purpose of adopting arrangements to discharge the responsibility to make the assessments needed to raise the specified contributions, PMA appointed a committee consisting of a representative from American President Lines, Ltd. (APL), Matson Navigation Company (Matson), and Pacific Far East Line, Inc. (PFEL); operators of U.S. registered ships as "common carriers by water" as defined in the first section of the Act, Holland American Line (Holland America), Union Steamship Company of New Zealand (Union), common carriers by water, and Overseas Shipping Company (Overseas) (status not clear in record) (Exh. 5). The committee's report on work improvement fund contributions procedures consisted of a majority report subscribed to by the Chairman on behalf of APL, Union, Holland America, and Overseas, and a dissent by Matson and PFEL (Exh. 5, sub A).

a. The majority recommended an arrangement for dividing the costs of the ILWU Modernization and Improvement Fund set forth in the Memorandum of Agreement with the ILWU of October 18, 1960, whereby contributions to the fund are to be "based on cargo tonnage basis" (Exh. 5–A, p. 1) with an annual review by the Association to determine the equity of the formulas as conditions change (Exh. 5, Sub A, p. 1). The report states, "the committee recommends that the contributions to the Fund be raised on a cargo tonnage basis . . .", but the committee's deliberations "centered on three methods of contribution . . . (1) contributions based on straight time man-hours of each employer, (2) contributions based on manifested cargo tonnage, (3) a combination of (1) and (2). In the text reference is made to "the same as the present tonnage formula" which is "the cargo is that manifested for loading or discharging at Pacific Coast ports" (p. 5). The "manifesting" qualification was an essential part

of the committee's report which was adopted by the membership. (See also p. 7, referring to "the proposed charge on manifested tonnage." Whatever the manifest showed was to be the guide.) (Note: The costs of the fund are those set forth in Art. II, par. 1, of the Modernization Agreement which incorporated, with revisions, the provisions of par. 39 of the Memorandum of Agreement of October 18, 1960. The former Agreement was not drafted in final form and signed and sealed until November 15, 1961, but was entered into "as of" January 1, 1961. The committee report was dated January 4, 1961.)

b. The minority reported that the formula should be based on a combination whereby part of the fund would be accumulated by tonnage assessments and part by man-hour assessments with 40 to 60 percent proportion to begin with, subject to correction in the light of experience (Exh. 5, Sub B 10–11).

9. The Committee's majority report was considered by the Board of Directors at a meeting on January 6, 1961, and after "considerable discussion" of the committee's report "it was moved and seconded that the collection of the Fund be based on a tonnage formula with all tonnage being treated equally as to rate for a period of six months . . ." The Minutes show the vote on the motion was 12 "yes," 3 "no" and 3 "withheld," followed by the notation "Motion carried," and were subscribed by J. A. Robertson, Secretary (Exh. 2–P).

10. The Board of Directors' action was considered by the membership at a meeting on January 10, 1961. Respondents were shown as "Present", represented by Messrs. C. R. Redlich and E. G. Horsman, along with representatives of about 81 members (not counting names of members appearing more than once) and staff personnel including the President of PMA. The Minutes showed the "three recommendations which had been made" as explained by the Chairman:

> It was regularly moved and seconded that the Majority recommendation of the Committee appointed to propose a method for collection of the Fund, calling for a tonnage formula with bulk cargoes at one-fifth the general cargo rate, be adopted, with the understanding that the method of collection will receive continued study and be presented to the Membership again in six months.
>
> The Chairman explained the three recommendations which had been made:
>
> 1. *Majority Report* (on which the motion is based)
>   26¾¢ on general cargo
>   5½¢ on bulk
> 2. *Minority Report*
>   10¢ a ton
>   12¢ per manhour
> 3. *Board of Directors*
>   20¢ a ton

It was further agreed that the Board of Directors would examine and determine the definition of bulk cargoes.

followed by the notation that a secret ballot was taken and the vote polled as follows:

246 yes
74 no
21 withheld
67 absent

"Motion carried by a majority of the total voting strength[1] of the Association Membership." The Agreement of October 18, 1960, between PMA and ILWU was ratified unanimously. The minutes were duly subscribed by the Secretary (Exh. 2–0). As of January 1, 1961, all cargo is to be measured for assessment purposes on tonnages as shown in ships' manifests.

11. The record shows no challenge or question as to the regularity of the vote by either the directors or the members. The Bylaws provide that any contract made by PMA on behalf of its members with a union "shall bind the members" except that any member who has not voted or otherwise approved a commitment can relieve himself by resignation within seven days from the vote thereon (Exh. 3, Art. XI, secs. 1 and 3). The record shows no resignations.

12. The Board of Directors at a meeting on January 16, 1961, adopted a motion "that unpackaged scrap metal . . . is to be classified as a bulk cargo . . . effective as of January 16, 1961" and agreed "that the tonnage declarations made by companies are to be made in exactly the same manner as manifested and reported during the year 1959 . . .". This action had the effect of adding the "during the year 1959" qualification to the "as manifested" qualification. The minutes were duly subscribed by the Secretary (Exh. 2–N).

13. The Vice President and Treasurer of PMA in a circular letter of February 3, 1961, wrote members on the subject, "Cargo dues—Tonnage—Automobiles," after noting automobiles were being reported on a weight basis: "Any steamship company or contracting stevedore who has not been reporting and paying dues on automobiles on a measurement basis since January 1958 should immediately complete a revised tonnage declaration form . . . Future reports on automobiles for PMA dues and Modernization and Improvement Fund purposes are to be made on a measurement basis" (Exh. 36). A February 24, 1961, communication to "committee members," referring to a February 21, 1961, meeting of members, stated:

[1] Members have different numbers of votes as prescribed in Article VI of the Bylaws. Votes at the membership meetings depend upon a formula which gives effect to the volume of cargo handled by each member at certain ports and to the number of personnel employed (Art. VI, Sec. 1).

(4) The Mechanization Fund assessment for autos should be on a measurement ton basis, regardless of how manifested. 8 agree, none oppose (Exh. 44).

As of February 21, 1961, the qualifications "as manifested" and "during the year 1959" disappeared and were replaced by "a measurement basis" in regard to automobiles only.

14. The Board of Directors at its regular quarterly meeting on March 8, 1961, approved changes (a) in assessments for full and empty "Army conexes" and (b) to provide that "coastwise cargo be assessed in the traditional manner at the rate of one-half the Work Improvement Fund rate for offshore and intercoastal cargo; that is, a single ton of coastwise cargo would pay a total of 27½¢ assessment, one-half at the point of loading and the other half at the point of discharge." The minutes were duly subscribed by the Secretary (Exh. 2–M).

15. As of December 18, 1961, PMA reduced the tonnage assessment on lumber, logs, and automobiles to 24½¢, but added 4¢ for the Walking Bosses and Foremen's Mechanization Fund and an assessment of 15¢ per man-hour "on all ship clerk hours" (Exh. 56, meeting 12–13–61).

16. The minutes of the annual meeting of members on March 13, 1961, show unanimous ratification "of all actions of the Board of Directors and Association Committees during the year 1960." The minutes were duly subscribed by the Secretary (Exh. 2–L). The minutes of the meeting of members on May 14, 1962, show "that the Membership action of March 14, 1962 [the defeat of the motion ratifying all action of the Board of Directors and Association Committees during the year 1961] be and hereby is rescinded and that all actions . . . during the year 1961 be ratified." The motion was carried and on another vote was "made unanimous," and the minutes were duly subscribed by the Secretary (Exh. 2–G).

17. The minutes of the Directors Meeting on July 3, 1962, show a motion unanimously carried that "the contribution rate on all lumber moving in the coastwise trade shall be $0.05 per ton, 2½¢ of which is paid at the port of loading and 2½¢ at the port of discharging." The minutes were duly subscribed by the secretary (Exh. 2–F).

18. The minutes of the Directors Meeting on December 12, 1962, show a motion unanimously carried "that the contribution rate to the Walking Boss Mechanization Fund be 2¢ per ton effective January 1, 1963" instead of 4¢ per ton as before. The minutes were duly subscribed by the Secretary (Exh. 2–D).

19. At the annual meeting of the members of PMA on March 14, 1963, "all actions of the Board of Directors and Association Commit-

tees during the year 1962" were ratified by motion "unanimously carried." The minutes were duly subscribed by the Secretary (Exh. 2–A).

20. The several "actions," resolutions, and adopted motions of members of PMA were acted on by those members providing terminal facilities and wharfage, including Respondents, by charges to VW and other users by seeking collection from shippers and by being billed separately by Respondents (Exhs. 9, 23, 32). One member of PMA informed a PMA official that the cost of the assessment on automobiles is so much greater "as compared to the stevedoring cost" that it could never be considered that the cost would be absorbed (Exh. 24). The Committee considering the assessments itself knew shippers would be asked to pay in expressing a belief the measurement did "not work an inordinate hardship on the shipper" (Exh. 27). The entire membership considered (a) "the problem of collecting funds from Volkswagen due the Mechanization Fund" at one of its meetings (Exh. 2H) and (b) a recommendation to establish "an escrow account for payments by stevedores on behalf of Volkswagenwerk" (Exh. 2C).

21. a. At the meeting of the Board of Directors of PMA and American Flag Operators, July 3, 1962, after noting that companies handling Volkswagens "had made no contribution to the Mechanization Fund" (p. 5), a motion to approve a recommendation of the "Coast Steering Committee" was unanimously carried to modify a previous action so as "to provide that PMA counsel assist Marine Terminals (and other stevedoring companies handling Volkswagens) only if the action by or against Marine Terminals raises issues which jeopardizes the Mechanization Plan or other interests of the industry . . ." (p. 6) (Exh. 2–F).

b. The previous action was taken at the meeting of the Board of Directors, December 13, 1961, wherein "it was agreed that PMA will give such support and will participate in any legal action taken and that the matter will be turned over to PMA Legal Counsel." The support and action referred to "the problem of collecting funds from Volkswagen due the Mechanization Fund" and a request by Respondents "that they be authorized to bring suit against Volkswagen for the monies due" (Exh. 2–H, p. 4).

22. The facilities used by VW were initiated by means of a "Stevedoring Order" which described the contents of the arriving ship and the work to be paid for (Exh. 36).

23. Respondents were required to prepare a "tonnage declaration form" (Reports of Tonnages) and to send it, together with "a check

for contributions to be in the Association's hands *not later than the 20th of the month following the month in which such cargoes are handled*" (Exh. 35, item 7). The foregoing was dated January 17, 1961. A further instruction to members, including Respondents, over the signature of the Vice President and Treasurer of PMA on March 16, 1961, stated: "We again wish to reiterate the fact that this contribution is a contractual commitment, exactly the same as welfare, pension and vacation contributions, and should be paid into the Association not later than the 20th of the month following the month in which such tonnages were handled" (Exh. 55, p. 2).

24. Respondents, acting by their Vice President, discussed the problem of the assessment on automobiles with other companies who handle them on the Pacific coast, and none thought it was possible for members to absorb the assessment (Tr., 239). The matter was also discussed at PMA meetings (Tr. 240). It was the uniform opinion of the contracting stevedores with whom the Vice President talked that the assessment could not be absorbed by members when on a measurement basis (Tr. 241). No agreement was reached as a result of the discussions as to how assessments would be collected, it was stated (Tr., 247), but as a result everyone subject thereto did the same thing by using the same measurement, but not paying the resulting assessments on Volkswagens brought in under contract carriage (Tr., 209–270). After VW refused to pay the amount of billings representing the assessment on a measurement basis, the Respondents and members of PMA refused to pay their assessments, and so did Waterman Corporation of California, agents for Walleniusrederierna (Exh. 9). Respondents stated they "are merely following out the instructions of the Board of Directors of the Pacific Maritime Association and therefore are considered only a collection agency in this matter" and asked for instructions as to "what stand we can take in demanding payment of this assessment" (Exh. 9). Associated-Banning Co. had asked PMA officials for instructions on how to handle refusals to pay assessment charges (Exh. 11) after Waterman Corporation of California, agents for Wallenius Line, stated they would pay only on a unit basis as manifested in 1959 (Exh. 12), not on a measurement basis. Respondents discussed assessments with an official of PMA. In a letter to the official, Respondents' Vice President noted the official "was aware of what was behind" Respondents "not making certain payments into the plan, but nevertheless, you had to protect yourself by writing the letters referred to above" (Exh. 13). The "letters" were demands for payment of assessments.

25. Automobiles are assessed by a measurement ton measure rather than by a unit or weight measure. Comparative measures are as follows:

	Weight	Measurement
Sedans	1,643 lbs.=0.8 wt. ton	7.8 cubic tons.
VW transporters	2,193 lbs.=1.1 wt. ton	11.4 cubic tons[1] (Tr., 281-282).
Other figures show:		
Sedans	1,609 lbs.=0.8 wt. ton	8.3 cubic tons.
VW average (tons approximate)	2,028 lbs.=1.0 wt. ton	10.0 cubic tons (Exh. 7).

[1] (NOTE: Exh. 7 shows for Transporters 2,447 lbs. and 11.8 tons and different average.) Roughly, the average assessment on Volkswagen vehicles would be about 10 times as high as on a measurement tonnage basis than on a weight ton basis. The measure applicable to Complainant's property was estimated to be at a level 10 to 15 times higher than the measure for assessing other general cargo (Exh. 7, p. 2, par. 6).

26. The assessment applicable to automobiles was stated to increase the cost of handling by from 33⅓ percent (Exh. 25) to 35 percent (Exh. 9). Another estimate was that the increase caused by the new measure was about 22 percent in the case of sedans and 31 percent in the case of transporters (Exh. 26). Another estimate was "more than 26 percent in discharge costs" of Volkswagens (Exh. 7). These estimates were not refuted. In contrast, the estimated average increase in the "discharging costs" or "cargo handling expenses" of packaged general cargo resulting from the assessment was 2.2 percent (Exh. 7 and Exh. 26, p. 2). The measurement ton measure causes a $2.76 per vehicle charge in comparison with a 28¢ per vehicle charge on a weight ton measure. The longshore cost is $10.45 per unit. Lumber is assessed on a unit measure based on 1,000 board feet per unit at the rate of 2½¢ per manifested ton (Exh. 26, p. 2). Unboxed automobiles are normally handled for charging purposes between factory and distribution on a unit basis (Exh. 26, p. 2).

27. The man-hours necessarily employed in handling Complainant's property, unboxed automobiles, always have been less than practically any other commodity (Exh. 26). The mechanized handling of packaged general cargo may effect savings, but because of past improved handling methods no new practical application of mechanization to the discharge of unboxed automobiles is visualized (Exh. 7). Automobiles will benefit less from mechanization than other cargo. The average direct labor cost, without fringe benefits, of discharging Volkswagen vehicles was 49¢ per measurement ton as compared with the 27½¢ measurement ton assessment. The assessment is 56 percent of the average direct labor cost (Tr., 284). In 1962, 28½¢ was the assessment, or 58 percent of the average. The total direct longshoremen's labor cost of all PMA members in 1962 was $103,953,362, and total fund assessments were about $5,200,000 (Tr., 285, Exh. 49),

or an assessment of 5.8 of the total direct labor cost ("wages") (Tr., 284).

28. For Volkswagen vehicles transported in chartered ships, the manifests and bills of lading show the number of automobiles and the weight in kilos. No specific rate or total freight is shown being noted by the endorsement "freight prepaid" or "freight as agreed." Contracts for freight are based on a rate per automobile unit. For the same reason, unloading charges are customarily on a unit basis (Exh. 7).

The intercoastal freight rate structure is on a weight basis, i.e., not measurement, and the reporting and levying of a tonnage assessment for automobiles is on a unit of 2,000 pounds (Id., and Tr., 222–223, 288–290, 313). The California State wharfage on unboxed automobiles is based on a weight ton of 2,000 pounds (Id.). Volkswagen vehicles are manifested for purposes of common carrier (liner) shipments on a unit basis of measure (Id., and Exh. 12). Many automobile manifests show weight, but some show measurements also (Tr., 323–324).

29. Any property other than automobiles would be measured for assessment charges on a manifest basis even where the per ton charge is less (Exhs. 7, 44).

FINDINGS

1. Complainant VW is a shipper of property consisting of automobiles on common carriers by water in foreign commerce and on private carriers through exportation from the Federal Republic of Germany (Germany) and importation into the United States, and obtains and uses the facilities of Respondents.

2. Respondents are persons carrying on the business of furnishing warehouse or other terminal facilities in connection with a common carrier by water and each is an "other person subject to this act" as defined in the first section of the Act.

3. Respondents have entered into an agreement with other common carriers by water and with other persons who are carrying on the business of furnishing wharfage and terminal facilities in connection with common carriers by water that they will regulate transportation rates and control and regulate competition among each other by establishing uniform charges which Complainant and others must pay for unloading and storage services, as a part of wharfage and terminal facilities, measured by the tonnages of property handled.

4. Respondents have provided for a cooperative working arrangement by agreeing to assess themselves in accordance with PMA directives and to pay assessments into the Mechanization and Modernization

Fund. Assessments and payments are collected by charges for facilities supplied to Complainants.

5. Neither a true copy of any agreement regulating transportation rates and controlling and regulating competition, nor any memorandum of the cooperative working arrangement has been filed with the Commission.

6. Respondents, in conjunction with other persons, members of PMA, by measuring the assessment of the amounts they are obligated to pay into the Mechanization and Modernization Fund, using a measurement ton regardless of how manifested for automobiles, but a revenue ton (i.e., whatever type of tonnage used to compute freight charges) as manifested for other cargo, and by adopting special rules for certain other property, indirectly subject the property automobiles and the particular person Complainant VW to undue and unreasonable prejudice and disadvantage.

7. Respondents' regulations and practices relating to and connected with receiving, handling, and delivering property consisting of automobiles are unjust and unreasonable insofar as such property is required to be measured differently, for the purpose of Mechanization and Modernization Fund assessments, from other property, with the result that such property bears a disproportionately high share of the cost of unloading when the assessment costs are included as part of Respondents' charges for facilities and services furnished to Complainant.

Discussion

Introduction:

Respondents' Answer does not deny the status of Complainants as exporters of automobiles from Germany and as importers thereof into the United States, nor that Respondents are engaged in foreign commerce (Answer, par. II). Respondents admit that they are in the business of furnishing terminal services in connection with common carriers by water, but deny that terminal services were furnished Complainant in connection with a common carrier by water or that the Commission has jurisdiction over them as terminal operators (Answer, par. III). Respondents admit they have included as part of their charges for services the amounts of assessments under the Supplemental Agreement on Mechanization and Modernization (Answer, par. IV). Respondents deny anything they have done violates any provisions of the Act (Answer, pars. V, VI, VII, and VIII), but admit the statements regarding the action in Admiralty before a United States District Court and deny the Commission's jurisdiction with respect to the matters alleged (Answer, pars. IX and X). The facts admitted will be accepted without further dis-

cussion, particularly the fact that Respondents have passed on to Complainant in their charges and billings the agreed-upon assessments which produce the money for the Mechanization and Improvement Fund. Wherever services are rendered, it is considered that such services are part of the total facilities furnished by Respondents. (See cases cited below.) Herein the term facilities includes services.

Respondents' three major denials are:

First, they are not persons subject to the Act, at least with respect to the activities involved.

Second, no unfiled or unapproved agreements of the type described in section 15 are involved.

Third, they have not violated any other provisions of law in sections 16 or 17 of the Act.

Reasoning in Support of Findings:

Section 22 of the Act creates a right in "any person" to file a complaint setting forth a violation of the Act "by a common carrier or other person subject to this Act."

The facts in items 4, 5, and 9 through 19 establish that PMA members are both common carriers by water and other persons and that their activities which are the subject of this proceeding have all been taken after following correctly the procedures of their agreements of association and have all been duly authorized and carried out pursuant to such authorizations. There is no question herein as to unauthorized acts or agreements, nor that Respondents are not fully aware of, and responsible for, each action.

1. *Persons subject to the Act.*

There is no denial of Complainant's status as "any person," referred to in section 22, but Respondents deny they are an "other person" under the first section of the Act because their activities are limited to the stevedoring of chartered ships; neither wharfage, warehouse, or terminal facilities, nor facilities in connection with a common carrier by water are the subject of the proceeding; and, therefore, the law does not apply to them.

The denial is not supported. The facilities furnished to the Complainant and furnished to the public are far more comprehensive than stevedoring services. Stevedoring is combined with the furnishing of all kinds of terminal facilities. The services range from the opening of hatches to towing cars to storage areas and require the furnishing of many kinds of equipment such as towing tractors and other gear. The fact that VW's order is titled "Stevedoring Order" does not control what happens after the order is issued. Complainant's order to Respondents explicitly refers to charges covering the supply

of discharging gear, 10 days' free storage, public liability and property insurance, and wharfage on cars. As part of its nonstevedoring facilities, Respondents furnished motor-driven tractors and bridling devices and guard service, lighting, and cleaning for their storage spaces. Respondents may also be considered as furnishing warehouse facilities to the extent they furnished a parking lot pending collection of the cars by dealers even though there was no roof over, and walls surrounding, the cars as would be the case with a traditional warehouse.

A PMA official testified that longshoremen employed in terminal operations were to benefit equally with those involved in stevedoring work (Tr., 106–107, Exh. 5A, p. 7), thus admitting more extensive operations. The Commission's predecessors have held that persons furnishing hand trucks, flat top trucks, lift trucks, switch engines, and the labor required to operate such equipment are "other persons" and the furnishing of stevedoring and terminal services constitutes a "facility". *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761 (1946) and *Carloading at Southern California Ports (Agreement No. 7576)*, 2 U.S.M.C. 784 (1946). Where stevedoring has been combined with furnishing terminal facilities, the Commission has assumed jurisdiction and been sustained. *Greater Baton Rouge Port Comm'n* v. *United States*, 287 F. 2d 86 (5th Cir. 1961) cert. denied, 368 U.S. 985 (1962).

Respondents concededly furnished terminal facilities in connection with other common carriers by water and about 90 percent of their business is done for common carriers. Of this business Respondents furnished Complainants the use of their facilities in connection with the common carriage of some of the 9,363 vehicles in 1961 and 13,672 vehicles in 1962, shipped through Pacific ports, and made its facilities available at all times to importers, regardless of how the vehicles were shipped.

In *California* v. *United States*, 320 U.S. 577 (1944), the Supreme Court sustained jurisdiction over terminal operators in their relations to all carriers and shippers, stating (at 586):

> And whatever may be the limitations implied by the phrase "in connection with a common carrier by water" which modifies the jurisdiction over those furnishing "wharfage, dock, warehouse, and other terminal facilities," there can be no doubt that wharf storage facilities provided at shipside for cargo which has been unloaded from water carriers are subject to regulation by the Commission. * * *

Jurisdiction depends on status. Respondents' status is that of an "other person" subject to the Act within the meaning of the first section, because their status is fixed once the connection with a common carrier is shown and does not shift to divest from time to time, depending on whether or not the warehouse or terminal facilities are

furnished for a common carrier. Respondents' acts in connection with common carriers—not conformity with other sections of the Act besides the first—fix their status or classification.

Findings 1 and 2 are supported.

2. *Unfiled Agreements.*

The record shows, first, there was an agreement that the collection of assessments for the Mechanization and Modernization Fund were to be made from users of members' services; and, second, the subject matter of such agreements is covered by section 15 of the Act.

First, each Respondent as an "other person subject to this act" and the members of PMA, consisting of common carriers by water and other persons furnishing terminal facilities, adopted motions, resolutions, and other actions prescribing their future conduct, and performed acts in accordance therewith. The Moderzination Agreement to which respondents as members of PMA are a party expressly provides for collection of assessments under "arrangements adopted" pursuant to the PMA bylaws (Fact No. 7). Agreements under section 15 include "other arrangements," and this is one of them. Respondents were present at meetings and voted on the necessary resolutions to implement the Modernization Agreement. By these actions, Respondents became parties to an agreement and conformed in whole and in part with such agreements. Respondents understood and acceded to the directives of the Board of Directors and of the PMA officers, guided by approved committee reports, all of which were duly authorized in accordance with constitution and bylaws requirements binding on Respondents. The majority committee report was adopted after "considerable discussion" and so was well understood. Section 15 explicitly makes the term "agreements" include "understandings." Each action involved an understanding as to what was to be done, followed up by action. The Respondents were parties to all the agreements evidenced by the minutes of meetings and written communications from the directors and officers. Part of these understandings was that collection of the assessment would be from members' customers.

The majority believes the agreement as to the manner of assessing its own membership does not fall within section 15 because "standing by itself, it has no impact upon outsiders." It is hard to take this assertion seriously. In the first place there is no "impact" test to determine whether an agreement falls within section 15. In the second place this statement seems to say that assessments totaling $29 million have no impact upon persons who will provide this amount of money. To make the agreement to assess stand by itself apart from how and from whom it is to be collected ignores significant realities. If the

agreement to assess really stood by itself, apart from any agreement to collect, and had no impact on outsiders, there would have been no need for members, including Respondents, to ask for instructions or authorizations when the outsiders refused to pay, nor for the refusal of Respondents, other terminal operators, and stevedores to refuse to pay the assessments. If the agreement to assess truly stood "by itself," each member would be honor bound to pay, no matter what happened. The claimed lack of agreement about collections is contradicted by the fact that everyone behaved as though all understood the assessment would be collected from outsiders such as Complainant and failed to pay after seeking instructions when VW refused to pay. The correspondence shows a general understanding that PMA members were only collection agents, and when shippers ("outsiders") refused to pay, the members need not pay. Their own concept as agents implies agreement and precludes adverse interest. The collection method was communicated to PMA officials and was discussed at meetings, attended by most of the members, in terms which conveyed an understanding that all had arrangements to have the amounts needed collected from users of members' services. The exact method each would follow to collect the money may not have been discussed, but it was understood that all would use the same measure and obtain the product of its use from customers. The evidence showed other terminal operators had done the same thing after discussion on the subject. The fact that some may not have segregated their charges the same as Respondents or stated them separately on a piece of paper does not negative the evidence and eliminate the fact of agreement to include the charges. Anyone who has expenses relating to the assessment would normally reflect his expenses by charges creating someone else's costs without agreement, but it might not be done after deciding on the same measure as here, nor after consultation, nor in accordance with instructions as to what to do if it didn't work, nor in agreement as to how to conduct litigation if this became necessary. Recognition of the understanding was shown in the letter referring to the "need to protect yourself by writing" letters asking for payment of overdue assessments. The letter preserved the appearance of rights, rather than made serious demands. The protection only concerned the need to dissemble the fact that the customers of Respondents were being billed for the assessments in one form or another and payment of assessments by Respondents would not be made unless the customers paid. One of the officers of PMA stated the intent of all members that the obligations to pay were a "contractual commitment," but it was clear actual payment depended on collec-

tions. There was only one practical way the commitment could be implemented, and this was well understood to be through payments by customers of Respondents.

