FEDERAL MARITIME COMMISSION

No. 65–9

AGREEMENT NO. T–1768—TERMINAL LEASE AGREEMENT

Decided January 10, 1966

Agreement No. T–1768, a Preferential Assignment Agreement of marine terminal property from the City of Oakland to Sea-Land, providing for the payment of an annual minimum and maximum compensation based upon the Port of Oakland Tariff, is subject to section 15 of the Act. As such, it has not been shown to be unjustly discriminatory or unfair or otherwise violative of section 15 if modified as ordered by the Commission. Agreement No. T–1768 is approved and Agreement No. T–5 covering part of the area covered by Agreement No. T–1768 is cancelled.

J. Kerwin Rooney, attorney for the City of Oakland, acting by and through its Board of Port Commissioners; *C. H. Wheeler* and *Sterling Stoudenmire, Jr.*, attorneys for Sea-Land of California, Inc., Respondents.

Miriam E. Wolff and *Thomas C. Lynch*, attorneys for San Francisco Port Authority; *Arthur W. Nordstrom* and *Walter C. Foster*, attorneys for City of Los Angeles; *Edward D. Ransom* and *Robert Fremlin*, attorneys for Encinal Terminals; *Leslie E. Still, Jr.*, attorney for City of Long Beach, Interveners.

Donald J. Brunner, Hearing Counsel.

REPORT

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

By order of investigation served April 9, 1965, the Commission instituted these proceedings to determine whether Agreement No. T–1768 between the City of Oakland (Oakland) and Sea-Land of California, Inc. (Sea-Land) should be approved, disapproved or modified pursuant to section 15 of the Shipping Act, 1916 (the Act). Oakland and Sea-Land appeared as Respondents favoring approval. The San Francisco Port Authority (San Francisco), City of Los

Angeles (Los Angeles), and Encinal Terminals (Encinal), intervened in opposition to approval. The City of Long Beach (Long Beach) intervened in favor of approval. A hearing and oral argument in lieu of briefs were held. An Initial Decision was issued by Examiner Benjamin A. Theeman to which exceptions and replies have been filed. We have heard argument on these exceptions and replies.

THE BACKGROUND OF THIS PROCEEDING

On June 18, 1965, the Commission issued its Report and Order in its Docket Nos. 1128: *Agreement No. T-4: Terminal Lease Agreement at Long Beach, California;* 1129: *Agreement No. T-5: Lease Agreement at Oakland, California.* In those cases the Commission held that agreements between Long Beach and Sea-Land and Oakland and Sea-Land were subject to section 15 of the Act. The agreements there under consideration granted to Sea-Land exclusive use of piers and adjacent areas at yearly rentals of $147,000 in lieu of otherwise applicable tariff charges. As such, they were considered as granting to Sea-Land "special rates" and unlawful unless approved under section 15. The Commission approved the agreements over the exceptions of Encinal, Los Angeles, and San Francisco that the agreements were "unjustly discriminatory" because based on other than tariff rates and noncompensatory rentals and "contrary to the public interest" and "detrimental to the commerce of the United States, because their implementation would disrupt the traditional Pacific coast system of assessment of terminal charges in accord with published tariffs." The Commission found that the agreements were not unjustly discriminatory as the rentals prescribed therein provided adequate returns on the ports' investments and no adverse effects of the agreements were shown upon other carriers, other ports, or other terminals, the record failing to show the requisite competition between other terminals within the ports of Oakland and Long Beach. Furthermore, the Commission was unable to find that approval of the agreements was likely to cause disruption of the traditional uniformity of terminal charges on the Pacific coast.

THE PRESENT AGREEMENT

The agreement which is the subject of this proceeding, No. T-1768, covers not only the area covered by Agreement T-5, which was the subject of Docket No. 1129, namely berth 9 and the adjacent marshaling and storage yards, but also another berth (berth 8) and some additional storage area.[1] The term is 20 years. Oakland reserves secondary rights to the use of the premises. Sea-Land agrees that if it should publish a tariff of terminal charges, it shall be identical to Oakland's tariff for like services.[2] Use of the facility by Sea-Land is to be at tariff charges but minimum and maximum yearly figures are fixed at $450,000 and $550,000, respectively, subject to adjustment because of cost of improvements, including the installation of two cranes, to be made by Oakland, which was estimated at $2,238,000.[3] Paragraph 6 of Agreement No. T–1768 provides that in the event Agreement No. T–5 is approved, the area covered by it should be withdrawn from Agreement No. T–1768, and the maximum and minimum yearly compensation reduced by $147,000.

The Initial Decision

The examiner, in his Initial Decision, approved Agreement No. T–1768. He found the rental to be fair and reasonable inasmuch as Oakland would more than recover its investment even under the minimum rental of $450,000. He further found that the agreement was not unjustly discriminatory or unfair as between carriers, none of which protested it; shippers, who testified in favor of Sea-Land's service; or ports, which were not able to show injury because of the agreement, or that similar agreements would not be available to them. He finally found no likelihood of the destruction of the Pacific coast terminal system and thus did not find the agreement "detrimental to the commerce of the United States" or "contrary to the public interest."

The Examiner recommended, however, that paragraph 6 should be clarified. He stated, Sea-Land could conceivably avoid paying more than the minimum amount of compensation to the port if it exclusively uses berth 9 after the volume of business passes the $450,000 mark.

Discussion and Conclusions

The vast majority of the issues raised by way of exceptions to the Initial Decision in this proceeding by San Francisco, Encinal, and Los Angeles were also raised by these parties in excepting to the Initial Decision in Docket No. 1129, and were explicitly rejected by us. Spe-

[1] Oakland grants a use in common by Sea-Land and Encinal of the apron area running parallel to berth 8, between the extreme westerly boundary line of the assigned premises and berth 7.

[2] Hearing Counsel suggested and Oakland and Sea-Land agreed to modify this provision to include tariffs published by "any business entity, affiliated as to ownership or control with (Sea-Land)."

[3] Hearing Counsel suggested and Oakland and Sea-Land agreed to modify the words of this provision which originally read "twelve-month period" to read "year".

cifically, San Francisco and Encinal argue that agreements for compensation in lieu of tariff charges are unjustly discriminatory or unfair. As we have stated in our report in Docket No. 1129 and in *Agreement No. 8905—Port of Seattle and Alaska S.S. Co.*, 7 FMC 792, 800 (1964):

> An agreement for the use of public terminal facilities at a rental which deviates from the terminal's regular tariff provisions, may run afoul of the Shipping Act's proscriptions and is deserving of our scrutiny for any illegal discrimination or prejudice that may result. Such an agreement, however, is not unlawful or unreasonable merely because it does not follow the terminal's tariff charges.

There is nothing in the record in this proceeding to indicate operations under the agreement will take place in an unlawful manner. The record discloses no unlawful discrimination or prejudice against any carrier, shipper, port or terminal. No carrier testified against approval of the agreement, and the port of Oakland in fact has openly stated its willingness to assign other terminal properties in the same manner and under the same conditions offered to Sea-Land.

Shipper witnesses without exception testified in favor of Sea-Land's operations.

There is no showing that terminals or ports will be in anyway injured by approval of T–1768. The record is barren of proof that any cargo will be diverted from any port or terminal or that any carrier aside from Sea-Land will shift his operations to a different port or terminal.

San Francisco, Encinal, and Los Angeles all contend that the method utilized for determining the reasonableness and fairness of the compensation is not proper. This method is designed to assign all costs and expenses of the specific terminal property here involved, including allocations of all general terminal expenses, to the specific area covered by T–1768. This method has been utilized by us in both Docket No. 1129 and *Agreement No. 8905—Port of Seattle and Alaska S.S. Co., supra*. We adopt it here as the proper method of determining the reasonableness and fairness of the compensation to Oakland for the use of its facility by Sea-Land.

San Francisco, Encinal, and Los Angeles in addition reiterate the allegations made in Docket 1129 that agreements for compensation in lieu of tariff charges are contrary to the public interest and detrimental to the commerce of the United States. Many dire consequences are foreseen by interveners if T–1768 is approved, including the disintegration of the tariff method of compensation for provision of terminal facilities and the collapse of the stability of Pacific coast terminal operations. There is no evidence in the record that such will take place. As we said in Docket No. 1129 (p. 15 of mimeographed decision), "we will not disapprove the agreements on the basis of speculation alone."

The contention that Agreement T–1768 in fact gives an exclusive rather than the preferential use provided for by its terms is without merit. The record shows that Sea-Land's sailing schedule and the short in-port time of Sea-Land's vessels will allow for a secondary berthing, and Oakland officials have stated that every endeavor will be made to use the secondary berthing rights.

San Francisco and Encinal reraised the arguments made in 1129 that Oakland may act in an unlawful manner under the agreement and that the Commission should not wait to disapprove a subject agreement but should do so on presently available information. We once again reject these arguments. There is no showing on the record in this proceeding that Oakland will act in other than a lawful manner nor will we disapprove the agreement on the basis of speculation alone. T–1768 has much to recommend it. Oakland has acted to develop and improve its port and Sea-Land as well as members of the shipping public will benefit from T–1768.

Interveners argue that approval of Agreement T–1768 would be contrary to our holding in Docket 1084, *Investigation of Wharfage Charges on Bulk Grain at Pacific Coast Ports*, served August 18, 1965. This contention is without merit. In Docket 1084, we merely held that the Department of Agriculture was required to pay wharfage for its cargo which was transported over Respondents' wharves, because such cargo used the wharves. The level of the wharfage charge was not in issue and, in fact, the wharfage charged on the bulk grain (45 to 50 cents) was different from that assessed other cargo (80 cents). There is nothing inconsistent with that holding in our position here. In fact in Docket 1084 the Commission explicitly noted that grain terminals are special facilities, costs of such operations should be separately determine, and "a like course should be followed in connection with the handling of any other commodity that moves in large quantities under circumstances which are unique * * *." This is the situation present at the facility covered by Agreement T–1768: containerized cargo moves in large quantities over special facilities under unique circumstances. Sea-Land does pay all charges, including wharfage, up to the minimum and, as we have stated in Dockets 1128–1129, *supra*, there is no requirement, in the absence of a showing of illegality, that all users must pay wharfage computed upon the same basis. The minimum–maximum rental method of paying wharfage has been approved in Agreement No. 8905—*Port of Seattle & Alaska S.S. Co.*, 7 F.M.C. 792 (1964), as well as in Dockets 1128 and 1129, and we see nothing present in this proceeding to show why it cannot lawfully be applied here.

Interveners allege that the Examiner erred in holding that injury need be shown for a violation of sections 16 or 17 of the Act. It is true that no "injury" in the sense of monetary loss must be shown for a violation of these sections as is necessary when reparations are sought for such violation. However, since compensation for the use of terminal facilities in a minimum–maximum rather than straight tariff form is not in itself unlawful, there must be some showing of an unreasonable disadvantage among the users of the facilities on these different bases before a minimum-maximum compensation can be declared contrary to section 17, and 16 itself requires a showing of such unreasonable disadvantage. "Injury," as used by the Examiner, is to be considered as synonymous with "adverse effect."

There are ony two issues in this proceding not considered in Docket No. 1129: (1) the reasonableness and fairness of the compensation for the larger area here involved, and (2) the proper method of relating T–5 to T–1768; i.e., by modification of the latter and/or cancellation of the former.

The Examiner found the compensation for the area covered by T–1768 to be fair and reasonable upon the basis approved by the Commission in Docket No. 1129. The cost and expenses of the specific terminal property here involved, including allocations of all general terminal expenses to the areas covered by T–1768, were considered. It was shown that under the $450,000 minimum compensation Oakland would more than recover its investment and would receive a rate of return of about 4.6 percent on the value of the land and improvements. The maximum figure ($550,000) was shown to yield Oakland a 7 percent return on the value of the land and on the depreciated reconstruction cost of the terminal facility, and a 6 percent capital recovery on the cranes during the 20-year period.[4] Both minimum and maximum compensations are fair and reasonable. As we observed in Agreement No. 8905, *supra* (at 802), this "is not a rate case where we have a direct interest in the level of the Port's return on its terminal facilities. Beyond this, the Port, of course, is a public body, experienced in terminal management. We have no grounds for disputing its judgment * * *."

Although T–1768 does not appear to be in anyway unlawful, because it covers in part the same area which is the subject of T–5 it is possible for the parties to operate under T–1768 in a manner inconsistent with

[4] The cranes were considered differently, being movable equipment with a salvage value + the end of the 20-year period.

their express intent to conduct their operations at berths 8 and 9 as if the premises constituted one indivisible unit.

Agreement T–1768 provides for both a minimum and a maximum level of compensation. However, as intervener protestants observe, it is possible for the parties to operate under T–1768 so that only the minimum level of compensation will be paid. Paragraph 6 of T–1768 states that if T–5 is approved, the area covered by it; i.e., berth 9, will be removed from the scope of T–1768 and will be subject to the flat annual rental of $147,000. Thus, Sea-Land could use the area as a whole until the $450,000 minimum had been reached, thereafter restricting its activities to berth 9, where the flat rental there applicable would protect Sea-Land from paying any more for the use of the facility.

There is no indication that the parties to T–1768 will operate in this manner. However, because they realize that such a possibility exists, they have agreed to cancel T–5 and modify T–1768 by deleting paragraph 6. We feel that this cancellation and modification must be made because the failure to make them would leave on file with the Commission agreements which do not truly embody the intent of the parties.[5]

An appropriate order will be entered approving Agreement T–1768, with the deletion of paragraph 6, and the inclusion of the modifications agreed to by the parties noted above, and cancelling Agreement T–5.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
Secretary.

[5] Section 15 requires, *inter alia,* that a "true copy, or if oral, a true and complete memorandum, of every agreement" subject to it be filed with the Commission.

FEDERAL MARITIME COMMISSION

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AGREEMENT No. T-1768—TERMINAL LEASE AGREEMENT

ORDER *

The Commission has this date entered its Report in this proceeding, which is hereby made a part hereof by reference, and has found, *inter alia*, that Agreement No. 1768 between the City of Oakland and Sea-Land of California, Inc., as modified by the parties, is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, ports or between exporters from the United States and their foreign competitors, nor detrimental to the commerce of the United States, contrary to the public interest, or violative of the Shipping Act, 1916, if modified by the deletion of paragraph 6, and that section 15 requires the cancellation of Agreement No. T-5 between the same parties.

Therefore, it is ordered, That

1. Agreement T-1768 is approved with the following modifications:
   (a) On page 5, paragraph 4(a), in the 9th line from the bottom of the page, elimination of the words "twelve-month period" and substitution of the word "year" therefor;
   (b) On page 6, paragraph 4(d), insertion between the word "it" and the word "should" the following: ", or any business entity affiliated as to ownership or control with assignee,";
   (c) Deletion of paragraph 6.

By the Commission.

*Amended order of Jan. 26, 1966, follows.

FEDERAL MARITIME COMMISSION

No. 65-9

AGREEMENT No. T-1768—TERMINAL LEASE AGREEMENT

AMENDED ORDER

JANUARY 26, 1966

The Commission issued its Report and Order in the captioned proceeding on January 10, 1966, approving Agreement No. T-1768 between the City of Oakland and Sea-Land of California, Inc., as modified and canceling Agreement T-5 covering a part of the same terminal area.

It now appears that Agreement T-1768 may not become operative, because of the problem involved in the purchase, erection, and installation of a crane until April, 1966. Because of this situation the parties could be left without an approved agreement under which they can operate.

Therefore, it is ordered, That ordering paragraphs 2 and 3 of the order of January 10, 1966, are deleted.

It is further ordered, That the order of January 10, 1966, is amended to read as follows:

2. Agreement T-5 shall remain in effect until the commencement of Agreement T-1768; and

3. The parties shall submit to the Commission on or before the effective date of Agreement T-1768 a modification of Agreement T-1768 complying with this order, and a cancellation of Agreement T-5.

By the Commission.

[SEAL]

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1185

OCEAN FREIGHT CONSULTANTS, INC.

v.

THE BANK LINE LIMITED

Decided January 11, 1966

The Bank Line Limited, a common carrier by water, violated section 18(b) (3) of the Shipping Act, 1916, by charging a higher rate for a shipment in foreign commerce than the rate on file in its tariff properly applicable at the time.

Pursuant to section 22 of the Act, Ocean Freight Consultants, Inc., an assignee and holder of legal title to the claim, is entitled to payment of reparation in the amount of $140.

Henry Wegner for Ocean Freight Consultants, Inc.

Paul F. McGuire and *John M. Linsenmeyer* of Kirlin, Campbell & Keating for respondent, The Bank Line Limited.

REPORT

BY THE COMMISSION:

Chairman HARLLEE, *Commissioner* BARRETT and *Commissioner* DAY concluded that on this record The Bank Line Limited (Bank Line) must pay to Ocean Freight Consultants, Inc. (OFC) the sum of $140. Their respective views are set forth below.

John Harllee, Chairman:

This proceeding arises out of a complaint filed by OFC, as assignee of Mead Johnson International, a division of Mead Johnson & Company (Mead Johnson), alleging that Bank Line violated section 18(b)(3) of the Shipping Act, 1916 (the Act), in assessing and receiving payment from Mead Johnson of a higher freight rate on certain exported commodities in foreign commerce than the rate properly applicable at the time; and seeking reparation in the amount of $140 pursuant to section 22 of the Act.

OFC is a New York corporation engaged in the business of auditing ocean freight charges. Where the audit shows overpayments, OFC attempts to collect the same on behalf of the shipper which may include proceedings before this Commission. Services are performed on a percentage of collection basis. In the agreement between Mead Johnson and OFC in evidence herein, it is provided that each claim must be submitted to Mead Johnson for approval before any action on the claim is taken.

On May 20, 1965, OFC filed its complaint on behalf of Mead Johnson, the shipper herein, setting forth three causes of action based on overcharges.[1] In addition to Bank Line, Strachan Shipping Company and U.S. Atlantic and Gulf/Australia-New Zealand Conference were named as respondents. On June 10, 1964, respondents moved to dismiss alleging, among other grounds,[2] that OFC had no legal capacity to sue absent an assignment from Mead Johnson. By letter dated June 12, 1964, received by the Commission on June 15, 1964, Mead Johnson assigned the claims to OFC "for collection of reparation * * * on our behalf * * *." The Commission denied this part of respondent's motion following the practice established by the Interstate Commerce Commission. The Interstate Commerce Commission has long allowed the assignment of claims for reparation for violations of the statute it administers. The Supreme Court has held that an assignment may vest legal title in the assignee without passing to him beneficial or equitable title, and such assignee may recover damages in an action brought in his own name but for the benefit of equitable owners of the claims. The Court further held that claims for reparation are an assignable property right in the absence of express legislative mandate to the contrary. Finding no such language in the Interstate Commerce Act, the Court allowed the action by an assignee of the legal title but not the beneficial interest in a reparation claim before the I.C.C.[3] In its order dated December 22, 1964, the Commission stated:

> In accordance with the stated purpose of our Rules of Practice and Procedure to "secure the just, speedy and inexpensive determination of every pro-

[1] The two other claims in the amounts of $103.66 and $38.87 respectively were dismissed by the Commission prior to hearing by order served June 8, 1965, because they were barred by the 2-year limitation contained in section 22.

[2] The motion also asked that the complaint be dismissed as against Strachan and the Conference for failing to state a cause of action against either. This part of the motion was granted by order served December 22, 1964.

[3] See *Spiller* v. *Atchison, Topeka, and Santa Fe Railway Co.*, 253 U.S. 117, 133–135 (1920).

ceeding," * * * this assignment will be accepted as the filing of a new or supplemental complaint as of June 15, 1964 * * *.[4]

On January 7, 1965, respondents moved for reconsideration of the above denial alleging among other things (a) the Commission's order was based on an assignment to OFC of a claim which is in violation of New York State penal law and therefore illegal; and (b) the complainant being a corporation may not bring an action on behalf of others under the Commission's rules. By order dated February 19, 1965, the Commission denied respondent's motion stating:

The validity of an assignment under the New York State penal law may well affect the conduct of the complainant's business in that State, but cannot be determinative of our practice. We are required by section 22 of the Shipping Act, 1916, to permit the filing of claims for reparations by any person who may have suffered because of an alleged violation of the act, or his successor in interest. The practice before the Commission by "firms and corporations on behalf of others" prohibited by Rule 12(g) [sic] of our Rules of Practice and Procedure does not affect the ability of complainant to bring this action. Practice in this context refers to the gamut of activities performed by lawyers on behalf of others; it does not qualify the statutory right of any entity, corporate or otherwise, to seek redress to some legal grievance under section 22 of the Act.

Hearings were held before and briefs submitted to Examiner Benjamin A. Theeman. The examiner issued an initial decision in which he found a violation of section 18(b)(3) and awarded reparation.

No exceptions to the initial decision were filed. We have reviewed the initial decision on our own initiative.

FACTS

1. At all times herein mentioned, Bank Line published, maintained and had on file with the Commission, Freight Tariff No. 9, U.S. Atlantic and Gulf/Australia-New Zealand Conference F.M.C. No. 1 containing item #450, reading as follows:

Description	*Basis*	*Rate*
Canned goods, N.O.S. (foods), including beverages, non-alcoholic and canned shrimp	W/M	$50.00

2. The details concerning the shipment are as follows:

(a) The shipment was transported by Bank Line on the MV *Nessbank* pursuant to Bill of Lading No. 77 dated at New Orleans, November 20, 1962;

(b) The shipper was Mead Johnson. The consignee was Charles McDonald, Mead Johnson PTY, Ltd., the Australian branch of Mead Johnson;

[4] The I.C.C. also treats assignments made subsequent to the filing of a complaint as the filing of a new or supplemental complaint. See *Carolina Cotton & Woolen Mill Co.* v. *Southern Railway*, 195 I.C.C. 654, 659.

(c) There were three items: (1) 300 cartons of canned infants' food known as Sobee powder (24 one pound cans per carton) measuring 350 cu. ft.; (2) 5 cartons of tube feeding sets measuring 25 cu. ft.; and (3) 1 carton of literature measuring 1 cu. ft. All three items measured 376 cu. ft.;

(d) Freight for the 376 cu. ft. was charged at the rate of $66 per 40 cu. ft. and totalled $620.40;

(e) The sales by Mead Johnson to its branch were on a CIF basis. However, full freight was prepaid by Mead Johnson.

3. OFC, on behalf of Mead Johnson, advised Bank Line that the rate of $66 per 40 cu. ft., for the 300 cartons of canned food was improper; that the proper applicable rate was $50 per 40 cu. ft. as set forth in item #450; and that an overpayment of $140 had been made. OFC demanded a refund of the $140 which Bank Line refused to make. This proceeding resulted.[5]

4. The record contains no evidence to show how or from where the rate of $66 per 40 cu. ft. for the 300 cartons was obtained. Bank Line does not contend nor did it offer any evidence to show that item #450 of Tariff No. 9 does not apply to the 300 cartons as contended by OFC. Evidence was introduced to show that on May 3, 1962, a similar shipment of 100 cartons of Sobee powder and 3 cartons of tube feeding were shipped via Bank Line at a rate of $50 per 40 cu. ft. for the powder and $66 per cu. ft. for the tube sets.

Discussion and Conclusions

As early as 1915, the Supreme Court, in *Louisville & N.R.R. Co.* v. *Maxwell*, 237 U.S. 94, was called upon to interpret section 6 of the Interstate Commerce Act—not unlike our section 18(b)(3)—which then read in part:

> Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, * * * except such as are specified in such tariffs.[6]

Justice Hughes, speaking for the majority, wrote:

> Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which

[5] OFC's claim is limited to the freight for the 300 cartons of Sobee powder.

[6] Section 18(b)(3) in pertinent part reads as follows:

"No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time * * *."

has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

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

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

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

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

While it is true that the *Maxwell*, *Silent Sioux*, and *Johnson* cases (and the many that follow them) relate to the Interstate Commerce Act provision requiring the exaction by carriers of the filed tariff rate, section 18(b)(3) is similar to that provision and should be similarly construed. *U.S. Nav. Co.* v. *Cunard SS Co.*, 284 U.S. 474 (1932).

It is clear that the collection by Bank Line of the rate of $66 per cu. ft. for the 300 cartons is not in accord with the tariff on file with the Commission. Thus, this action, in the light of the above, constitutes a violation of section 18(b)(3) of the Act.

Section 22 of the Act provides for the payment of "Full reparation to the complainant for the injuries caused by said violation." In this instance full reparation represents the difference between the rate that Mead Johnson should have paid on the 300 cartons and the rate it actually paid, or the sum of $140. It is so found.

Bank Line contends that OFC is not entitled to reparation because "the freight charges * * * were not paid by OFC nor were they ultimately paid by Mead Johnson the shipper and OFC's assignor; * * * that the freight charges will ultimately be paid by the consignee in Australia. Thus, neither OFC nor Mead Johnson as OFC's sole assignor will have suffered any damage from the alleged overcharge." There is no merit to this contention. Similar contentions have been made to the predecessor to this Commission and the ICC and have been rejected. *Oakland Motor Car Co.* v. *Great Lakes Transit Corp.*, 1 U.S.S.B. 308, 311 (1934). The problem of reparation in overcharge cases before the ICC was finally adjudicated by the Supreme Court in *Southern Pacific Company et al.* v. *Darnell-Taenzer Lumber Company et al.*, 245 U.S. 531 (1918). Justice Holmes on page 533–534 stated:

> The only question before us is that at which we have hinted: Whether the fact that the plaintiffs were able to pass on the damage that they sustained

in the first instance by paying the unreasonable charge, and to collect that amount from the purchaser, prevents their recovering the overpayment from the carriers. The answer is not difficult * * * The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events.

Respondent repeats on brief to the examiner the contention formerly made in its motion for reconsideration that OFC should be barred from the collection of this claim because the nature of its business violates the criminal code of the State of New York wherein it was incorporated. As shown above, the Commission rejected this contention in its order of February 19, 1965. There is nothing in the record that constitutes new facts, or a new question of law that warrants altering the Commission's decision. The Act establishes the Commission as the agency entrusted with the duty to protect the public interest in connection with ocean transportation. There is no showing in this record that the holding of this proceeding is detrimental to the public interest, nor that consequences contrary to the public interest are anticipated.

On the record as a whole, it is found and concluded:

(a) The applicable rate in the tariff on file with the Commission affecting the shipment of 300 cartons of Sobee powder is $50 per 40 cu. ft.;

(b) Bank Line violated section 18(b)(3) of the Act by charging a rate of $66 per 40 cu. ft. for the shipment;

(c) OFC, as assignee of Mead Johnson, has legal title to the claim herein arising out of the overcharge and is entitled to file, prosecute, and receive payment of reparation thereunder.

An appropriate order will be entered directing Bank Line to pay to OFC the sum of $140 representing the difference between the rate charged and the applicable tariff rate.

Commissioners James V. Day and Ashton C. Barrett:

It was not contended that any other rate than that on file with the Commission should be applied (and evidence was absent to show how or from where the rate of $66 per 40 cu. ft. for the shipment of 300 cartons was obtained). We hold on this record that Bank Line must pay to OFC the sum of $140 representing the difference between the rate charged and the applicable tariff rate.

Commissioner Hearn Dissenting:

An important question is presented in this proceeding and in my view that question transcends both the merits and statutory obligations in the premises. That question, which the majority answered in the affirmative, is whether the Federal Maritime Commission, as a quasi-judicial agency, is going to countenance and entertain this type of champertous practice.

A simple perusal of the record reveals a shocking example of champerty. Ocean Freight Consultants (OFC) has been permitted to sue in its own name to recover reparation for harm which it never sustained, grounded on a shipping transaction to which it was never a party. The actual shipper, Mead Johnson, which obviously had a legitimate claim against respondent,[1] elected, rather than pursue that claim in its own name *pro se* or through an attorney or practitioner approved by the Commission, to enter into an agreement with OFC whereby proceeds realized through OFC's efforts would be divided between Mead Johnson and OFC.

When OFC's legal competence to bring this suit first was raised, Mead Johnson executed what has been accepted by the majority as an "assignment" of its claim to OFC. Evidence of this "assignment" is contained in Exhibit 8. A mere reading of the so-called "assignment" readily establishes that it is nothing more than an agency agreement between Mead Johnson and OFC, whereby the agent, OFC, is authorized to pursue the collection of the principal's claim. Exhibit 8 reads:

> In matters before the Federal Maritime Commission, Docket 1185, Ocean Freight Consultants, Inc. versus the Bank Line Ltd., Strachan Shipping Company and U.S. Atlantic and Gulf/Australia-New Zealand Conference, we hereby assign claims 453, 455, and 460 to Ocean Freight Consultants Inc. *for collection* of reparation sought by Ocean Freight Consultants, Inc. *on our behalf* under section 22 of the Shipping Act of 1916. (Italics added.)

Quite obviously nothing was "assigned" to OFC by Mead Johnson except the right to represent it in litigation, and consequently, OFC had no claim properly to pursue before the Commission. For the majority to read Exhibit 8 as an "assignment" sufficient to support a suit for reparation renders a long standing and recently repromulgated rule a nullity. That rule, Rule 2(h) provides:

> Practice before the Commission by firms or corporations on behalf of others shall not be permitted (46 CFR 502.28).

If Rule 2(h) has any merit, then quite apart from the laws of the State of New York (which absolutely prohibit OFC's suits in that State), and a traditional public policy decrying the type of suit here in issue, our own rules bar this proceeding.[2]

[1] I agree that reparation in this record could have been awarded to a proper complainant.

[2] During the pendency of this litigation our own Rules of Practice and Procedure were under review. In accordance with law, the proposed Rules were published in the Federal Register and otherwise made available to interested parties. Comments were invited and received. Rule 2(h) was included. Neither OFC nor any other person complained of Rule 2(h).

In this regard, I would like to note that the horrendous posture of the record bears out the Commission's wisdom in adopting Rule 2(g) of our Rules of Practice and Procedure, which provides that a person not an attorney at law shall be permitted to practice before the Commission upon specific admission after demonstrating that he—

> possesses the necessary legal, technical, or other qualifications to enable him to render valuable service before the Commission and is otherwise competent to advise and assist in the presentation of matters before the Commission (46 CFR 502.27).

In support of its decision, the majority has placed unwarranted reliance on *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U.S. 117 (1920). But while *Spiller* does countenance assignments of freight claims, that case must be construed in light of its peculiar facts, and those facts make all the difference. There, the real parties in interest were members of a Cattle Raisers' Association and the assignee was Secretary of that association. In fact, "the Cattle Raisers' Association was prosecuting the claims for the owners thereof" (253 U.S. 117 at 133) and they were represented by "counsel" at the hearing (253 U.S. 117 at 125). Here, the claim was prosecuted by a complete stranger to the transaction, and it may be said fairly, prosecuting the claim in the hope of reward for itself.

Certainly all in government, particularly an Independent Regulatory Agency, attempt to provide a forum wherein procedures are simplified in order to allow an aggrieved party an opportunity to present his case and if successful to be made whole. That is the spirit of the Administrative Procedure Act and in my opinion the way this agency attempts to act in the public interest. However, allowing this type of claim would in my mind encourage bounty hunting, which would have an injurious effect on the entire industry.

Therefore, I would not permit, as our Rules do not permit, this type of practice before the Federal Maritime Commission.

Commissioner John S. Patterson Dissenting:

An examination of the record discloses that complainants were retained by a shipper to audit and review copies of bills of lading for the purpose of discovering erroneous freight charges. For purposes of the present claims, complainants are shown by the record to be agents, not assignees. They are not in fact appearing in person. Complainants are appearing in a representative capacity. Rule 2(g) of our Rules of Practice and Procedure (General Order 16) prohibits such appearance before the Commission (46 CFR § 502.27; F.R. October 26, 1965, Vol. 30, No. 207).

FEDERAL MARITIME COMMISSION

No. 1185

OCEAN FREIGHT CONSULTANTS, INC.

v.

THE BANK LINE LIMITED

ORDER OF REPARATION

The Commission on this date made and entered a report in this proceeding, which is hereby incorporated herein by reference, in which it found, *inter alia*, that respondent, The Bank Line Limited, had violated section 18(b)(3) of the Shipping Act, 1916, in assessing and receiving payment from Mead Johnson International, the assignor of complaint, Ocean Freight Consultants, Inc., of a higher freight rate than the rate properly applicable, and that complainant is entitled to reparation for such violation.