Supplementing the evidence of an agreement to regulate rates and competition are the actions taken to select counsel to enforce collection of assessments. At a meeting on May 14, 1962, it was "agreed that PMA will give such support and will participate in any legal action taken and that the matter will be turned over to PMA Legal Counsel." The agreement was in response to a request by respondents that PMA give support "on the Volkswagen suit." The suit was referred to in "a communication from the Funding Committee covering the problem of collecting funds from Volkswagen due the Mechanization Fund." The funds were not considered to be due from Marine Terminals. This shows clearly the understanding of everyone that VW and other shippers, not the members, were to pay the money "due the Mechanization Fund" and members were collecting agents. Inability to collect from "outsiders" rather than from members was understood to be a shared "problem."

Later there must have been belated recognition of the perils of this action, because it involved PMA counsel in representing both the creditor PMA and the defaulting debtor member such as Respondent Marine Terminals who refused to pay his "contract commitment" assessment. The appearance that the assessment was due from members was all that had to be preserved, not the real claim. Thereafter, it was provided "that PMA counsel assist Marine Terminals Corporation (and other stevedoring companies handling Volkswagens) only if any action against Marine Terminals raises issues which jeopardize the Mechanization Plan or other interests of the industry . . ." PMA reserved the right to institute action against members still in default, by shifting to a limitation on actions.

It is not apparent how the shift takes the curse off the embarrassment involved in representing adverse interests because jeopardizing issues could arise in a debt action. The evidence underlines the point that respondents and PMA understood they were working together in a nonadversary arrangement to collect money due from "outsiders" rather than from members. Normally, even jeopardy to the Mechanization Plan would not justify such an understanding where some one has failed to meet a "contract commitment." It took a special understanding to alter normal conduct. Their initial spontaneous actions point to common understandings and arrangements to work together in effecting collections from shippers in spite of a conflicting debtor-creditor relation between PMA and its members,

and only their afterthoughts point to an understanding that the adversity must be preserved, but only where the Plan was not jeopardized. Both actions were preceded by agreement in any event. After agreement there was modified conduct in recognition of the adverse interests and separate counsel were retained when the admiralty action was initiated when all other action had failed to make the outsider VW rather than the members pay up without question.

Section 15 is explicit that the "term 'agreement' in this section includes understandings, conferences and other arrangements."

Respondents concede in their answer that they "admit that they have included as part of their charges for services the amounts of the assessments . . ." and the evidence supports the finding that they did so as the result of a common understanding, agreement, or working arrangement.

The majority disposes of this evidence by stating the record is devoid of evidence showing an additional agreement. Perhaps a court will decide the evidence is not adequate to prove the complaint contrary to my position, but absence of evidence will not be the reason for rejecting the complaint. The Administrative Procedure Act in section 8(b) directs us to provide a statement of the reasons or basis for our conclusions. The directive is not satisfied by such a succinct disposal of all this evidence. The reasons or bases are thought to be supplied by stevedores' opinions and explicit statements to the contrary. In my opinion, this evidence is overcome by other statements and deeds showing agreement to pass on the assessments, but, whatever the outcome may eventually be, the majority should not pretend the other evidence does not exist and accept such self-serving statements without also substantiating the statement and overcoming the evidence which complainants presented with reasons showing noncontradictory effect. The characterization of the majority position as "more logical and less contrived" does not supply the deficiency of reasons or basis for the "devoid of evidence" ruling.

Second, the subject matter of the agreements is related to the subjects of section 15. Section 15 requires that the subject of agreement be related to "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations or special privileges or advantages; controlling, regulating, preventing, or destroying competition . . . or in any way or in any manner providing for an exclusive, preferential or cooperative working arrangement." The subject matter of the agreements was (a) the measurement of the property using the terminal facilities, in accordance with the agreed guiding regulations, and (b) the method of collection of the charges calculated after mak-

ing the measurement. Both regulated or controlled rates and competition.

The effect of the measurement tonnage measure and assessment was to create a new cost element in addition to preexisting rates for terminal facilities. Respondents had to increase their charges to their customers to recover the new costs and thereby the total transportation cost of moving automobiles was increased. The measurement ton assessment on automobiles became a part of the Respondents' rate structure. The facts showed further that all operators got together and decided they could not absorb but would pass on the assessment applicable to automobiles, and PMA's members themselves agreed to impose the charge. Respondents' lawyers were under no illusion about everyone's understanding or contemplation when they wrote with reference to the Supplemental Agreement between PMA and ILWU effective January 1, 1961:

> It was contemplated that these assessments, as added stevedoring or terminal costs, could be added to the charges of the stevedore or terminal companies.

The agreement on the conduct of litigation shows how important the method of collection was on rates. If it is understood Respondents need not pay assessments unless they or PMA can collect separately, rates will be regulated at a lower level than if assessments are a cost of business which Respondents must pay as a debt whether collected or not. Accordingly, these agreements regulate rates, depending on which course of action is followed. Granted there was plenty of ambiguity in the method of collection to be followed as shown by the shifting positions taken, but the fact of change itself shows a prior understanding that rates were to be regulated after each change. The high level of charges from the automobile measure and the large number of automobiles imported caused large sums of money to be involved. This situation created extreme pressures to prevent the "contract commitment" advice from being taken too seriously and to devise methods of collection which would not disrupt members' rates which would occur if the assessment were truly a debt of the members. The alteration of normal conduct and temporary confusion as to the niceties of selecting counsel disclosed an understanding of how Respondents' rates would be affected, depending on whether Respondents were debtors or PMA agents for collecting the assessment. In the former case the credit of PMA members and PMA power over them protected the Fund; in the latter, only the credit of a much larger number of shippers.

The increase in charges constitutes a regulation of transportation rates, and the combined activity of Respondents and other terminal

contractors and stevedores in agreeing to not absorb the assessment, as well as their activities as members of PMA, constitutes a control and regulation of competition.

Confirmation of the control of competition is supplied by generalized business considerations. If a group of competitors agree to share a cost element such as the rental of a pier and terminal area and then allocate the rent after a collectively made decision to named customers or specified types of property, instead of allowing actual use to govern the allocation, they thereby distort the normal forces of the market by their agreement to allocate, which is the equivalent of control.

The fact that the increased charges may have applied only to noncommon carriage is not material, because the common carrier test applies to fixing the status of persons defined in the first section of the Act and does not exclude activities and property from the law's protection. The fact that the combined activities resulted in an understanding to collect by passing on assessments in the form of higher transportation charges and to make them apply to property transported in noncommon carrier service does not absolve the actor once he is classified as an "other person." Validating absolution would make identical activity in relation to identical property have different consequences under the law, depending on the status of the ship carrying the property before it reaches the Respondent. Under the first section, the status of Respondent is fixed by his acts before the ship reaches the terminal facilities. Legal conclusions involving sections 15 or 16 must be based on status ascertained before the actions complained of, not on common carrier versus noncommon carrier refinements ascertained afterwards.

The majority seeks to avoid the consequences of reasoning by referring to the "literal language of section 15" relative to a "cooperative working arrangement" and stating the terms of section 15 were qualified by Congress by means of legislative history "to apply only to those arrangements" which affect "competition." The terms are also thought to be qualified by associating them with agreements to pool secretarial workers or to share office space and agreements which affect only labor-management relations. The latter was interpreted by a court not to be covered by a provision of the Interstate Commerce Act relating to combinations and consolidations of land carriers.

Section 15 is sufficiently explicit and need not be compared with unrelated laws or interpreted to limit the subject to cooperative working arrangements and "competition" in disregard of other provisions in section 15. My decision is also based on the other terms and on the understandings and arrangements, cooperative or otherwise, relative

thereto. Far from finding the record "devoid of evidence showing the existence of such an additional agreement" to pass on assessment expenses, I find the record amply supplied with evidence on such an agreement and its relation to the subjects referred to in the first paragraph of section 15.

Finding No. 3 is supported.

The acts of Respondents and others following their agreements to assess themselves in response to the adoption of the PMA resolutions and motions and the issue of PMA directives consisting of using the measurement tonnage measure on automobiles and collecting the amounts found to be due by passing on the necessary expenses equally constitute a cooperative working arrangement. Respondents and other PMA members all worked together in doing the same thing pursuant to their prior arrangements. Contributions are referred to in the By-laws as being required under "arrangements" of PMA. Everyone "contemplated" doing the same thing. The same reasoning applies here to support the finding as was applied to the preceding part of section 15.

Additionally, when VW refused to pay on billings including the assessment, the Respondents and other PMA members affected thereby refused to pay assessments. Wallenius Line, a common carrier but not shown as a member, also refused to pay (Tr., 324). This action constitutes evidence of an understanding and a cooperative working arrangement (a) to charge persons such as Complainants for the amount of assessments and (b) to relate the payment of the assessment directly to the Respondents' ability to collect the charge pursuant to the arrangement. If the amount could not be collected, the assessment would not be paid.

Under almost identical "cooperative working arrangement" language of Section 412 of the Federal Aviation Act, 1958 (49 U.S.C. § 1382), the Civil Aeronautics Board held that the establishment of an employer collective bargaining association of carriers was a cooperative working arrangement which had to be filed. *Airlines Negotiating Conference Agreements*, 8 CAB 354 (1947).

Finding No. 4 is supported.

The obligation to file has been established above. The records of this office confirm that none of the agreements found herein to exist have been filed. A finding that the agreements and memorandums of arrangements have not been filed is thus supported without the need for further proof.

Finding No. 5 is supported.

3. *Other provisions of law have been violated.*

Section 16 of the Act makes it unlawful for any other person subject to the Act either alone or in conjunction with any other person, either directly or indirectly, to give any preference or advantage to any description of traffic in any respect whatsoever or to subject any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. A violation of section 16 is complained of.

Two facts stand out in relation to preference, prejudice, or disadvantage:

First, the charges by Respondents to meet PMA assessments where automobiles are handled were measured by the measurement ton, regardless of how manifested, and no other property was measured by such a rule. Other property was measured according to the way it had been manifested in 1959. The use of the measurement ton measure required a change from both earlier methods and from current practices in regard to automobiles, in comparison with measure of all other property for assessments as freighted or manifested. The measure depended on how freight charges were determined, except for automobiles. The Vice President, before February 21, 1961, when the "measurement" measure for automobile assessments officially went into effect, had claimed such a measure rather than a tonnage measure had applied all along, at least since January 1958, but his claims never were adopted officially by PMA. All we have before February 21, 1961, is his personal assertion of what PMA should be doing rather than what PMA actually did. Somewhat inconsistently with the claim, letters regarding declaration forms refer only to "tonnages" in January and March 1961.

Second, the effect of the change in measurement and the different treatment was to make the traffic described as automobiles bear a substantially higher assessment charge: (a) about 10 times higher than if measured on a weight basis as shown in many manifests and as other cargo is measured, (b) from 22 percent to 35 percent higher in terms of unloading costs than other traffic described as packaged general cargo which bore a 2.2 percent increase as a result of the assessments, and (c) about 10 to 15 times higher than other general cargo.

Where exceptions were made for other descriptions of traffic, the charges were always lower: (a) lumber was measured on a unit basis for assessment charges, but automobiles were not, even though manifested in some cases on a unit basis and there was a normal method of measuring other handling costs on a unit basis, and (b) Army property and coastwise cargoes received concessions.

All the concessions applied to property in domestic transportation, but the increased charges applied to automobiles imported from foreign countries.

Unboxed automobiles were shown generally to require less man-hours handling per unit than practically any other commodity, yet automobiles still paid more.

There is no explanation in the record to show why the different measurement method was applied to Complainant's property. The method was shown to deviate from measurement practices on the coast for other purposes.

The result of the measurement ton measure is that, in the words of at least two stevedoring companies, it is "not based on practical considerations and has no comparison to other commodity assessments" (Exhs. 24 and 25). Still another stevedore referred to the measure as "discriminatory and is contradictory to overall basis of assessing weights or measurement as freighted", i.e., as manifested (Exh. 23). Other evidence showed that ever since Volkswagens were first shipped to the Pacific coast in 1954, "they have been freighted on a unit basis, or on lumpsum FIO or time charter" and not only freight but terminal facilities have always been computed and paid at so much per unit (Exh. 26). Another stevedore referred to statements that "establish the inequity of the effect of the present assessment to these vehicles on a measurement ton basis . . . disregarding the basis on which these vehicles are freighted, as well as the basis on which all stevedores on the Pacific coast handle their contracts" (Exh. 16). In other words, established trade measurement practices have been disregarded in this one instance for no apparent reason and followed in the case of all other property. This action creates an unreasonable prejudice.

The result of the shift to measurement tons for automobiles made the increase applicable to property where "the man-hours necessarily employed in their handling always have been less than practically any other commodity." This was said to accentuate the percentage disparity the cost increase. Others refer to the "undue burden on this one commodity" (e.g., Exh. 18). Such effect creates an unreasonable disadvantage.

There was not in 1959 nor at this time any uniform practice in manifesting automobiles any more than there was in 1959 with respect to other property, except that in the coastal trade automobiles are manifested and freighted on a weight basis and common carrier shipments of Volkswagens were and are most frequently manifested and freighted on a unit basis, although weights and measures may be shown. The treatment of automobiles cannot be justified on the basis of any uniform traditional trade practice of using a measurement ton measure. This action creates a preference for other property and a prejudice to automobiles.

Because of the difference in the method used to measure Complainant's property, both in relation to other services for automobiles and to other descriptions of traffic, and the resulting high increase in the economic effect caused by the departure from the usual measures, it is concluded that there has been preference and advantage to traffic other than Complainant's property and disadvantage and prejudice to Complainant's property. The actions have been indirect because the method used was to adopt the measure enforced by PMA in cooperative arrangement with other members.

Precedents of this agency have added to section 16 the requirement of a showing that competitors have been meted out different treatment before undue prejudice in violation of section 16 may be proven, *Afghan-American Trading Co.* v. *Isbrandtsen Co.*, 3 FMB 622 (1951) and *Huber Mfg. Co.* v. *N. V. Stoomvaart Maatschappij "Nederland" et al.*, 4 FMB 343 (1953), but others have held section 16 was violated without any proof of disadvantage among competitors, *Absorption or Equalization on Explosives*, 6 FMB 138 (1960), *Swift & Co. et al.* v. *Gulf and South Atl. Havana Conf.*, 6 FMB 215 (1961), affirmed: *Swift & Company* v. *Federal Maritime Commission*, 306 F. 2d 277 (U.S.C.A., D.C. 1962). In *New York Foreign Frgt. F. & B.* v. *Federal Maritime Com'n.*, 337 F. 2d 289 (U.S.C.A. 2d 1964) at p. 299 the Court held that the charge ". . . of widely varying amounts, for no apparent reason, suffices to establish discrimination in violation of section 16 (First)." The Court was referring to charging shippers disguised markups and was validating a rule which prevented a practice that was alleged to violate section 16 unless prevented by rule. The Court distinguished the cases involving "transportation or wharfage charges . . . dependent on the particular commodity involved . . ." where the fees for shipping bananas would bear no relation to the fees levied for heavy industrial equipment, and where proof of a violation would require a showing of competitive relationship. The Court continued by stating the fact that the widely varying amounts covered substantially identical services and ". . . seems to us to be prima facie discriminatory in a regulated industry" (Id.). This statement means the action itself violates the law without proof of a competitive relation to anyone else. The present facts do not concern a comparison of services and related versus unrelated charges for the services, but concern a cost of doing business in the form of an assessment which is like a tax. Nevertheless, a requirement of a competitive relationship is excludable as a prerequisite to proof of a violation because the measure of Respondents' charges is equally unrelated by apparent reason to what the charge is for, just as widely varying charges

are unrelated to services that are substantially the same. The statements of the Court about the sufficiency of variations unsupported by reasons and lack of need for competition as proof to establish violation of section 16 (First) are thus pertinent and applicable. A finding of undue prejudice or disadvantage under section 16 should not be made to depend on competition, but may exist in relation to other kinds of property where it is shown they should be treated alike, absent contrary reasons. The existence of competitive shippers may affect the amount of reparation due, but not liability under section 16.

Finding No. 6 is supported.

Section 17 of the Act requires every other person to observe just and reasonable regulations and practices relating to the receiving, handling, storing and delivering of property. Section 17 singles out certain acts of discrimination against property and authorizes the Commission to prescribe just and reasonable practices. Section 17 concerns practices in connection with property, no matter how it is transported, whether by common carrier or otherwise.

Respondents have established, observed, and enforced, relative to the receiving, handling, storing, or delivering of property, in the discharge of obligations as a PMA member, the following regulations and practices:

a. Adoption of a method of measuring such property to obtain money to meet payments to the Fund;

b. Acceptance of the obligation to make, and making monthly payments to PMA in accordance with the agreed measure; and,

c. Inclusion in their charges for terminal facilities of the amount due by application of the agreed measure.

It has been held that practices which result in the assessment of charges against persons not directly benefited by services rendered are an unjust and unreasonable practice within the meaning of section 17. *Terminal Rate Structure—Pacific Northwest Ports*, 5 FMB 53 at 55 (1956). In that proceeding only book entries were involved. A cost allocation accomplished by actual charges against persons not directly benefited, as where automobiles have lower handling charges than other cargo and receive less benefit than other general cargo on the average from the arrangement with ILWU, is equally if not more a "practice" than book entries. Our predecessor stated in the *Terminal Rate Structure* case (supra) at p. 56, "the terminals may not recover, through a service charge, deficiencies in revenue attributable to a totally different operation". Respondents have followed PMA directives by imposing charges resulting from the automobile

measure to make up for deficiencies in assessments and contributions to the Fund resulting from lower assessments on coastwide trade, lumber, certain Army property, and to some extent the lower assessment on all other property. Complainant's property is made responsible for bearing 10 times higher charges than other property and 20 times higher than that in the coastwise trade. The difference in treatment between Complainant and all others resulting in this expensive result is also an unjust regulation.

The Respondents' practice may not be looked at only in relation to one item of property, i.e., automobiles, but must be viewed as part of the complex of practices of which it is a part and comparisons and evaluations made as to the reasonableness of the entire system of cost measurement and allocation. The majority avoids this task of passing on reasonableness of the measure on the ground that (a) "there is no statutory requirement" of equality and (b) "it was necessary in the business judgment of respondents." Neither is there any statutory requirement of inequality and *Evans Cooperage Co., Inc.* v. *Board of Commissioners*, 6 FMC 415 (1961), does not hold that charges may be differentiated without reason so as to burden one person or class of property 10 times more than others where "the record contains no basis upon which a reasonable allocation of costs could be made". In the *Evans* case, on the contrary, the charge to complainant was exactly the same as to everyone else, and it was only found the benefits, while somewhat different, could not be measured precisely. The facts were that the ship charged dockage did not tie up to the dock, but to the seaward side of a ship already tied up. The "business judgment" argument only means the measure is reasonable because Respondents say so. This is an excuse, not a reason.

Finally, the fact that the decision was a business judgment unrestrained by normal forces of supply and demand introduces potential unjustness in the regulation by its unrestrained character. Here business judgment is not being exercised subject to competitive market restraints of other suppliers, but is being exercised by substantially all suppliers to regulate the market itself. Judgment is restrained by the vote of PMA members who are virtually the entire market for the handling of property passing through Pacific coast ports. The articles of association obligate obedience to the voted decision. There is no other practical restraint, particularly in view of evidence that ILWU was putting pressure on non-PMA members to contribute the same as members. Normally the function of regulating the market itself when needed in the public interest is reserved to government, rather than to a private association or to the association aided by the dominant labor union association.

If the assessment charges varied in response to competitive forces within the market, a business judgment decision might not be unjust because of the protective restraint afforded by the open market. Where the market protection is missing, however, there is no assurance of justness, and it is the function of government to provide the assurance. The facts of this case provide a perfect example of what happens when there is a single decision rather than an interplay of conflicting decision by many entrepreneurs. The tenfold charge would probably be impossible under competitive conditions. PMA was able to single out various subjects of commerce and, aided by labor unions, to make property subject to assessment to meet labor costs in the same way that the government measures property for tax purposes to meet costs of government. There was no practical restraint on its choice. The unrestrained choice of a measure unrelated to labor costs needs justification to begin with, but is made unjust by the unequal application made possible by Respondents' participation in the PMA control over the market.

The majority refers to the reasonableness of Respondents' activities attested by (1) efforts to change the Mechanization Fund assessments, (2) offers to pass on only part of the assessments, and (3) measurement levies on dues for several years without protest. Presumably the statement refers to the second paragraph of section 17, requiring other persons subject to the Act to establish "reasonable regulations and practices," and to activities equated with regulations and practices. There is no question in this dissent as to Respondents' good intentions in seeking a change in the assessment and offering to pass on only part of the assessment. What have been questioned and found wanting are the actual results of Respondents' practices in line with the agreed regulations. The facts show the assessments have not changed, nor have claims against VW for full payment actually been changed. At most the offer to pass on only part of the assessment was a bargaining concession, not a change of conduct. With regard to several years of levy without protest of the PMA dues assessment as distinguished from the Mechanization Fund assessment on a measurement basis, past failure to challenge the practice relative to dues may not be translated into present and future reasonableness of the disparate practices relative to the Mechanization Fund. The past in this case must relate to before November 1961, because around that time VW representatives made known their objections to what was being done to them in regard to the Fund Assessments (Tr., 151–155). If Respondents make the intended changes, another issue might be presented.

Finding No. 7 is supported.

4. *Observations.* The many complex considerations in this proceeding ultimately funnel themselves down to the single error of PMA in choosing property rather than labor (in terms of man-hours with adjustments to meet disclosed inequities) as a measure. PMA chose the wrong measure for its members' obligation to compensate the working man for displacement from mechanization improvements creating fewer opportunities for work. Praiseworthy as these endeavors are, PMA lost sight of the basic consideration that sections 16 and 17 of the Act are founded on a policy of protecting property in commerce and protecting its competing owners and the public against unfair competitive practices. Such policy includes protection of the public against unfair market control. Had PMA chosen to follow its minority committee report and avoided the use of the protected property to measure its charges on shippers and on commerce and used instead a labor measure, and property to a less extent, equitably applied, my conclusions about these acts would very likely be the reverse of what they are. With such a measure, any burden would be directly related to and attributable to labor costs and become a just cost of business. Different assessments would be based on genuinely different situations. No description of traffic and no particular person would be singled out as the object of disadvantage. The entrepreneurs' expenses would be related to the working man's production. The measure would be related to compensation for displaced production, would not be subject to unfair market control, and would be just, fair, reasonable, and without prejudice or disadvantage.

Conclusion

For the foregoing reasons the Examiner should be reversed in deciding there has been no violation of sections 15 or 16 and no failure to comply with section 17 of the Act, and the exceptions should be sustained.

Commissioner Hearn, *dissenting:*

Like the majority, I conclude that the record does not establish violations of sections 16 and 17 of the Act. Complainant's automobiles have not been disadvantaged or prejudiced to the preference or advantage of any other automobile shipper, and the assessment of complainant's automobiles on a measurement rather than a unit or weight basis, has not been shown to constitute an unreasonable practice relating to the receiving, handling, storing, or delivering of property. Further, although it is asserted that automobiles shall derive only a general or common benefit from the fruition of the PMA–ILWU com-

pacts, there need "be no precise equivalence between the services rendered and the charges." *Evans Cooperage Co. Inc.* v. *Board of Commissioners*, 6 FMB 415, 419 (1961).

I disagree with the majority solely on the reading of the record in the light of section 15. As a general rule, our long established national policy frowns upon concerted action by members of all segments of our business community. Ocean shipping, forwarding, and terminal operating subject to our jurisdiction have traditionally enjoyed an exemption from this rule where the concerted action is not contrary to our public interest or detrimental to our commerce,[3] and is pre-approved by the Commission. Absent the foregoing, such conduct is contrary to section 15 and is unlawful under the Shipping Act.

As exceptions to our national antitrust policy, proposed agreements must be scrutinized carefully:

> The condition upon which such authority [the authority to legalize concerted action] is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than necessary to serve the purposes of the regulatory statute. *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, 57 (D.C. Cir. 1954).

It is in this context that the following language of section 15 is so important:[4]

> Any agreement . . . not approved . . . by the Commission shall be unlawful, and agreements . . . shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, . . . any such agreement . . . .

Thus, the sole issue to which I address myself is whether respondents, persons subject to the Act, entered into and carried out an agreement, understanding, or arrangement within the purview of section 15 with other members of PMA, many of whom are admittedly common carriers by water or other persons subject to the Act.[5] It is my conviction that the members of PMA entered into and carried out a "co-operative working arrangement" which, as I have noted,

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[3] "[T]he Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under the anti-trust laws." *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, 57 (D.C. Cir. 1954).

[4] Unlike the Examiner, I find nothing in section 15 "inane." Nor did the Commission in *Unapproved Sect. 15 Agreements—S. African Trade*, 7 FMC 159 (1962) at page 190, find the phrase "inane" or superfluous:

"Accordingly, section 15 requires—as it has for the 45 years since enacted—the filing of a copy, or 'if oral' a true and complete memorandum, of 'every agreement' covering any of the wide range of anticompetitive activities therein mentioned, 'or in any manner providing for an exclusive, preferential, or cooperative working agreement.' "

[5] The agreement or agreements between PMA and ILWU are clearly labor-management agreements and consequently are not within the reach of the Act. While these agreements may have triggered the arrangement by the membership of PMA, the PMA–ILWU compacts are irrelevant to the central issue here.

required this Commission's approval as a prerequisite to its effectuation under the explicit language of the statute.

I agree with the majority's statement that the legislative history of the Act makes it clear that section 15 was intended to apply only to those cooperative working arrangements "which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping . . . public . . . ." but I read this record as definitely affecting (1) the shippers of automobiles ratewise, and (2) the competition among PMA members themselves with respect to the discharge rates that they may offer automobile shippers. While "agreements . . . to pool secretarial workers or share office space" may be cooperative working arrangements not within the scope of section 15 as the majority says, certainly a working agreement to raise $29 million over a 5½-year period, through detailed and uniform assessments relating to cargo handled, is a different situation and is hardly akin to a secretary pool in my opinion. Furthermore, it is different not only in size but, more importantly, in character.

The record illustrates that PMA knew the assessment had to be passed on to the cargo, at least to automobiles.[6] A telegram from Brady-Hamilton, one of the PMA members who handled Volkswagens states:

> The position of the Committee, that the assessment on unboxed auto is the responsibility of the stevedore to pay, appeared to attempt to release [PMA] from any responsibility, to the extent that the stevedore could be entirely free to absorb all of the assessments if he desired. The cost of this assessment is so much greater as compared to the stevedoring cost it could never be considered . . . . (Ex. 24).