Therefore, it is ordered, That respondent, The Bank Line Limited, pay to complainant, Ocean Freight Consultants, Inc., $140.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1066

ALCOA STEAMSHIP CO., INC.—GENERAL INCREASE IN RATES IN THE ATLANTIC GULF PUERTO RICO TRADE

Decided January 13, 1966

Proposed general increases in rates of respondent Alcoa in the regulated Atlantic and Gulf to Puerto Rico trade found to be unjust and unreasonable to the extent they provide a rate of return exceeding 10 percent on the rate base of $1,293,936 computed utilizing ton-mile method of allocation of vessel expenses and depreciation. Alcoa ordered to adjust its rates accordingly.

Elmer C. Maddy and *Russel T. Weil* for respondent Alcoa Steamship Co., Inc.

John T. Rigby and *Seymour I. Berdon* for party complainant the Commonwealth of Puerto Rico.

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

REPORT

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

The Commission ordered this investigation concerning the lawfulness under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, of the rates, fares, charges, rules, classifications, regulations, and practices contained in respondent Alcoa Steamship Co. Inc.'s tariff schedules in Outward Freight Tariff No. 3, FMC-F No. 4, naming numerous increases in commodity rates from Atlantic and Gulf ports in the continental United States to ports in the Commonwealth of Puerto Rico. The Commission's order of investigation suspended these schedules to and including November 25, 1962. The rates became effective on November 26, 1962.

The Commonwealth of Puerto Rico, by virtue of its protest to the increases, became a party complainant under rules 3(a) and 5(h) of our Rules of Practice and Procedure. Hearings were held before Examiner C. E. Morgan, who issued an Initial Decision to which exceptions and replies have been filed.[1] We have heard oral argument.

Alcoa published increases in rates in varying amounts on about 1,400 of the 1,500 commodities in its tariff. Rates were not increased on self-propelled vehicles, vehicle accessories, bulk commodities, or explosives. The individual rates generally were increased about 20 percent, with a resulting overall increase of about 19 percent. This was the first general increase in rates by Alcoa since 1958, in spite of substantially increased costs since then.

There was some doubt whether Alcoa would experience as much as a 19-percent increase in its freight revenues in view of its competition and other factors, but a 19-percent increase in revenues for the projected year was accepted by the parties as a basis of their computations of net profits or net losses.

The leading commodities carried by Alcoa in the Puerto Rican trade in revenue tons for the year and for the half year listed below were:

	1961	1st half of 1962
Canned Goods & Groceries	15,125	6,085
Dry Goods	9,669	3,692
Electrical Materials & Equipment	16,097	4,102
Grain Products, Bagged	24,784	10,785
Iron & Steel Products	18,065	10,289
Machines & Machinery	3,943	4,782
Packing House Products	15,518	5,280
Vehicles	67,118	34,103
Total revenue tons	170,319	79,118

The total revenue tons carried from U.S. ports to Puerto Rico by Alcoa in 1961 were 343,378. Of this 1961 total tonnage, vehicles constituted about 19.5 percent, and the rates on self-propelled vehicles were not increased.

Before briefs were filed Alcoa reduced its rate on canned goods and groceries, and adding the 1961 tonnage for these commodities to the vehicle tonnage, makes a total of 24 percent for cargoes on which there were no increases or on which the increases later were dropped.

[1] The Commonwealth of Puerto Rico by letter asked the Commission to accept its brief before the Examiner in lieu of exceptions. Such a letter does not comport with the requirements of Rule 13(h) of the Commission's Rules of Practice and Procedure which requires that exceptions "shall indicate with particularity alleged errors" and is accordingly rejected as an exception to the Initial Decision. The position of Puerto Rico as expressed in its brief before the Examiner has, however, been considered by us in the determination of this proceeding.

In the first half of 1962, Alcoa carried a total of 238,510 revenue tons from U.S. ports to Puerto Rico. The rates as held down or later reduced on vehicles (34,103 tons), canned goods and groceries (6,085 tons), as well as all iron and steel products (10,289 tons) amount to a percentage of only 21 percent of the total tonnage carried by Alcoa in the United States-Puerto Rican trade. Moreover, inclusion of all iron and steel products tonnage overstates the above percentage since of these products only the rate on iron and steel plates (one of many items under the generic heading) was held down or later reduced. The rate on dry goods was increased from 54 cents to 65 cents, a cubic foot, and this rate was not held down. Other increases in the rates on the above listed commodities were 69 cents to 83 cents a cubic foot on electrical materials and equipment, 90 cents to 108 cents per 100 pounds on wheat in bags, 93 cents to 112 cents per 100 pounds on iron and steel billets, 60 cents to 72 cents a cubic foot on household washing machines, and 104 cents to 125 cents per 100 pounds on packinghouse products. As seen, these particular increases amount to 20 percent each.

No increase was proposed by Alcoa on certain liquids, such as lubricating oil, in bulk, in vessel's tanks, and on certain acids. These rates were held down to develop the business and because Alcoa had added deck tanks to its vessels and was using its deep tanks. Also, there was an absence of increased cargo handling costs for these commodities. The rate on merchandise, variety store, in carrier's containers also was held down, but here again Alcoa's cargo handling expenses were much less than in the case of ordinary package freight received in numerous small packages.

In a general revenue case, such as this one, we are concerned with revenues and expenses in general, but not with any analyses of costs for specific individual commodities.

Alcoa, a wholly owned subsidiary of the Aluminum Company of America, has operated a common-carrier service since 1951 southbound from United States, Atlantic, and Gulf ports, to ports in Puerto Rico, the Virgin Islands, West Indies, Venezuela, and the Guianas. It began a northbound common-carrier service from ports in Puerto Rico to New York, Philadelphia, and Baltimore in August 1962. Alcoa also is a contract carrier and proprietary carrier northbound of commodities such as bauxite, sugar, and phosphate. Bauxite transported mainly for its parent company is the principal northbound cargo of Alcoa.

In its southbound trade to Puerto Rico, Alcoa used seven vessels. Four of these were C–1's which were approximately 20 years old, and three were C–2's about 18 years old. Generally the C–1's were used in and out of the Atlantic ports, and the C–2's in and out of Gulf ports, but occasionally there were variations. Alcoa owned a total of 13 vessels, and chartered others for use in the other trades.

In 1961, Alcoa offered a weekly service to Puerto Rico from New York, and a weekly service from Baltimore generally via New York. From the Gulf in 1961, it provided a weekly service out of Mobile and New Orleans. No northbound common-carrier service from Puerto Rico to the United States was provided in 1961, or in the first half of 1962.

Since August 1962, Alcoa has offered a weekly service from Baltimore and Philadelphia, and fortnightly service out of New York via Philadelphia and Baltimore and has continued its weekly Gulf service from Mobile and New Orleans. The change in scheduling out of the Atlantic ports reduced Alcoa's transit time from Baltimore to Puerto Rico by three to four days. One of the reasons leading to the change in service of Alcoa out of Baltimore was the withdrawal of the Bull Lines from the Puerto Rican service. Alcoa presently faces the competition of Sea-Land Service, Inc., American Union Transport and Motorships, Inc., and other carriers out of the port of New York. Out of Baltimore Sea-Land provides direct sailings to Puerto Rico. The competitive picture is quite flexible since carriers may enter and leave this trade at will. There is no conference in the trade, and Alcoa's competition would restrain it somewhat from excessive increases in its rates.

In September 1962, Alcoa commenced weekly northbound service to Baltimore and Philadelphia, and a fortnightly service to New York. Alcoa also provided a weekly service northbound to Mobile and New Orleans. The northbound common-carrier service of Alcoa has been very insignificant tonnagewise compared with its southbound service.

Operating southbound from Atlantic and Gulf ports, Alcoa generally also operated as a common carrier to the Virgin Islands with the same vessels on the same voyages as were used to serve Puerto Rico. Alcoa has provided common- or contract-carrier service to or from the Atlantic ports of Searsport, Maine; New York, N.Y.; Philadelphia, Pa.; Wilmington, Del.; Baltimore, Md.; Norfolk, Va.; and Charleston S.C.; and to or from the Gulf ports of Galveston, Tex.; Baton Rouge, New Orleans, and Braithwaite, La.; Gulfport, Miss.; Mobile, Ala.; and Pensacola, Panama City, Jacksonville, and Tampa, Fla. To a relatively minor extent Alcoa in some instances with the same vessel as used to serve Puerto Rico and on a same voyage has served other foreign ports and has provided way-to-way service.

Operating as a contract carrier northbound Alcoa has transported (1) bauxite from Trinidad to Mobile, (2) sugar from ports in Puerto Rico to New York, Philadelphia, Wilmington, Baltimore, Norfolk, Jacksonville, Tampa, New Orleans, and Galveston, and (3) phosphate coastwise from Tampa to Baltimore, Norfolk, and Searsport, using the same vessels used in the southbound common-carrier service to Puerto Rico on the same individual round-trip voyages. The bulk commodities transported in the contract trade besides loading more heavily were more quickly handled, required less port time and encountered less delay than the general cargo.

For the entire year 1961 for its Puerto Rican service, Alcoa had a small net profit before Federal income taxes of $69,919 or a net income after such taxes of $39,061, both as calculated by Hearing Counsel, or a net loss before Federal income taxes of $1,128,217, or $1,308,873, or $1,501,951 as calculated under various methods by Alcoa.

For the entire year of 1962 for its Puerto Rican service, Alcoa had a net loss before Federal income taxes of $72,243 as calculated by Hearing Counsel, and which loss was $908,690, or $1,081,122, or $1,435,599 as calculated under various methods by Alcoa.

On the basis of Alcoa's small profit or its loss in 1961, and its loss in 1962, regardless of which figures of record are selected as the most accurate for that year, it is clear that Alcoa is entitled to some general increase over its prior rates which were in existence in 1961 and for about 11 months in 1962. Alcoa is entitled to such an increase because it should not be compelled to operate at a loss as it did in 1962, or at a minimum profit or loss as it did in 1961.

For the projected year based upon the proposed increased rates both Alcoa and Hearing Counsel offered projected income figures. The respondent showed a net loss before Federal income taxes under its various calculations of $227,242, or $338,376, or $654,848, whereas Hearing Counsel showed a net profit before Federal income taxes of $771,393 and a net income after such taxes of $375,769.

The largest differences between Alco and Hearing Counsel were in their calculations of vessel expenses,[2] which differ because of their

[2] Vessel expenses herein are intended to include: wages; payroll taxes; contributions—welfare plans; subsistence; stores, supplies & equipment; fuel; repairs—performed domestic; insurance—hull and machinery; insurance—P. & I.; insurance—other; and other vessel expense. Vessel expenses herein are intended to exclude port and cargo expenses, otherwise sometimes called voyage expenses. The total of all expenses shown by the parties exclusive of overhead, depreciation and U.S. income tax will be referred to as "vessel operating expenses."

different methods of allocating Alcoa's overall vessel expenses to its Puerto Rican service. Other differences were in the calculations of overhead and of depreciation, as well as differences in the valuation of Alcoa's assets as allocated to the Puerto Rican service.

Since the overhead figure for the projected year used by Hearing Counsel, and the overhead figures for that year used by Alcoa under two of the three results shown by it, are based upon total vessel and voyage expense ratios, the calculation of vessel expenses becomes doubly important.

Alcoa and Hearing Counsel substantially agree in their calculations of revenues and of port and cargo expense and other voyage expenses.

Since the expenses of Alcoa's Puerto Rican common-carrier service are commingled with the expenses of Alcoa's contract-carrier services and its Virgin Island and foreign service, a principal problem in this proceeding is the determination of a just and reasonable allocation of vessel expenses to the Puerto Rican common-carrier service of Alcoa.

In general, the respondent has allocated vessel expenses as between its southbound common-carrier service on the one hand, and, on the other hand, its northbound contract-carrier service on the basis of days operated in each service, whereas Hearing Counsel supports a ton-mile allocation. After the initial daily basis allocation above by respondent it initially made a further allocation of southbound expenses between Puerto Rico, the Virgin Islands, and other foreign ports on the basis of a revenue prorate. While Alcoa supports this revenue prorate as reasonable, it however, does not oppose a ton-mile prorate as between Puerto Rico and the Virgin Islands, after its initial breakdown of expenses on a daily basis as between southbound common-carrier service and northbound contract-carrier service. The ton-mile method of allocating vessel expenses adds together the costs of all voyages for a year's time, including in-ballast costs and idle and strike-time costs, and then allocates the total costs of the year to the various common-carrier and contract-carrier services on the basis of tonnage times distance carried in each service.

In fact, on brief Alcoa makes a computation based upon such a ton-mile prorate. Alcoa allocates total southbound vessel expenses on the daily basis, but separates southbound Puerto Rico expenses from Virgin Island southbound expenses on a ton-mile basis. The total for the Puerto Rican and Virgin Island tonnage for 1961 is 573,-106,000 ton-miles. The Puerto Rican ton-miles of 504,988,000 are 88.1

percent, and Alcoa takes 88.1 percent of total southbound vessel expenses, which it calculates at $2,958,987 to obtain the revised Puerto Rican vessel expenses for 1961 of $2,606,868.

For the year 1961, Hearing Counsel calculate vessel expenses to be $1,305,994, as compared with Alcoa's calculations of $2,434,999 (daily basis between southbound and northbound, then revenue prorate on southbound between Puerto Rico and Virgin Islands), and $2,606,868 (daily basis between southbound and northbound, then ton-mile prorate between Puerto Rico and Virgin Islands). Hearing Counsel calculated for 1961 a ton-mile ratio for the Atlantic of 27.927 percent, and applied this to Alcoa vessel expenses and fuel of $2,724,780 to obtain Puerto Rican Atlantic vessel expenses and fuel of $760,949. The same process for the Gulf used figures of 23.778 percent, and $2,292,223 with resulting Puerto Rican Gulf vessel expenses and fuel of $545,045, or a total for the Atlantic and Gulf of $1,305,994.

Hearing Counsel for 1961 used the figure of $5,515,913 as a total of port expenses, cargo expense and other voyage expense, making a total of vessel and voyage expenses of $6,821,907, or of $6,487,074 if net passenger and mail revenue of $334,833 is deducted. Alcoa's figure of $5,534,856 for the total of port expense, cargo expenses and other voyage expenses is not much different from Hearing Counsel's figure of $5,515,913, and the relatively small difference is explainable from the handlings of passenger expense mainly, and from changes in figures resulting from adjustments of the number of voyages and voyage days, from 98 to 96 voyages and from 1,221 to 1,208 days. Throughout their calculations Alcoa and Hearing Counsel generally agree to the allocations of port, cargo and other voyage expenses, inasmuch as both allocate these expenses directly where possible or on a ton basis. Alcoa thus obtains its total of vessel and voyage expenses for 1961 of $7,969,855 using the daily/revenue prorate of vessel expenses, or a similar total of $8,141,724 using the daily/ton-mile prorate of vessel expenses.

Hearing Counsel used the total Puerto Rican vessel and voyage expense figure above of $6,821,907 and a company-wide Alcoa vessel and voyage expense for 1961 of $39,483,207 to obtain a ratio of 17.27799 percent applicable to Atlantic and Gulf. This percent times $5,184,587, the Aloca net overhead company-wide, results in an overhead for 1961 for the Puerto Rican service of Alcoa of $895,792.

Surprisingly, Alcoa first calculated a lesser overhead than did Hearing Counsel. The overhead for 1961 as calculated first by Alcoa is

$802,824 on the revenue prorate basis. On brief, Alcoa states it will accept Hearing Counsel's method of calculating overhead, and using its own figures of vessel and voyage expenses Alcoa obtains, by the vessel and voyage expense ratio method, an overhead figure for 1961 of $983,480. Additionally, Alcoa calculates a third figure for 1961 for overhead of $1,004,689 using its still higher vessel and voyage expenses based on the daily/ton-mile prorate, instead of the daily/revenue prorate.

Alcoa's depreciation for 1961 is computed by it as $234,085, and by Hearing Counsel as $142,442, a difference of about $92,000. The difference results from the methods of allocating depreciation on vessels equipment, structures, and spare parts, to the Puerto Rican trade.

The principal difference of the parties in computing depreciation was in the allocation of depreciation to the C–2 vessels, one using a daily or time basis and the other a ton-mile basis. On C–2 vessels, Alcoa allocates depreciation of about $126,400 and Hearing Counsel about $55,400, a difference of about $71,000. On the total depreciation on four C–2 vessels of $233,223 in 1961, Alcoa takes 54.2 percent for the Gulf/Puerto Rican trade, which percent is determined from a ratio based on 593 days in the Gulf/Puerto Rican trade of these vessels compared with 1,095 optimum days of these vessels in all trades. Hearing Counsel take 23.778 percent of the $233,223 depreciation figure, determining this percentage from a ton-mile ratio of 263,642,000 ton-miles in the Gulf/Puerto Rican trade compared with 1,108,756,000 ton-miles in all trades in which these vessels were used. This difference is another illustration of the fact that the daily basis used by Alcoa in allocating expenses to the Puerto Rican trade produces a higher expense than does the ton-mile prorate of Hearing Counsel.

On 1961 depreciation of $14,116 on the C–1 vessels, Alcoa using a daily ratio of 615 days over 1,460 days, or a 42.1 percentage, obtains an allocation of depreciation to the Atlantic/Puerto Rican trade of about $5,900 compared with Hearing Counsel's allocation of about $3,900 which is based on a ton-mile prorate of 27,927 percent for the Atlantic Puerto Rican trade.

For 1961 depreciation on structures in Puerto Rico both Hearing Counsel and Alcoa allocate the same 100 percent, or about $53,500, and for depreciation on equipment in Puerto Rico both allocate the same 100 percent, or about $14,400.

Of total depreciation on spare parts of $9,378, Alcoa allocates 1,208 days in the Puerto Rican service over 4,745 optimum days, or 25.5 percent, or about $2,400 depreciation to the Puerto Rican trade. Hearing Counsel use vessel and voyage expense ratios of 9.48932 percent for the Atlantic and 7.78867 percent for the Gulf to obtain a total depreciation on spare parts for the Puerto Rican service of $1,620. Hearing Counsel's percentages are derived from Atlantic vessel and voyage expenses of $3,746,690, a corresponding figure for the Gulf of $3,075,217, and a total for all trades in which the vessels were used of $39,483,207.

Hearing Counsel use the same vessel and voyage expense ratio percentages as above in computing depreciation allocable to the Puerto Rican trade on structures outside of Puerto Rico and on equipment outside Puerto Rico. Out of total depreciation on structures outside of Puerto Rico of $27,527 and out of total depreciation on equipment outside of Puerto Rico of $50,797, Hearing Counsel obtain depreciations for the Puerto Rican service, respectively, of about $4,800 and about $8,800. Alcoa obtains corresponding depreciation figures on structures and equipment outside of Puerto Rico allocable to the Puerto Rico trade of about $10,800 and about $21,200. Alcoa for these figures uses 41.8 percent, which is the prorate of the revenue on Puerto Rican cargo of $7,586,785 over the revenues of all general cargo of $18,150,850.

For the projected year, both Alcoa and Hearing Counsel project freight revenues in the Puerto Rican trade of $12,395,842, and passenger and mail revenues in the trade of $261,437. Both also make allowances for passenger and mail expenses of $44,616 as part of other voyage expenses. Besides the difference in the projections of depreciation for that year, the other differences in the income account are in the projections for overhead and for vessel expenses.

The Examiner's decision

The Examiner found that the general increases in rates proposed by Alcoa are just and reasonable, and will not result in an unlawful rate of return, but rather in a small net loss.

The following table illustrates the differences in the parties' projections of Alcoa's income account for its Puerto Rican service and includes another projection by the Examiner:

TABLE I.—*Alcoa income account Puerto Rican service projected year*

	Alcoa's estimate	Hearing Counsel's estimate	Examiner's estimate
Revenues:			
Freight revenues	$12,395,842	$12,395,842	$12,395,842
Passenger and mail revenue	[1] 261,437		[1] 261,437
Total	12,657,279	12,395,842	12,657,279
Expenses:			
Vessel expense	[2] 3,487,546	2,342,202	[3] 2,914,874
Less passenger and mail revenues		[1] 261,437	
Gross profit after vessel expense but before voyage expense	9,169,733	10,315,077	9,742,405
Port, cargo and other voyage expenses including passenger and mail expenses	[4] 8,275,108	[4] 8,275,108	[4] 8,275,108
Gross profit from vessel operations	[5] 894,625	[5] 2,039,969	[5] 1,467,297
Overhead	[6] 1,315,065	[6] 1,097,966	[6] 1,251,040
Depreciation	[7] 234,442	[7] 170,610	[7] 234,442
Total (overhead and depreciation)	1,549,507	1,268,576	1,485,482
Net profit (or loss) before Federal income taxes	[8] (654,882)	[8] 771,393	[8] (18,185)
Federal income tax		395,624	
Net profit after taxes		375,769	

[1] All revenues are the same, except that in one projection passenger and mail revenues are deducted from vessel expenses, whereas in the other projections they are added to revenues.
[2] The Alcoa vessel expense figure in this table is based on the daily allocation of southbound and northbound expenses first, and then a ton-mile allocation between Puerto Rico and Virgin Islands.
[3] The Examiner's vessel expense figure is the arithmetical average of the above figures of Alcoa and Hearing Counsel.
[4] There is no dispute as to the allocation of voyage expenses.
[5] The differences in gross profit from vessel operations result from the different allocations of vessel expenses; Alcoa allocated vessel expenses largely upon daily basis, Hearing Counsel on a ton-mile basis, and the Examiner on an average of these two bases.
[6] The overhead figures herein are allocated on substantially the same methods, but are related to the three different totals of vessel and voyage expenses. The Examiner took his vessel expense above of $2,914,874 plus agreed voyage expenses of $8,275,108, or a total of $11,189,982 times 11.18 percent to obtain his overhead figure of $1,251,040. The 11.18 percent is the 1962 ratio of Alcoa's net overhead to its total vessel and voyage expenses for all of its operations, or $4,734,178 over $42,360,117.
[7] Depreciation differences are composed largely of depreciation on C-2 vessels. The Examiner accepted the time basis here rather than the ton-mile basis.
[8] Alcoa shows a substantial net loss before taxes, Hearing Counsel a net profit, and the Examiner a net loss of $18,185.

Because of his determination that the proposed rates would be noncompensatory, it was unnecessary for the Examiner to find the rate base on which a rate of return should be allowed or what such rate of return should be. He did, however, make a finding as to the proper rate base. The table below shows the rate base as determined by Alcoa, Hearing Counsel and the Examiner.

Column I is Alcoa's computation including the listing of its vessels at market value, other assets at book value (prudent investment standard), and the computation of working capital on the basis of a "buffer fund" of 1 month's average expenses plus the difference between average monthly expense and average collections on current bills.

Alco's tariff provides for an extension of credit privileges up to 15 days. Working capital in column I is computed by taking the total vessel and voyages expenses for the first 6 months of 1962 of $5,334,217, plus overhead of $496,356, making a total of $5,830,573 not including depreciation. One-sixth of this total is $971,762, or 1 month's average expenses, and average monthly collections were $815,800. The difference between the last two figures is $155,962, and this added to the $971,762 makes the working capital figure below $1,127,724. In column II of the table below is Alcoa's computation of its rate base using both vessels and other assets at book value (prudent investment standard), and working capital of an amount equal to one round voyage expense for each ship in the service. In column III in the table below are the computations of Hearing Counsel, which also utilize "prudent investment" and working capital of an amount equal to one round voyage expense for each ship in the service. The differences between columns II and III are the result of the differing methods of allocating values to the Puerto Rican service, as well as of allocating vessel expenses, which result in the different computations of the components of working capital. Alcoa allocates the book value of vessels to the Puerto Rican trade based upon the number of days spent in that trade whereas Hearing Counsel allocates vessels on a ton-mile prorate. Structures and equipment located in Puerto Rico were directly assigned by both parties. Those located elsewhere were allocated on a revenue basis by Alcoa and on the vessel operating expense ratio by Hearing Counsel. Spare parts were allocated on a day basis by Alcoa while Hearing Counsel used the vessel operating expense ratio. Column IV in the table below is the Examiner's conclusion as to a fair and reasonable rate base.

TABLE II.—*Alcoa rate base**

	I Alcoa	II Alcoa	III Hearing Counsel	IV Examiner
Vessels	$1,551,250	$280,983	$206,450	$243,717
Other property and equipment	315,128	315,128	253,769	284,449
Working capital	1,127,724	861,200	833,717	847,459
Total	2,994,102	1,457,311	1,293,936	1,375,625

*Cols. I and II are as of June 30, 1962; col. III is as of Dec. 31, 1961.

In general, the Examiner rejected market value as the means of evaluating vessel assets, and rejected the buffer fund basis of working capital in favor of the amount about equal to the proper share allocated to the Puerto Rican service of one round voyage expense for each ship used in that service. He then gave weight to both the daily and the ton-mile methods of allocating to the Puerto Rican service the expenses of working capital and value of vessels and other assets by averaging the different figures in columns II and III above.

Discussion and Conclusions

Allocation of vessel operating expenses, vessel depreciation, and overhead

As will be seen from the above, a finding as to whether or not Alcoa will make a profit at its proposed increased rates depends upon what method is used to determine the amount of expenses which should be allocated to the Puerto Rican service. It is not surprising, therefore, that the principal issue upon exceptions in this proceeding is whether the Commission should adopt the vessel-day method of allocating vessel expense and vessel depreciation which Alcoa advocates, or the ton-mile method advocated by Hearing Counsel. Neither party is willing to accept the Examiner's use of an average of the figures derived by the two methods, each maintaining that its position is more accurate.

It is axiomatic in proceedings to determine the reasonableness of rates, that the concomitant "cost finding is not an exact science," and that "all that is required is that the results obtained represent a reasonably close approximation of the assignable costs." *Increased Rates on Sugar, 1962*, 7 F.M.C. 404, 411 (1962).

Having considered all the arguments in favor of the alternative methods, it is our opinion that the ton-mile method more nearly approximates the assignable costs of Alcoa to its regulated Puerto Rico service.

The vessel-day basis, although superficially appealing, suffers from many built in faults.

The benefit derived from a transportation service is that cargo (tonnage) is transported over distance (miles) to its receiver. As stated in a recent and definitive study, "The product which the transportation industry sells is the ton-mile in freight service and the passenger-mile (or passenger journey) in passenger service." "Study Of Cost Structures And Cost Finding Procedures In The Regulated Transportation Industries," R. L. Banks & Associates, Prepared for U.S. Department of Commerce dated November 1959, at page 21.[3]

[3] While this study does criticize the ton-mile method for certain deficiencies, it does not even mention the vessel-day theory. To the same effect see "Explanation of The Development Of Motor Carrier Costs With Statement As To Their Meaning And Significance," I.C.C., Bureau of Accounts, Cost Finding and Valuation, Prepared by Cost Finding Section, Statement No. 4–59, dated Aug. 1959, at pages 12–13: "Tons and ton-miles * * * are the generally accepted 'sales' unit in transportation service."

This has often been recognized by this Commission and its predecessors. As we noted in *Atlantic & Gulf-Puerto Rico General Increase*, 7 F.M.C. 87, 98 (1962), "The basic factors contributing to vessel operating expenses [are] the tonnage and the distance carried."

The nature of ocean transportation is, furthermore, such that these costs of operating vessels between points are mainly "joint costs," or costs which should be borne proportionately by the users of the services in both directions. Although the joint cost concept may be less accurate when applied to an operation like that of Alcoa, where the two services differ as to types of cargo, port time and vessel utilization, it is still true that if Alcoa did not operate its common-carrier service to Puerto Rico its vessels would not be available there to haul its contract cargo back to the mainland. The burdens of expenses such as strikes and idle days should, in the absence of a showing that they should be otherwise borne, be allocated on the basis of tonnages times miles carried, i.e., the basic components of the service for which the users pay. The same is true of dry dock and repair days, particularly in light of the fact that testimony of record indicates that the contract bauxite is cargo which necessitates maintenance of vessels because of the manner in which it is loaded.

Ballast leg and positioning leg days also should be allocated on the ton-mile basis. An attempt to allocate such days on a vessel-day basis shows another basic flaw in that method, the great possibility for arbitrariness an inconsistent positions. Alcoa originally allocated nearly all of these costs to the regulated trade, arguing that unemployed legs should be charged against the cargo to be loaded at the end of such movements. However, in many cases, if not all, such movements are the result of having diverted the vessel from a direct return for the purpose of carrying contract cargo. The argument could well be made that costs of ballast and positioning legs should be charged against the cargo which caused the diversion in the first place rather than against the cargo to be loaded after the diversion from the direct route of return had taken place. The fact that Alcoa later revised its allocations to eliminate some ballast expenses originally allocated to the regulated trade merely serves to underscore the danger inherent in the vessel-day method. In the light of the possibility of arbitrary and inconsistent allocation and the strong argument that such expenses should always be allocated to the use which has caused the diversion, we cannot accept the vessel-day method. The ton-mile method is proper, not only because it avoids the difficulties noted, but because we believe it fairly allocates expenses which, like those discussed above, should be borne by users in proportion to amount of their tonnage carried.

Voyage expenses have been allocated by Alcoa either directly or by cargo tonnage by ports. The allocations by Alcoa of these items has been accepted by all participants.

All parties agree that overhead (administrative and general expense) is appropriately allocated in the relationship the vessel operating expense of the service bears to that of the company as a whole. The differences in results are caused by the different methods of allocating vessel expense. Having adopted the ton-mile method for the vessel expense portion of vessel operating expense, we accordingly also apply it to overhead.

All parties agree that in this proceeding depreciation should follow vessel expense and be allocated in the same proportions.

Depreciation is an accounting means of reflecting the wearing out of the fixed assets employed and therefore wherever possible should be spread over the units produced or in the case of water transportation the ton-miles produced. The reasonableness of allocating these costs on a ton-mile basis is manifest. These costs are truly "joint"; ships depreciate all the time, not only during the days when ships are used in a particular segment of the trade.[4]

Alcoa asserts that the vessel-day allocation method more nearly approximates assignable costs than the ton-mile method because: (1) some of its expenses (primarily seamen's wages, insurance, and fuel) vary directly with time and not ton-miles; (2) the ton-mile method fails to distinguish between port days and sea days and allocate their expenses to the proper services; (3) the ton-mile method has overstated the expense of the contract (northbound) leg which requires less port time than the common carriage due to the fact that general cargo requires more time in loading than bulk proprietary cargo; and (4) the ton-mile method destroys the "venture theory" of accounting.

We cannot agree that these criticisms of the application of the ton-mile method of allocating costs to the common carrier operation of Alcoa are sufficient to justify the use of the vessel-day method with all of its inequities as pointed out herein.

Although it is true that expenses like seamen's wages do vary with time, it is not necessarily true that allocation should be made wholly on a time basis. The difficulties with such a method have been noted above. It is sufficient here to note that the "mile portion" of the ton-

[4] Although originally computing overhead and depreciation on a revenue prorate, Alcoa now accepts an expense prorate method of computing these expenses, admitting this latter method is proper.

mile formula does take cognizance of the fact that there are time related expenses and gives weight to them for the simple reason that distance is traveled in time.

While it is recognized that there is some difference in vessel expense at sea and in port, due primarily to the reduced fuel consumption in port, an accurate allocation of port time to cargo carried is practically impossible due to the presence in port of a considerable amount of inactive time, which, as noted supra lends itself to arbitrary and inconsistent allocation. The various vessel expenses in port are such as should be borne in relation to tonnage carried.

In this proceeding, the justness of such an approach is highlighted by the fact that, as noted above, repair time is something obviously necessitated by the contract bauxite, and thus is directly related to the type of tonnage carried.

As the general overhead expenses affect all users of a service all of the time, they should be apportioned on the basis of directly incurred costs, in relationship to vessel operating expenses.

Finally, far from destroying the "venture theory" of accounting, the ton-mile method gives it full effect: it is, rather, the vessel-day method which destroys this theory. The venture theory of accounting attempts to reflect the fact that many costs of steamship operations are "joint costs" borne for the benefit of users of the transportation in both directions and which should thus be allocated to apply to both directions. As has been observed by an experienced steamship operator, "It is axiomatic in steamship operations that the entire voyage is the venture. This concept stems from the days of the Phoenicians and is equally true today. Voyages are scheduled and services extended or contracted on the basis of the results of the round voyage. To separate the results by voyage legs * * * produces * * * misleading results." [5]

The ton-mile formula and formulae similar to it are supported by considerable precedent, both of other transportation agencies and the courts.[6]

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[5] Statement of Frank A. Nemec, Executive Vice President of Lykes Brothers Steamship Co., Inc., on behalf of the Committee of American Steamship Lines, before the Joint Economic Committee of the 88th Cong., 1st sess., Hearings of Nov. 19, 1963, p. 23.