Marine Terminals, as well, advised PMA on November 29, 1961, (Ex. 25): "There is no way that the contractor could absorb such an increase . . . " and an interoffice PMA memo of December 13, 1961, (Ex. 27) states:

> The Committee at present feels that the tonnage formula does not work an inordinate hardship *on the shipper* . . . . [Italics added].

In a letter dated March 1, 1961, Marine Terminals advised PMA of its difficulties in collecting contributions to the Mech Fund assessed against Volkswagens:

> We have informed them that we at Marine Terminals are merely following out the instructions set forth by the Board of Directors of the Pacific Maritime Association and *therefore are considered only a collection agency in this matter.*

[6] PMA also knew that assessments against Army cargo were passed on. PMA's records show that lest Volkswagen get relief, the Army would be next in line; ". . . they are still querulous about the propriety of such contributions." (Ex. 22.)

> We find ourselves in a very awkward position and wish to be advised of the *committee's decisions on how automobiles will be assessed* and what stand we can take in demanding payment of this assessment. (Ex. 9.) [Italics added.]

The "collection agency" designation becomes more than a unilateral misconception on Marine Terminals' part when PMA's minutes of December 13, 1961 (Ex. 2H) are examined:

> Chairman read a communication from the Funding Committee covering the problem of collecting funds *from Volkswagen* due to the Mechanization Fund . . . Marine Terminals requested that a letter covering this discussion be forwarded to them and that they be *authorized* to bring suit against Volkswagen for the monies due. Marine Terminals also requested that PMA give both legal and moral support on the Volkswagen suit. It was agreed that PMA will give such support and will participate in any legal action taken and that the matter will be turned over to PMA Legal Counsel. [Italics added.]

Again, PMA's minutes of March 14, 1963 (Ex. 2C) show:

> On the matter of mechanization assessments Counsel recommended an escrow account for payments by the stevedores *on behalf of Volkswagenwerk.* The Board of Directors this morning took no action to modify its previous position that the contributions be paid currently. [Italics added.]

In my view, these exhibits[7] reveal a cooperative working arrangement by members of PMA relating to the fixing or regulating of transportation rates, at least so far as automobiles and possibly Army cargo are concerned. It is of no moment that a formal, legally binding contract to assess certain tolls upon cargo has not been produced. "Section 15 is not concerned with formality but with the actual effect of the arrangement." *Unapproved Section 15 Agreements—S. African Trade, supra* at 188. The failure of respondents and PMA to get prior approval for the plan from the Commission renders the effectuation of it unlawful. As stated in *Status of Carloaders and Unloaders*, 2 USMC, 761 (1946) at page 766:

> When carriers or "other persons" undertake, by agreement, to *fix* or *regulate* rates, . . . there must be performed a series of acts under the statute. (1) They must file the agreement with the Commission.

Due to the posture of the record and the narrow question under section 15 presented here, I do not reach the issue of approvability, under section 15, of PMA's plan in furtherance of the laudable social ends envisioned by its arrangements with ILWU. However, approvable or not, the parties are not relieved of their obligation to secure the approval of the Commission before they attempt to carry it out.

In conclusion, I believe the majority seriously erred in not finding

[7] The exhibits are contemporaneous records and as such are far more persuasive than the after-the-fact, self-serving statements of PMA witnesses to the contrary.

that the respondents, Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles) violated section 15 by being parties to, and carrying out, a cooperative working arrangement with other members of intervener PMA without the prior approval of this agency.

No. 1089

VOLKSWAGENWERK AKTIENGESELLSCHAFT

v.

MARINE TERMINALS CORPORATION, ET AL.

ORDER

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is incorporated herein by reference, therefore,

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

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1170

FIRESTONE INTERNATIONAL COMPANY, A DIVISION OF THE FIRESTONE TIRE & RUBBER COMPANY

v.

FAR EAST CONFERENCE ET AL.

Decided October 14, 1965

Respondents conduct in asserting breach of its dual rate contract with Complainant and in demanding damages therefor, found not to constitute coercion and harassment in violation of section 14 Third and section 14b of the Shipping Act, 1916.

A. Vernon Carnahan and *Peter J. Gartland* for complainant.

Herman Goldman, *Seymor H. Kligler*, and *Sol D. Bromberg* for respondents.

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

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 Firestone International Company (International) against the Far East Conference (Conference) and its member lines. Complainant, as a party to a dual rate freight agreement with the Conference, seeks of the Commission an order requiring Respondents to cease and desist from activities claimed to be in violation of section 14 Third (46 U.S.C. 812) and section 14b (46 U.S.C. 842) of the Shipping Act, 1916 (the Act), with respect to certain shipments in 1962 from International to various firms in the Philippines on nonconference vessels.

In his Initial Decision, Hearing Examiner Paul D. Page, Jr., concluded that no cease and desist order should be issued and recom-

mended the dismissal of the complaint. The parties filed exceptions and replies to the Initial Decision, and we heard oral argument.

FACTS

The following statement is based on the Examiner's findings, though in somewhat less detail.

Complainant, Firestone International Company, is an unincorporated division of the Firestone Tire & Rubber Company (Firestone of Ohio), an Ohio corporation. International engages in exporting Firestone of Ohio products, principally finished goods such as tires, tubes, and related products, synthetic rubber, and fabric textiles.

Respondents are the Far East Conference, an association of carriers encompassing trade from Atlantic and Gulf ports of the United States to Japan, Okinawa, Korea, Taiwan, Siberia, Manchuria, China, Hong Kong, Republic of the Philippines, Vietnam, Cambodia, and Laos; and its 19 member lines.

In 1940, Firestone International Tire & Rubber Export Company (the predecessor of the Complainant International) entered into a dual rate agreement with the Conference. In 1947, Complainant was substituted for Firestone International Tire & Rubber Export Company as the signatory to the contract. The provisions of this contract, as amended in 1948, which are relevant to this proceeding are:

1. The Shipper, in consideration of the rates and other conditions stated herein agrees to forward by vessels of the Carriers all shipments made, directly or indirectly, by him, his agent, subsidiary, associated and/or parent companies and shipped from United States ports, excepting, however, Pacific Coast ports, to ports in Japan, Korea, Formosa, Siberia, Manchuria, China, Indo-China, and Philippine Islands.

* * * * * * *

4. If, at any time, the Shipper shall make any shipment or shipments in violation of any provision of this Agreement, the Shipper shall pay liquidated damages to the Conference in lieu of actual damages which would be difficult or impracticable to determine. Such liquidated damages shall be paid in the amount of freight which the Shipper would have paid had such shipment or shipments moved via a Conference Carrier computed at the contract rate or rates currently in effect. Failure of the Shipper to pay liquidated damages within thirty days after the receipt of notice from the Conference that such liquidated damages are due and payable shall be cause for the Conference to terminate the Shipper's right to the contract rates until the Shipper pays to the Conference the amount due. In the event the Shipper violates this contract more than once in any period of twelve months, the Conference may cancel this contract by serving written notice of such cancellation upon the Shipper and notifying the Maritime Commission of such action. If the contract is cancelled for violation thereof as provided herein, the Conference may refuse to enter into a new contract with the Shipper until any unpaid liquidated damages due to the Conference have been paid in full.

In order that the Conference may determine the existence or non-existence of a violation hereof, the shipper shall, upon request, furnish to the Conference full and complete information with respect to any shipment or shipments made by such Shipper in the trade covered by this Agreement.

* * * * * * *

8. Any disputes between the parties hereto arising out of this Agreement or involving the interpretation or effect thereof, shall be referred to a board of three arbitrators, one of whom shall be appointed by the Shipper, the second of whom shall be appointed by the two arbitrators appointed as aforesaid, including, but without limitation, the amount of damages arising from the same shall be made a rule of the Court.

Beginning about October 4, 1962, and continuing until about March 5, 1963, when the complaint was filed, Far East and International engaged in a continuing controversy with respect to nine shipments by International from United States Atlantic and Gulf ports to Philippine ports on nonconference vessels. The terms of sale on all nine shipments were FAS and all but one of these shipments were consigned to Firestone Tire & Rubber Company of the Philippines (Firestone of the Philippines).[1] International prepaid the ocean freight, prepared the documentation and appeared as shipper on the attendant bills of lading.

The first shipment was loaded aboard the nonconference steamer *Eurylochus* at Baltimore and was discharged at Manila about June 29, 1962. It was the only shipment of the nine which International sent to someone other than Firestone of the Philippines. On October 4, 1962, Mr. J. A. Dennean, the Conference Chairman, sent a letter to Complainant requesting information concerning that shipment, as provided in article 4 of the dual rate contract. Complainant replied that the shipment had been purchased on a FAS Baltimore basis and had been made on a nonconference vessel at the request of its customer, Sherwin-Williams Company.

On March 7, 1963, a further letter was sent by Chairman Dennean to Complainant stating that the Conference had received information that various other shipments had been made by International on nonconference vessels, *Elias Lemos*, *Eurymedon*, *Eurymachus*, *Eurygenes*, and *Negba*, from the ports of New York, Charleston, Houston, and New Orleans to Manila during November and December 1962. The Conference requested further information in order to determine whether there was, in fact, a violation of the dual rate contract.

On March 11, 1963, Mr. Marrubio, International's traffic manager, stated in reply that International made the shipments via nonconference vessels in accordance with instructions received from its cus-

[1] The Examiner found that Firestone of the Philippines is Complainant's 75 percent owned subsidiary.

tomers abroad. He attached a copy of a letter which had been sent by Firestone of the Philippines to Firestone of Ohio requesting that arrangements for future shipments to Manila be made via nonconference lines, since it appeared that considerable savings could be made by shipping on nonconference vessels. Mr. Marrubio added that "as these shipments were purchased on a FAS seaport basis (International) had no alternative but to comply with (International's) customer's request."

In correspondence through May 1963, the Conference asserted "indicated" contract violations by International and demanded further details regarding the shipments. International denied the violations and furnished no further information.

On June 11, 1963, Chairman Dennean wrote to International pointing out that Standard and Poor listed International as owning 75 percent of the voting power of Firestone of the Philippines. He stated that Firestone of the Philippines was a subsidiary company of International within the meaning of the terms of the dual rate contract, and that shipments made by Firestone of the Philippines were required to be made on vessels of members of the Conference.

The foregoing letter referred to shipments by International to Firestone of the Philippines on the nonconference vessels *Tagya* and *Navarino* for which the Conference requested the payment of $6,617.44 in liquidated damages. The Conference stated that Complainant's failure to pay liquidated damages within 30 days would be cause for termination of Complainant's right to contract rates in accordance with the dual rate contract. As with similar shipments, International denied the asserted violations on the grounds that the shipments were purchased on a FAS seaport basis, and it had no alternative but to comply with its customer's request.

Mr. Dennean's letter of June 11, 1963, was answered not by International, but by Firestone of Ohio, speaking through Mr. R. W. Wettstyne, its Director of Traffic. He requested that any proceedings in regard to the dispute be held in abeyance pending the outcome of *The Dual Rate Cases* before the Federal Maritime Commission.

On October 30, 1963, counsel for the Conference requested of Mr. Wettstyne payment of $36,702.28 in liquidated damages for all shipments in question. Firestone of Ohio was given the option of making payment of the liquidated damages or designating an arbitrator, in accordance with paragraph 8 of the contract. The letter reiterated that under the terms of the contract Firestone of Ohio's right to contract rates could be terminated.

On December 11, 1963, Conference Counsel again wrote Mr. Wettstyne, requesting payment of the liquidated damages owing to the Conference and stated that unless these were paid arbitration pro-

ceedings would be instituted. Apparently no reply was made and on January 30, 1964, the Conference through its attorney wrote International demanding arbitration pursuant to the dual rate contract, and referring specifically to the shipments made in 1962, and on the following vessels: *Elias Lemos*, *Eurymedon*, *Eurymachus*, *Negba*, *Eurytan*, *Eurygenes*, and *Eurylochus*. In this letter the Conference designated one arbitrator and requested International to do the same. International was also given the option of substituting the American Arbitration Association.

Shortly thereafter, on March 6, 1964, International filed this complaint which alleged in essence that Respondent was violating section 14b and section 14 Third of the Shipping Act, 1916, by asserting breaches of their dual rate contract, by demanding liquidated damages for the asserted breaches, by threatening to institute proceedings to collect liquidated damages, and by threatening termination of its rights to contract rates. In its prayer for relief, International asked that Respondent be enjoined from continuing any of these actions.

Discussion and Conclusions

The Examiner concluded that the dispute between International and the Conference was one arising out of their dual rate contract and that under the terms of that contract the parties had agreed to submit their disputes to arbitration, which International has refused to do. Moreover, he found that the evidence did not justify an order to the Conference to cease and desist from proceeding to arbitration nor did the evidence disclose any violations of the Act upon which the Commission could premise a cease and desist order. International and Hearing Counsel except.

In its complaint International alleged that the activities of the Conference (1) constituted unlawful activity under the Commission's regulations of March 15, 1962,[2] and (2) violated the provisions of section 14b and section 14 Third of the Act. Thus, upon the adverse decision of the Examiner, International excepts to the ultimate decision of the Examiner, and in particular to the Examiner's failure to find that the Conference's application and enforcement of the dual rate contract was unlawful under the Shipping Act. In addition, International excepts to the Examiner's finding that International is a stockholder in Firestone of the Philippines. Finally, International excepts to the failure of the Examiner to receive certain evidence and to make certain findings propounded on brief.

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[2] This ruling was actually promulgated and published in the Federal Register on Mar. 21, 1962.

Although Hearing Counsel concur in the Examiner's ultimate conclusion insofar as he concludes that the complaint should be dismissed for failure of proof, they object to certain grounds upon which that decision was based. They contend that the Examiner has unduly concerned himself with the underlying dispute between the parties and has misconstrued the main issue for determination here to be whether the facts in this case justified an order to the Conference that they cease and desist from referring their dispute with International to arbitrators. Hearing Counsel assert that "although issuance of the order prayed for would necessarily preclude arbitration Complainant more importantly seeks relief from conduct which it alleges violates the Act." Therefore, Hearing Counsel advocate the dismissal of the complaint as recommended by the Examiner, but urge the Commission to base its decision soley upon a finding that the Complainant has failed to support its allegations that the Conference's activities constituted violations of section 14b and section 14 Third of the Act.

First, we must consider the dispute in light of the statutory background. On October 3, 1961, Congress enacted Public Law 87–346, which, among other things, added new section 14b to the Shipping Act, 1916, authorizing "* * * ocean common carriers and conferences thereof serving the foreign commerce of the United States to enter into effective and fair dual rate contracts with shippers and consignees, * * *" consistent with the standards therein established and provided such contracts expressly included certain specified clauses. Section 14b(3) provided as follows:

> * * * (the contract) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: Provided, however, that it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract * * *.

At the time Public Law 87–346 was enacted, the contract read in part:

> The shipper, in consideration of the rates and other conditions stated herein agrees to forward by vessels of the Carriers all shipments made, directly or indirectly, by him, his agents, subsidiary, associated and/or parent companies and shipped from United States ports, excepting, however, Pacific Coast ports, to ports in * * * (the) Philippine Islands.

Section 14b(5):

> Limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided, however,* That the contract may specify that in the case of a breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling;

The fourth clause of the Far East Conference dual rate contract at the time of enactment of Public Law 87-346 provided that if the shipper makes any shipment in violation of any provision of this contract, he "shall pay liquidated damages to the Conference in lieu of actual damages." This clause goes on to state that "such liquidated damages shall be paid in the amount of freight which the shipper would have paid had such shipment * * * moved via a Conference Carrier computed at the contract rate or rates currently in effect."

Section 3 of Public Law 87-346 provided for interim validity of existing dual rate contracts:

> * * * all existing agreements which are lawful under the Shipping Act, 1916, immediately prior to enactment of this Act, shall remain lawful unless disapproved, canceled, or modified by the Commission pursuant to the provisions of the Shipping Act, 1916, as amended by this Act: *Provided, however,* That all such existing agreements which are rendered unlawful by the provisions of such Act as hereby amended must be amended to comply with the provisions of such Act as hereby amended, and if such amendments are filed for approval within six months after the enactment of this Act (April 3, 1962), such agreements so amended shall be lawful for a further period of not to exceed one year after such filing. Within such year the Commission shall approve, disapprove, cancel or modify all such agreements and amendments in accordance with the provisions of this Act.[3]

By an interpretative ruling issued March 21, 1962, the Commission determined that:

> * * * (Section 3 of P.L. 87-346 and Section 14b of the Shipping Act, 1916 prohibit) a carrier or conference of carriers from denying contract rates for a period of 90 days after April 2, 1962, to a contract shipper who on April 2, 1962, was a party to a lawful contract rate agreement and who prior to April 3, 1962 * * * advises said conference in writing or by telegram that he agrees to be bound by said contract rate agreement amended to the extent necessary to comply with the provisions of section 14b of the Shipping Act, 1916; Provided, That the conference has filed with the Federal Maritime Commission a proposed form of contract pursuant to section 3 of Public Law 87-346.
>
> * * * * * * *
>
> Furthermore, on and after April 3, 1962, the provisions of any contract rate agreement which has been modified in order to comply with the proviso clause of Section 3 of Public Law 87-346 are lawful and enforceable as between the parties only to the extent that such provisions (1) were lawful on April 2, 1962, and are not inconsistent with the requirements of Section 14b of the Shipping Act, 1916, or (2) are required to make said contract agreement comply with Section 14b of the Shipping Act, 1916. Any other provision of any such contract rate agreement is unlawful and may not be applied or enforced directly or indirectly, until such provision has been approved by the Commission.

[3] By subsequent enactment, the time allowed the Commission (and the period of interim validity) was extended to Apr. 3, 1964, Public Law 88-5 (77 Stat. 5) (1963).

In accordance with the directives of the interpretative ruling quoted immediately above, Respondent filed with the Commission a proposed form of contract, and Complainant notified Respondent in writing of its agreement to be bound by the contract amended to the extent necessary to comply with the provisions of section 14b of the Act. Therefore, during the period of breaches asserted by Respondent, June 1962–January 1963 the contract between Respondent and Complainant was lawful and enforceable against it only to the extent that its provisions were lawful on April 2, 1962, and were not inconsistent with the requirements of section 14b.

In its complaint, International alleges that it was a party to a dual rate freight agreement with the Conference and that the Conference and its member lines have "knowingly and willfully" conspired to make unwarranted assertions of breach of contract against International, to demand the payment of damages therefor, and to threaten to cancel the dual rate contract. International's position is that these assertions of breaches were unwarranted and unlawful because they were known to be groundless, since shipments were made FAS and International did not have the legal right to select the carrier, and were designed to harass and coerce International into refusing to deal with carriers who were not members of the Conference. Underlying these allegations is a basic charge that the Conference was attempting to enforce a dual rate contract that did not meet the requirements of section 14b.

By the terms of the first provision of the parties' dual rate contract, all shipments by International and its affiliates were to be made on Conference vessels. The shipments in question, however, were made on nonconference vessels, and were consigned to Firestone of the Philippines allegedly a subsidiary of International, and to Sherwin-Williams. Furthermore, it appeared that International prepared the documentation required on all nine shipments, appeared as shipper on all bills of lading, and, along with Interplant,[4] selected the carrier.

On the basis of the foregoing, we are of the opinion that the Conference had just and reasonable cause to suspect that International had breached its dual rate contract, and any attempt by the Conference to enforce its contract by the means made available therein was justified. As a matter of fact, the Conference would have been delinquent in its duty had it not attempted to police its dual rate contract because of the obligation it owes to its shippers to see to it that the enforcement of rates be consistent and uniform.

With respect to the merits of the dispute, the Conference contends that International had the legal right to select the carrier and that in

[4] "Interplant" is a "department" of Firestone of Ohio, which International states, has no policy- or decision-making responsibility.

selecting nonconference carriers, International violated the contract. International, in defense of its position that Firestone of the Philippines had the legal right to select the carrier, asserts that the shipments involved were sold FAS seaboard, and that Firestone of the Philippines had directed it to ship nonconference.

It is not essential to this proceeding that the question of who had the legal right to select the carrier be resolved. All that need be said is that under the circumstances the Conference was justified in investigating possible violations of its dual rate contract, asserting a breach of the dual rate contract, demanding liquidated damages, and attempting to proceed to arbitration. Respondents' good faith prosecution of what it believed to be a valid claim cannot be held to constitute harassment and coercion.

International argues that the Conference by attempting to enforce a contract which did not, and which the Conference knew did not, meet the criteria required by section 14b violated the Shipping Act, 1916.

As noted above, the Far East Conference dual rate contract for many years contained a provision requiring a signatory not only to transport his shipments but the shipments of all affiliates aboard Conference vessels. Section 14b(3) provides that a dual rate contract must be limited to the extent that it "covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier." Section 3 of Public Law 87–346 provided that dual rate contracts legal before the passage of section 14b, such as the contract of the Far East Conference, shall continue to be legal to the extent authorized by section 14b. Thus, contracts that were lawful prior to the passage of section 14b remained lawful to the extent they were not inconsistent with the requirements of that section. Therefore, in the context of this proceeding, the dual rate contract of the Far East Conference was amended by operation of law to include the qualification that the contract would apply only to shipments where the party to the dual rate contract had the legal right to select the carrier.

Similarly, the liquidated damage provision of the contract was amended by operation of law, in order to preserve its legality under the Shipping Act, to incorporate the provision of section 14b(5).

In our view, the contract of the Conference, as amended by operation of law to meet the requirements of section 14b, was operative at the time of the alleged breaches. Consequently, the matter should be resolved, as required by that contract, by reference to arbitrators to determine if any breach occurred and whether damages should be awarded.

This holding is consistent with our earlier view of arbitration clauses as set forth in *The Dual Rate Cases*, 8 FMC 16 (Mar. 27, 1964), where we stated:

> Arbitration has developed as an efficient means of settling disputes under commercial contracts generally and would appear to be an appropriate means of disposing of routine disputes which arise under dual rate contracts. We therefore have no objection to clauses which call for the arbitration of disputes * * *.

We reaffirm what we said there.

Arbitration provisions have a long history in both Commission approved Conference agreements and dual rate contracts, and they have met with our approval. In this manner, the Commission has given to the parties of those dual rate contracts the opportunity to settle their differences between themselves. Although cases do arise where recourse to the Commission can be had notwithstanding arbitration provisions, this is the exception rather than the rule. We will not nullify arbitration clauses without serious cause.

In light of our disposal of the case in this manner, it is unnecessary to discuss other exceptions.

An order dismissing the complaint will be entered.

By the Commission.

No. 1170

FIRESTONE INTERNATIONAL COMPANY, A DIVISION OF THE FIRESTONE TIRE & RUBBER COMPANY

v.

FAR EAST CONFERENCE ET AL.

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, *Therefore*,

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

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 65–29

IMPOSITION OF SURCHARGE BY THE FAR EAST CONFERENCE AT SEARSPORT, MAINE

Decided November 5, 1965

Agreement No. 17, the organic agreement of the Far East Conference, found to operate in a manner which is unjustly discriminatory and unfair as between ports; between exporters from the United States and their foreign competitors; detrimental to the commerce of the United States; and contrary to the public interest.

Far East Conference ordered to open rates on newsprint from Searsport, Maine to Manila, Republic of the Philippines.

Elkan Turk, Jr., for respondent, Far East Conference.
Edward Langlois, for Intervener, Maine Port Authority.
Norman D. Kline and *Robert J. Blackwell* for Hearing Counsel.

REPORT

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

This proceeding is before the Commission upon an order directing the Far East Conference to show cause why its organic agreement (FMC Agreement No. 17) should not be amended to remove the Port of Searsport from the trading range of the conference.

The Commission directed this order to the Conference because it appeared that the applicable tariffs of the Conference result in a situation which is detrimental to the commerce of the United States, contrary to the public interest, and otherwise in violation of the Shipping Act, 1916.

This proceeding is the outgrowth of an earlier Commission investigation in *Imposition of Surcharge on Cargo to Manila, Republic of the Philippines*, FMC Docket No. 1155 (Feb. 3, 1965). The Commission instituted Docket No. 1155 to investigate the lawfulness of surcharges on cargo moving from ports in the United States to Manila.

Republic of the Philippines. The purpose of the proceeding was to determine whether the surcharges were contrary to sections 15, 16, 17, and 18(b)(5) of the Shipping Act, 1916.

As far as pertinent here, the Commission named as Respondents the Far East Conference and its members. The Far East Conference serves Manila from United States Atlantic and Gulf ports, but this range of service does not include Canadian Atlantic ports. Maersk Line, however, a Far East Conference member, serves Canada to Manila as an independent.

The Far East Conference on July 25, 1963, filed with the Commission surcharges of $10 per ton, as freighted, on cargoes destined for discharge at Manila, to be effective October 28, 1963. The amount of the surcharge has fluctuated since, but a surcharge is still in effect at Manila and is scheduled to be increased from $5 to $10 per ton on January 1, 1966.

In Docket No. 1155 the Commission held that carriers operating from the United States to Manila were justified in imposing a surcharge on cargo unloaded at the Port of Manila, because of the extraordinary delay occasioned by labor difficulties and port congestion. Nevertheless, the Commission found that Respondent, Maersk Line, by imposing a surcharge on newsprint at Searsport, Maine, while not applying a surcharge at St. John, New Brunswick, Canada, demanded, charged, and collected a charge which is unjustly discriminatory between shippers and ports and unjustly prejudicial to exporters of the United States as compared with their foreign competitors contrary to section 17 of the Shipping Act, 1916.

In conjunction with this holding, the Commission discussed the matter in its opinion as follows:

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

These facts establish that Pacific Star Line and Maersk Line by assessing a surcharge on newsprint at Searsport, Maine, while not at Canadian Atlantic ports, have unjustly discriminated against Great Northern and the Port of Searsport while advantaging Canadian shippers of newsprint and the Port of St. John. We find that a sufficient competitive relationship exists between the shippers and ports concerned; we find that Great Northern and the Port of Searsport have suffered pecuniary harm by the imposition of the surcharge and the resultant diversion of traffic, and we find that the transportation conditions are similar from St. John and Searsport. Pacific Star and Maersk, therefore, have demanded, charged, and collected a charge which is unreasonable. We find this conduct to be contrary to the provisions of section 17, which provides that "no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors." *West Indies Fruit Co.* v. *Flota Mercante* (7 FMC 66 (1962)). *Grays Harbor Pulp & Paper Co.* v. *A. F. Klaveness & Co. A/S*, 2 U.S.M.C. 366, 369 (1940). We will order these carriers to cease and desist from this unreasonable practice by removing the inequality of treatment between shippers and ports by appropriate tariff amendments.