[6] C.A.B.—*American Airlines, Inc., et al., Domestic Trunk Lines, Service Mail Rates*, 21 C.A.B. 8, 37 (1955); *American Air Lines, Inc., Mail Rates*, 14 C.A.B. 558, 570, 571, 572 (1951).

I.C.C.—*Western Passenger Fares*, 37 I.C.C. 1, 22 (1915); *New York, S. & W. RR. Co. Reorganization*, 236 I.C.C. 425, 432 (1939).

Courts—*Central of Georgia R. Co.* v. *Railroad Commission of Alabama*, 209 Fed. 75; 79 (M.D. Ala. 1913); *Boyle* v. *St. Louis & S.F.R. Co.* 222 Fed. 539, 541 (E.D. Ark. 1915), affirmed, 244 U.S. 106 (1917).

Although, as Alcoa points out, consistency in allocation methods applied should not be maintained if its result is inequitable, in the absence of a showing of unfair treatment it is indeed a goal to be sought. The application of the ton-mile method is therefore proper here, where we have shown it to be the fairer of the methods considered. Indeed, the Commission has adopted the ton-mile method for use by the carriers in the domestic offshore trades, and these carriers (including Alcoa) have submitted reports purporting to use it.[7]

Although the ton-mile method has not always been used in proceedings before this Commission and its predecessors, it has never been rejected and has been used more often than any other allocation method.[8] The only case in which the vessel-day method was used for vessel operating and related expenses was *Pacific Coast/Puerto Rico Rate Increase*, 7 F.M.C. 525, 529 (1963). It is significant to note the language employed by the Commission in adopting that method which was employed by Waterman Steamship Corporation: "No party to the proceeding objected to the allocation methods utilized by Waterman, and they are found to be reasonable for the purposes of this proceeding." In other words, the vessel-day method was accepted because no one attempted to show there was anything wrong with it. That is hardly the case here, where many flaws of this method have been indicated.

We therefore adopt as proper in this proceeding the ton-mile method of computing vessel expenses and vessel depreciation.

The rate base

Having determined, unlike the Examiner, that the ton-mile method should be employed for allocating expenses, we find that Alcoa will earn a net profit after taxes at its increased rates of approximately $375,769. (See Table I—Hearing Counsel's Estimate, page 12, *supra.*)

It therefore becomes necessary for us to determine the rate base upon which such earnings are predicated. Specifically we must find the proper amounts to be assigned for the value of vessels and other assets and the amount to be allotted to working capital.

Alcoa maintains that vessels should be valued at market value, while Hearing Counsel maintain that "book value" (prudent investment standard), should be used. We agree with Hearing Counsel. As de-

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[7] See F.M.C. General Order 11, Fed. Reg. June 17, 1964.

[8] See e.g., *Atlantic-Gulf/Puerto Rico General Rate Increases*, 6 F.M.B. 14, 25 (1960); *Pacific-Atlantic/Guam Increases In Rates*, 7 F.M.C. 423 (1962).

fined by our decisions "prudent investment" means "amounts which have been invested prudently * * * as of the time they are first devoted to the particular trade, plus amounts prudently invested in betterments, all depreciated to the period for which the rates are being tested. * * *" *Atlantic & Gulf-Puerto Rico General Increase*, 7 F.M.C. 87, 107 (1962). Such a standard prevents an undue inflation of the rate base predicated upon monies which Alcoa has not spent. Valuations based upon market value, moreover, are subject to the opinion and predictions upon which such value is based which may be totally unrelated to the utilization of the property involved, the basis upon which assets must be valued. The evil of the use of a market value standard is brought forcibly home when it is realized that logically these non-utilization related factors would lead to an increase or decrease in rates as market values rise or fall, thus placing the general public at the mercy of these unpredictable fluctuations. This cannot be allowed to happen.

The "prudent investment" standard has been used by this agency consistently since the above-quoted case and is the traditional rate-base approach for all Federal regulatory agencies. It has, moreover, been approved by the courts as the standard offering the needed protection to consumers from exorbitant rates which should be followed unless justification appears for inflating the rate base. None appears here.[9] We adopt the "prudent investment" method of assigning asset values.

As noted above, Hearing Counsel maintain that the amount allocated to working capital should be equal to one round voyage expense for each ship in the service, while Alcoa argues that its amounts should be equal to a "buffer fund" of 1 month's average expense plus the difference between average monthly expense and average collections on current bills. The Commission has consistently followed the round voyage expense measure of working capital,[10] believing that it is sufficient for meeting current operating costs, the purpose of working capital. It was, in fact, the measure used in *Atlantic & Gulf-Puerto Rico General Increase*, *supra*, the last Puerto Rican case involving a general rate increase. In that case the Commission's predecessor explicitly disapproved working capital based on a "buffer fund" theory.

[9] The fact that some of Alcoa's vessels have been fully depreciated does not justify the use of market value. The choice of using these vessels is Alcoa's. It should certainly not be rewarded because it has refused to replace 20-year-old vessels.

[10] See *Atlantic & Gulf-Puerto Rico General Increase, supra* at 109; *General Increases In Rates (1961)*, 7 F.M.C. 260, 289 (1962); *General Increases In Alaskan Rates and Charges*, 7 F.M.C. 563, 582 (1963); docket 969, *Alaska Steamship Company—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska*, decided Mar. 5, 1964.

Alcoa attempts to distinguish this case from the earlier one by noting that in the prior case freight was prepaid under the tariff while a 15-day credit is allowed in this case. We think this distinction is without validity. Though the tariff allows 15-day's credit, there is no showing here that payments are actually deferred for that length of time. Even if they are, it is not unlikely that Alcoa is receiving credit on the expense side. The most persuasive answer, however, is that in the earlier case the Board did consider the possibility of lag between expenses and revenues and held "To the extent that there is any such lag, the working capital allowed by the Board—an amount approximately equal to one round voyage expense of each vessel in the service—is ample to take care of the carriers needs" (at page 109). No reason has been shown to depart from the measure which our experience has shown to be proper for working capital, and we adopt it here.

Alcoa's computations of working capital and valuation of assets made under the round voyage and prudent investment standard (see column II of table II) are also faulty. They are made on the basis of vessel-days and fail to reflect the proper nature of the expenses which are their components. We accordingly adopt Hearing Counsel's rate base computations embodied in column III of table II which properly compute asset values and working capital.

The rate of return

We must now determine the proper rate of return on the above rate base ($1,293,936).

Alcoa asserts that it should be 15 percent after Federal income tax, and in any event should be sufficient to provide and maintain a prudent operating ratio (ratio of expenses to gross revenues) of from 88 to 90 percent after taxes.

Hearing Counsel maintain that such a high rate of return is not justified and that the operating ratio theory of rate of return should be rejected.

At the outset we reject the "operating ratio" theory of rate of return for use in this proceeding. Its application here as supported by Alcoa's witness would result in a return to the carrier of $800,000 or some 62 percent of its rate base of $1,293,936.

There are in addition other factors militating against the use of the "operating ratio" formula here. It fails to take into consideration the fact that the real test of adequacy of investment is the return on capital commitment in light of all risks. The operating ratio approach, concerning itself solely with revenues and expenses, gives no clue to the supply price of capital. Because of its failure to consider the investment factor, operating ratio encourages constant rate increases. There is no incentive to hold down expenses when their very increase would justify increased revenues.

Alcoa argues that other regulatory agencies have applied operating ratio where the rate base was small as in the instant case.[11] This may well be true, but it should not be applied where, as here, the low rate base is due to the carrier's choice of continuing to use its vessels without replacement. To apply operating ratio in such a case might have the deleterious effect of discouraging carriers from replacing aged assets.[12]

Consistent with all of our precedents, we adopt as the measure of a reasonable rate of return that amount which is required to meet all allowable expenses of providing service, including the cost of acquiring or retaining the capital needed to provide service. The level of earnings needed to pay interest on respondent's notes and to pay dividends adequate to give stockholders a return comparable with other investments having a comparable risk should be allowed.

In the light of this measure, Alcoa's requested 15-percent rate of return seems unreasonably high. The Commission has never approved such a high rate of return, and there appears to be no reason for approving it here. Alcoa's argument in support of this rate of return is based upon the testimony of its witness Mr. Erdahl, who in turn based his opinion as to its necessity in part upon the "operating ratio" theory we have rejected. Even to the extent Mr. Erdahl's opinion is based upon factors other than operating ratio, we feel that it will not support a 15-percent rate of return. An attempt was made to justify this percentage by showing that it was in line with the returns of three subsidized American-flag lines: American Export, Moore-McCormack and United States Lines. However, the collective average rate of return for the three carriers over the 15-year period chosen by Alcoa (1947–1961) is considerably below 15 percent on net book value of assets (8.26 percent) and somewhat below on a market value basis (14.2 percent). Moreover, rates of return for the period are not of persuasive force because the period includes several periods following the war in which profits were unusually high because of shortages, crises and special programs (e.g., Truman Doctrine, Marshall Plan, Berlin Blockade and Korean War).

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11 Operating ratio has never been used by this agency. See e.g., *Atlantic & Gulf-Puerto Rico General Increase, supra* at 104–5.

12 At least 1 regulatory agency has explicitly rejected operating ratio because of this deleterious effect. Re *Salt Lake City Lines*, 30 P.U.R. 319 (Utah Public Service Commission, 1959).

We feel that considering all of the circumstances a rate of return not in excess of 10 percent is reasonable on this record, and rates allowing for a greater return are unreasonable. A rate of return is to be based in large part upon the type of risk attendant to an enterprise. It therefore appears reasonable to approve a rate of return for Alcoa no higher than those we have approved for other carriers in other trades with similar risks.[13]

It is true that the risks of the carriers in these trades are not identical to those of Alcoa. The number of recent cases involving instability in the Puerto Rican trade convinces us that the rate of return for Alcoa should be somewhat higher than in the Guam trade where a more stable situation exists and, consequently, risks of operation are lower.[14]

The risks attendant to the Puerto Rico trade seem more akin to those of the Hawaii and Alaska trades. Although it could be argued that Alcoa should be granted a greater rate of return than the carriers in the Alaska and Hawaii trades because the greater number of carriers in the Puerto Rican trade may increase Alcoa's risk in comparison with the risks borne by carriers in the Hawaii and Alaska trades at the time of our decisions relating to those trades cited, Alcoa's risk is reduced because of its ability to carry its own cargo inbound.

An order will be entered requiring Alcoa to file tariffs adjusting its rates to allow it a rate of return for its regulated Puerto Rican service not to exceed 10 percent of a $1,293,935 rate base.

COMMISSIONER JOHN S. PATTERSON, CONCURRING AND DISSENTING:

I agree with most of what my fellow Commissioners have said about the standards to be applied in adjudicating reasonableness and lawfulness of respondent's rates for the period following November 26, 1962, excepting the "rate of return" discussion.

The facts as I have evaluated them in this record, even though they are considered meager in some respects, do in my opinion tip the scales between reasonableness and unreasonableness in favor of the former. Therefore, I conclude that a 15-percent rate is reasonable and hence allowable. Without discussing detailed factors, I consider the record showing the competitive conditions in the Puerto Rico and Virgin

[13] We have approved the following rates of return for carriers in other domestic offshore trades:

1. Pacific Coast/Hawaii—8.32 and 10.59 percent (*General Increases in Rates (1961)*, 7 F.M.C. 260 (1962))
2. Pacific-Atlantic/Guam—6.42 percent (*Pacific-Atlantic/Guam Increases in Rates*, 7 F.M.C. 423 (1962))
3. Pacific Coast/Alaska—9.07 percent—(*General Increases in Alaskan Rates and Charges*, 7 F.M.C. 563 (1963))

[14] "Respondents APL and PFEL are the only common carriers providing service between the United States and Guam * * *", *Pacific-Atlantic/Guam Increases In Rates*, 7 F.M.C. 423, 424 (1962).

Islands trade and the capital attraction and retention needs of Alcoa Steamship Company fully justifies a rate of return in excess of that allowed by the Commission's order herein, if this company under present conditions is to have the ability to command capital. Certainly such capital will come from investors only if a fair and satisfactory return on their money is realized.

In my opinion, "rate of return" decisions should not be based on comparisons with other carriers' results at other times and places. I believe that such comparisons are not entirely irrelevant but that, generally, financial needs are only accidentally similar. To me, a prerequisite for decisions in this category is that decisions should be based primarily on a review of each carrier's financial requirements in the context of the historic forces of a free market place for capital, as close as possible to the time of decision.

Order

No. 1066

Alcoa Steamship Co., Inc.—General Increases in Rates in the Atlantic Gulf Puerto Rico Trade

The Commission, having on this date issued a report in the captioned proceeding, which report is herein incorporated by reference, which found, *inter alia*,

1. That the rate base of respondent Alcoa Steamship Co., Inc., for its operation in the regulated Puerto Rican service should be $1,293,936, computed by utilization of the methods approved herein; and

2. That its rates in such service should be adjusted to allow it a rate of return not to exceed 10 percent of such rate base;

Therefore, it is ordered, That respondent file with the Commission within 30 days of the service of this order revised tariffs for its regulated Puerto Rican service adjusting its rates for such service as to allow it a rate of return not to exceed 10 percent of its $1,293,936 rate base as related to revenues and expenses of the projected year.

By the Commission.

[SEAL] (Signed) Thomas Lisi,
Secretary.

FEDERAL MARITIME COMMISSION

No. 65–28

ADMISSION TO CONFERENCE MEMBERSHIP—PACIFIC COAST EUROPEAN CONFERENCE

*Decided January 11, 1966**

Agreement No. 5200 found not to comply with requirements of section 15 of the Shipping Act, 1916, and General Order No. 9. Pacific Coast European Conference and its member lines ordered to amend Agreement No. 5200 to so comply, otherwise the Commission will withdraw approval of their basic conference agreement.

General Order No. 9 is a reasonable and valid promulgation of rules pursuant to sections 15 and 43 of the Shipping Act, 1916, and the Commission is authorized to disapprove Agreement No. 5200 for noncompliance therewith.

Leonard G. James and *F. Conger Fawcett* for Pacific Coast European Conference, respondent.

Richard S. Harsh and *Donald J. Brunner*, Hearing Counsel.

REPORT

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

PROCEEDINGS

By order served August 9, 1965, we directed the Pacific Coast European Conference (Conference) and its member lines to show cause why their agreement (FMC No. 5200) should not be disapproved pursuant to section 15 of the Shipping Act, 1916 (the Act) because of the Conference's failure to comply with the requirements of that section and of our General Order No. 9 (General Order). The respondents have filed their opening memorandum, Hearing Counsel have answered, and respondents have replied thereto. We heard oral argument.

FACTS

The Pacific Coast European Conference is an association of common carriers by water operating from ports on the Pacific Coast of the

*Denial of petition to reopen decided March 22, 1966.

United States to ports in Europe, Iceland, North Africa, the Atlantic islands of the Azores, Madeira, Canary and Cape Verde, and by transshipment at the aforementioned ports to ports in West, South and East Africa. The operations and activities of the Conference are conducted pursuant to its basic conference agreement No. 5200,[1] which was originally approved under section 15 of the Act in 1937.

Section 2 of Public Law 87–346 amended section 15 of the Act to provide that no conference agreement shall be approved, nor shall continued approval be permitted for any conference agreement "which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal."

General Order No. 9 (46 C.F.R. 523 *et seq.*) was adopted in implementation of section 15 and contains the Commission's guidelines concerning admissions to and withdrawals and expulsions from conference membership.[2] Conferences subject to the Commission's jurisdiction were given until July 20, 1964, to file any amendments to their agreements which were made necessary by General Order No. 9.

On November 5, 1964, the Commission wrote the Conference chairman, Mr. David Lindstedt, advising him that as yet no amendments to Agreement No. 5200 pursuant to General Order No. 9 had been received and further advising him of the requirement of section 523.10 (a) of General Order No. 9 that all existing conference agreements be modified to comply with the General Order and filed with the Commission by July 20, 1964. The letter requested the chairman's clarification of the Conference's position regarding its agreement and General Order No. 9. In his response dated November 16, 1964, Mr. Lindstedt advised that he had "studied the conference agreement in the light of General Order No. 9 and believe[d] that every substantive provision of the General Order [was] fully set forth in the conference agreement." He further stated that if, in the Commission's opinion, the conference agreement did not fully comply with the General Order and he was advised in what respect this is so, the matter could be presented to the members of the Conference for appropriate action.

By letter of April 30, 1965, the Bureau of Foreign Regulation advised that Clauses 4, 10, and 15 of the conference agreement did not comply with the requirements of subsections 523.2 (a), (b), (c), (d), (e), and (i) of the General Order. The Bureau's letters con-

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[1] Agreement No. 5200 provides, *inter alia,* for the establishment, regulation and maintenance of agreed rates, charges and practices on cargo moving in the trade covered by the agreement.

[2] For the complete text of General Order No. 9 see Appendix.

tained detailed discussion of the specific changes which would be necessary to effect compliance with the General Order.

The Conference made no attempt to amend Agreement No. 5200 to comply with the changes recommended by the Commission's staff. Instead, Mr. Lindstedt, by letter dated May 20, 1965, informed the Commission in relevant part as follows:

The five different reporting requirements . . . , appear to us to be indirect efforts of the Commission to demand reports from the members of the Conference that are not authorized by any provision of the Shipping Act. In our opinion, the Commission is attempting to obtain reports from the Conference that it cannot lawfully obtain otherwise, and is attempting to do this by forcing us to agree to furnish the reports. Section 15 of the Shipping Act does not require steamship lines to agree on anything. It only requires the steamship lines to file whatever agreements they may voluntarily enter into.

If you can show us anything in section 15 of the Shipping Act which requires that the lines shall adopt agreements that are prescribed in a General Order, then, of course, we will reconsider. Otherwise, the members of this Conference believe that their present Agreement is lawful in every respect, and that it continues lawful unless and until it can be disapproved upon proper, specific findings, as set forth in section 15 of the Shipping Act.

Following receipt of this explanation of the Conference's position, the Commission served the Order to Show Cause. The order stated that it appeared that Agreement No. 5200 did not comport with the provisions of General Order No. 9 in the following respects:

(a) There is no provision for furnishing a detailed statement of the reasons for expulsion to the party expelled (section 523.2(i)).

(b) There is no provision that applications for membership shall be acted upon promptly (section 523.2(b)).

(c) "Just and reasonable cause" for denial of admission to membership does not comply with the requirements of General Order No. 9 (section 523.2(a)).

(d) There is no provision for "prompt notification to the Commission of the admission of new members" (section 523.2(d)).

(e) There is no provision for advice to the Commission of the conference denial of membership to any line (section 523.2(e)).

Discussion and Conclusion

Respondents contend that, while their agreement "comports" with General Order No. 9 and section 15 of the Act, General Order No. 9 is invalid administrative "legislation"[3] which is completely without statutory support and as such cannot provide the basis for disapproval of respondents' agreement. They argue that General Order No. 9 by "prescribing mandatory preconditions for approval (or continued approval)" of conference agreements effectively reverses the "pre-

[3] In the words of the Ninth Circuit Court of Appeals "Rulemaking is legislation on the administrative level." *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 693, *cert. denied* 338 U.S. 86 (1949).

sumption" in favor of conference agreements found in the Shipping Act and is thereby in "direct conflict with the statutory scheme, and is, as a consequence, void, 'a mere nullity.' " In short, respondents contend that we may make no rules implementing, explaining, interpreting, of clarifying the statutory requirement that conference agreements provide "reasonable and equal terms and conditions of admission and readmission to conference membership of other qualified carriers in the trade" and "that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal." [4]

A short review of the body of case law regarding conference admissions in existence when section 15 was amended to include the "reasonable and equal" provision will demonstrate that General Order No. 9 was indeed necessary to carry out the provisions of the Act and was intended to effectively insure that the Congressional intent behind the "reasonable and equal" provision was realized. While an early decision of the U.S. Maritime Commission approved the rejection of an applicant for admission on the ground that at the time of the request for membership it did not have an established operation in the trade, *Hind Rolph & Co.* v. *Compagnie Generale Transatlantique*, 2 U.S.M.C. 138 (1939), somewhat later the U.S. Maritime Commission rejected denial based on an agreement which permitted admission only of an applicant engaged in operating vessels regularly in the trade. *Black Diamond S.S. Corp.* v. *Compagnie Maritime Belge*, 2 U.S.M.C. 755 (1946). The Commission said in the *Black Diamond* case:

> . . . a proper clause would be somewhat as follows:
>
> Any common carrier by water as defined in section 1 of the Shipping Act, 1916, as amended, who has been regularly engaged as such common carrier in the trade covered by the agreement, or who furnishes evidence of ability and intention in good faith to institute and maintain a regular service between ports within the scope of this agreement, may hereafter become a party to this agreement. . . .

Thus, in 1962 the Antitrust Subcommittee of the House Committee on the Judiciary in its Report, Monopoly Practices in the Ocean Freight Industry, said:

> Since 1940 the Commission (FMC) and its predecessors have committed themselves to an affirmative policy of assuring relatively easy access to conference membership for newcomers. . . . It is safe to generalize by saying that today, as a matter of law, a line must be admitted to any steamship conference provided it has the ability to maintain, and has the good faith intention of instituting a regular service within the ambit of the conference agreement. Such membership, of course, must be granted upon "equal terms" with existing participants in the conference *eo converso* a carrier willing to participate in any given conference

[4] Our authority to promulgate "such rules and regulations as may be necessary to carry out the provisions of [the] Act" is found in section 43.

must be willing to abide by the terms and conditions of the conference agreement. (Footnotes omitted.)[5]

Since the declaration of this "open door" policy conferences have sought to deny admission on many grounds and to impose a variety of conditions upon admission to conference membership some of which our predecessors found were in fact exclusionary and designed to prohibit or at least deter admissions. The cases on admissions are many and the repetitious citation here would accomplish little.[6] It is sufficient to say, however, that securing free and open admission to conferences has in the past proved a constant problem. Nor has it ceased to be a problem today, for when the Antitrust Subcommittee issued its report in 1962, it said at page 99 thereof:

Various reasons have been offered over the course of years for excluding applicants from conferences. Since it is by now recognized by conferences that few if any of these alleged justifications would be considered valid today in view of the Board's "open door" policy with respect to membership, current efforts to exclude new members from steamship conferences have had to assume more subtle guises. These have taken the form of attempting to persuade applicants to remain outside the trade because of the thinness of traffic, delay and procrastination in the processing of applications for admission, or exacting as conditions of membership agreement with respect to rate practices in areas beyond the scope of the conference. (Footnotes omitted)

It was against this background that section 15 was amended to include the reasonable and equal provision.[7] We think it clear that Congress in so amending section 15 was in fact but statutorily formalizing what had already been the declared policy for over two decades and that the reasonable and equal language was merely convenient legislative shorthand for the more particularized requirements found in the many decisions of our predecessors under section 15.

Experience under section 15 demonstrated that the problem presented by conference admissions to membership was twofold. On the

[5] Report of the Antitrust Subcommittee of the House Committee on the Judiciary on Monopoly Problems in the Ocean Freight Industry, March 1, 1962, pages 96–98.

[6] For example, however, the following bases for denial or conditions on admission were found unlawful: trade already adequately tonnaged, *Sigfried Olsen* v. *Blue Star Line, Limited*, 2 U.S.M.C. 529, 532; requirement that applicant join additional conference, *Cosmopolitan Line* v. *Black Diamond Lines, Inc.*, 2 U.S.M.C. 321, 329; admission would bring about unnecessary and excessive competition, *Waterman S.S. Corp.* v. *Arnold Bernstein Line*, 2 U.S.M.C. 238, 243–44; possibility of applicant ceasing operation in future, *Sprague S.S. Agency, Inc.* v. *A/S Ivarans Rederi*, 2 U.S.M.C. 72, 76; agreement to impose condition on admission to membership that applicant withdraw from litigation before the Federal Maritime Board, in which applicant's position was adverse to conference's, *Pacific Coast European Conference—Limitation on Membership*, 5 F.M.B. 247.

[7] Although the Antitrust Subcommittee's Report was not issued until after H.R. 6775 (the bill which ultimately became P.L. 87–346) was passed by the House, the Merchant Marine and Fisheries Committee which reported the bill had the benefit of the Antitrust Subcommittee's findings and conclusions since the bill itself was "the product of careful and harmonious work between the two standing committees of the House." Hearings Before the Merchant Marine Subcommittee of the Senate Committee on Commerce, June 16, 1961, Part 1, page 7.

one hand it concerned the validity of the various substantive criteria established by conferences for the determination of whether an applicant was qualified for membership, and on the other hand it concerned the more "subtle guises" of attempted exclusion such as persuasion, procrastination and the exaction of conditions. Thus General Order No. 9 itself seeks to achieve a twofold purpose. It seeks to insure that invalid substantive criteria established by conferences do not work to exclude qualified carriers from membership.[8] It further seeks to insure that conferences do not practice the more "subtle" methods of exclusion by requiring that all applications be acted upon promptly (section 523.2(b)) and by requiring that all conditions of membership be specified in the agreement and approved by the Commission (Note to section 523.2(a)). Yet other provisions are designed to insure that all actions taken with regard to admissions, withdrawals and expulsions are promptly reported to the Commission so that we may insure that the requirements of section 15 are met (the reporting requirements of sections 523.2 (d), (g), (i)).

Notwithstanding all this it is apparently respondents' view that each conference action must be reviewed on an *ad hoc* basis because they variously state that "congress clearly intended that each case be determined on its own merits, with reference to the statutory standard," and that we cannot categorize in advance "across-the-board terms for automatic termination or disapproval," and that "to the extent that General Order No. 9 'requires' disapproval of Agreement 5200 for nonconformance to its terms, it is inconsistent with the statutory scheme . . . [and] is therefore necessarily invalid and of no legal force." Respondents offer many citations in support of their contentions, most of which deal with regulations found by the courts to exceed the statutory grant of power upon which the regulations were based. We find these cases inapposite. The reduction of almost 30 years of agency case law to a rule of future application is merely the substitution of administrative "legislation" for administrative *stare decisis* and can hardly be considered in excess of our statutory authority—particularly in view of the fact that the vastly predominant portion of the agency case law was made prior to the statutory amendment giving recognition to the policy established in that case law. Moreover, to take each conference action on an *ad hoc* basis would through time-consuming litigation result in just that delay in the admission of quali-

[8] Thus, section 523.2(a) requires that all conference agreements 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 his signature thereto."

fied applicants that the General Order seeks to prevent. Respondents content themselves with repeated assertions that General Order No. 9 is in direct conflict with section 15 but they do not state how this is so.[9] We think the foregoing clearly demonstrates that far from being in conflict with section 15, General Order No. 9 is in complete harmony therewith and simply seeks to realize the Congressional intent behind that section.

Respondents in addition to arguing in invalidity of General Order No. 9 also contend that their agreement "comports" with the General Order anyway. The relevant provisions of respondents' agreement dealing with admissions, withdrawals, and expulsions are: Article 4 dealing with maintenance of service as a prerequisite to common carrier status and readmission fee; Article 8 prescribing the majority necessary to admit new members; Article 10 setting forth the qualifications necessary for admission; Article 11 providing for the admission fee; Article 12 providing for withdrawal from membership on 30 days' notice; and Article 13 providing that a resigning member shall be bound to the terms of the agreement for the 30-day notice period but will not be entitled to vote. We shall deal with the alleged instances of noncompliance in slightly different order than they appear in the show cause order instituting this proceeding.

As approved to date, Article 10 of Agreement 5200 which establishes the basic criteria for admission to the conference provides:

> 10. *Membership.* Any person, firm or corporation regularly operating, or giving substantial and reliable evidence of intention to operate regularly, as a common carrier by water in the trade covered by this agreement may become a member of the Conference upon the agreement of the parties as provided in Article 8, and by affixing his, their or its signature hereto, or to a counterpart hereof. No eligible applicant shall be denied membership except for just and reasonable cause and no membership shall become effective until notice thereof has been sent to the government agency charged with the administration of Section 15 of the U.S. Shipping Act, 1916, as amended.

This provision fails to comply with General Order No. 9 in two respects. On one hand it fails to provide that all applications shall be acted upon promptly as required by section 523.2(b) and the inclusion of the proviso that no application shall be denied except for "just and reasonable cause" is in conflict with section 523.2(c) which provides that "no carrier which has complied with the condition in paragraph (a) of this section shall be denied membership." [10] As to the former respondents state that if the word "prompt" is the difference between

[9] Unless the assertion that an agreement may not be disapproved for noncompliance with General Order No. 9 but only for noncompliance with section 15 is intended to illustrate this conflict. If this be the case the clear answer is that the agreement is or would be disapproved for failure to meet the standards of section 15 as explained and clarified in General Order No. 9.

[10] See *supra* footnote 8.

compliance and noncompliance then the word "substantially" is without meaning.[11] Respondents misconceive the issue here. While Article 10 provides that "no membership shall become effective until notice thereof has been sent to the" Commission, the article is devoid of any statement requiring prompt conference action upon an application. As we have already noted, procrastination in acting upon applications for admission is one of the ways in which conferences may seek to discourage new members. So long as the basic agreement contains no requirement that prompt action be taken and so long as that agreement continues to enjoy our approval, conferences may at least argue that no such requirement is applicable. To avoid any such misunderstanding as to the obligations under the agreement, we shall insist on the inclusion of a clause which specifically requires prompt action on all applications for membership. This is not as respondent implies an attempt to achieve a "definitive, Platonically-'essential' conference document." Rather it is an effort to avoid the recurrence of the same sort of problem that has plagued regulatory efforts under the Shipping Act almost from the instant of its enactment—that of conflicting interpretations of conference agreements. The majority of proceedings under the Shipping Act concerned in one way or another the meaning of provisions of section 15 agreements and the authority, duties, and responsibilities of parties to them. Respondents themselves have been involved in several such proceedings over the years.[12] In promulgating General Order No. 9, we sought nothing more than the prevention of future controversy over the membership practices of conferences in our foreign commerce by the establishment of uniform guidelines. As we have already noted so long as respondents' agreement fails to contain the obligation to act promptly on applications for membership they are free to argue that by continuing our approval of the agreement, we have somehow waived the requirement as to them. But respondents argue that "substantial" compliance cannot hinge upon anything so minute as the absence of the word prompt, thus their agreement is in "substantial" compliance with the General Order.

We think our authority clearly extends to the prescribing of uniform admission, withdrawal, and expulsion clauses which must be included verbatim in all conference agreements, and we could have adopted this course. However, our experience has been that conferences operating in our foreign commerce have experienced some diffi-

[11] Section 523.1 requires that all conference agreements contain provisions "substantially" as set forth in the General Order.

[12] See for example, *Pacific Coast European Conference—Payment of Brokerage*, 5 F.M.B. 225 (1957) ; *Pacific Coast European Conference—Limitation on Membership*, 5 F.M.B. 247 (1957) ; *In Re Pacific Coast European Conference*, 7 F.M.C. 27 (1961) ; and *Pacific Coast European Conference Port Equalization Rule*, 7 F.M.C. 623 (1963)

culty in translating uniform clauses into the languages of the various countries operating vessels in our commerce. Thus, where consistent with the purpose of the Act and our responsibilities under it, we allow individuals to use their own language so long as the required result is achieved. Respondents' agreement does not, of course, achieve the required result, and unless amended to do so, it will be disapproved.

The second issue raised by Article 10 of respondents' agreement is concerned with that portion of the Article which states that "No eligible applicant shall be denied membership except for just and reasonable cause." The inclusion of "just and reasonable cause" as a ground for denying membership runs directly counter to section 523.2(b) which states that "no carrier which has complied with the requirements of paragraph (a)" of section 523.2 shall be denied membership.[13] Respondents' Article 10 is otherwise in compliance with section 523.2(a) and carriers meeting the requirements of 523.2(a) should be admitted to membership without more. But respondents have added a further condition or proviso upon which admission can be denied—that of "just and reasonable cause."[14] We will recognize no such further conditions. Respondents must delete the objectionable language.

Section 523.2(d) provides:

Prompt notice of admission to membership shall be furnished to the Federal Maritime Commission and no admission shall be effective prior to the postmark date of such notice.