To implement this result, the Commission directed Maersk to end the discrimination by some appropriate tariff action.[1]

After issuance of the Commission's decision and order, Maersk applied for an extension of time to comply. The Commission rejected the request by order of February 19, 1965. In denying the petition, the Commission stated:

There can be no doubt that Maersk must comply with the terms of the original order. Certainly, a request for additional time to decide whether to seek reopening or to petition for appellate review cannot operate as an automatic stay of our order requiring the elimination of a demonstrable discrimination. Indeed, the filing of either does not have that result.

Nor can their pleas that compliance is difficult in light of their obligations as members of the Far East Conference and as parties to Agreement No. 8200 with the Pacific Westbound Conference alter our rejection of this request for enlargement. Maersk Line is directed to end the discrimination set out in our opinion. No obligation of a conference member can delay the elimination of action which is contrary to a statute of the United States. Conferences, which exist pursuant to our section 15 approval, must not only cooperate fully to eliminate discrimination but, indeed, we expect them to take the lead to such end.

For these reasons, we deny the request.

Still Maersk failed to comply. Thereafter, upon application of the Commission to the United States District Court for the Southern District of New York, Maersk was directed to show cause why an order should not be made by the District Court pursuant to section 29 of the Shipping Act to enforce obedience by Maersk to the Commission's order of February 3, 1965. In subsequently ruling upon that order to show cause, the District Court on July 13, 1965, refused to enter an

[1] The order provided as follows:

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

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

injunction against Maersk on two grounds: (1) That Maersk was not serving Searsport and, therefore, it was not necessary that it change a rate applicable at the port, and (2) that Maersk, having on three occasions petitioned that Far East Conference to eliminate the Searsport surcharge in order to allow Maersk to comply with the order and was not permitted by the Conference to make the change, could not comply with the order.

Therefore, the Commission is confronted with the problem of how to alleviate the discrimination against Searsport and against shippers and exporters who desire to use the Port of Searsport. To be sure, the discrimination we found in Docket No. 1155 remains. A surcharge is still imposed at Searsport and no surcharge is imposed at St. John. The fact that Maersk does not serve both ports does not obviate this discrimination. The significant fact is that a Far East Conference member calling at Searsport must assess a surcharge. Thus Searsport is at a disadvantage compared to St. John whether Maersk calls at either port or not. And the direct causation of the disadvantage is the Far East Conference.

Briefly, it is the Conference whose refusal to amend its tariff that compels the continuance of a situation which has been found to be a violation of section 17. Although the actual instrumentality of discrimination was Maersk in serving both Searsport and St. John, the underlying responsibility for the continuation of the discrimination rests with the Conference. Since the Conference refuses to amend its tariff, we will amend it for them. We hereby order the Far East Conference to open the rate at Searsport on newsprint destined for Manila.

While the Order to Show Cause which initiated this proceeding contemplated striking Searsport from the range of the Conference, we have decided upon a less drastic course. We will leave the Conference intact at Searsport, but order the Conference carriers to set rates on newsprint independently at that port. Sections 15 and 22 are our authority for this action.

We must find, in order to invoke section 15, that an agreement between common carriers subject to our jurisdiction operates in a manner that is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of the Shipping Act.[2] We hold that the

[2] Section 15 provides:

"The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations."

Far East Conference agreement has operated in a manner which is unjustly discriminatory or unfair as between ports and between exporters from the United States and their foreign competitors. In addition, we find that the agreement has operated in a manner which is detrimental to the commerce of the United States and contrary to the public interest.

Initially, we take note of certain of the provisions of the organic agreement, approved by us, which permits the Conference members to act collectively. The preamble to Agreement No. 17, approved November 14, 1922, provides:

> That the parties hereby associate themselves together in a FAR EAST CONFERENCE to promote commerce from North Atlantic, South Atlantic and Gulf ports of the United States of America to JAPAN, OKINAWA, KOREA, TAIWAN (Formosa), SIBERIA, MANCHURIA, CHINA, HONG KONG, REPUBLIC OF THE PHILIPPINES, and the territory formerly known as Indo-China, namely VIETNAM, CAMBODIA, and LAOS, for the common good of shippers and carriers, by providing just and economical cooperation between the steamship lines operating in such trades; and to the accomplishment of that end the parties hereby severally agree with each other as follows * * *.[3]

Thus, two facts are readily apparent: The Conference serves United States, and not Canadian ports and the Conference was intended to promote commerce, in the United States to Orient trade, for the common good of shippers and carriers. It is now appropriate to measure the operation of the agreement against its own terms and purposes as well as the terms and purposes of section 15.

First we consider the question of discrimination between ports. In Docket No. 1155, we found that Maersk by imposing a surcharge on newsprint at Searsport while not applying a surcharge at St. John had demanded, charged, and collected a charge which is unjustly discriminatory between ports contrary to section 17. Let us examine what has occurred since we entered this finding. The surcharge is still applicable at Searsport, but no surcharge is applicable at St. John. As we found in Docket No. 1155, the two ports are competitive, Searsport has suffered pecuniary harm by the imposition of the surcharge, and transportation conditions from St. John and Searsport are similar. Only one significant fact has changed; Maersk no longer serves Searsport.[4] Does this fact obviate the section 17 violation? We think not.

[3] This language is taken from Agreement No. 17–31, approved Nov. 7, 1963, which updated the list of foreign countries served to reflect current geographic designations.

[4] By depriving Searsport of service, this simply compounds the harm to this port.

Searsport is at the same disadvantage it was before. And Searsport remains at a disadvantage because the Conference refused to alleviate the discrimination. On at least three occasions, Maersk requested that the Conference permit Maersk to comply. The Conference refused.[5]

Thus, one cause of the discrimination against Searsport is the refusal of the Conference to remedy the situation. It would be possible for carriers to establish or permit rate parity between Searsport and St. John *but for* the artificial restrictions of the Conference tariff. For it is the recalcitrant Conference that is primarily responsible for higher rates being applicable at Searsport as well as for the curtailment of service there by Maersk. We, therefore, hold that the Far East Conference agreement has operated in a manner which is unjustly discriminatory between ports.

We consider next the issue of whether the agreement operates in a manner which is unjustly discriminatory or unfair as between exporters from the United States and their foreign competitors. In Docket No. 1155, we found that Maersk, by assessing a surcharge on newsprint at Searsport while not assessing a surcharge at Canadian Atlantic ports, demanded, charged, and collected a charge which is unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Again, nothing new has occurred subsequent to our finding except that Maersk has ceased providing service at Searsport. And again, what difference does this make? As far as the prejudice to Great Northern is concerned, it can make no difference. Great Northern is still at a disadvantage as compared with their competitors from Canada. The disadvantage in large measure is the result of the Conference's collective rate making. This is so because of the Conference tariff requirements, pursuant to which carriers cannot treat Great

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[5] In *Federal Maritime Commission* v. *Maersk Line* 243 F. Supp. 561, 562 (S.D.N.Y. 1965) the Court found:

"Evidence has been offered that at three Conference meetings held since the issuance of the Commission's order, Maersk has moved for the elimination of the Conference surcharge, and that the motions have been lost."

The Far East Conference minutes which are required to be filed with the Commission and which are subscribed to and certified as being a true and complete record of all actions provide:

1. "Motion was made and seconded that the Manila surcharge applied on newsprint paper shipped from Searsport, Maine, be eliminated forthwith. Motion was lost. Motion was thereupon made and seconded that the Manila surcharge be withdrawn on shipments of newsprint paper irrespective of the port of shipment. Motion was lost. (Meeting No. 1989, Feb. 17, 1965.)
2. "Motion was made and seconded that the Manila surcharge be eliminated forthwith on newsprint paper shipped from Searsport, Maine. Motion was lost. Motion was then made and seconded that the surcharge be eliminated on newsprint paper shipped from all ports to Manila, P.I. Motion was lost. (Meeting No. 1990, Feb. 18, 1965.)
3. "Motion was made and seconded, subject to concurrence of Pacific Westbound Conference, that the surcharge be eliminated with respect to newsprint paper shipped from Searsport, Maine. Motion was lost. (Meeting No. 1991, Feb. 24, 1965.)"

Northern fairly as compared with exporters from eastern Canada. We therefore, hold that the Far East Conference agreement has operated in a manner which is unjustly discriminatory and unfair as between exporters from the United States and their foreign competitors.

We turn now to the issue of detriment to commerce. Are the rate making practices of the Conference or the rates themselves detrimental to the commerce of the United States? It would appear that the action of the Conference which results in Maersk's refusal to serve Searsport would be enough in itself to justify a holding that the Conference has acted to the detriment of our commerce. This, coupled with the harm to Great Northern in its export business, is the essence of detriment to commerce. The record discloses that Great Northern, in order to remain competitive, has absorbed part of the surcharge and on one occasion diverted cargo to St. John to avoid the impact of the additional charge. The record further shows that Great Northern has lost some business to competitors using Canadian Atlantic ports. Accordingly, we find that the Far East Conference agreement has operated in a manner which is detrimental to the commerce of the United States.

We are further convinced that the agreement is operating in a manner which is contrary to the public interest. As we noted in our order denying a request for an extension of time in Docket No. 1155, we expect the Conference to take the lead in ending discriminatory situations. "Conferences, which exist pursuant to our section 15 approval, must not only cooperate fully to eliminate discrimination, but indeed, we expect them to take the lead to such end." This "suggestion" was not made as a passing remark. To the contrary, the passage represents what we consider to be the obligation of conferences under the public interest criterion. Here we have a classic demonstration of indifference to the needs of the public. While carriers wish to group together in rate making conferences for private commercial reasons, in exchange for this privilege we insist that these arrangements contribute in some manner toward public interest. As we said in *Pacific Coast European Conference*, 7 FMC 27, 37 (1961):

> A Conference agreement is not some sacrosanct private arrangement but a public contract, impressed with the public interest and permitted to exist only so long as it serves that interest.

One would have to look hard and long to discover what contribution to the public interest has been made by the Conference in their arbitrary action at Searsport.

The Conference can hardly be said to have acted toward the common good of shippers and carriers nor to have attempted to promote commerce from a United States port, the purported purpose of the agree-

ment. The Shipping Act provides a pervasive regulatory scheme. This scheme cannot be avoided by carriers hiding behind section 15 agreements. As the Supreme Court said in *Federal Maritime Board* v. *Isbrandtsen*, 356 U.S. 481 (1958) "Congress struck the balance by allowing Conference arrangements passing muster under sections 15, 16 and 17." Here the Conference has shown no concern for the public interest and has actually aggravated a situation which we held to be contrary to section 17. Conference authority to set rates on newsprint at Searsport is the major cause of the current discriminatory situation. Consequently, we will withdraw authority to set this rate.

Our remedy—to open the newsprint rate from Searsport to Manila—is authorized by law. Section 15 itself provides that we may disapprove an agreement upon a finding that the agreement operates in a manner which is unjustly discriminatory between ports or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Similarly, the Commission may modify an agreement where the agreement operates in an unlawful manner. Indeed, the Commission has a duty to take such action in the face of such a finding. *Pacific Far East Line* v. *United States* 246 F. 2d 711 (1957).

In *Empire State Highway Transp. Ass'n* v. *Federal Maritime Bd.* 291 F. 2d 336, 339 (1961), the Court summarized this authority as follows:

> [W]hen a Conference has engaged in conduct violative of the fair and reasonable standards of the Act the Board may withdraw approval of the basic agreement itself, or require its modification.

Therefore, the Commission has the power to take the action contemplated by the order to show cause that instituted this proceeding; that is, the Commission may modify the Far East Conference agreement to eliminate Searsport from the authorized trading range of the Conference. Since we may take this action, we obviously may take lesser action; we may declare the newsprint rate at Searsport "open." Rather than modify the basic agreement, we believe it will be more expedient to alter the rate structure developed under the basic agreement. This will leave Conference jurisdiction intact at Searsport, but it will require carriers serving that port to set rates individually on newsprint moving to Manila. Since the Conference serves many destinations in addition to Manila, we believe it desirable not to curtail the scope of the agreement in any other respect. We resort to individual rate fixing because collective action has proven to be discriminatory. This order is authorized by section 15 and section 22.[6]

[6] Section 22 provides:
"The (Commission), upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act."

We reaffirm the view of our predecessors that we may act under section 15 not merely against the terms of section 15 agreements but against rates fixed in concert as well. In *Edmond Weil* v. *Italian Line "Italia"*, 1 U.S.S.B.B. 395, 398 (1935), our predecessors stated:

> An unreasonably high rate is clearly detrimental to the commerce of the United States, and upon a showing that a Conference rate in foreign commerce is unreasonably high the Department will require its reduction to a proper level. If necessary, approval of the Conference agreement will be withdrawn.

While not necessary to the ultimate decision, this dictum is a proper statement of Commission authority.

In *Pacific Coast—River Plate Brazil Rates*, 2 U.S.M.C. 28, 30 (1938), this position was reaffirmed. There the Conference allowed commodity rates on lumber to expire and thereafter, because of the failure of the Conference to agree, the "cargo, not otherwise specified" rate was applied. The Commission, citing *Edmond Weil*, found this rate to be an unreasonably high rate detrimental to the commerce of the United States. Thereafter, the Conference agreed on the lumber rate, and the Commission stated that "[u]nder the circumstances there now is no reason for withdrawing approval of Conference Agreement No. 200."

Again, in *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 U.S.M.C. 342, 347 (1940), the Commission considered the activity of a conference in quoting rates at a fixed percentage below nonconference competition. The Commission held:

> A rate may be so low as to be unreasonable, and as one of the purposes of the Conference agreement is the establishment of reasonable rates, this reduction is a violation of the agreement and constitutes a condition unfavorable to shipping in the foreign trade. Inasmuch as the Conference has restored the rate to 60 cents no order with respect thereto will be entered.

These cases stand for the proposition that the Commission may either cancel or modify the agreement or act against the offending rate itself. Indeed, as the Supreme Court said in *California* v. *United States*, 320 U.S. 577, 582 (1944):

> Having found violations of §§ 16 and 17, the Commission was charged by law with the duty of devising appropriate means for their correction.

Once before the Commission considered a problem where individual carriers, operating pursuant to a Conference tariff, violated section 17. In *Nickey Bros* v. *Manila Conference*, 5 FMB 467 (1958) the Commission's predecessor noted that while some of the Conference members were not violating the statute because they did not operate in the particular trade in question, they were members of the Conference and since the Conference was ordered to establish rate parity, the order

was directed to all Conference members whether they served the trade (or violated the Shipping Act) or not. Our order in this case follows the rationale in *Nickey;* it is a practical means of eliminating the discrimination.

Thus, the Commission has the power to act against Conference rates. We will, therefore, remove the artificial barrier imposed by the Conference, which created the discriminatory situation, by opening the Conference rate at Searsport on newsprint moving to Manila. This will remove the excuse that carriers cannot establish rates on a non-discriminatory basis at Searsport. Upon opening the rate carriers may set rates freely. We will be alert to ascertain whether these independent rates are non-discriminatory.

The Conference argues that section 15 cannot confer the authority to remove Searsport from the range of the Conference. The argument is premised upon the contention that section 15 makes approval of agreements mandatory unless they are found to operate in a manner proscribed by section 15. The Conference contends that there is absolutely no showing (rather the Commission's own findings in Docket No. 1155 are to the contrary), that the Conference has violated section 15 in any respect. In other words, the Conference argues that the only legitimate inquiry would be for the Commission to show cause why the agreement should not enjoy continued approval.

The argument, however, ignores the fact that the Commission earlier found unjust discrimination against the port of Searsport and shippers using that port, and that the finding of unjust discrimination was based on substantial evidence. Since the condition which permits the continuation of this discrimination lies with the Conference, there is a sufficient foundation to find that Conference action should be modified by the Commission to alleviate the unlawful conduct.

The Conference argues that as a matter of law the Conference cannot be held to discriminate against Searsport by reason of Canadian rates. This argument is based upon a contention that the Commission's proposed remedy in this proceeding—to eliminate Searsport from the range of the Conference—can be made only if the Commission finds that the Conference itself violated section 17 by treating competitive exporters and competitive ports differently. And, of course, the Conference claims that this finding cannot be made on this record.

The argument runs this way: No finding of discrimination can be made unless the same person (or Conference) serves both the preferred and the prejudiced port; the Conference does not control rates from Canadian ports; therefore, the Conference did not discriminate;

citing *Texas & Pacific Ry Co.* v. *United States*, 289 U.S. 627 (1933).[7] While we have not heretofore relied upon a holding that the Conference has violated section 17, we have relied upon the equivalent language in section 15.

The impact of this argument in the instant case would be curious indeed. First of all we could not find a violation of section 17 by the Conference since it, as a Conference, does not control rates from St. John. Secondly, we could not under section 15 scrutinize the Conference's conduct to determine whether there is discrimination between ports or between United States and foreign exporters. This is too restrictive. The Commission is not powerless to act against a situation which has a harmful impact on our commerce, one of our ports, and on one of our exporters simply because the trading range of the Far East Conference does not include Canada. Section 17 does not explicitly contain a requirement that a finding thereunder be made only against a carrier which prefers one port or exporter and prejudices another port or exporter by serving both. Certainly in this context such a holding would effectively frustrate the purposes of section 17. There is discrimination because shipments from Searsport pay a surcharge and shipments from St. John do not. So long as there cannot be parity between the two ports, the discrimination will continue. Consequently, since the Conference does not have control over Canadian rates and, therefore, cannot establish parity of rates, we will suspend their control over the newsprint rate at Searsport. Since the Conference does not control rates both from Searsport and St. John, we will not let them control either. Then carriers who do serve both ports can equalize the rates.

The Conference argues that this proceeding is procedurally defective because it denies the opportunity for cross-examination which is guaranteed by the Administrative Procedure Act. It also claims that the order fails to give them appropriate notice of the matters of fact and law to be asserted, and that this proceeding is improper because it was "conceived in vindictiveness and dedicated to harassment." However, the APA does not require a full evidentiary hearing with full opportunity for cross-examination. The right of cross-examination should be granted where it is necessary for full disclosure of facts.

[7] The *Texas & Pacific* principle has been construed to apply only where the Interstate Commerce Commission is directing the carriers to remove the discrimination where the order requires the carriers to do something they are powerless to perform. In *New York* v. *United States*, 331 U.S. 284, 342 (1947) the Court commented as follows:

"If the hands of the (Interstate Commerce) Commission are tied and it is powerless to protect regions and territories from discrimination unless all rates involved in the rate relationship are controlled by the same carriers, then the 1940 amendment to § 3(1) fell far short of its goal. We do not believe Congress left the Commission so impotent."

The statutory provision alluded to is similar to Shipping Act provisions; therefore, we follow this principle.

Where it is not necessary, then the opportunity for cross-examination is not afforded as a matter of right.

The argument of the Conference shows this as section 7(c) merely states:

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

The obvious qualification is that a party is entitled to cross-examination only where it is necessary for full disclosure of the facts. Furthermore, the "hearing" to which Respondent is entitled does not necessarily mean a full evidentiary proceeding. "Hearing" is defined to be "any oral proceeding before a tribunal." It may be by trial or argument. Davis, *Administrative Law Treatise*, section 7.01, p. 407.

Respondent is, of course, entitled to a fair hearing. But that concept means only that the party must have an opportunity to meet such facts which adversely affect its interests.

A leading authority on administrative law has discussed this problem at some length and concluded:

> The cardinal principle of fair hearing is neither that all facts used should be in the record unless they are indisputable, nor that all facts used should be subject to cross-examination and rebuttal evidence, nor that "nothing can be treated as evidence which is not introduced as such," but it is that parties should have opportunity to meet in the appropriate fashion all facts that influence the disposition of the case. Davis, *Administrative Law Treatise*, section 15.14, p. 432.

It is well recognized in administrative law that cross-examination is unnecessary where no issue of fact is raised and the party has full opportunity to be heard on the issue of law.

Thus, the Commission finds that the Conference has been given an opportunity to meet the facts which adversely affected its interests. And, with respect to the findings made in Docket No. 1155, these facts speak for themselves and may be used by the Commission. There is no further need for cross-examination, since the Conference was earlier provided an opportunity to contest such facts before the Commission.

While the APA requires notice in administrative proceedings, this requirement is flexible and is met if the notice amounts to a general summary of the matters in issue. Here, it is evident that respondents have been given adequate notice, since the Conference has been aware of the problem since its inception and since the Commission's order to show cause contains a summary of the development of the problem.[8]

[8] See "Review of Dual-Rate Legislation 1961–64," 88th Cong., 2d sess., where the subject was discussed at 418–21 and 607–09 before the House of Representatives Merchant Marine and Fisheries Committee, Special Subcommittee on Merchant Marine.

In *Cella* v. *United States*, 208 F. 2d 783 (1953), the Court held that in an administrative proceeding, it is only necessary that the one proceeded against be reasonably apprised of the issues in controversy, and any such notice is adequate in the absence of a showing that a party was misled. As this Commission itself has stated in a previous case, all that is required in a pleading instituting an agency action is a statement of the things claimed to constitute the offense charged so that Respondent may put on his defense. *Pacific Coast European Conference—Limitation on Membership*, 5 FMB 39, 42 (1956).

With respect to this argument, the Commission holds that the Conference has been given sufficient notice of the matters involved so that it could prepare its own position.

With respect to the harassment and vindictiveness of the proceeding, the accusations are unjustified, since the origin of the proceeding results from refusal of the Conference to allow Maersk to comply with a Commission order. The Commission is simply, and in accord with its duty, trying to alleviate a patently discriminatory situation.

The Conference also contends that the proceeding is procedurally defective because the order to show cause imposes upon it the burden to estabish the facts. We reject this contention. No matter what may be the state of the law with respect to burden of proof in this proceeding, one fact remains: The Commission in its earlier decision made a finding of unjust discrimination and it now has evidence before it that the Conference has prohibited Maersk from complying with the order. In effect, the Commission has fulfilled its burden since we rely upon these indisputable facts. Thus, it is not now so much a question of burden of proof as a question of whether the facts already before the Commission have any legal effect. Furthermore, our decision rests upon the record, not on the basis of whether one side or the other has met its burden of proof.

Ultimate Conclusion

The Far East Conference agreement and the Conference tariff, by requiring the assessment of a surcharge at Searsport, Maine, on newsprint moving to Manila, Republic of the Philippines, has operated in a manner which is unjustly discriminatory and unfair as between ports and between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, and contrary to the public interest, contrary to the requirements of section 15 of the Shipping Act, 1916. We will order the Conference to open

the rates on newsprint at Searsport, and we will order carriers serving that port to file and observe nondiscriminatory rates.

An appropriate order will be entered.

COMMISSIONER HEARN dissenting:

The majority in ordering the rates on newsprint "open" at Searsport, Maine, only, in an effort to put that commodity at that port on a parity with the rates from the Port of St. John, New Brunswick, I fear, have missed the mark. Respondent Conference's surcharge in this trade has been approved by our decision in Docket 1155. That case established the fact that the surcharge is justified and is a legitimate expense because of port conditions in Manila over which the carriers have no control. As a matter of principle, all cargo lifted to Manila should bear equally its fair share of the increased costs attendant on calls at that port.

In *Imposition of Surcharge on Cargo To Manila*, Docket No. 1155, the Commission found that one of the Conference members, Maersk Line, in addition to serving the newsprint trade at Searsport under the aegis of the Conference, also lifted newsprint from the Canadian port of St. John, a port not within the scope of the Conference's jurisdiction. Maersk did not assess a surcharge against newsprint from the Canadian port and we found that its action constituted an unlawful discrimination against newsprint emanating from Searsport. To obviate that unlawfulness we ordered Maersk to cease and desist from assessing the surcharge on newsprint out of Searsport. Subsequently, Maersk abandoned its Searsport service.

While Maersk did not strictly comply with our earlier order neither did it violate that order since it abandoned the Searsport trade. In effect it avoided our earlier order. Currently Searsport is being well served by other members of the Conference who have a voice in setting Conference rates at Searsport and who wish to assess the Commission approved surcharge, based upon the earlier carefully deliberated decision, which in my opinion they have a right to do. Consequently, since the Conference does not serve St. John it has not engaged in discriminatory practices and has not violated the shipping statutes. Further, it is apparent that, in spite of long work stoppages this year, five Conference carriers have furnished Searsport with eight sailings through August; the State Port Authority Representative at oral argument, advised us that the current Conference service is adequate; and most importantly that since our order in Docket No. 1155 no newsprint has been diverted from Searsport to St. John.

The proceeding now before us was instituted, in light of the foregoing, to determine whether or not Searsport should be stricken from

the trading range of the Conference. I am convinced that Searsport does not want this result and there is no basis on this record for such drastic action. Nor do I believe that the less drastic action ordered by the majority here; i.e., opening of the newsprint rate at Searsport, is supported by the record. The plain facts are that we have already determined that the existence and the level of Respondent's surcharge is lawful, and that the Conference vessels who offer newsprint service and levy the surcharge at Searsport do not now offer the same services at lower rates at St. John.

The majority action here gives rise to grave questions respecting the legality of surcharges assessed:

(1) against other commodities by Conference vessels throughout their service range; and
(2) against newsprint which may be offered by shippers at other ports within the Conference range.

The majority action here is official Commission approval of a discrimination against shippers of newsprint from any other port and of an undue tariff burden against shippers of all commodities from all ports within the Conference range.

Finally, the ordering of the newsprint rate "open" may be completely illusory in so far as the level of the surcharge is concerned because the carrier's cost of doing business must be considered in setting a rate, even an "open" rate, and the cost of doing business in Manila involves elements not found at other ports. Consequently, the ordering of an "open" rate on newsprint may well leave the rates at the same level as they are today.

In my opinion no action lies against the Conference since it has conducted its activities within the letter of the law, if not within its spirit. *Practices of Fabre Line and Gulf/Mediterranean Conf.*, 4 FMB 611 (1955).

Therefore, I would discontinue this proceeding.

COMMISSIONER JOHN S. PATTERSON, dissenting:

I dissent from the results reached in the majority report in this proceeding, and, for reasons advanced by Commissioner George H. Hearn, I am in accord with his dissenting opinion.

My additional reasons for dissenting are:

1. The Commission has no authority to order the Far East Conference to revise rates nor to "withdraw their authority to set this rate" in response to an order of investigation to show cause by Federal Maritime Commission Agreement No. 17 should not be amended to remove the Port of Searsport from the trading range of the Conference. Such

an order reaches a decision not responsive to the order initiating the adjudication.

2. Alleged bad conduct does not confer authority to revise rates. If past and present conduct of the carriers is thought to be unlawful, acts must be proven in an adjudication pursuant to the Administrative Procedure Act and related to the Shipping Act, 1916. If the Far East Conference Agreement operates to the detriment of the commerce of the United States, the terms which guide the carriers' conduct have to be specified, and we must show in a hearing what has been done and how the detriment occurs. This has not been done.