Article 10 of Respondents' agreement provides in relevant part:

. . . no membership shall be effective until notice thereof has been sent to the governmental agency charged with the administration of section 15 of the U.S. Shipping Act, 1916, as amended.

Here again there is no requirement of prompt action, and since the effectiveness of any admission is contingent on the dispatch of the required notice the reason for requiring prompt notice is obvious. Procrastination in sending the required notice is just as harmful to the prospective member as delay in action upon his application. For the reasons stated *supra* we will require that the provision be amended to require "prompt" notice.

Section 523.2(e) provides:

Advice of any denial of admission to membership, together with a statement of the reasons therefor, shall be furnished promptly to the Federal Maritime Commission.

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[13] See footnote 8 *supra*.

[14] For an instance in which respondents sought to use the proviso as a means of forcing an applicant for membership to withdraw from litigation before the Federal Maritime Board as the price of admission to the conference, see *Pacific Coast European Conference—Limitation on Membership*, 5 F.M.B. 247 (1957).

Although respondents concede that there is no express provision in its agreement which explicitly provides that advice of any denial of admission to membership shall be furnished to this Commission, they argue that denial of membership to any line would appear in the conference minutes, which must be filed with the Commission pursuant to Article 16 of their agreement.[15] Respondents argue that this provision is perfectly adequate and that minutes are the "logical vehicle" for the conveyance of advice to the Commission.

Minutes may be one vehicle for submitting advice to the Commission, but their possible use as a means of communication in no way commits or directs anyone to provide anything. Our experience has been that minutes generally contain no more than a simple statement of the action taken and contain no explanation of the reasons underlying the action. Moreover, nothing in respondents' agreement requires that the "advice of denial" be furnished "promptly." As we have already stated, the matter of conference membership was deemed of sufficient importance to warrant a specific statutory amendment, and we consider it sufficiently important to require a separate report on all actions taken by conferences regarding admissions to and withdrawals and expulsions from conference membership. Respondents' agreement is not in substantial compliance with section 523.2(e) and must be modified.

Section 523.2(i) provides:

No expulsion shall become effective until a detailed statement setting forth the reason or reasons therefor has been furnished the expelled member and a copy of such notification submitted to the Federal Maritime Commission.

Article 15 of respondents' agreement provides in pertinent part that:

. . . No expulsion shall become effective until and unless notice thereof with a detailed statement of the reason or reasons therefor and the record vote of the member lines thereon, shall have been mailed to the governmental agency charged with the administration of section 15 of the United States Shipping Act, 1916, as amended.

The Conference admits that Article 15 does not expressly provide that an expelled member will be furnished a statement setting forth the reasons for expulsion. Respondents contend, however, that Article 4, which stipulates in part that:

. . . Any member failing to make a sailing for a period of eighteen (18) consecutive months after July 1, 1961 shall be deemed to have abandoned common carrier status in the trade covered by this Agreement and shall forthwith cease to be a member of this Conference.

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[15] Article 16 provides:

"Copies of Minutes of all Meetings, rates, charges, classifications, rules and/or regulations and additions and amendments thereto, and changes therein adopted, pursuant to the provisions of this agreement, shall be sent to the United States Maritime Commission, Washington, D.C."

contains "the single most important reason" for expulsion and also contains, within itself, "its own 'detailed statement of the reason(s)' therefor."

Respondents' very assertion that Article 4 contains the "most important" reason for expulsion implies that there may be other grounds for which expulsion would be justified. These other grounds may not be found in the conference agreement. Neither does the agreement provide that a statement of the reasons for expulsion, whatever they might be, shall be furnished to the expelled member. The furnishing of such a statement is required by section 523.2(i), and the effective date of expulsion is conditioned thereupon. In the absence of a provision requiring that a statement of the reasons for expulsion shall be given to the expelled member, there can be no compliance with section 523.2(i).

There remains one final argument of respondents which is not directed to the merits but to the show cause procedure itself. First, respondents object to the show cause procedure if it is construed as shifting the ultimate burden of proof to respondents. The simple answer to this is that the Commission may not by choice of a particular form of proceeding shift the burden of proof to one upon whom the law does not place it. The burden of proof in a show cause proceeding, the same as in any other proceeding before us, is upon the proponent of the order (Administrative Procedure Act, § 7(c) 5 U.S.C. 1006). Secondly, respondents "seriously question" whether this show cause procedure "is proper, without consent of the parties." Respondents' argument is that (1) under our rules of Practice and Procedure "shortened procedure" under Rule 11 [16] may not be had without consent of the parties, (2) this proceeding is a shortened procedure, and (3) respondents have not consented to the procedure—therefore the proceeding is invalid.

We had thought the procedural validity of show cause proceedings was laid to rest in *American Export & Isbrandtsen Lines, Inc.* v. *Federal Maritime Commission*, 334 F. 2d 185 (9th Cir. 1964). In that case these same respondents attacked the procedure on grounds such as: (1) failure to furnish the respondents with a copy of a complaint; (2) the Commission acted as both prosecutor and judge by allowing its own counsel to appear in the case; (3) the Commission permitted intervention in violation of its own rules and the Administrative Procedure Act; (4) failure to hold an evidentiary hearing in violation of the Commission's own rules and the Administrative Procedure Act; (5) failure to afford adequate notice of all matters of fact and

[16] All references to Rules of Practice and Procedure are to the 1953 Revision which was in effect at the time of this proceeding.

law asserted in violation of the Administrative Procedure Act; and (6) failure to make findings required by the Administrative Procedure Act. In each instance the Court sustained the show cause procedure and stated:

We are not impressed by the criticisms, multiplicitous as they are, made by petitioners [respondents here] to the procedures adopted by the Commission in this case. From our review of the record we are satisfied that no substantial right of due process was denied to them and no prejudice was suffered by them. (334 F. 2d 191)

Respondents do not here allege that the show cause procedure denies them due process or works any prejudice. They merely assert that we needed their consent to the procedure and that such consent was never given. Respondents reliance upon Rule 11 is misplaced. It reads in relevant part:

(a) . . . By consent of the parties and with approval of the Commission by notice, *a complaint proceeding* may be conducted under shortened notice. . . . [Emphasis ours.]

Thus, from a simple reading of the first paragraph of Rule 11, it is patently clear that so-called "shortened procedure" is restricted to complaint proceedings and is in no way applicable to proceedings instituted on the Commission's own motion, be it by order of investigation or by order to show cause. As was made clear in the *American Export & Isbrandtsen* case, *supra*, show cause proceedings are governed by Rule 5(g) which provides:

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

Clearly, no consent of respondents is contemplated or required by Rule 5(g).

On the basis of all the foregoing, we find and conclude that the conference agreement does not contain provisions literally or substantially in conformance with the five specific provisions of General Order No. 9 set forth in the Show Cause Order. An appropriate order will be entered.

Commissioner JOHN S. PATTERSON, concurring separately:

For the purposes of this adjudication, General Order No. 9 (46 CFR, Part 523) is valid and must be obeyed by the regulated public. Accordingly, I concur in the conclusions herein.

The rules in General Order No. 9 may not be collaterally challenged in a proceeding to determine whether an agreement ought to be disapproved for noncompliance therewith. Considering my fellow Commissioners have elected to reply to the challenge, I deem it necessary to disassociate myself from the reply and to call attention to my dissent in the statement accompanying adoption of General Order No. 9, served May 4, 1964. Briefly, I believe the regulations are not authorized by law and, in my opinion, constitute overregulation. The variance from law is that section 15 of the Act authorizes more than one way of providing reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, but the rules allow only one way to conform, namely, by the use of all nine provisions which must be "substantially" as written in the rules. To the extent other ways are forbidden, the rule is not authorized and the carriers by policy are regulated more than is necessary.

APPENDIX

GENERAL ORDER 9

REPRINT FROM FEDERAL REGISTER

Issue of May 1, 1964 (29 F.R. 5797)

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[General Order 9]

PART 523—ADMISSION, WITHDRAWAL AND EXPULSION PROVISIONS OF STEAMSHIP CONFERENCE AGREEMENTS

On March 21, 1962, the Commission published in the Federal Register (27 F.R. 2646) a notice of proposed rule making (Docket No. 981) with respect to rules governing procedures for admission to and withdrawal and expulsion from conferences and invited comments thereon. After consideration of the comments received, the Commission revised certain of the proposed rules, republished the revised proposed rules in the Federal Register December 10, 1963 (28 F.R. 13369–13370), received comments and heard oral argument thereon.

The Commission has carefully considered the comments submitted and arguments on the proposed revised rules and in light thereof herewith adopts and promulgates its final rules. Comments and arguments not discussed or reflected herein have been considered and found not justified or not material.

Many conferences object to § 523.2(a) which sets forth the basic criteria for conference membership. These objections called for either greater generality or more specificity in spelling out the criteria for admission into a conference. Some conferences seek the right to deny admission for "just and reasonable cause" thus allowing broad discretion over the essential elements required for admission. Other conferences want included in the rules clear, well-defined standards of what constitutes "evidence of ability" to maintain common carriage. Particularly, these conferences would require that the common carrier would have to give the conference precise data on its financial soundness and the types and speeds of its vessels.

The rule as drafted is neither extremely general nor overly specific, but rather it attempts to strike a balance giving the conferences some discretion in submitting for approval other conditions on admission to membership.

It is also contended that the requirements for readmission should not be the same as those for admission. Although there may be some distinction between the applicant which is applying for membership in a conference for the first time and an applicant which is applying for readmission to the conference, we are of the opinion that the rule covering initial admission to conference membership is sufficiently broad to allow conferences the necessary degree of discretion in submitting for approval specific proposals dealing with readmission to membership as well as when acting on applications for readmission.

Some conferences object to the provision making admission to conference membership effective as of the postmark date of notice to us of the admission, § 523.2(d). They contend that a carrier's status should not be indefinite pending postmarking of a notice, and that the risks of oversight or delay in the conference office or postal service may result in postponing the effectiveness of its admission to conference membership. Historically, the postmark form of notice has been used, and is the minimum necessary to insure us of prompt apprisal of all actions with respect to admissions to conference membership.

Objection is made to our requirement that we be furnished with an advice of any denial of admission to membership, together with a statement of the reasons therefor, § 523.2(c). The conferences urge that as a practical matter it is unnecessary to require the advice because an applicant which has been denied admission would probably complain to the Commission. The requirements of this section are almost self-explanatory. It is by no means a certainty that the denied applicant would complain to the Commission, and in order to see that the conferences are operating under their agreements and in accordance with the Shipping Act, 1916, it is necessary that we be kept informed of conference actions as they relate to admission to membership. We must be apprised of any discrimination real or potential regardless of whether the aggrieved party desires or is in a position to complain to us.

Several attacks have been leveled at § 523.2(f) regulating withdrawals from conferences.

Some conferences object to allowing a party to withdraw without a penalty. They contend that a penalty provision for withdrawal from a conference may be just and reasonable. The contention is without merit and directly contrary to the explicit words of the statute, which requires that conference agreements "provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal."

Further objections were raised to a provision requiring a minimum period of 60 days written notice of an intention to withdraw from conferences employing dual rate systems. Section 523.2(f) has been modified to require only a 30-day notice period for withdrawal from all conferences.

Several conferences objected to our provision in § 523.2(h) making expulsion from a conference contingent upon a showing of "continued failure" to abide by the terms of the conference agreement. Certain single breaches of a conference agreement are said to justify expulsion. We have removed the "continued failure" provision to allow conferences to so phrase their agreements to provide for expulsion for single offenses of certain provisions of the basic agreement and will determine the reasonableness of these expulsion criteria when the modified agreements are submitted to us for approval.

Several conferences objected to our requirement conditioning effectiveness of expulsion upon our approval. We have eliminated this requirement, substituting therefor provision § 523.2(i), which conditions the effectiveness of expulsion upon receipt by the expelled member and the Commission of a statement setting forth the reason or reasons for expulsion. To make the effectiveness of expulsion contingent upon our approval would perhaps unfairly allow the "expelled" member to compete as a conference member while attempting to postpone our approval of his expulsion as long as possible.

We do not, however, by removing approval as a condition precedent for expulsion intend to imply, as some conferences have suggested, that we have no authority over expulsion. We have and will exercise the authority to disapprove every agreement submitted to us which does not contain reasonable expulsion provisions, as well as reasonable conditions for admission and withdrawal. The Commission's power to prescribe the conditions under which expulsion may be permissible is implicit in the statutory language governing admission and withdrawal. The Commission's rules governing admission, designed to implement the statutory mandate of Public Law 87–346, could be rendered completely void by conference expulsion procedures if the requirement for reasonable and equal admission conditions is not interpreted to include reasonable expulsion provisions. To hold otherwise would enable any conference to admit a carrier pursuant to the rules and shortly thereafter expel that member on the slightest provocation.

Some conferences allege that it is unnecessary for us to be supplied with detailed explanations for expulsion of a carrier. The reasons behind the requirement that the Commission be informed of the reasons for any denial of admission to membership apply with equal force here.

Therefore, pursuant to sections 15 and 43 of the Shipping Act, 1916 (75 Stat. 763–4 and 766), 46 CFR is hereby amended by inserting a new Part, Part 523, reading as set forth below following Commissioner Patterson's dissent.[1]

SUBPART A—CONFERENCE AGREEMENT PROVISIONS—ADMISSIONS, WITHDRAWALS, EXPULSION

SUBPART B—CURRENT CONFERENCE AGREEMENTS

SUBPART C—PROPOSED NEW CONFERENCE AGREEMENTS

AUTHORITY: The provisions of this Part 523 issued under secs. 15 and 43 of the Shipping Act, 1916 (75 Stat. 763–4 and 766).

SUBPART A—CONFERENCE AGREEMENT PROVISIONS—ADMISSION, WITHDRAWAL, EXPULSION

§ 523.1 *Statement of policy.*

(a) Section 2 of Public Law 87–346, effective on October 3, 1961, amends section 15 of the Shipping Act, 1916, to provide that no conference agreement shall be approved, nor shall continued approval be permitted for any agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

(b) It is the responsibility of the Federal Maritime Commission under the Shipping Act, 1916, to determine that all conference agreements contain reasonable and equal terms and conditions for admission and readmission to conference membership of qualified carriers according to the requirements set forth in paragraph (a) of this section.

§ 523.2 *Provisions of conference agreements.*

In effectuation of the policy set forth in § 523.1, conference agreements, whether in effect on October 3, 1961, or initiated after that date, shall contain provisions substantially as follows:

[1] Filed as part of original document.

(a) 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.

NOTE: The above Provision will not preclude the conference from imposing legitimate conditions on membership, including but not necessarily limited to, the payment of an admission fee, payment of any outstanding financial obligations arising from prior membership, or the posting of a security bond or deposit. All such conditions must be made expressed terms of the conference agreement, filed with and approved by the Commission pursuant to section 15 of the Shipping Act, 1916.

(b) Every application for membership shall be acted upon promptly.

(c) No carrier which has complied with the conditions set forth in paragraph (a) of this section shall be denied admission or readmission to membership.

(d) Prompt notice of admission to membership shall be furnished to the Federal Maritime Commission and no admission shall be effective prior to the postmark date of such notice.

(e) Advice of any denial of admission to membership, together with a statement of the reasons therefor, shall be furnished promptly to the Federal Maritime Commission.

(f) Any party may withdraw from the conference without penalty by giving at least 30 days' written notice of intention to withdraw to the conference: *Provided, however*, That action taken by the conference to compel the payment of outstanding financial obligations by the resigning member shall not be construed as a penalty for withdrawal.

(g) Notice of withdrawal of any party shall be furnished promptly to the Federal Maritime Commission.

(h) No party may be expelled against its will from this conference except for failure to maintain a common carrier service between the ports within the scope of this agreement (said failure to be determined according to the minimum sailing requirements set forth in this agreement) or for failure to abide by all the terms and conditions of this agreement.

(i) No expulsion shall become effective until a detailed statement setting forth the reason or reasons therefor has been furnished the expelled member and a copy of such notification submitted to the Federal Maritime Commission.

SUBPART B—CURRENT CONFERENCE AGREEMENTS

§ 523.10 *Resubmission of current agreements.*

(a) All conference agreements which are lawful on the effective date of these rules and which are amended to comply with these rules and filed with the Commission within 60 days after adoption of these rules by the Commission, shall remain lawful unless disapproved, cancelled or modified by the Commission.