ORDER

The Commission instituted Docket No. 65–29 pursuant to sections 15 and 22 of the Shipping Act, 1916, upon order directed to Respondent Far East Conference to show cause why Agreement No. 17 should not be amended to remove the Port of Searsport from the trading range of the Conference, because the applicable tariffs of the Conference result in a situation which is detrimental to the commerce of the United States, contrary to the public interest, and otherwise in violation of the Shipping Act (sec. 17, par. 1). The Commission has this date entered its report stating its findings and conclusions, which report is made a part hereof by reference, and the Commission has found that Agreement No. 17 of the Far East Conference has operated in a manner which is unjustly discriminatory and unfair as between ports and between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, and contrary to the public interest.

Therefore, it is ordered, That the Far East Conference on or before November 22, 1965, open the rate on newsprint at Searsport, Maine, on shipments to Manila, Republic of the Philippines. Carriers wishing to file tariffs to carry newsprint from Searsport to Manila shall file an appropriate tariff to become effective on the same date that the Conference rate becomes "open"; otherwise, individual initial tariffs must be filed on 30 days' notice. If the rate is not opened as ordered above within the time specified, Searsport shall be deleted from the authorized trading range of the Conference.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NOS. 269–277, 279–281, 283–289, 291–311, and 314–363

TILTON TEXTILE CORP., ET AL.

v.

THAI LINES, LTD.[1]

Applications dismissed.

Alan F. Wohlstetter for Respondent Thai Lines, Ltd. and Motorships, Inc.

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

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER[2]

Thai Lines, Ltd., by 90 applications filed pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure, seeks authority to pay reparation for overcharges to four Complainants and to waive the collection of undercharges from 86 Complainants.[3] All of the shipments were in foreign commerce (Hong Kong to the United States). Thai Lines contends that these rate disparities resulted mainly from the failure of its General Agent in the United States, Motorships, Inc., to carry out instructions to file various rate changes * * * increases as well as decreases. Being unaware of this noncompliance, Thai Lines subsequently assessed shippers rates which differed from those in its tariff then on file with the Commission, thereby violating section 18(b)(3) of the Shipping Act, 1916. This section provides as follows:

(3) No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such

[1] These special dockets were consolidated for hearing with Docket No. 1083, Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade.

[2] This decision became the decision of the Commission on Nov. 12, 1965, and an order was issued denying the applications.

[3] These applications were filed in September, October, and December 1963.

carrier rebate, refund, or remit in any manner or by any devise any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

The Commission's decision in Special Docket No. 377, *Ludwig Mueller Co., Inc.* v. *Peralta Shipping Corp.*, served January 13, 1965, is clearly dispositive of these applications. In that case the Commission concluded that it is without authority to grant special docket relief permitting deviations from foreign trade rates on file. Accordingly, waivers of collections of such undercharges cannot be granted and authorizations to refund such overcharges are unnecessary. The law forbids the former and directs the latter.

An order dismissing these applications will be entered.

(Signed) JOHN MARSHALL,
Presiding Examiner.

September 16, 1965

FEDERAL MARITIME COMMISSION

DOCKET No. 1167

REDUCED RATES ON AUTOMOBILES—ATLANTIC COAST PORTS TO PUERTO RICO

Decided November 16, 1965

The 1¢ differential between the rates of South Atlantic & Caribbean Line, Inc., and TMT Trailer Ferry, Inc., for carriage of automobiles from Miami, Florida, to San Juan, Puerto Rico, removed and rates for both carriers fixed at 35¢ inclusive of all charges.

Homer S. Carpenter for TMT Trailer Ferry, Inc. (C. Gordon Anderson, Trustee).

John Mason and *Edward M. Shea* for South Atlantic & Caribbean Line, Inc.

Donald J. Brunner as Hearing Counsel.

REPORT ON REMAND

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

This Commission by Report and Order served February 4, 1965, set minimum rates for all carriers involved in the carriage of automobiles from the North Atlantic, Gulf, and South Atlantic coast ports to ports in Puerto Rico. Among the rates set were the rates of 36 and 35 cents for South Atlantic & Caribbean Line, Inc. (SACL) and TMT Trailer Ferry, Inc. (TMT), respectively. SACL petitioned the Court of Appeals for the District of Columbia Circuit (*South Atlantic & Caribbean Line, Inc.* v. *Federal Maritime Commission and United States*, No. 19,267) for review of the Commission order insofar as this one cent differential is concerned.

In its brief to the court of appeals SACL cited for the first time pertinent legislative history bearing on the authority of the Commission to set a rate differential based on quality of service rendered. The Commission petitioned the court of appeals to remand the proceeding to it for the determination of whether or not such authority exists.

On September 17, 1965, the court of appeals granted Respondents' motion to remand, retained jurisdiction of the proceedings, and directed the Commission to file its report on remand within 60 days. Specifically, we are required to answer the following question:

May the Federal Maritime Commission set different minimum rates on the carriage of automobiles between Miami, Florida, and San Juan, Puerto Rico, which difference in rates results in a differential between two competing carriers?

The Commission received briefs from TMT, SACL, and Hearing Counsel and heard oral argument.

The Commission in its report served February 4th prescribed a one cent differential between SACL and TMT because of its finding that TMT's slower time was a disadvantage in the trade and that TMT needed the differential to protect itself from such service disability. SACL has argued in its brief on remand and in its argument, that the legislative history of section 4 of the Intercoastal Shipping Act, 1933, indicates that Congress did not intend that the Commission have the authority to set rate differentials based solely upon differences in the quality of service rendered. In 1938 consideration was given to granting the Commission such power, but Congress rejected this course of action.[1] SACL does not now challenge the power of the Commission to set differentials based upon factors other than differences in the quality of service rendered; it does not, for example, challenge the power of the Commission to set different rates for different carriers operating between the same two ports based upon differences in costs.

We are persuaded that the legislative history cited by SACL reveals a congressional intent to withhold from the Commission the power to set rate differentials based solely on quality of service rendered. The arguments presented by TMT do not dissuade us from that view. TMT argues that the statute is plain on its face and that resort to legislative history is unnecessary in interpreting the statute. The Commission cannot agree.

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[1] The House version of the bill which became sec. 4 (H.R. 10315, 75th Cong., 3d Sess., 1938) contained the following proviso:

"Provided, That in prescribing such maximum and minimum rates, fares, and charges, differentials *may be* established based upon differences in services rendered." (Emphasis added.) H. Rept. 2168, 75th Cong., 3d Sess. (1938), at 63.

The Senate version contained no such provision, and the conference report stated:

"The House bill authorizes the Commission in prescribing rates to establish differentials based on differences in service rendered. The Senate amendment omits this proviso, * * *. The bill as agreed to in conference (sec. 43) omits the proviso as to differentials, * * *." H. Rept. 2582, 75th Cong., 3d Sess. (1938), at 26–27.

The Chairman of the House Committee on Merchant Marine and Fisheries explained later that the proviso was omitted due to the objection of nearly all of the Senate conferees. 83 Congressional Record 8913.

Statutes must be read in the light of the legislative considerations surrounding their enactment, unless there is no ambiguity as to the meaning of the statute. *Gemsco, Inc.* v. *Walling*, 327 U.S. 244, at 260 (1945). See *Alcoa Steamship Company* v. *Federal Maritime Commission*, 348 F. 2d 756, at 758 (D.C. Cir., 1965). If the statute explicitly authorized rate differentials based on quality of service rendered, we would have no problem in affirming our previous opinion. But, the statute is silent, and the legislative history evidences an intent to withhold that power.

We therefore hold that the Commission may not as a matter of law set different minimum rates on the carriage of automobiles between Miami, Florida, and San Juan, P.R., which difference results in a differential between two competing carriers, if such differential is based on differences in the quality of service rendered.[2] The record in the instant proceeding provides no factual bases on which to base a rate differential between SACL and TMT.

We are therefore vacating our previous order insofar as it related to SACL and TMT, and a minimum rate of 35 cents per cubic foot, not subject to additional charges, will be set for both carriers. An appropriate order will be entered.

COMMISSIONER HEARN dissenting:

In the original Commission Report served February 4, 1965, I disagreed with the majority's decision whereby rates for the carriage of automobiles from Florida to Puerto Rico were approved at 00.35 (cents) for TMT and 00.36 (cents) for SACL. At that time, I stated in my dissent that I believed that the record supported the legality of 00.31 (cent) rate for TMT and 00.32 (cent) rate for SACL, but that I would not order a one cent differential in favor of TMT. There has been nothing added to the record now, since that time, which would cause me to change my view.

With respect to the question presented upon remand, I am constrained again, to disagree with the majority. In my opinion, the

[2] This holding is in accord with a decision of our predecessor, the United States Shipping Board Bureau, in *Intercoastal Investigation,* 1 U.S.S.B.B. 400. In that investigation, the Bureau stated that:

"A modern, efficient, and economical intercoastal service is in the public interest and any carrier offering it is entitled to all the protection of law. If the department allows Shepard (Shepard Steamship Co.) or any other carrier not offering that kind of service to set the standard of competition and permits it by means of tariff advantages, such as Shepard claims to itself, to undermine carriers attempting to offer that kind of service, it would inevitably lead to the gradual but sure destruction of such other carriers, which is inimical to the declared policy of the law." 1 U.S.S.B.B. at 430–431.

We think it noteworthy that Shepard was the principal advocate before the Congress in 1937 urging that the U.S. Maritime Commission be given the power to set rate differentials based on quality of service rendered. See Hearings Before the Committee on Commerce, etc., 75th Cong., 2d Sess., on S. 3078, part 2, Dec. 13, 1937, p. 49.

Commission does have the authority to set different rates for competing carriers regarding a particular commodity in the same trade. The authority for my view is the language of section 4 of the Intercoastal Shipping Act, 1933, as amended which, since it is clear and unambiguous, precludes a resort to legislative history or other aids to statutory construction *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485 (1943). In pertinent part that section provides that when the Commission finds:

> "any rate * * * unjust or unreasonable; it may * * * order enforced a just and reasonable maximum or minimum or maximum and minimum rate * * *"

Conceivably, and quite probably, a particular rate on a given commodity between two geographic points could be unjust or unreasonable for one carrier yet just and reasonable for another carrier. The Commission, in such a case, could leave undisturbed the just and reasonable rate and "order enforced" a rate for the competing carrier which would then be "just and reasonable." In such an instance, the resulting rates while different, would not constitute a "differential"; i.e., a protective "spread" in the rate levels of the competitors. Based upon varying costs, different rate levels could lawfully be ordered. And varying costs well may be the reflection of varying services. Compensatoriness, in my opinion is the touchstone of rate legality, and since costs are the reflection of services different services could result in diverse levels of compensatory rates.

However, while I believe the statute clothes the Commission with authority to set differing rates, in the context of this case, I cannot now, as I could not in February, find that the lower rate found lawful for TMT would not also be lawful for SACL. On the contrary, I find now, as then, that while SACL's 00.32 (cent) rate was just and reasonable and therefore lawful, and TMT's 00.31 (cent) rate was similarly lawful, there is nothing in the record to preclude SACL from initiating a 00.31 (cent) rate. I regret to say that the majority's action today, pegging the rate for both carriers at 00.35 cents, creates a 00.03 and 00.04 (cent) windfall for the carriers since the majority, referring to the existing rates of SACL and TMT (00.32 and 00.31 cents, respectively) in February, found "the present rates of the South Atlantic carriers do not appear to be noncompensatory * * *"

COMMISSIONER JOHN S. PATTERSON, dissenting:

The majority has decided that its decision to fix the rates of TMT Trailer Ferry, Inc. (TMT), and South Atlantic & Caribbean Line, Inc. (SACL), for transporting automobiles to Puerto Rico from Jacksonville and Miami, Florida, must be revised to fix the SACL

rate at 35 cents per cubic foot, which is the same rate fixed for TMT in the earlier proceeding when it raised the rates of each from 31 and 32 cents to 35 and 36 cents, respectively.

The Commission's statutory authority was considered at the time of the first Report in this Docket and was neither then nor is it now ambiguous. The authority may be exercised to adjudicate separate rates for separate services of individual carriers because of the references to "any rate" and "any carrier" in section 4 of the Intercoastal Shipping Act, 1933. Such an interpretation was the basis of my adjudication then and continues to be the basis of this adjudication in response to the *per curiam* order of the United States Court of Appeals for the District of Columbia Circuit in No. 19,267, filed September 17, 1965, ordering that the Commission's motion be granted and the case remanded to the Commission for reconsideration. Our motion was that the majority desired to reopen and reconsider its Report and Order inasmuch as certain "pertinent legislative history" relative to the 1938 amendments to the Intercoastal Shipping Act was "not presented to nor considered by the Commission before the Commission issued its Report and Order now under review." Such consideration has been completed, and the majority is now ready with a new rate and new order.

The newly fixed rate on the other hand is justified by the reasoning of the majority that the pertinent legislative history bearing on the authority of the Commission to set a rate differential based on the quality of service rendered is not authorized because it shows section 4 of the Intercoastal Shipping Act indicates that Congress did not intend that the Commission have authority to set rate differentials between individual carriers based solely upon differences in the quality of service rendered.

The majority is of course, by its earlier decision, committed to rate fixing, but must now disregard service differences because they consider themselves compelled to do so based on their interpretation of the legislative history, and must modify the previously fixed SACL rate so that TMT may not charge a lower rate than SACL. To me their reasoning is not warranted or compelling on this record.

There has been no new adjudication of the SACL rate and a finding that the rate is unjust or unreasonable as basis for the authority to "determine, prescribe, and order enforced a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge * * *" pursuant to section 4, but only a new rate fixed based on a principle of equality. The power to decide on the rate has been taken from SACL and assumed by the Commission, regardless of unjustness or unreasonableness.

As regards the legislative history "cited for the first time" to the majority, the citing of the legislative history is not applicable to my dissent in the first report because it was considered to be a fundamental part of my responsibilities to interpret all matters of law, including if necessary legislative history, before my dissenting report was written.

My dissent has already found, and is reiterated here, that the two existing rates (TMT, 31 cents; SACL, 32 cents) are reasonable, and it was based on the belief that section 4 of the Intercoastal Shipping Act authorizes a rate differential based on the circumstances applicable to each trade.

Section 4 authorizes determination and prescribing of rates only if they are unjust or unreasonable. Review of the facts at the time of my first report showed that the existing rates did not need to be prescribed, both because of certain record deficiencies and because Respondents had sustained their burden of proof in justifying their rates, by showing that rates were established by each Respondent's own decisions based on existing competitive influences in a historic free market trade and by claims of fully compensated operations. Therefore, rates were concluded to be just, reasonable, and lawful.

At least two faults in the majority's present reasoning come into sharp focus and hence compel me not to revise my earlier opinion. They are:

> *First*, the reasoning assumes service and cost are separable factors in adjudicating whether differentials in rates are just and reasonable.
>
> *Second*, the reasoning is inconsistent in omitting consideration of the effect of service disability based on transit time between New York to Puerto Rico and Jacksonville and Miami to Puerto Rico as a justification for a rate differential.

The only relevant service differential is thought to be the longer transit time caused by TMT's tug propulsion and towed barge operation, rather than the longer transit time caused by geography.

Service, costs, and revenues are inseparable factors in ship operations. They are equally inseparable factors in rate regulation. The experienced costs must be obtained from revenues. Revenues are obtained from transportation service for various units of property at the established rates. Costs per unit of property transported depend on the amount transported, and the amount transported depends on rates in relation to the service supplied. The greater the property units transported the less the cost per unit. In this case, a relatively new or at least different type of service, low costs, and rates priced to attract property for transportation service available have produced

competition. The introduction and encouragement of competition in a free economy assures a certain amount of consumer-shipper protection through market restraints, obviating a need for strict regulatory control, particularly where full cost information is inadequate. Reasoning along these lines supported the earlier dissenting opinion. The earlier majority opinion at least gave shippers the protection of market choice in two methods of service and a small rate differential. The majority has now denied shippers even this protection and has thus assured a need for still stricter regulation. One of the carriers has been denied the ability to attract traffic proportional to its service, resulting in the carrier's probable elimination as a further blow to competition. Rate equality will benefit only SACL as the faster carrier. The majority stated as follows in recognizing the cost and service differentials:

> A differential of approximately 4 cents would thus appear adequate to preserve the competitive relationship which naturally exists between the North and South Atlantic trades * * *
>
> A representative of TMT indicated that TMT's slower service made it difficult for it to attract cargo, and auto dealers indicated that TMT's lower rates were in part the reason why they shipped on its vessels. At a time when SACL and TMT had approximately the same rate (the second quarter of 1963) and SACL carried new cars, over 50 percent of the new car tonnage TMT was scheduled to handle was diverted to SACL.
>
> The record indicates that from February 14, 1964, to March 13, 1964, during which period TMT had in effect a rate in excess of 3 cents per cubic foot lower than SACL, SACL continued to operate at substantial vessel capacity.
>
> The Examiner, weighing the above considerations together with the fact that the number of vessels of TMT might increase, determined that the differential could be somewhat smaller and still allow adequate protection to TMT.

Service differentials based on transit time to Puerto Rico exist also between carriers operating out of New York and carriers operating out of Jacksonville and Miami, Florida. The "competitive relationship" is equally service relationship. Nevertheless, the majority does not use legislative history to eliminate the New York to Puerto Rico longer transit time differential as a relevant justification for a rate differential. A 4-cent New York differential remains. Obviously, there is a difference in distance caused by geography between New York and Puerto Rico and between Jacksonville and Miami and Puerto Rico, but these distances are reflected in transit time as a service disability. A difference in distance caused by geography is just as much a cause of longer travel time as a difference in propulsion methods and ship construction is a cause of longer travel time. If the majority is going to take its stand on the fact that longer transit time is a service disadvantage in the trade (referred to as "slower time") but must be an irrelevant factor between TMT and SACL

because of legislative history, consistency demands an equivalent irrelevance in regard to the New York carriers and geography as a cause of longer transit time.

I fear the majority by continuing to ignore the disciplines and forces of the free marketplace is still in pursuit of illusory objectives, and its new conclusion, as far as TMT is concerned, seems to be an expensive and drastic consequence of rhetorical hair splitting over the application of section 4 of the Intercoastal Shipping Act alone as qualified by legislative history insofar as it separates service and cost and then prohibits service differentials out of Florida ports based on travel time caused by "inferior" service and permits cost differentials, but somewhat inconsistently disregards legislative history by ordering a uniform service differential for all carriers out of North Atlantic and Gulf ports based solely on travel time caused by longer distance.

ORDER ON REMAND

The Commission having considered the briefs and arguments of respective counsel on the question posed in its order on remand, and on this day having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof, and having found that it is without authority to set rate differentials between competing carriers based on quality of service rendered,

Therefore, it is ordered, That paragraph 3 of the Order of the Commission served February 4, 1965,* is hereby vacated, and the following is substituted therefor: The minimum rate of TMT and SACL operating from Florida ports shall be 35 cents. This rate shall not be subject to any additional charges for arrimo; and

It is further ordered, That a copy of our Report and Order on Remand, duly certified by the Secretary, be forthwith transmitted to the United States Court of Appeals for the District of Columbia Circuit.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

*Vol. 8 FMC Reports p. 428.

FEDERAL MARITIME COMMISSION

No. 996

PHILIPPINE MERCHANTS STEAMSHIP CO., INC.

v.

CARGILL, INCORPORATED

Decided December 2, 1965

Determination of the landed weight of copra found to be the responsibility of respondent-consignee and the assessment against the vessel of a charge for this service found to be an unjust and unreasonable practice relating to the receiving and handling of cargo in violation of section 17 of the Shipping Act, 1916. Proceeding remanded to Examiner for taking of additional evidence to determine which services and facilities are provided by Cargill for the benefit of the vessel or at least made available by Cargill to vessels desiring to use them. Reparations for any injury caused by improperly imposed service charges also to be considered upon remand.

Agreement between respondent and Consolidated Stevedoring Company providing for division of net profits found to be a "cooperative working agreement" for the "apportionment of earnings" and required to be filed under section 15 of the Shipping Act, 1916.

Robert L. Harmon for complainant.
Carter Quinby and *Raymond J. Dittrich* for respondent.

REPORT

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

This proceeding was instituted by a complaint filed by Philippine Merchants Steamship Co., Inc. (Complainant), a common carrier in our foreign commerce, alleging violations by Cargill, Incorporated (Cargill or Respondent), an operator of a terminal facility, of various sections of the Shipping Act, 1916 (the Act).

Specifically, it is alleged that (1) Cargill has entered into unfiled agreements with the San Francisco Port Authority (the Port) and Consolidated Stevedoring Company (Consolidated) in violation of section 15, and (2) Cargill has assessed service charges against Complainant and engaged in certain stevedoring practices in violation of sections 16 and 17 of the Act. Complainant requests reparations in the amount of $9,130.85.

Hearings were held before Examiner John Marshall, pursuant to which an Initial Decision was issued to which both parties have filed exceptions and replies. We have heard oral argument.

FACTS

Cargill operates a terminal facility at Pier 84 in San Francisco under a license issued by the Port. The facility is used primarily for the unloading of Respondent's own bulk copra in conjunction with its copra warehouse and processing plant located immediately adjacent to the pier.

Copra is discharged by means of automatic diggers (electrically powered caterpillar track mounted equipment which is placed in the hold of the vessel) and pneumatic blowers which are located on the pier. These blowers draw the copra out of the vessel through flexible pipes and deposit it on a conveyor belt running lengthwise along the pier. From this conveyor belt the copra is automatically dropped to a drag-type conveyor belt which takes it to the scalehouse where it is automatically weighed in hopper-type containers and then automatically conveyed to either the warehouse or directly to the crushing plant. The usual discharge rate, based upon two 8-hour shifts, is 500 short tons per day. Vessels are at the pier about two-thirds of the time. The warehouse capacity is approximately 10,000 short tons.

Some 80 percent of Respondent's copra discharged at Pier 84 is from its own charters, the costs of which are not of record. The portion of the remainder carried by conference carriers has been at open rates ranging from $17 to $18 per long ton, berth terms, landed weight. That carried by Complainant, a nonconference carrier, has ranged from $16.50 to $17 depending on the loading point.

Shippers have their own methods, which vary, for determining the weight of the copra placed on board vessels, and bills of lading carry the notation "shipper's weight" or "Said to weigh." The master of the vessel for his purposes checks the weights to be taken on by applying a rule of thumb based upon a space stowage factor. Loading costs include a service charge of 68.32 cents per long ton (actually assessed as 61 cents per short ton). Bulk Philippine copra is conventionally shipped under c.i.f. terms. Ninety-five percent of the price is paid on first presentation of the shipping documents, leaving the consignee 5 percent with which to adjust differences in weights and grades.

The Agreements Between Cargill and the Port

Until July 1, 1954, Cargill occupied Pier 84 subject to the specific provisions of the printed form agreement utilized by the Port for all such waterfront licenses. This form, though twice revised, was con-

tinuously captioned "Assignment of Space" and provided that said assignment constituted a license to use the space revokable at the pleasure of the Port on 30 days' notice. The space was stated to be 11,470 square feet, and the monthly rental $137.64.

Subsequent to July 1, 1954, Cargill has continued possession under successive editions of the printed form agreement recaptioned to read "License To Use Space Non-exclusive." The noted provisions have remained essentially the same except that the right of revocation has been extended to include licensees and the monthly rental payable by Cargill has been increased to $172.05 and then to $229.40. No agreement has contained any refence to service charges.

The port controls a large number of wharves on the San Francisco waterfront representing property values and capital investments of many millions of dollars. It operates none of these directly but instead grants nonexclusive licenses to others who may be engaged in some manufacturing or trading business, or may be steamship companies, or stevedoring companies, or strictly terminal companies. These licenses conform to the specific terms for wharf space licensing set forth in the Port's tariff. In the standard printed form agreement used there is provision for filling in the name and address of the licensee, a description of the space, and the monthly license fee. The fee is the rate per square foot prescribed in the Port's tariff multiplied by the number of square feet licensed. This tariff, the provisions of which are expressly made applicable to all licensed wharf areas, provides for two types of licenses defined as—

(a) a Preferential License which gives the licensee the right to the preferential non-exclusive use of the wharf area described in the license and

(b) a Temporary License which gives the licensee the right to the temporary non-exclusive use of the wharf area described in the license.

The rights under wharf area licenses are stated in the Port's tariff as follows:

Subject to the rates, charges, rules, and regulations named in this and other sections of this Tariff, and subject further to any restrictions, conditions, limitations, and modifications set forth in the license itself, wharf area license shall include only the license or right (a) to moor vessels owned, operated, or represented by the licensee at the area licensed, (b) to assemble, distribute, load, and unload merchandise and the cargoes of, or for such vessels, over, through, or upon the licensed wharf area, and (c) to perform such other related activities as may be necessary; subject further to the provision that when the licensed wharf area, or any part thereof, is not required for the use of the licensee, or is unoccupied, the Chief Wharfinger [agent of licensor] may, at his discretion, assign temporarily said facility, or any part thereof, to another.

By separate agreement dated October 15, 1956, the Port agreed to accomplish certain improvements to Pier 84 desired by Cargill on condition that Cargill would initially pay the costs estimated at not to

exceed $60,000. It was further provided that this expenditure would be amortized by means of the Port granting Cargill a credit each month to be determined at the rate of 45 cents per ton for all copra or other cargo discharged at Pier 84 for the account of Cargill. This credit applied to wharfage charges accruing to the Port at the rate of 50 cents per ton. The presently effective license agreement, dated July 1, 1963, No. 5829, was submitted by Cargill to this Commission for review. The Director, Bureau of Domestic Regulation, by letter dated October 9, 1963, advised Cargill that "Upon completion of the staff's review of the subject agreement, it has been concluded that it is not subject to section 15 of the Shipping Act, 1916."

The Agreement Between Cargill and Consolidated

Consolidated Stevedoring Company (Consolidated) is an independent contractor engaged in the furnishing of stevedoring services at various locations, including Pier 84. On June 1, 1960, Consolidated entered into an agreement with Cargill whereby Cargill agreed to develop and furnish Consolidated, "on a nonexclusive basis," equipment for aboard-ships digging of copra for use in connection with the blowers, drag conveyors, and other existing pier equipment, all in consideration of (1) a rental charge of $1.50 (later increased to $1.62½) per short ton of copra unloaded, and (2) a portion of the net profits realized by Consolidated from stevedoring operations utilizing the equipment. Maintenance of the blowers and conveyors, as well as the electric power for their operation, is provided by Cargill. The portion of profits to be paid to Cargill by Consolidated was based upon a schedule which ranged downward from 92 percent on small amounts to 70 percent on large amounts. Net profits were prescribed to be the total rates charged vessels minus the Pacific Maritime Association's payrolls and assessments, payroll taxes, payroll insurance, and Workmen's Compensation charges, the aforesaid $1.50 per ton rental charge, and a fee of 50 cents per ton to cover Consolidated's management salaries, insurance, fixed costs, and other direct operating expenses attributed to each unloading. The latter fee of 50 cents, a so-called management fee, was later reduced to 37½ cents, and then eliminated. In lieu thereof, Cargill guarantees a minimum income to Consolidated of 37½ cents per short ton per ship.

The Service Charge

As noted Cargill assesses a service charge against the vessel of 61 cents per short ton on bulk copra discharged at Pier 84. There has always been a service charge at this terminal though not always as much, and it has always been collected by and accrued to the lessee. It is assessed against all vessels using the terminal and, under Re-

spondent's present tariff, covers any one or more of the following services performed by the terminal:

1. Arrange berth for vessel.
2. Arranging terminal space for cargo.
3. Checking cargo to or from vessel as required.
4. Receiving outbound cargo from shippers and giving receipts therefor.
5. Delivering cargo to consignees and taking receipts therefor.
6. Preparing manifests, loading lists or tags covering cargo loaded aboard vessel.
7. Preparing over, short and damage reports.
8. Ordering cars.
9. Supplying shippers and consignees with information regarding cargo and sailing and arrival dates of vessels.
10. Lighting the terminal.
11. Provision of dock facilities.
12. Providing a facility to furnish fresh water.
13. Order line handling gangs.
14. Provide electrical power to operate shoreside and shipboard machinery.
15. Provide extra lights for the top side of the ship.
16. Provide a gangway.
17. Provide slings and pallets for loading ship stores.
18. Provide road and dock space for making ship repairs, and for ship painting.
19. Provide a telephone service.
20. Provide a mail service for ships.
21. Provide a fork lift truck for loading supplies and repair material on board ships.

NOTE.—Service charges do not cover or include any cargo-handling operations or labor.

Until May 5, 1961, this service charge, as well as like service charges of three other terminals operating under license agreements with the Port, was published in successive tariffs issued by the Port. The other terminals were Islais Creek Cotton Terminal, Islais Creek Grain Terminal and Elevator, and Central Terminal. The services, which were the same for each terminal, consisted of those above numbered 1 through 11; the charge was assessed against a vessel for the performance of any one or more of them, and accrued to and was collected by the licensee unless otherwise provided in the license. On May 5, 1961, the Port deleted these service charge provisions from its tariff on advice of counsel "* * * so that there would be no question at any future time as to whether or not (they) belonged there."

On or about June 7, 1961, Cargill wrote to the lines which had been regularly serving Pier 84, some 15 in number, to confirm (1) the decision of the Port to modify its tariff to delete service charges not collected by itself and, (2) the intention of Cargill to continue to assess the then current charge of 61 cents per ton. Complainant was not one of the 15 lines to which notice was sent on June 7, 1961, as it was not then one of the regular users of Cargill's facility. Some time between September 1 and November 22, 1961, Cargill issued its own service charge tariff, entitled Cargill, Incorporated Tariff No. 1, and filed it with the Commission.

During the summer of 1961 bulk copra was mechanically discharged from Complainant's vessels berthed at Pier 84 as follows:

Dates	*Vessel*	*Short tons*
June 13–26, 1961	SS Weybridge	8,703.65
July 8–10, 1961	SS Inchstaffa	1,820.16
July 13–17, 1961	SS Shaukiwan	3,263.36
Aug. 22–23, 1961	SS Tindalo	1,181.44

The service charges assessed against these four vessels, and paid, totaled $9,130.85. Each of the individual invoices provided that the charge was for the operation of Pier 84 while the particular vessel discharged. There were and are no other charges assessed by Respondent against vessels utilizing Pier 84.

The Examiner's Decision

The Examiner found that the space license agreement and Pier 84 improvement agreement were the only agreements between Cargill and the Port. He further found that these agreements contained no provisions which required their filing under section 15.[1] The license agreement, he found, granted only " 'first call privileges' to use certain described terminal space areas for fixed monthly rentals, which are neither exclusive nor preferential, as these terms are used in section 15 of the Act." The pier improvement agreement, under which Cargill initially paid for the improvement and was granted allowance against wharfage was found by the Examiner to constitute nothing more than "partial payment of the wharfage charges due from Cargill to the Port in advance."

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[1] Sec. 15 requires the filing of agreements of persons subject to the Act which involve fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports, limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement.

The Examiner treated the stevedoring agreement between Consolidated and Cargill as falling outside the scope of section 15 because he found that Consolidated was not carrying on the business of furnishing terminal facilities, and thus was not subject to the Commission's jurisdiction.[2]

In considering the validity of the "service" charge the Examiner, using the Freas formula,[3] treated the amount charged for "service" as reasonable. He went on, however, to investigate the problem of against whom the service charges should be levied. Although the Examiner did not find that any of the 21 service charge items listed in Respondent's tariff was unavailable to vessels, he noted that some were seldom if ever performed, and that others seemed to represent negligible if any costs to Cargill or appeared to be services actually performed by Consolidated at no expense to Cargill. The Examiner specifically found that Respondent's practice of assessing the vessel for weighing the copra was not a proper charge against Complainant as the charge was for the benefit of the consignee (Cargill) which had the duty of weighing the copra under its contracts of affreightment and sale. He, therefore, found that the assessment of the weighing charge against Complainant was "an unjust and unreasonable practice relating to or connected with the receiving, handling, storing or delivering of property" in violation of section 17 of the Act. He further required that Respondent establish and observe just and reasonable regulations and practices to assure that its service charge reflects only the reasonable cost and value of services and facilities which it can and does make available and which are for the benefit of the vessel. As evidence of compliance with this requirement, he suggested that Respondent file, with the Commission, within 30 days of the final decision in this proceeding, a statement containing a realistic listing of the services and facilities covered by its charge and a showing that the charge does not constitute an unjust or unreasonable practice.

The Examiner found that the failure of Respondent to have at all times on file with the Commission a tariff covering the service charge was not an "unreasonable practice" in violation of section 17 since notice of the continuation of the service charge had been given through Cargill's letter to lines regularly using Pier 84.

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[2] Sec. 15 extends only to those agreements to which each party is either a common carrier by water or other person subject to the Act. Sec. 1 of the Act defines "other person" to be anyone "* * * carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water."

[3] This is a formula for segregating terminal costs among wharfinger services. It was approved in docket 640, Terminal Rates Structure—California Ports, 3 U.S.M.C. 57 (Aug. 24, 1948). The Edwards-Differding Formula, upon which it was patterned, was introduced in 1936. See Practices, etc., of San Francisco Bay Area Terminals, 2 U.S.M.C. 588 (1941).

DISCUSSION AND CONCLUSIONS

The Agreements

Complainant alleges that the Examiner erred in failing to find that the agreements between Cargill and the Port and the agreement between Cargill and Consolidated required filing for Commission approval under section 15 of the Act.

We feel that the Examiner was correct in his determination that the agreements between Cargill and the Port do not fall within the ambit of section 15. Complainant is unable to designate any particular provision of the agreements which would bring them within section 15, but it points to the following as indicative of comprehensive unfiled section 15 agreements between Port and Cargill:

(1) Cargill's "first call" berth privilege made pursuant to provisions in Port's tariff;

(2) The charging and retention of dockage and wharfage fees by the Port and the charging and retention of the service charge by Cargill;

(3) The credit allowed Cargill against wharfage as a means of amortizing the cost of improvements made for Cargill by the Port at Pier 84.

If no single part of the activities between Cargill and the Port falls within section 15, then, of course, the sum of these activities are not within that section. We feel that the Examiner correctly determined that the three activities noted above failed to indicate the presence of section 15 agreements.

The means whereby wharfage and demurrage is charged by the Port and the service charge made by Cargill is not by agreement at all, let alone section 15 agreement. The Port furnishes wharfage and collects for wharfage and demurrage not through any agreement, but according to its tariff which contains uniform rates for all users. Cargill imposes uniform service charges for all users of its facility over which the Port exercises no control of any kind.

It is true that the "first call" privilege is granted to Cargill pursuant to an agreement between Cargill and the Port—a license entered into pursuant to provisions contained in the Port's tariff. This agreement, however, is not one which grants to Cargill any kind of "special" privilege or could otherwise be said to fall within the scope of section 15. All users of the Port's facilities are free to enter into such licenses and to enter into them subject to the same tariff rates and regulations. These licenses differ in kind from the arrangements involved in the recently decided dockets No. 1128—*Terminal Lease Agreement at Long Beach, California;* No. 1129—*Terminal Lease Agreement at Oakland, California;* served June 18, 1965. In those cases, agreements granting the use of terminal facilities to a carrier were found to be subject to section 15, because those agreements, unlike

the license here involved, granted the use of the facilities to the carrier in consideration of a flat rental in lieu of the tariff charges which would otherwise have applied at the facilities.

Nor does Cargill's "wharfage credit" in any way "prefer" Cargill over the other users of the Port's facility. Cargill is, as noted above, required to pay the same wharfage as other users of the facility. Cargill is entitled to reimbursement for its expenditures at Pier 84. The record does not indicate that the $60,000 figure set by the Port is an unreasonable amount for the expenditure. The "wharfage credit" merely constitutes a convenient way of reimbursing Cargill.

We agree, however, with Complainant's contention that the agreement between Cargill and Consolidated is one which must be filed for approval under section 15. The Examiner determined that the agreement was not subject to section 15 on the basis that Consolidated is a "stevedore" and that "the business of stevedoring, without more, has never been held to be within the scope of section 15." We need not here decide the broad question of whether one who provides only stevedoring services furnishes terminal facilities within the meaning of section 1 of the Act. It is sufficient for our purposes here to say only that Consolidated does furnish such terminal facilities.

The main function of the Cargill facility, the unloading of copra, is performed through the use of automatic diggers, pneumatic blowers and conveyor belts. While these diggers are owned by Cargill they are furnished to the carrier and operated by Consolidated, which rents them from Cargill. They are the means whereby copra is removed from vessel hold.

As our predecessor agency, the United States Maritime Commission, held in *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761, 767 (1946), terminal facilities means "all those arrangements, mechanical and engineering, which make an easy transfer of passengers and goods at either end of a stage of transportation service."

In that case, independent contractors who transferred property between railroad cars and place of rest on a pier were held to be "furnishers of terminal facilities" because the equipment and labor they furnished did provide for such easy transfer.

The fact that the equipment furnished by the carloaders and unloaders may have been owned by them while that furnished by Consolidated is owned by Cargill is irrelevant. One who operates an important link in the chain of transference of goods "furnishes" a terminal facility whether or not he owns that link. As the Supreme Court stated in *U.S.* v. *American Union Transport*, 327 U.S. 437, 443, 451 (1946), "no intent * * * appears to divide persons furnishing wharfage, dock, warehouse, or other terminal facilities into regulated

and unregulated groups. * * * [I]f this board * * * effectually regulates water carriers, it must also have supervision of all those incidental facilities connected with the main carriers. * * *"

Under the agreement between Cargill and Consolidated, provision is made for the payment to Cargill by Consolidated of a portion of the net profits realized by the latter through the furnishing of its services. This is a "cooperative working arrangement" for the "apportionment of earnings" within the meaning of section 15.

As respondent concedes, "there is little record evidence relating to (the) practical effects" of the Cargill-Consolidated stevedoring arrangement. While it is true that Consolidated is the only stevedore known to have served Pier 84, there is no showing that the Pier is closed to others, or that any others have ever sought or been denied the opportunity to work it, or that any carrier has ever requested any other stevedore. There is furthermore no showing that Cargill in any way controls the rates that Consolidated charges for its services or that these rates are unreasonable. Complainant had full opportunity to present such evidence, if it existed, at the hearings in this proceeding. It is, therefore, determined that the Cargill-Consolidated agreement has not been shown to violate sections 16 or 17 of the Act.

The Service Charge

Complainant contends that the Examiner was correct in finding that the imposition of the charge for weighing the copra against it was a violation of section 17, but in addition maintains that the Examiner erred in not finding that the imposition of the weight charge also violated section 16, and that the levying of the service charge as a whole against it was a violation of sections 16 and 17. It maintains that a terminal operator may not impose a service charge when it is also the consignee of the cargo and, even if it could, the service charge here should have been outlawed as no part of it was shown to benefit Complainant. It alleges that the Examiner improperly applied the Freas formula in holding the amount of the service charge to be reasonable.

Respondent asserts that the Examiner erred in outlawing the charge for the weighing of the copra as a charge against the ship. It argues that the ship benefits from the weighing as the determination of the correct weight is essential for the proper freight rate. It maintains, moreover, that even if the charge in the last analysis should be borne by the consignee, it is permissible under the rationale of our docket 744, *Terminal Rate Structure—Pacific Northwest Ports*, 5 FMB 326 (1957), to allow the terminal to assess it against the ship which will then pass it on to the consignee if it is so required by the terms of the contract of affreightment.

We hold that the Examiner was correct in finding that Cargill had not violated section 16 with respect to the service charge. There was no showing that competitive shippers were disadvantaged through the imposition of the service charge.[4] The record, moreover, shows that certain of Respondents competitor-consignees also collect identical service charges.

Nor was there a showing that the charge was used by Cargill as consignee to obtain or by Cargill as terminal operator to allow itself to obtain transportation by water at less than the rates which would otherwise be applicable.[5] Any charges levied by a shipper or consignee against a carrier of its cargo could be termed counter or offsetting charges, but so long as these charges are reasonably related to the cost of service they are proper in amount and cannot violate section 16. We hold that the Examiner properly applied the Freas formula in finding that the service charge was proper in amount.

Cargill is entitled to compensation for the legitimate expenses incurred in performing its terminal functions. Any charge levied to recoup such expenses cannot be said to be obtaining transportation for less than the applicable rates.

Moreover, an essential element for the proof of a violation of section 16, first paragraph, or section 16 second appears to be missing—the "unfair device or means." To support an allegation of a violation of these sections it must be shown that one did something or attempted to do something which he knew or should have known was unlawful. Thus, for example, in *Hohenberg Brothers Company* v. *Federal Maritime Commission*, 316 F. 2d 381 (1963), the Court of Appeals for the District of Columbia Circuit affirmed the Commission's determination that a shipper had violated section 16 because the shipper sought a "rebate" on the basis of a claim it knew or should have known was

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[4] Sec. 16 first, provides:

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

[5] Sec. 16, first paragraph provides:

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

Sec. 16, second provides that it shall be unlawful for a "common carrier by water" or "other person":

"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."

false. Such element of known illegality is not present here. The fact that terminal consignee competitors of Cargill assessed a similar service charge suggests that Cargill, rather than feel its charge was unlawful, had every reason to believe it was proper.

We also agree with the Examiner, however, that the imposition of the weighing portion of the service charge against complainant was improper and as such was an "unreasonable practice" within the meaning of section 17.

The carrier has no obligation to weigh the copra. Under the Trading Rules of the National Institute of Oilseed Products, the obligation to determine the proper weight of copra and the costs of weighing are borne by either the buyer or seller, depending upon whether the copra is sold on a "shipping weights" or "landed weights" basis. The record shows that the great majority of copra is sold on a "landed weights" basis. In such cases the obligation to pay weighing costs is placed by the trading rules upon the buyer-consignees. Although the determination of the correct weight is necessary for the assessment of the proper freight rate, and thus the carrier may be said to "benefit" from the weighing service, such benefit is not the kind that will justify the imposition of the weighing charge against the carrier.

As our predecessor held in *Intercoastal S.S. Frt. Ass'n* v. *N. W. M. T. Ass'n*, 4 FMB 387, 394 (1953), the imposition of a charge is to be made against one who "uses" the service and when "the vessel has no duty [to perform the service] * * * it naturally follows that Respondents' service for which the service charge is imposed is not for the use of the vessel * * *."

The ruling in our docket 744, *supra*, which allowed a terminal to assess a charge which was ultimately to be borne by the cargo against the ship in the first instance, does not apply to a situation such as this where the terminal operator is a party to the contracts of sale and affreightment. It is not true, as Complainant maintains, that a terminal operator may not impose a service charge when it is also the consignee of the cargo. If that were the case, the operator of a terminal facility would be free to violate section 17 of the Act by engaging in the "unreasonable practice" of excluding his cargo from the charge and imposing it upon other users of its facility.

However, as the Examiner observed, it is difficult to determine which services and facilities for which Cargill imposes its service charges are actually made available by it for the benefit of the ship. We are not now in a position to make a definitive statement on any portion of the service charges other than the weighing portion: the record with respect to them is not sufficiently clear. This proceeding must therefore be remanded to the Examiner for the taking of addi-

tional evidence to determine which of these services and facilities are provided by Cargill for the benefit of the ship, or at least made available by Cargill to ships desiring to use them. Charges should reflect only the reasonable cost and value of such services and facilities.

Reparations

Respondent has violated section 17 and a determination on remand must also be made of the amount of reparations due for any injury caused by the improperly imposed charges.

An appropriate order will be issued.

Commissioner John S. Patterson and Commissioner George H. Hearn concurring and dissenting.:

We concur in the conclusion of the majority, but would further find that Cargill has also violated the introductory paragraph of section 16 of the Act by obtaining or attempting to obtain transportation by water for property at less than the rates otherwise applicable, knowingly and willfully, directly or indirectly, by an unjust or unfair device or means. This record establishes that Cargill, at one and the same time, is both a consignee and a terminal operator, and that Cargill has deducted from the carrier's freight the cost of weighing copra (which all agree is for the account of the consignee) and other "service charges" many of which are of very doubtful validity. Cargill knew the effect of what it was doing. The unwarranted deductions constitute an "unjust or unfair device or means," and since the unwarranted deductions have resulted in a freight rate "less than the rates * * * otherwise applicable," Respondent's willfull conduct is unlawful under section 16. The cargo, and consequently the consignee, is the beneficiary of most of the elements of the "service charge," and shifting the cost of these benefits to the vessel by the consignee under its status as a terminal operator constitutes an unjust or unfair device or means.

FEDERAL MARITIME COMMISSION

No. 996

PHILIPPINE MERCHANTS STEAMSHIP CO., INC.

v.

CARGILL, INCORPORATED

ORDER

Full investigation of the matters and things involved in this proceeding has been had, and the Commission on December 2, 1965, has made and entered of record a report stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof. The Commission found in said report, *inter alia:*

1. That Respondent Cargill, Incorporated, has entered into an unfiled agreement with Consolidated Stevedoring Company in violation of section 15 of the Shipping Act, 1916;

2. The Respondent has violated section 17 of said Act by the imposition of a weighing charge against Complainant, Philippine Merchants Steamship Co., Inc.; and

3. That the record with respect to other violations of section 17 by the Respondent is not sufficiently clear.

Therefore, it is ordered,

1. That respondent cease and desist from imposing the weighing charge against Complainant;

2. That the proceeding be remanded to the Examiner for (a) the taking of additional evidence to determine which services and facilities are provided by Cargill for the benefit of the ship, or at least made available by Cargill to ships desiring to use them. Charges shall reflect only the reasonable cost and value of such services and facilities, and (b) the determination of the amount of reparations due Complainant for any injury caused by improperly imposed charges; and

3. That Respondent cease and desist from effectuating its agreement with Consolidated Stevedoring Company held to be subject to section 15 of said Act in the report in this proceeding until the agreement has been filed with and approved by the Commission.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 382

THE EAST ASIATIC CO., INC.—APPLICATION FOR PERMISSION TO WAIVE COLLECTION OF UNDERCHARGES

Decided December 2, 1965

Application for permission to waive collection of undercharges on shipment of used Volkswagens from St. Thomas, Virgin Islands, to Los Angeles, California, denied.

Gordon L. Poole, Esq., *Elmer E. Metz, Esq.* and *Robert Fremlin, Esq.* for Applicant.

REPORT

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

This is an application pursuant to rule 6(b) of the Commission's Rules of Practice and Procedure filed by East Asiatic Co., Inc. (Applicant), the California agent for the East Asiatic Co., Ltd., a Danish-flag line, for an order authorizing it to waive the collection of undercharges to Europa Used Car Co. in the amount of $6,567.08 in connection with a shipment of used Volkswagens from St. Thomas, Virgin Islands, to Los Angeles, California.

Examiner Edward C. Johnson issued an initial decision to which exceptions were filed by East Asiatic Co., Inc. The proceeding was remanded to the Examiner for further consideration, after which a supplemental initial decision was issued. This proceeding is before us on our own motion to review this supplemental initial decision.

The facts alleged in the verified application and found by the Examiner are substantially as follows:

Tropical Motors Corporation (Tropical), a used car dealer in St. Thomas, had overstocked itself with used Volkswagens and thereafter finding that there was a market for these automobiles in Los Angeles, entered into a sales agreement with Europa, a California importer of used automobiles. Just prior to May 3, 1963, Europa communicated with applicant and asked for a special rate for the carriage of the

used vehicles covered by its sales agreement with Tropical. Applicant's tariff on file with the Federal Maritime Commission (Commission) at the time quoted a rate for "Automobiles, new or used, * * * " of $36.30 per ton W/M, with handling charges of $.90 W/M. Applicant, however, agreed with Europa to grant it the lower rate of $175.00 per automobile, subject to filing the tariff decrease with the Commission. Accordingly, Applicant sent a tariff reduction to the Commission naming a commodity rate for "Automobiles, new or used, * * * " of $175.00 per unit, with handling charges of $.90 W/M. Applicant, believing that the reduction was governed by the rules applicable to the foreign commerce of the United States; i.e., that the reduced rate became effective upon filing with the Commission, proceeded to book the automobiles aboard one of its vessels. Since East Asiatic Co., Ltd's service between the Virgin Islands and Los Angeles is in the offshore domestic trade, the Commission rejected the reduction for failure to afford the 30 days' notice required by section 2 of the Intercoastal Shipping Act, 1933. Pursuant to telephone conversations with the Commission's staff and its San Francisco representative, as a result of which applicant alleges that it was under the impression that no problem would arise if it filed another tariff page giving the appropriate notice, applicant filed a new tariff reduction. Because applicant had failed to provide that this tariff reduction cancelled the $36.30 W/M automobile rate already on file, it was also rejected. By this time, the automobiles were on their way to the United States, having been booked under a $175.00 per unit rate, although the $36.30 per ton W/M rate was the one then legally on file. This amounted to an undercharge in the sum of $6,567.08, computed as follows:

Freight under new rate:	
$175.00 per unit	$9,100.00
Freight under old rate:	
17,264 cu. ft. @$36.30 per 40 cu. ft	15,667.08
Difference—not paid	6,567.08

Europa contends that it owes nothing further to applicant for the carriage of the automobiles and refuses to pay the undercharges on the ground that it had received a booking at the lower rate.

In his initial decision, the Examiner denied the application of East Asiatic, Inc., and determined that the Commission's decision in Special Docket No. 377, *Ludwig Mueller Co., Inc.* v. *Peralta Shipping Corp., Agents of Torm Line* was controlling and required denial of the application.

Applicant excepted to the Examiner's recommended decision on the grounds, inter alia, that the *Ludwig Mueller* decision relied upon by the Examiner involved tariff deviations in the *foreign trade*, whereas the shipment involved herein was transported in the *domestic offshore* trade; that the Examiner's decision contained no discussion whatever of the Commission's authority to grant special docket requests in the noncontiguous domestic trade, although the Commission has determined that under certain circumstances it has such authority; and, that as a result of the foregoing, the Examiner had based his decision upon grounds which were not clearly disclosed or adequately sustained.

Since it appeared that the Examiner had failed to take full cognizance of our decision in *Ludwig Mueller*, at least insofar as it related to the Commission's authority to apply the special docket technique in the domestic offshore trade, and since it further appeared that the shipment involved herein was in fact made in the so-called offshore domestic trade, we remanded this proceeding to the Examiner for consideration under the Intercoastal Shipping Act, 1933.

In his supplemental initial decision, the Examiner granted East Asiatic, Inc.'s application for permission to waive the collection of the undercharges. Since it appears, however, that the basis upon which the Examiner granted relief is inconsistent with our position in *Ludwig Mueller*, we have determined to review this supplemental initial decision on our own motion.

Discussion and Conclusions

The general principles relevant to the decision of this proceeding have already been settled in *Ludwig Mueller*. In view of the fact, however, that the *Ludwig Mueller* decision did represent a departure from our prior policy with respect to rule 6(b) applications, we take this opportunity to restate and possibly clarify these principles, their scope and their purpose, as they concern our authority to grant rule 6(b) applications in the noncontiguous domestic trade.

There is no question that the applicable rate for the shipment of used Volkswagens involved herein was the $36.30 W/M rate on file with this Commission during the period in question. Applicant, however, concedes that it has assessed and collected a lower rate of $175.00 per unit.

Section 2 of the Intercoastal Shipping Act, 1933 (1933 Act), prohibits a carrier by water in intercoastal commerce from charging a greater or *less* or different compensation from that contained in the tariff on file with the Commission.

In his supplemental initial decision, the Examiner found the applicant to have violated the aforementioned section 2 of the 1933 Act,

but, nevertheless, concluded that the extenuating circumstances present in this record justified the granting of the equitable relief requested. The Examiner based his conclusions on the consideration that an innocent shipper should not be made to bear the consequences of a carrier's failure to file a particular rate which it had agreed to do and which it intended in good faith to make applicable to the shipment in question.

After a careful examination of the record, considered in the light of our recent decision in *Ludwig Mueller*, we are of the opinion that the Examiner misconstrued our holding in *Ludwig Mueller* and erred in permitting the waiver of $6,567.08 in undercharges. The finding that here the application of a rate other than the one legally on file was the result of a misunderstanding or a misconception of the carrier does not provide sufficient basis upon which to rest the granting of relief in a special docket application.

In *Ludwig Mueller*, after determining that our controlling statutes did not permit us to authorize deviations from filed tariffs in the foreign trade, notwithstanding rule 6(b) of our Rules of Practice and Procedure, we went on to add:

> It may be asked, at this point, what is the function of our special docket procedure and when may it be used. It is a procedure whereby there is approved a refund from a carrier to a shipper of the difference between a rate that the carrier admits and the Commission finds to be unreasonable (and therefore unlawful), and *a rate which the Commission adjudges to be reasonable.*
>
> It becomes immediately apparent, therefore, *that only in those cases where the Commission is empowered to direct the enforcement of a reasonable rate is our special docket technique applicable * * **. (Emphasis added.)

The Commission is empowered to direct the enforcement of a reasonable rate under section 18(a) of the Shipping Act, 1916, and section 4 of the 1933 Act, both of which relate *solely* to the Commission's jurisdiction over common carriers in the noncontiguous domestic trades.

Section 18(a) provides that whenever the Commission finds a rate to be unreasonable it may determine, prescribe, and order enforced a just and reasonable *maximum* rate. The Intercoastal Act, section 4, authorizes the Commission whenever it finds a particular rate unjust or unreasonable to prescribe and order enforced a just and reasonable *maximum or minimum* rate.

From the foregoing, it is evident that our special docket technique requires that all considerations of intention, error, misunderstandings, and the like, be discounted as irrelevant. The question is not one of inequity or injustice, but rather one of fact, namely the "reasonableness" or "unreasonableness" of the rates in question. We are well aware now, as we were in *Ludwig Mueller*, that this strict interpreta-

tion of our statutes with respect to special docket applications, may result in hardship in certain instances but the statutes, enacted by Congress and administered by this Commission are abundantly clear and we must adhere to them. In *Louisville & N.R.R. Co. v. Maxwell*, 237 U.S. 94, 97, Justice Hughes speaking for the Court, stated:

> The rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it and they as well as the carrier must abide by it unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

And as we asserted in *Ludwig Mueller* in this regard:

> * * * we believe that strict construction of the statute will result in more careful tariff administration and management by carriers and conferences, and the obviation of possible undue or unfair preferences or advantages and discriminations.

In view of what we have stated in *Ludwig Mueller*, and in the body of this opinion, the only proper way that we can authorize a deviation from duly filed tariffs and grant the waiver requested in the present application is for us to ground that waiver upon a finding that the tariff or legally applicable rate of $36.30 W/M is unreasonable, and a concomitant finding that the rate of $175.00 per unit, actually charged, is a reasonable one.

The Examiner, however, did not find nor did the applicant allege that the duly applicable rate was unreasonable and that the rate actually charged was reasonable. Indeed, the record is devoid of any facts upon which we, in the final analysis, could make any such findings. Therefore, on the basis of the record before us, we have no alternative but to deny East Asiatic Inc.'s application. An appropriate order will be entered denying the application.

COMMISSIONERS JAMES V. DAY AND ASHTON C. BARRETT dissenting:

Consonant with our dissenting opinion in Special Docket No. 377, *Ludwig Mueller Co., Inc.* v. *Peralta Shipping Corp., Agents of Torm Line*, we would grant the relief requested.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 382

THE EAST ASIATIC CO., INC.—APPLICATION FOR PERMISSION TO WAIVE COLLECTION OF UNDERCHARGES

ORDER

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

It is ordered, That the application of East Asiatic Co., Inc. for permission to waive the collection of undercharges is hereby denied.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1159

IN THE MATTER OF AGREEMENT No. 14–19 AND CLAUSE 11 OF AGREEMENT No. 14–1 AS AMENDED, AND CLAUSE 10 OF AGREEMENT 14–20, TRANS-PACIFIC FREIGHT CONFERENCE (HONG KONG)

Decided December 2, 1965

Article 10 of Agreement 14–20 between the member lines of the Trans-Pacific Freight Conference (Hong Kong) providing for the exclusive services of shipping agents not being found 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, 1916, is approved pursuant to section 15 of the Shipping Act, 1916.

Charles F. Warren and *John P. Meade* for Respondents.

Robert J. Blackwell, *J. Scot Provan*, and *Thomas Christensen* as Hearing Counsel.

REPORT

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

This is an investigation into certain proposed exclusive agency arrangements between the member lines of the Trans-Pacific Freight Conference (hereinafter TPFC) and their agents.[1] In its now proposed form the agreement would forbid the agents, or their "subsidiaries and/or associated and/or affiliated and/or related companies" to represent a nonconference carrier in the trade.

Oceanic Lloyd, Ltd., an agent for independent carriers operating in the trade intervened in the proceeding, but later withdrew. Hearing Counsel remains as a party to the proceeding. Hearings have

[1] The original order of investigation covered Agreement No. 14–19. The Conference subsequently proposed Agreement No. 14–20 to supersede No. 14–19. Accordingly, the Commission by supplemental order expanded the proceeding to include No. 14–20.

been held and Examiner Paul D. Page, Jr., issued an Initial Decision approving the agreement to which exceptions and replies have been filed. Oral argument has been heard.

FACTS

The TPFC is an association of 24 steamship lines operating liner service from Hong Kong, Taiwan, and Bangkok to United States Pacific ports. Its membership includes seven American-flag lines, six Japanese, four Norwegian, three Philippine, one British, one Danish, one Dutch, and one Yugoslav.

As approved in January 1963, article 11 of the basic agreement contains TPFC's presently effective exclusive agency arrangements which merely prohibit the agent and/or its subsidiaries from representing nonconference lines. The present proposed amendment would further extend the prohibition to the Conference member "or its subsidiaries or its agent's subsidiaries and/or associated and/or affiliated and/or related companies or concerns either of itself or of its agents."

Almost all the lines, both Conference and nonconference, serving this trade are represented by agents. The most important duties of the agent are to solicit, process, and book cargo, provide cargo documentation, and in general build up his principal's carriage in the trade. Agents also service claims, clear vessels, operate and organize stevedoring, buy fuel and engage in other general husbanding of the vessels.

The agent in effect becomes part of the line it represents, and if the carrier is a Conference member, the agent sometimes represents the carrier at Conference meetings. The Conference lines view the relationship between themselves and the agent as one which is fiduciary in nature and because of this there is usually an exclusive agency contract between the two stating that the agent shall not represent another carrier in the same trade without permission of the carrier. In the TPFC some members have executed this generally accepted exclusive agency contract with their agents; others have not. Some members of the Conference utilize the same agents but only where the members do not compete for the same cargo movement or do not have competitive sailings.

The Conference bases the necessity of exclusive agency contracts on the conditions prevailing in the Hong Kong-U.S.A. liner trades.

Historically, service in this trade was provided by TPFC carriers and the leading independent Isbrandtsen, now American Export-Isbrandtsen. During the period 1954–61, Hong Kong exports to the

United States increased by approximately 900 percent. In 1962 there was an influx of nonconference lines in the trade from Hong Kong to the United States, at which time a rate war began, and there were thought to be violations of the Shipping Act, 1916, as well as of the Conference agreement and dual rate contract. This influx was allegedly induced by the fact that in April 1962 the Conferences were required by Congress to place into effect a weakened contract rate system (Public Law 87–346) which resulted in a depression of the charter market. As a result of the entry of the independents, intense competition arose among the nonconference lines and between them and the Conference lines. Rates fluctuated, and the trade became unstable.

During such periods exporters in the trade were under heavy pressure from stateside consignees to utilize nonconference carriers at lower rates than those offered by the Conference, even if this involved concealed violation of the exclusive patronage clause of the dual rate contracts.

TPFC feels that since its lines are represented at Conference meetings by their agents, and since the Conference lines have no secrets from these agents, it is necessary that exclusive agency agreements be enforced to eliminate the situation in which a "dual agent" is in a position to obtain information and transfer it to a competing line, thereby enabling the competitor to plan his destructive competition. The Conference claims such exclusive agency is necessary to insure adequate policing of dual rate contracts.

Though most of the TPFC members presently favor and practice the exclusive agency principle, the Conference feels it is necessary to have a clearly defined Conference rule on the matter to guarantee its uniform continuance, since if a single Conference member disregards this principle, it would open a pipeline carrying confidential information to the nonconference operators in the trade.

It is the use of a section 15 approved modification to the Conference agreement to accomplish this end, not the use of individual exclusive agency contracts, to which Hearing Counsel objects.

Hearing Counsel opposed the approval of this agreement on the ground that its adoption by the Conference would prevent the establishment of independent service in this trade because the agreement would preclude the nonconference operator from securing a good agent to represent him.

An executive of American Export-Isbrandtsen, which operates United States-flag vessels nonconference in this trade, testified in favor of the agreement stating that it represents "sound and practical, sensible and good Conference operation." The same executive further

testified that in his opinion the exclusive agency contracts do not hamper the entrance of independent lines into the instant trade.

The Initial Decision

The Examiner would approve the agreement in question on the ground that there is no showing that the agreement is (1) unjustly discriminatory or unfair as between carriers, (2) that it operates to the detriment of the commerce of the United States, (3) that it is contrary to the public interest, or (4) is in violation of the Act.

The Examiner concluded that the rule before the Commission is properly useful to Conference carriers in competition, will safeguard and promote rate stability, and is therefore a rule which will further the purposes and policy of the Shipping Act.

Discussion and Conclusions

We agree with the Examiner's ultimate conclusion that the agreement should be approved. Hearing Counsel's exceptions are primarily directed to the Examiner's reliance on and construction of the Court's decision in *Aktiebolaget Svenska Amerika Linien et al.* v. *Federal Maritime Commission*, District of Columbia Circuit Court of Appeals (No. 18,554), decided June 10, 1965. We think it unnecessary to deal with what may be a proper interpretation of the *Svenska* case, because regardless of the construction or applicability of that case, the record here compels us to reach the same conclusion as the Examiner regarding the approvability of this agreement.

Hearing Counsel's contention that approval of the agreement would prevent the establishment of independent service in the trade because the nonconference operator would be precluded from securing competent agents to represent him is unsupported by the record in this proceeding. The Examiner correctly found that there is no evidence that any independent was handicapped in entering the trade by inability to secure a competent agent, as a result of the existence of the exclusive agency rule.

The only evidence in the record to support Hearing Counsel's contention is the testimony of Mr. Keith David, president of Sabre Shipping Corporation, which formerly operated foreign-flag vessels in this trade. Mr. David expressed his belief that the existence of this agency rule would "tend" to prevent the establishment of independent service in the trade. The record contains no further evidence in support of this contention.

The Examiner correctly found that independent competition to the Conference exists and that competent agents in Hong Kong are avail-

able and eager to represent nonconference carriers who may desire to enter the trade.[2] Hearing Counsel himself, in oral argument, stated that he believed the Examiner was correct on this point.

On the basis of the facts in this case, it is concluded that this agreement has not been shown to cause agents to be unavailable to nonconference lines, and has not been shown to prevent the entrance of independents into the trade. Accordingly the agreement will be neither detrimental to the commerce of the United States nor contrary to the public interest, or in any way violate the standards of section 15. Of course, should our continuing surveillance over actual operations under the agreement reveal that the circumstances in this trade have altered so as to restrict the entrance of independents into the trade, we shall reconsider whether our approval granted here should be withdrawn. The agreement will be approved.

By the Commission.

[2] Among them are W. R. Loxley & Co. Ltd., established in the Far East trade since 1870, which has represented Nippon Yusen Kaisha and the Ben Line; Barrette Shipping (Hong Kong) Ltd. which was established in the Far East trade in 1954, and has represented Mitsubishi Line, Iino Lines, Shinnihon Line, Nissen Line, Marchessini Line, and T.S.K. Line; and Elder Deacon & Co., Ltd. active in Far East trade for 125 years which has acted as agent for Peninsula & Orient Lines, British India Steam Navigation Co., Ltd., Eastern & Australian Co., Ltd., Silver Line, Prince Line, Burns, Philip Line, Salem Line and others.

No. 1159

In the Matter of Agreement No. 14–19 and Clause 11 of Agreement No. 14–1 As Amended, and Clause 10 of Agreement 14–20, Trans-Pacific Freight Conference (Hong Kong)

ORDER

This proceeding having been initiated by the Federal Maritime Commission and the Commission having fully considered the matter and having this date made and entered of record a Report containing its findings and conclusion thereon, which Report is hereby referred to and made a part hereof,

It is ordered, That clause 10 of Agreement No. 14–20 be, and it is hereby, approved.

By the Commission.

(Signed) Thomas Lisi,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1114

IRON AND STEEL RATES, EXPORT-IMPORT

Decided December 2, 1965

Respondents' rates on iron and steel between United States North Atlantic and Gulf ports and ports in the French Atlantic/Hamburg range, between United States North Atlantic and Gulf ports and ports in the United Kingdom, between United States Atlantic, Gulf, and Pacific ports and ports in Japan, between United States Pacific coast ports and ports in Australia, and from United States Atlantic, Gulf, and Pacific ports to ports in the Republic of the Philippines, found not to be contrary to sections 15, 17, or 18(b)(5) of the Shipping Act, 1916.

When a rate disparity in reciprocal trades, in similar commodities appears, and when movement of goods under the higher rates has been impaired, the carrier quoting the rates must demonstrate that the disparate rates are reasonable.

Elkan Turk, Jr., for Far East Conference; *Burton H. White* and *Elliott B. Nixon* for North Atlantic Continental Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic United Kingdom Freight Conference, Orient Overseas Line, and Scandinavian American Line; *Edward D. Ransom*, *Robert Fremlin*, and *R. Frederic Fisher* for Pacific Westbound Conference and Pacific Coast Australasian Tariff Bureau; *George F. Galland* and *William J. Lippman* for States Marine Lines; *Ronald A. Capone* and *Robert H. Binder* for Cunard Steam-Ship Company Limited and China Merchants Steam Navigation Co., Ltd.; *Robert L. Harmon* for Knutsen Line and Holland America Line; *Edward S. Bagley* for Gulf/United Kingdom Conference and Gulf/French Atlantic Hamburg Range Freight Conference; *Richard W. Kurrus* and *James N. Jacobi* for American Export Isbrandtsen Lines, Inc.; *Thomas K. Roche*, *Sanford C. Miller*, *Charles S. Haight, Jr.*, and *William F. Faison* for Meyer Line; *Edward F. Platow* for China Union Lines, Ltd.; and *Morton Zuckerman* for Scindia Steamships, Ltd., some of the respondents.

John A. Kennedy, Jr., and *Nelson A. Stitt* for Japan Iron & Steel Exporters' Association; *Alan D. Hutchison* for Florida Wire Products

Corp., General Steel & Wire Co., Inc., Ivy Steel & Wire Company, National Wire Products Corp., Southeast Steel & Wire Corp., Southwest Wire Products Corp., and Wire Sales Company; *James M. Henderson* and *Jacob P. Billig* for The Port of New York Authority; *Thomas P. Brennan* and *John A. Kocur* for Crucible Steel Company of America; *D. Franklin Kell* for Textile Waste Association; *Chas. R. Seal* for Virginia State Ports Authority; and *C. H. Gourley* for Traffic Board—North Atlantic Ports Association; Interveners.

Robert J. Blackwell and *Roger A. McShea III*, Hearing Counsel.

REPORT

Chairman Harllee and Commissioners Hearn, Barrett, and Day all agree that under section 18(b)(5) when a rate disparity in reciprocal trades, on similar commodities appears, and when movement of goods under the higher rates has been impaired, the carrier quoting the rates must demonstrate that the disparate rates are reasonable.

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

The Commission instituted this investigation to determine (1) whether the outward and the inward freight rates on iron and steel items published by Respondent Conferences and common carriers by water operating between United States North Atlantic and Gulf ports and ports in the French Atlantic/Hamburg range, between United States North Atlantic and Gulf ports and ports in the United Kingdom, and between United States Atlantic, Gulf, and Pacific ports and ports in Japan, are so unreasonably high or low as to be detrimental to the commerce of the United States, and (2) whether the discrepancy between such outward and inward rates results in unjust prejudice to exporters of the United States compared with their foreign competitors. Subsequently, the Commission expanded the investigation to include the trade between United States Pacific coast ports and ports in Australia, and the trades from United States Atlantic, Gulf, and Pacific ports to ports in the Republic of the Philippines.

Examiner C. W. Robinson issued an initial decision which we elected to review. In addition, Hearing Counsel filed technical exceptions, and we heard oral argument.

FACTS

At the end of World War II a large part of the world's steel-producing potential had been destroyed, and this vacuum was filled by exports from the United States until the second half of the 1950's,

when new and more modern foreign mills began to come into production. Eventually, the output of the foreign mills, which are better geared for exporting than are American mills, exceeded their domestic requirements, causing the mills to seek business abroad.

In 1955, the United States was a net importer of pipe, reinforcing bars, wire rods, and structural steel, but was a net exporter of most other steel products, particularly sheets, plates, and tin plate. In 1963, total imports from the world market were about 5½ million tons and exports were about 2 million tons.

One of the greatest strides in steel production has been made by Japan, which now is the third largest producer in the world. The quality of Japanese steel is equal and in some instances superior to American steel. After Japan, the largest producers of the free world are Belgium-Luxembourg, West Germany, France, and the United Kingdom, in that order. The primary foreign competitor on the Pacific coast is Japan; in the Gulf, the Benelux countries and Japan; and on the Atlantic coast, western Europe.

Generally, the large American steel manufacturer is not too interested in exporting and concentrates on its domestic business. The larger mills, however, would be more interested in exporting were overall conditions favorable to them. A very large amount of money has been and is being invested to modernize the domestic steel industry, to put it on a more competitive basis both at home and abroad, but full results from this program probably will not be felt for perhaps 10 years. American exporters at present sell certain steel products abroad because of service, quality, delivery, specifications, and in some cases the desire of the customer to maintain a source in the United States, at least on a partial basis.

When the large integrated mills are considering the prospect of exporting, primary attention is given to their own basic costs, customs duties and sales taxes in the foreign countries, other foreign charges, and competitive prices; these factors usually make it extremely difficult if not impossible for them to export to most of the areas here concerned, in the absence of peculiar situations such as the need for specialty items, strikes, disaster, or other nonrecurring conditions.

As far as the American exporter is concerned, the greatest disparity is in the price itself, and the ocean freight is not the vital factor; in fact, it usually is one of the last factors to be considered. In the case of Japan and Europe, the disparity in price sometimes exceeds the entire freight rate. In addition, some Japanese and German mills do not charge for incorporating better features in their products contrary to the general American practice. The foreign mills also make

considerable effort to describe their commodities more fully, to pack more substantially, and to ship more quickly. These little extras put the American exporter at a further disadvantage in his effort to find markets abroad, but the American mills are improving in that respect.

The mere fact that the imported commodity is cheaper than the domestic commodity does not necessarily mean that the former will be used by the domestic consumer. Such things as quality, delays, deliveries, and the possibility of damage, most of which are greater in the case of imports, must be considered, and the advantage of the imported product over the domestic product usually must be considerable before a determination can be made to purchase the imported material. Patriotism is another thought in the minds of some consumers. Although one witness for a large integrated mill agrees that there is some margin beyond which a consumer will not go to continue to buy imported steel, he is of the opinion that no one knows what the margin is or to what extent it varies by product or transaction or circumstance. On the other hand, other witnesses gave approximate dollar estimates as to what domestic customers will pay as a premium to purchase domestic steel, namely, between $7 and $10 a ton; they will pay less if it is a case of switching to domestic from foreign purchases.

Some of the fully integrated mills have increased their exports in the past few years. The closer the mill to shipside the more aggressive it is apt to be in attempting to export (lower costs for imported ores and no inland freight). Although one large mill, which uses independent liner services, complained of ocean freight classification problems, which its witness contends is a hindrance in exporting, it nonetheless has increased its exports to Europe, principally to Italy, which does not come within the geographical area of the investigation. Much of the movement of sheets abroad is the result of special prices induced by excess stocks or excess semifinished stocks, which are then finished within the limitation of the material; overruns; changes in sheet sizes at the end of an automobile production year; and rejects usable for other purposes.

The costs of production of standard carbon steel in all the countries within the scope of this investigation are considerably lower than those of the United States. That of Japan is lower than that of both the United Kingdom and the Continent. In 1962, steel wages in the United States were six times as high per man as those in Japan, and the latter's cost for the manufacture of a pound of steel was only 71 cents as compared with $3.17 in the United States. Over the past 5 years American steel wages have been three times those of the United

Kingdom and the Continent. Fringe benefits for the American steel worker are much greater than in Japan. American productivity per man is about 30 percent greater than in Japan. Located adjacent to ports, Japanese mills have no inland freight; furthermore, having few natural resources, the mills can shop worldwide for raw materials. The low Japanese production cost is recognized by American exporters as an almost insurmountable barrier to sales in Japan, except under unusual circumstances.

The Pacific coast has been the area most affected by steel imports, principally those from Japan. All purchases of Japanese steel are made through trading companies, which in turn purchase from the mills. The trading companies recently have secured warehouse facilities on the Pacific coast, which enable them to effect more prompt delivery and offset, to a great extent, the ability of domestic suppliers to deliver quickly where necessary. In some instances, domestic mills on the Pacific coast have withdrawn their published prices and also reduced their prices which may have accounted for the decrease in the importation of some steel commodities in early 1964 as compared with 1963.

The total steel market in seven Far Western States is about 6–7 million tons a year. In 1961, the foreign steel sold in those States was about 8 percent of the total; in 1963, about 17 percent; and in the first quarter of 1964, about 18 percent. Virtually all Japanese hot-rolled sheets into the Pacific coast area move on tramps, as do more than half of all steel imports. About 80 percent of hot-rolled sheets imported into the area are for the accounts of large importing processors.

The United States has never been competitive in Japan in a wide range of steel commodities. Tin plates, scrap, and rerolling material comprise the largest items from America to Japan.[1] Scrap usually moves in shipload lots in chartered vessels and constitutes more than 99 percent of steel exports. On the other hand, rerolling material, an item very akin to scrap, ordinarily moves on liners. Only seven items appear to move in both directions to any real degree, and there is quite a difference in values per ton. Except for scrap and tin plate, United States domestic prices are higher than those of Japan. There has been an increasing, although relatively unimportant, trend in the percentage of Japanese imports of steel from the United States. At the same time, Japan is increasing its share of steel exports to the United States at a phenomenal rate. Not only are the steel items

[1] The volume of rerolling material is decreasing.

exported from the United States different from those imported from Japan, but there also is a difference in products of the same nature. The variety of Japanese steel products has increased in recent years. In most instances, the rates on steel from the United States to Japan have no influence on the inability of American shippers to export; large Japanese home capacity and lower production costs are the main deterrents.

Between five and seven times more cargo, by weight, is exported from the Pacific coast to the entire Far East than is imported from the entire Far East to the Pacific coast. Westbound bulk carriers are so numerous that on return voyages they offer very low rates on steel to avoid paying for ballast. Some vessels go out as tramps and return on berth. Other reasons for low inbound rates are the rate wars that occurred in the 1950's and the absence of dual rate contracts binding shippers and/or importers to the Conference lines.

Although the Philippines formerly was a good market for American steel, a drastic drop of steel exports from the United States to the Philippines resulted during the postwar period because of rebirth of the Japanese steel industry, closeness to Japan, imports from Japan and Australia (about 60 percent of the total imports of steel are from Japan), gradual elimination of a tariff situation favorable to the United States, establishment of a tin-plating mill in the islands, the ocean freight differential between United States Atlantic and Pacific ports and ports in the United Kingdom and on the Continent, and discontinuance of AID shipments in 1962.[2]

European and Australian mills have lost business in the Philippines to the Japanese in about the same volume as the United States. Some tinplate still is exported from the United States to the Philippines as well as copper-clad steel rods in coils and copper-clad steel rods or bars, as to which there is no European competition. One large western mill continues to ship grinding balls of extra quality and higher value to a customer of long standing, since its efficiency has improved to such an extent that it uses less grinding media.

Recently, private interests in the Philippines completed negotiations with the Export-Import Bank for the construction of an integrated steel mill which will produce a wide range of commodities, including tinplate. In all likelihood, this will further reduce imports from the United States, with some possibility of the eventual entry of the new mill into the American market. On the other hand, as in the case of Japan, there may be a resultant demand for American scrap.

[2] AID shipments are those financed by the U.S. Government and handled through the Agency for International Development (State Department).

Australia has become a steel-producing country, and has been able to invade the Philippine market because of its lower production costs, its nearness vis-a-vis the United States, and its lower ocean freight rates. As already seen, the investigation limits the Australian inquiry to Pacific coast ports; the record contains little if any facts on the movement of steel in either direction in that area. Most of the rates on steel from the Pacific coast to Australia are lower than the corresponding inbound rates.

The volume of steel imported into the Gulf is large, has increased in the past 5 years, and constitutes about 23 percent of the total steel used in the area. Some full shiploads come from Japan, which accounts for the low inbound rates. The area is second to the Pacific coast in the availability of tramps from Japan. Imported steel can be barged into the hinterland, the distance depending upon the cost, and some of it is warehoused, as on the Pacific coast, permitting quick delivery. The Gulf is a particularly good area for tubular products used in oil exploration and drilling. There has been a drop in the sale of imported wire rods and reinforcing bars following recent reductions of domestic prices.

Steel sheets—plain and stainless—shapes, and tinplate continue to move to the Continent from the Atlantic coast on berth liners, but in small volume. Very little steel moves from the Atlantic coast to the United Kingdom; occasionally steel sheets, but under unusual circumstances only. The principal imports from the Continent and the United Kingdom are sheets, galvanized sheets, and tinplate, even though there has been a decrease in domestic demand for tinplate. Inbound liner carryings have decreased because of more tramp tonnage, whose rates fluctuate in accordance with supply and demand. Tramps carry bulk commodities to the Continent and ordinarily would return empty but for the volume of steel available to them. There are no independent berth operators from the United Kingdom to the Atlantic coast, and there is not much nonconference competition in the reverse direction. On the other hand, there is much nonconference liner competition to and from the Continent. The rates on certain steel items are lower outbound than inbound between Atlantic coast ports and ports in the United Kingdom and certain of the continental ports covered by the investigation. Importers in England and Scotland are fully aware that they can buy steel cheaper in other parts of the world than in the United States, and they have no problem with export rates from the United States.

The movement of bulk cargo from the Atlantic coast to the Far East is greater than inbound, and tramps carry most of the inbound

steel movement. There is not much tramp competition from the Atlantic coast to Japan. The existence of the dual rate system from the Atlantic and Gulf coasts to the Far East has tended to keep rates higher than in the reverse direction, where there is no such system.

DISCUSSION

The Presiding Examiner has decided in summary that inbound and outbound rates on iron and steel products in the trades involved here are not contrary to sections 15, 17, and 18(b)(5) of the Shipping Act, 1916. No party excepts to this final result. We sustain the initial decision in its ultimate conclusion and take this opportunity to comment upon some of the problems which arise in the area of rate disparities.

The making of ocean freight rates is an art and not a science; many factors can be considered in the fixing of rates. Likewise, ocean transportation is subject to a high incidence of instability, particularly because of its international nature. Furthermore, the presence of so many unregulated carriers on the sealanes makes dependable liner services a somewhat hazardous venture at times. It is argued that this uncertainty and unbridled competition account in large measure for what may seem at first glance to be abnormal or unjustified rate structures.

Conference rates on iron and steel are set by rate committees or by the Conference as a whole. Each Conference arrives at its rates after consideration of the particular facts in the particular trade. The final judgment on the rate level is designed to maximize revenue without hurting the trade, and the weight to be given the individual factors underlying a rate varies from time to time and place to place. On this record, Conferences or independent liner operators have not been shown to have deliberately taken any rate action which would decrease the volume or entirely eliminate the movement of traffic.

Shippers of iron and steel products making applications for rate reductions ordinarily are tendered a form to be filled out for consideration by the Conference, or the request is made over the telephone. Throughout the United States, representatives of the individual member lines of Conferences are constantly in touch with shippers and their needs, and they duly report this information to the Conferences. The Conferences in turn communicate with shippers and elicit the kind of information which should enable the Conferences to give proper consideration to requests for rate adjustments.

Some fabricators of steel articles made from domestic material, or purchasers of domestic steel for resale, want the import rates on

certain types of steel raised in order to make their businesses more competitive, and they believe that such increases in the long run will have some downward effect on Japan's total sales, particularly on the Pacific coast. The Conferences maintain, however, that any increase in the rates from Japan would stimulate nonconference competition and, if raised beyond a certain point—particularly if the inbound rates are raised to the level of the outbound rates—it would mean the complete loss for them of the steel business in favor of nonconference operators of one kind or another. Increasing the rates, they add, would not raise the landed prices materially; on the contrary, it would penalize the importer and not help the exporter. They further point out that the recent raising of the Conference rates on wire rods from Japan to the Pacific coast has not reduced the volume of imports but that the commodity is not as readily available to the Conference lines.

In contrast to those who want the inbound rates increased, other importers urge very strongly that the inbound rates should not be raised; in fact, they assert that the present rates are too high. The livelihood of these companies depends upon their ability to import such materials as wire rods to be converted to various uses for resale domestically, since these materials are not always available in the domestic market or are too costly. As the spread between the price of rods and finished product is very thin, any increase to such concerns in the cost of the imported article would lessen their ability to compete. The level of the inbound liner rates on wire rods has necessitated the use of vessels by large consumers on a charter basis, but many small importers cannot use charters as it is not economically feasible to import full shiploads. Small-volume importers prefer liner service which permits greater flexibility and usually results in delivery of the rods in better condition.

While volume is a factor in the setting of rates, it was not shown in this proceeding that it has been determinative of the level of any of the rates on steel. It is the overall volume which concerns the Conference and not just the volume of a particular shipper. The history of one Conference is that most rate requests are for the purpose of developing business rather than complaining of lower foreign rates. Requests for lower rates on steel are not often granted because the Conferences consider them already too low. In rare instances, a special rate may be established for a short period to meet a passing competitive situation but, generally speaking, Conferences are chary of emergency rate requests. In evaluating a request for a reduction,

competitive foreign-to-foreign rates are taken into account only where the reduction would make a movement possible which otherwise would not be possible.

Vessel expenses, exclusive of cargo handling costs, are substantially the same outbound and inbound, but loading and discharging costs are higher in the United States than in the foreign areas under consideration.

In some of the involved trades, tariff rates on certain steel items are simply "paper rates"—rates under which cargo seldom if ever moves—but most shippers know that if there is a bona fide possibility of movement they and the carrier (or the Conference, as the case may be) would probably be able to negotiate a practical rate permitting the movement. To some degree, such rates are high enough to be a bargaining factor. Paper rates usually are increased the same as other rates whenever there is a general tariff increase. This type of rate exists in nearly all forms of transportation. Again, a particular steel item might be subject to the "Cargo, Not Otherwise Specified" rate which is usually higher than a specific commodity rate.

The outbound rates on steel have no effect on domestic competition with imports, and it is generally agreed by witnesses representing their respective interests that American steel exports are not affected by inbound rates, since they do not influence in any way the exporter's ability to sell. In other words, there is no relationship between the two sets of rates. If the outbound rates were equalized with the inbound rates, the general result would be lower carrier revenue with little increase in exports.

As already noted, the cost of production of steel in the United States is so much higher than the cost in the foreign countries here involved that American exporters, barring some peculiar circumstances, are simply estopped from participating in exports. In many cases, even if the steel were carried free, the basic American cost still would be higher than the corresponding foreign cost. In the opposite direction, the mere fact that importers find it difficult to pay the common carrier rates on steel does not, by itself, mean that those rates are unlawful.

Section 18(b)(5) was added to the Shipping Act by Public Law 87–346 in 1961. It has not been thoroughly construed and has not been specifically applied to many ratemaking situations, particularly in the area of inbound/outbound rate disparities. While we find no violation of section 18(b)(5), we believe certain comments are appropriate.

Section 18(b)(5) provides as follows:

> The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

The Examiner found that the burden rests upon the Commission to prove the unlawfulness of the rates here under scrutiny, pointing out there is nothing in the Act which specifically declares that disparities in export-import rates are unlawful *per se*. The Examiner also relied upon the established fact that shippers and consignees expressed little if any concern over the disparity between outbound and inbound rates on steel.

In *Edmond Weil* v. *Italian Line "Italia"*, 1 U.S.S.B.B. 395, 399, cited by the Examiner, it was said:

> The mere fact that the rate in the reverse direction is substantially lower does not justify a finding that the rate under attack is unreasonable or in any other way detrimental to our commerce.

The *Weil* case was referred to with approval on various occasions during the debates on the proposed amendments to the Act. As finally enacted (Public Law 87-346), section 18(b)(5), according to the Examiner, codified the interpretation enunciated in *Weil*.

Hearing Counsel contend that the existence of a rate disparity along with a showing that tonnage will not move because a rate is so high, where the rate on the same or a similar item in the reciprocal trade is lower, should constitute the former rate as *prima facie* unreasonably high, and absent successful rebuttal by the carrier of the presumption created, the rate should be declared unlawful and subject to correction.

Thus, Hearing Counsel contend that Congress contemplated unfavorable inbound-outbound disparities and that such disparities are, therefore, to be considered in determining whether rates are unlawfully high or unlawfully low. They believe it has not been the intent of Congress to strike down such disparities as *per se* unlawful; rather, they believe that the congressional awareness of unfavorable inbound-outbound disparities requires the imposition of a *prima facie* standard; i.e., wherever disparities are shown to exist to the detriment of our foreign commerce, the carrier must come forth with a rational justification based upon the attendant transportation circumstances.

The carriers and Conferences contend that disparities are neither *per se* nor *prima facie* unlawful. In general, they argue that this is so because Congress has not explicitly created such a presumption. Furthermore, they contend that the facts in this case show that such a determination ignores ratemaking factors which differ widely in

the inbound situation from the outbound and that the factors, such as competition, volume, stowage, and loading costs vary widely between inbound and outbound. Therefore, a comparison of the rates alone is meaningless.

The question of presumptions that may arise when disparities are found to exist is more of academic than practical importance. More important than questions of burden of proof, shifting the burden, rebutting presumptions, and the like, are questions of how a potentially detrimental rate situation can be resolved most feasibly.

Out of the infinite variety of rate situations, we find that certain common facts keep recurring. For instance, one common, recurring relationship between rates is the one of importance here, a rate disparity; i.e., a situation in which the rate in one direction is significantly higher than the rate in the reciprocal trade on the same or similar commodity. Our experience shows that the existence of a rate disparity, in and of itself, has no conclusive legal significance. This is so because only with reference to other facts can we determine whether either rate is harmful. The language of section 18(b)(5), "unreasonably high" must be given some meaning. It does not refer to the level of profit earned by a carrier, since the Commission has not been charged with fixing a reasonable rate of return for carriers in our foreign commerce. Under section 18(b)(5), as in any rate proceeding, rate comparisons including comparison of rates in reciprocal trades, are proper and, in a rate disparity situation, necessary.

It seems to us that Congress intended the Commission, in making judgments under section 18(b)(5), to compare, among others, an outbound rate with the reciprocal inbound rate. When that comparison is made, we may find that the outbound rate is high in relation to the inbound rate.

When a rate disparity in reciprocal trades, on similar commodities appears, and when movement of goods under the higher rates has been impaired, the carrier quoting the rates must demonstrate that the disparate rates are reasonable. All facts pertaining to the reasonableness of the rates are uniquely in the possession of the carriers. Unless so interpreted, section 18(b)(5) becomes a nullity and we will not impute to the Congress the enactment of a meaningless statute. The mere existence of a disparity does not necessarily mean that the higher rate is "detrimental to the commerce of the United States." The Commission would still have the burden of proving that the rate has had a detrimental effect on commerce; e.g., that tonnage is handicapped in moving because the rate is too high. The carrier would be required to justify the level of the rate by showing that the at-

tendant transportation circumstances require that the rate be set at the level. Subjects of justification may include myriad ratemaking factors which might differ between the inbound and outbound rates. These include competition, volume of the movement, stowage, stevedoring costs, and others.

Although there were a few isolated instances where shippers stated they lost sales because of their inability to secure a rate reduction from Conferences, the record lacks evidence from which it can conclude that the rates are unlawful.

Another matter of concern in this investigation is our authority under section 15 to question rates.

Section 15 states:

> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

A long-standing view in Commission precedents is that the Commission may disapprove a Conference under circumstances where a Conference rate is so unreasonably high or low as to be detrimental to the commerce of the United States. While the Examiner appears to recognize this as being sound, he notes that the present record would not justify a finding that the agreements of the Respondent Conferences should be disapproved, cancelled, or modified, for it has not been shown that the agreements themselves have been the direct instrumentality of or used for the violation of either section 17 or section 18(b)(5), or that there has not been a showing that the Conference rates on steel are violative of either of those sections. We agree. However, the question of whether we could have taken action under section 15 remains.

Hearing Counsel argue that the Commission may disapprove an agreement where rates are "so unreasonably high or low as to be detrimental to the commerce of the United States." Thus, in *Edmond Weil* v. *Italian Line "Italia"*, 1 U.S.S.B.B. 395, 398 (1935), the Commission stated that an unreasonably high rate was detrimental to American commerce, as follows:

> An unreasonably high rate is clearly detrimental to the commerce of the United States, and upon a showing that a Conference rate in foreign commerce is unreasonably high, the Department will require its reduction to a proper level. If necessary, approval of the Conference agreement will be withdrawn * * *.

We agree that this is still a proper statement of our power under section 15; we may disapprove or modify a Conference agreement under section 15, if the rates set by that Conference are so unreasonably high or low as to be detrimental to the commerce of the United States.[3]

ULTIMATE CONCLUSIONS

Respondents' rates on iron and steel between United States North Atlantic and Gulf ports and ports in the French Atlantic/Hamburg range, between United States North Atlantic and Gulf ports and ports in the United Kingdom, between United States Atlantic, Gulf, and Pacific ports and ports in Japan, between United States Pacific coast ports and ports in Australia, and from United States Atlantic, Gulf, and Pacific ports to ports in the Republic of the Philippines, not shown to be in violation of section 17 of the Shipping Act, 1916, or in contravention of either section 15 or section 18(b)(5) of the Act.

Additional views of COMMISSIONER JAMES V. DAY:

While I agree with Chairman Harllee and Commissioner Barrett in the views expressed above, I feel it necessary to add the following comments:

So-called "paper rates"—listed in carrier tariffs but under which it is said cargo does not move—should receive particular attention in our inquiries in connection with rate disparities.

One other aspect of this proceeding prompts me to further expression. I feel that the effect of import steel on the domestic steel market may be considered by us under sections 15 and 18(b)(5) of the Act, 1916.

The existence of the tariff duty laws does not preclude corrective action under the Shipping Act of 1916.

Furthermore, I have observed no express requirement that the phrase "detrimental to the commerce of the United States" means "detrimental to the foreign commerce of the United States." It would seem that the statutory scheme of the 1916 Act and the 1961 amendments thereto encompass all of the commerce of the Unted States. I note that under section 1 of the 1916 Act the Congress was concerned with both foreign and domestic carriers and carefully defined each. Again, though, subsections 18(b)(1) (2) and (3) contain the words "foreign commerce of the United States," 18(b)(5) contains those words only when describing the carriers covered and the word

[3] See: *Pacific Coast—River Plate Brazil Rates*, 2 U.S.M.C. 28, 30 (1938); *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 U.S.M.C. 342, 347 (1940); and *Empire State Highway Transp. Assn.* v. *Federal Maritime Bd.*, 291 F. 2d 336 (D.C. Cir. 1961).

"foreign" is omitted in the phrase "detrimental to the commerce of the United States." Likewise section 15 should not be read to limit the phrase "detrimental to the commerce of the United States" to "detrimental to the foreign commerce of the United States." Indeed, agreements between carriers in the domestic trade have been approved in connection with this section.

Thus, it would seem that in a proper case evidence should be admissible on the question of whether an import rate was adversely affecting a domestic steel producer who might potentially be a source of supply of goods moving in the commerce of the United States.

The Shipping Act would not only envision protection to a shipper, port or carrier, but to any person (e.g., section 22 of the Act).

I would also note that the effect of an import rate on a domestic steel producer could well be material not only to competitive relationships as well as damages under the Shipping Act, but also could well bear on the public interest standard of section 15.

COMMISSIONER HEARN concurring:

Based on the record in this case I agree with Examiner Robinson in that there are no violations of the Shipping Act.

However, I cannot in good conscience dismiss this long and voluminous case without an attempt to extract something therefrom which may help us to establish guidelines for the protection of the public interest, particularly since in my mind there is no doubt that disparities continue to exist unabated.

I believe (1) that both sections 15 and 18(b)(5) are broad enough to permit the Commission to protect the wholly domestic commerce of the United States, in effect, all of the commerce of the United States particularly when that commerce is jeopardized by inbound "dumping" rates; (2) that when a rate *disparity* in *reciprocal* trades, on *similar* commodities appears, and when movement of goods under the higher rates has been *impaired*, that the carrier quoting the rates must *demonstrate* that the disparate rates are *reasonable*; (3) that under section 43, the Commission should set forth rules respecting rate disparities as they relate to sections 15 and 18(b)(5) of the Shipping Act, and (4) that under section 212(e) of the Merchant Marine Act 1936, this record warrants certain recommendations to the Congress.

This record reflects that iron and steel imports, particularly to our Pacific coast from Japan, enjoy far lower rates than do our exports from the Pacific coast to Japan. The record also establishes that while our outbound rates from the United States were increasing sub-

stantially our exports were dwindling. Conversely, while inbound rates from Japan were stabilized much lower than the outbound rates from the United States, Japanese offerings increased. For example, wire rods from Japan to all United States ports in 1955 totaled only a little over 6,000 tons, and moved to the United States at "negotiated" or "open" rates, by 1962 the inbound wire rod movement totaled almost 300,000 tons, accounted for better than 25 percent of Japan's total iron and steel market in this country, and was carried at a $19.00 rate, while the outbound rate for wire rods to Japan ranged from a low of $21.65 in 1957 to a high of $35.35 per ton in 1964 (with about seven fluctuations in this rate in these years), although a total of only 21 tons moved outbound in the trade between 1958 and 1962.[1] A similar story is told as to other commodities in these reciprocal trades. For example, outbound rates on steel plates from the west coast to Japan rose from a low of $21.65 per ton in 1957 to a high of $35.35 in 1964, although our exports plummeted from 275,269 tons in 1957 to less than 2,500 tons in 1962. Imports from Japan of steel plates to all United States ports burgeoned from slightly over 1,000 tons in 1955 to over 200,000 tons in 1962, although the rates from Japan to the Pacific coast edged from $15.50 to only $19.00 per ton in 1964.[2]

The record also shows that the importation of wire rods has had a most detrimental effect upon our domestic nail manufacturers on the Pacific coast. I believe that if this harm to them was caused by unreasonably low inbound rates then they are entitled to the protection which sections 18(b)(5) and 15 afford to the "commerce of the United States." It is irrelevant, I think, that other agencies of this Government protect our commerce against "dumping." If our commerce[3] has been harmed by an "unreasonable" rate, whether high or low, it is the duty of this Commission to declare that rate unlawful. Unfortunately, this record does not show the costs of carrying rods, or the costs of loading or discharging them, and the existence of the

[1] Over 3,000 tons were shipped to Japan in 1956 and 1957.

[2] The disparate rate situation favoring Japanese wire rod and plates to Pacific coast ports is mirrored on the east coast and Gulf coast. The outbound rates of the Far East Conference, on the rods, rose from a low of $22.00 to a high of $39.95 in 1964, and on plates from $24.00 to $32.75, whereas in the reciprocal trade, the inbound conference rates moved only from $17.00 to $20.50 per ton on each of these commodities.

[3] I read the word "commerce" in sections 15 and 18(b)(5) to be broader than do my colleagues. If Congress intended to limit that "commerce" in those sections to our "foreign commerce" it could easily—as it has in other sections of the same statute—have used that phrase "foreign commerce." The election of the Congress to omit that limiting word, "foreign" in my opinion evinced an intention to use the phrase in its normal, full sense. A situation could arise where an inbound rate on a commodity could be so low that actually a vessel would be out-of-pocket simply by carrying it. Upon importation, that commodity's sale well could be detrimental to the "domestic" commerce— which is part of our commerce—and I believe no one would doubt that in such a situation an injured party would have a cause of action under the Shipping Act.

disparity alone, is not sufficient to make the judgment that the rates are contrary to section 15 or 18(b) (5).

In all of these trades, the record, with relatively few and insignificant exceptions, demonstrates that substantial disparities in favor of inbound iron and steel products are the rule. We are told on the one hand that the inherent high cost of American manufacturer [4] is a most serious impediment to the maintenance of foreign markets, that big steel producers are "hedging" against this barrier by establishing manufacturing or finishing plants abroad, that severe tariff barriers also must be taken account of, and that our competitors are now reaping the benefits of their postwar manufacturing programs. Subtlety implied in these contentions is the belief that American mills are not particularly interested in foreign markets in light of these barriers. On the contrary, this record details the efforts of one large mill, Crucible Steel Company, which is aggressively engaged in exporting. Interestingly, Crucible is especialy concerned with the costs of ocean transportation and has often found that a small difference in ocean freight rates determines whether or not a sale can be made. On the shipping side, we are told that the absence of an inbound dual rate system in some trades, explains the disparity; that the cargo imbalance of reciprocal trades is another contributing factor, as is the fact that there is heavy tramp competition inbound. Whatever validity these arguments may have, it nevertheless remains obvious that our steel exports are declining,[5] that our steel imports are increasing,[6] and that disparities continue unabated. In this regard, it should be noted that while the United States accounted for more than 50 percent of the world ingot production in the 1920's, our production has declined from about 45 percent in 1950 to about 25 percent in 1961.

I believe that it is fair to assume that a carrier will not carry steel (or any other product) if the carriage involves a net loss to the ship. And I think it fair to assume that the actual cost of moving cargo in one direction should be substantially the same as it cost in the other direction. Of course, loading and unloading costs vary, and the best judgment that can be made on this record is that loading and unloading costs are higher at United States ports than they are at foreign ports, and generally, loading costs for iron and steel commodities universally exceed unloading costs. The precise difference cannot be gleaned from the record. However, all things considered, a reasonable disparity—

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[4] While it is true that the cost for the production of one pound of steel in Japan is 71 cents as compared to $3.17 in the United States, that disparity is mitigated somewhat by the fact that per hour productivity here is greater at least by 30 percent.

[5] From over 4 million short tons in 1955 to less than 3 million short tons in 1962. Deplorably, our 1962 exports include over 2 million tons of scrap.

[6] From less than 900,000 short tons in 1955 to almost 5 million short tons in 1962.

in the ideal case—would be that disparity which reflects the difference in cargo handling costs alone. I am aware that this judgment appears doctrinaire, but I am aware also that, except for broad generalities by way of explanation, the disparities stand legally unexplained. I am convinced that the existence of a substantial rate disparity is strong evidence that either or both of the reciprocal rates are "unreasonable." If there can be added to this evidence that our commerce has been harmed as a result of either or both of these rates, the carriers should be called upon to justify the rates. And by justification, I refer to transportation justification.

While this record may not suffice to support findings of unlawfulness, I think it unfortunate to let the matter rest here. This investigation has thrown much light on reciprocal disparities, and I believe it affords the Commission the opportunity, under sections 43, 15, and 18(b)(5) of the Act, to propose rules respecting the obligations of carriers to justify their rates. The Commission should consider the feasibility of promulgating rules to cope with disparate rate problems. For example, the Commission might consider such rules as (1) with the existence of a disparity of a fixed percentage between similar products in reciprocal trades, coupled with evidence that the outbound movements of the commodity is deterred, requires the carrier to justify the difference, under pain of having the rate disapproved, and (2) where an inbound rate appears to affect adversely our own commerce that the carrier be required to show that the rate exceeds the cost of loading and discharging the cargo. Failure to establish this should result in its disapproval.

Finally, I believe that if the Commission determines that it cannot successfully come to grips with this situation under our general rule-making grant, pursuant to section 212(e) of the Merchant Marine Act, 1936, the Commission should seek the help of Congress in solving this most vexing problem of disparities.

COMMISSIONER JOHN S. PATTERSON, concurring separately:

The order initiating this proceeding announced as its purpose:

(1) to determine whether the freight rates on iron and steel items set forth in the tariffs of about 103 common carriers by water as defined in the first section of the Shipping Act, 1916 (Act), violate sections 15 and 17 of the Act or should be disapproved under authority of section 17 or section 18(b)(5) of the Act; and

(2) to determine whether certain agreements among carriers associated in Conferences, heretofore approved, should be disapproved as authorized in section 15.

Because the evidence is inadequate for any of the foregoing purposes *I agree:*

(1) that no section of the Act has been violated,
(2) that no rates should be disapproved, and
(3) that no agreement should be disapproved.

The evidence consisted of testimony and exhibits. The testimony in 4,009 pages of the transcript explained how and why rates were established and the meaning of the exhibits.

There were 247 exhibits. Of these, 165 items were correspondence dealing principally with rates requests or inquiries. None involved a comparison of rates one way versus the return journey on the same product to show relationships. Eleven items were memorandums or statements by steel companies or their officials, describing the role of ocean freight rates in their businesses. None provided inbound-outbound comparisons, but indicated that other factors than freight rates affected their export business. The remaining items were a miscellany of documents, such as application forms for rate adjustments, reports to stockholders, a price history of several products in the San Francisco area, data on grinding balls shipped to the Philippines, an information bulletin, a statement of handicaps to trade by foreign governments, longshore wage rates in New York, a weekly report of charter fixtures in July 1963 by United States Steel Corporation, a reproduction of advertisements, newspaper articles, a cover sheet for a statistical analysis, etc.

In regard to tariffs, there were 21 abstracts from various conference tariffs, showing dates, two Meyer Line tariffs, one Meyer Line rate statement, one statement of export-import rates from Gulf to Europe, 1963–64, and two Zim Israel tariffs on selected steel items.

There were at least nine statistical presentations showing diverse information relative to trade with Japan between 1953 and 1962, and two dealing with the Far East trade generally between 1958 and 1962. There were six statements on Lykes' carryings between Gulf of Mexico ports and European ports in 1963 and 1964, and Lykes' cargo handling costs. Other figures on tonnages carried were supplied. It was impossible to analyze this information rationally.

The basic difficulty with the evidence is that the opinions in the transcript, the unrelated rates, the noncomparable commodities, the dissimilar shipping conditions, the uncorrelated time periods, and the statistics of rate history were too indefinite to be used as a basis of an adjudication with the assigned objectives of this proceeding. The evidence offered seemed to be only for the purpose of proving precon-

ceived theories or something generally against all respondents, not against carriers whose rates appeared in any specific exhibit. For me, it is impossible to decide that any Respondent has violated any law by particular acts at particular times, using such evidence.

Not one detrimental situation was proven. Among all the correspondence asking for favorable rate action, none indicated that any adverse decision would impede the flow of commerce. Some of the requests were 6 years old at the time of hearing and have nothing to do with commerce in the world today. Any detriment thought to exist was entirely in terms of what might have happened if rates had been more equal, and detriment is inferred from such a hypothesis. Individual law violation may not be based on such premises.

No doubt this proceeding proved the hard facts that it costs exporters substantially more to send goods abroad than it costs importers to move goods to the United States. As an abstract matter, this difference is hard to defend on grounds of fairness or logic. Most people would agree with the commonsense observation that it ought to cost about the same to carry the same article back and forth between the same ports, making allowance for the allegations that it costs more to load a steel product than it costs to unload the same product, and loading and unloading costs are higher in the United States. As victims, American exporters at least have the right to know why this situation exists. Possibly the Commission has the duty to examine into the reasons for this phenomenon and ought to find out if the commonsense abstractions have no basis in reality. It does not follow that the right way to go about the inquiry is to prosecute a whole segment of an industry. Neither does it justify, in the absence of facts, the conclusion that anyone who fails to fit his conduct neatly into this commonsense idea is *prima facie* a lawbreaker who ought to be made to come in and defend himself before a Federal inquisitor. Marketplace behavior is too complex for such easy procedures.

One might agree with the abstract proposition advanced by my colleagues that the appearance of "a rate disparity * * * when movement of goods * * * has been impaired * * *" requires a demonstration of reasonableness, assuming a ready way of determining impairment, but such a proposition is not supported by this record. In the absence of facts in this record to support a policy statement, a rule, or case law, whichever it is, as stated by my associate Commissioners, providing, as it will, future guidance, I believe under the circumstances and in the interest of keeping the subject open for dis-

cussion a proposed rulemaking proceeding may be desirable to establish the proposition, if such a rule is thought to be required.

In summary, my conclusions are:

I concur in the Examiner's ultimate finding that no violation of the Shipping Act, 1916, has been proven.

I conclude that the record in this proceeding proved that it costs exporters substantially more to send goods abroad than it costs importers to move goods to the United States.

I conclude that the available evidence in this proceeding is not suited to the objective of the adjudication, which was to determine whether rates are so unreasonably high or so unreasonably low as to be a detriment to commerce or whether disparities inbound and outbound are discriminatory and thereby prove Respondents have violated the Act. The deficiencies of the evidence are brought into sharp focus by the Examiner's generalized discussion of ratemaking as the reason or basis for conclusions.

I conclude there is no information in the exhibits permitting a comparison between inbound and outbound rates of any commodity of any carrier.

I conclude the Administrative Procedure Act requires the gathering of evidence and the empirical use of such evidence to reach a well reasoned conclusion concerning an alleged statutory violation. Also, I consider it to be axiomatic that in making judgments under section 18(b)(5) the Congress expects this Commission to compare, among others, an outbound rate with the reciprocal inbound rate. Such a comparison on this record reveals that the inbound rate is substantially lower as related to the outbound rate.

While not derivable from the facts on this record, although consistent with congressional intent, I believe that in the interest of evaluating the issue of fairness and reasonableness of freight rates, common sense alone dictates that it is incumbent upon this Commission in making judgments under section 18(b)(5) to consider that where a rate for transporting in one direction is high in relation to a corresponding rate in the opposite direction it establishes a recognizable out-of-balance condition which warrants that the rates be justified by the carrier making them, and the justification must be to the satisfaction of the Federal Maritime Commission. Such justification need not ncessarily be furnished as part of any claim of law violation, but as an aid in staff studies designed to assist the Commisison in performing its functions.

In order to get the answer to the question of why there is a substantial difference in shipping costs of exporting United States products versus importer's costs, I hold it is the duty of this Commission to ask the ratemakers to come forward and explain the basis on which the export rate is substantially higher. Depending upon what we find, the Commission may thereafter take appropriate action under the laws it administers.

The proceeding is discontinued.

(Signed) THOMAS LISI,
Secretary.