(b) Filing under this section may be accomplished by mailing to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, a signed original and fifteen (15) copies of the agreed modification, together with an original and fifteen (15) copies of a letter of transmittal and request for approval of the matter submitted.

§ 523.11 *Notice of filing.*

All modifications of conference agreements filed with the Commission pursuant to these rules shall be available for inspection at the offices of the Commission. A notice of such filing shall be published in the Federal Register as soon as practicable, and interested persons may, within twenty (20) days after such publication, file comments relating to such modification. Comments shall include a statement of position with respect to approval, disapproval, cancellation or modification, together with reasons therefor.

SUBPART C—PROPOSED NEW CONFERENCE AGREEMENTS

§ 523.20 *Agreement provisions.*

All new conference agreements, entered into subsequent to the date of adoption of these rules, shall contain provisions in substantially the form set forth in § 523.2, before approval by the Commission under section 15 of the Shipping Act, 1916.

By the Commission, April 21, 1964.

THOMAS LISI,
Secretary.

[F.R. Doc. 64-4258; Filed, Apr. 30, 1964; 8:49 a.m.]

By amendment dated June 26, 1964, the time for compliance with General Order 9 was extended to July 20, 1964.

FEDERAL MARITIME COMMISSION

No. 65–28

ADMISSION TO CONFERENCE MEMBERSHIP—PACIFIC COAST EUROPEAN CONFERENCE

ORDER

This proceeding having been initiated by an Order to Show Cause issued by the Federal Maritime Commission upon its own motion, and the Commission having fully considered the matter and having this day made and entered of record a Report containing its findings and conclusions, which Report is hereby referred to and made a part hereof;

It is ordered, That pursuant to section 15 of the Shipping Act, 1916, Agreement No. 5200 be disapproved, effective 60 days from the date of this Order, unless within that time, the Pacific Coast European Conference and its member lines shall have amended their conference agreement to comply with the requirements of section 15 of the Shipping Act, 1916, and the requirements of the Commission's General Order No. 9 in the following respects:

(a) to provide for furnishing a detailed statement of the reasons for expulsion to the party expelled (§ 523.2(i));

(b) to provide that applications for membership shall be acted upon promptly (§ 523.2(e));

(c) by deleting the phrase "just and reasonable cause" in the sixth line in Article 10 of the agreement and substituting the phrase "failure to meet the above requirements" therefor (§ 523.2(c));

(d) to provide for prompt notification to the Commission of the admission of new members (§ 523.2(d)); and

(e) to provide for prompt advice to the Commission of the Conference's denial of membership to any line (§ 523.2(e)).

By the Commission.

[SEAL] (S) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 65–28

ADMISSION TO CONFERENCE MEMBERSHIP—PACIFIC COAST EUROPEAN CONFERENCE

DENIAL OF PETITION FOR REOPENING

Respondents, Pacific Coast European Conference and its member lines, have petitioned to reopen this proceeding for rehearing, reargument and reconsideration. The sole basis for the petition is respondents' contention that "The final report does not, at any point, hold that Agreement 5200 contravenes any of the statutory proscriptions of Section 15 of the Shipping Act." Respondents quote from the opinion of the Court of Appeals for the District of Columbia Circuit in *Aktiebolaget Svenska Amerika L.* v. *Federal Maritime Com'n*, 351 F. 2d 756 (1965) at page 761:

The statutory language authorizes disapproval only when the Commission finds as a fact that the agreement operates in one of the four ways set out in the section [15] by Congress.

The particular portion of section 15 referred to above by the Court provides that we shall, after notice and hearing, disapprove any agreement which we find "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."

Citing our failure to find that their agreement operated in one of the above four ways, respondents take us to task because we "apparently overlooked the lesson learned from the *Svenska* case, *supra*, and that *Svenska* "should not, as it has been simply be ignored." Additionally, respondents renew their objection to the validity of our

General Order No. 9 and urge that it too "necessarily comes into conflict with *Svenska*." [1]

Our failure to deal with *Svenska* was based on simple ground that the decision in that case has no bearing whatsoever on the issues at hand. Indeed, less attention to *Svenska* and more careful scrutiny of the full text of section 15 would, it seems to us, have rendered readily apparent the inapplicability of the limited portion of section 15 at issue in *Svenska* and upon which respondents place their sole reliance now. For in the sentence immediately succeeding the portion of section 15 now relied upon by respondents, the precise provision controlling the issues here appears. That respondents had no misgivings concerning the precise portion of section 15 is clear from the following statement appearing in their Opening Memorandum in this proceeding:

> The relevant clause of Section 15 of the Shipping Act, from which the General Order is said to derive, was added to the statute in the 1961 amendments and states as follows:
>
> "No [conference] agreement shall be approved, nor shall continued approval be permitted for any agreement, . . . which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal."
>
> Notwithstanding the Show-Cause Order's conclusionary recital of "the Conference's failure to comply with the requirements of Section 15," it must be abundantly apparent that Section 15 has nothing whatever to do with it. Indeed, the charging allegations of the Order make specific reference solely to various provisions of General Order No. 9—none of which can be found in the relevant portion of Section 15.

In our report we went to great lengths to clearly show that General Order No. 9 was "necessary to carry out the provisions of the [Shipping] Act and was intended to effectively insure that the Congressional intent behind the 'reasonable and equal' provision [of section 15] was realized." No more need here be said about the validity of General Order No. 9. In our report and order on this proceeding we found that respondents' agreement failed to meet the requirements of General Order No. 9. Therefore, since General Order No. 9 was, as we took care to point out, in explanation and effectuation of the "reasonable and equal" provision of section 15, we found that the agreement failed to meet the requirements of section 15. Nothing more was required,

[1] In this regard, respondents are but restating their objection to a prior motion of Hearing Counsel to strike those portions of respondents' memoranda attacking the validity of General Order 9. In an order dated October 26, 1965, we served notice that any ruling on the motion would be withheld pending conclusion of oral argument thereby allowing the parties an opportunity to argue the motion. The discussion contained in our report of the issue of the validity of General Order 9 should have disposed of any doubt as to our disposition of the motion. However, it is hereby expressly denied.

certainly not a further finding of detriment to commerce or one of the other alternative grounds for disapproval of a conference agreement. Section 15 could not be more specific when it states "nor shall continued approval be permitted for any agreement . . . which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership. . . ." We found that respondents' agreement did not so provide. This disposes of the issues presented.

Respondents' motion to reopen the proceeding is hereby denied.

March 22, 1966.

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1212

MEDITERRANEAN POOLS INVESTIGATION

Decided January 19, 1966

(1) The Italy/U.S. North Atlantic Freight Pool, Agreement No. 8680, as amended to date and if further modified, not 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; detrimental to the commerce of the United States; or contrary to the public interest, or otherwise in violation of the Shipping Act, 1916.

(2) The Medchi Freight Pool, Agreement No. 9020, as amended to date and if further modified, not 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; detrimental to the commerce of the United States; or contrary to the public interest, or otherwise in violation of the Shipping Act, 1916.

(3) The Adriatic North Atlantic Range Freight Pool, Agreement No. 9060, as amended to date and if further modified, not 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; detrimental to the commerce of the United States; or contrary to the public interest, or otherwise in violation of the Shipping Act, 1916.

(4) The Israel-U.S.A., U.S.A.-Israel Freight Pool, Agreement No. 9233, as amended to date and if further modified, not 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; detrimental to the commerce of the United States; or contrary to the public interest, or otherwise in violation of the Shipping Act, 1916.

(5) The Marseilles-North Atlantic U.S.A. Freight Pool, Agreement No. 9361, as amended to date and if further modified, not 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; detrimental to the commerce of the United States; or contrary to the public interest, or otherwise in violation of the Shipping Act, 1916.

Warner W. Gardner, *Richard W. Kurrus*, *James N. Jacobi*, *Benjamin W. Boley*, *Edwin Longcope*, and *David I. Gilchrist*, for respondents.

Stanley Sher for Constellation Lines.

C. Brooke Armat for the Department of Justice, intervenor.

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

REPORT

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

This proceeding was instituted on our own motion and is now before us upon the exceptions of Hearing Counsel to the Initial Decision of Examiner Paul D. Page, Jr. The investigation is concerned with the initial or continued approval under section 15 of five separate agreements providing for "the pooling or apportioning of earnings" within the meaning of that section. The Examiner would approve the agreements.[1] Hearing Counsel takes exception to the initial Decision on four broad grounds.

1. The Examiner erred in approving the agreements and amendments thereto on the grounds that there was no evidence weighing against approval.
2. The Examiner erred in rejecting every proposed finding of fact offered by Hearing Counsel on the grounds that said facts were irrelevant or unsupported or unnecessary.
3. The Examiner erred in failing to require that the agreements and amendments thereto be modified as urged by Hearing Counsel.
4. The Examiner erred in approving the heretofore unapproved Israel and Marseilles[2] agreements retroactively. The Examiner further erred in approving various new amendments to the previously approved WINAC, Adriatic and Medchi[3] agreements retroactively.

THE AGREEMENTS

The agreements under consideration here are substantially similar in their operative provisons. Among the obvious differences are those

[1] Unless the context requires otherwise "agreements" as used herein includes the various amendments or modifications to the basic pooling agreements which are in issue. Also "approval" means both initial approval in the case of agreements not yet approved under section 15 and continued approval in the case of those agreements already approved.

[2] "Israel" and "Marseilles" are, respectively, the short form designations for the Israel-U.S.A., U.S.A.-Israel Freight Pool, and the Marseilles-North Atlantic U.S.A. Freight Pool.

[3] "WINAC," "Adriatic," and "Medchi" are, respectively, the short form designations for the Italy/U.S. North Atlantic Freight Pool, the Adriatic North Atlantic Range Freight Pool, and the Medchi Freight Pool.

of geographical area covered,[4] percentage shares of revenue allotted the various participating lines, and the memberships of the various agreements.[5] With the exception of the Marseilles pool which is a gross revenue pool, each of the agreement's has as its purpose the pooling of net freight revenue in accordance with certain percentage shares allotted each member line.[6] Net freight is arrived at by deducting a specified amount of "carrying money." Generally speaking, membership in the pool is conditioned upon membership in the conference covering the trade in which the pool operates. Each agreement provides for the admission of new lines and, upon specified notice, the withdrawal of members. The members of each pool undertake to maintain specified minimum sailing requirements and in some specified port calls penalties are provided for overcarriage and undercarriage and for failure to live up to the terms of the agreements. The pools are administered by secretariats to whom the lines submit manifests for accounting purposes. The secretary prepares provisional and final statements of the carryings of the members and the revenue accruing to them. Revenue is "divided" on the basis of these statements. Each agreement provides for bank guarantees and a system of penalties for breaches of the agreement as well as for overcarriage and undercarriage. Each agreement provides for a "governing" or "pool" committee composed of representatives of the members. These committees are the governing bodies of the pools and upon stated majorities can, among other things, change the provisions of the agreements, admit new members and extend the life of the pool. During the hearing an amendment to each agreement was proposed which would allow certain "interstitial" amendments to the agreements to be made effective without securing Commission approval. Under these proposed amendments changes in such things as carrying money, bank guarantees and memberships would be effected by resolution of the members without prior Commission approval although a copy of every such resolution would be promptly filed with the Commission for its information and records. Further details of the particular agreements are discussed below where necessary and pertinent.

[4] Thus, WINAC pool covers cargo destined for U.S. Atlantic ports north of Hatteras from ports on the West Coast of Italy between Ventimiglia and Reggio Calabria (both included) ; Medchi covers cargo to U.S. Great Lakes ports on the West Coast of Italy, between Ventimiglia and Santa Maria di Leuca, all Sicilian and Sardinian ports, and Marseilles, Barcelona, Valencia, Seville, Lisbon and Leixoes ; the Adriatic pool covers cargo from Venice to U.S. North Atlantic ports ; the Israeli pool covers cargo moving between U.S. ports north of Hatteras and Israeli ports, and the Marseilles pool covers cargo moving from Marseilles to U.S. North Atlantic ports.

[5] For a listing of the various memberships and the short-form designations used in this opinion, see appendix.

[6] Various ingredients went into the formula for determining individual shares such as past performance, future potential, etc.

Before setting forth the findings upon which we base our conclusions in this proceeding it is necessary to dispose of a threshold exception of Hearing Counsel. The second exception of Hearing Counsel is that the Examiner erred "in rejecting every proposed finding of fact offered by Hearing Counsel on the grounds that said facts were irrelevant or unsupported or unnecessary." The objection appears not so much directed to the rejection of any specific proposed finding as it is to the rejection of all proposed findings with only what Hearing Counsel calls "boilerplate language." Hearing Counsel contends that the Administrative Procedure Act (A.P.A.) requires more.

We presume that Hearing Counsel refers to section 8(b) of the A.P.A. which requires that "the record (decision) shall show the ruling on each" proposed finding and conclusion submitted by the parties with reasons in support thereof. In the present proceeding the respondents proposed 152 numbered findings and Hearing Counsel accepted some as proposed, others if revised and rejected still others.[7] As already noted Hearing Counsel then proposed his additional findings. The Examiner rejected these and other proposed revisions of Hearing Counsel stating, "To the extent that they are not substantially included herein all proposed findings and conclusions are rejected as irrelevant, not supported by substantial evidence, or not required for full consideration and complete disposition of the case." The courts have made it clear that section 8(b) does not require that a separate finding need be made on each exception to the Examiner's decision where the agency's decision unmistakably informs respondent of its rulings on all exceptions. *NLRB* v. *State Center Warehouse & Cold Storage Co.*, 193 F. 2d 156 (9th Cir. 1951). By the same token, an Examiner need not make a separate finding on each proposed finding submitted by a party. See *NLRB* v. *Sharpless Chemicals, Inc.*, 209 F. 2d 645 (6th Cir. 1954).

We have set forth below our findings. They are based upon a careful analysis of all the proposals of the parties and the Examiner's findings. We do not comment seriatim on each proposed finding submitted by the parties or made by the Examiner which we have altered or rejected, for in our opinion to do so might well make it more difficult to ascertain the basic findings and the reasons underlying our conclusions. See *The Commonwealth & Southern Corp., Holding Act of 1935*, Securities Exchange Commission, Release No. 7357 (1947).

[7] In doing this Hearing Counsel adopted the same method employed by the Examiner. Thus, Hearing Counsel merely states that, "Proposed facts not adopted are objected to as conclusionary, argumentative, not supported by substantial evidence or too broad."

The WINAC Trade

The WINAC trade is the cornerstone of Mediterranean-U.S. commerce. Of all the Mediterranean areas, Italy generates the most liner traffic to the United States. Using the range of ports covered by Trade Route 10 [8] the westbound liner cargo from Italy represented 40 percent of the total westbound cargo in the Mediterranean/U.S. trades for the years 1960–63. The next largest loading areas are Spain and Yugoslavia, each averaging about 11 percent of the Mediterranean total. This dominance of the Italian trade is even greater in terms of value than in terms of tonnage. In addition, the trade is heavily unbalanced in that the liner cargo movement on Trade Route 10 is predominantly outbound by a ratio of approximately 2 to 1.

The result of this imbalance is that westbound free space is high. In the first 10 months of 1963 only 35 percent of the space offered by the conference vessels in the WINAC trade was occupied and heavy westbound free space is fairly typical.

All of the witnesses were in general agreement that the westbound WINAC trade was heavily overtonnaged. About 15 lines have in the postwar period entered the trade only to leave it because of insufficient cargo. Conference vessels have averaged about 750 L/T of westbound cargo on each voyage.

The carriers in the WINAC trade are in some degree differently situated in their dependence upon the Italian loadings. Thus, the conference members may be divided between:

Lines serving only Italian ports	*Lines serving other Mediterranean ports besides Italian ports*	*Lines serving Mediterranean ports after passage from the Far East*
AEIL	AEIL passenger	AEIL T.R. 18
Costa	Fabre	APL
Italia	Fassio	Concordia PG
	Concordia Mediterranean	Hansa
	Hellenic	Maersk
	Jugolinija	
	Prudential	
	Torm	
	Zim	

The difference in each line's dependence on Italian cargo is, however, rather less than might be supposed from the above tabulation. Italy is much the most important loading area in the Mediterranean. For example, APL, one of the "transit" services, has on the average about 550,000 cu. ft. of space available in its Mariners after discharging in

[8] Trade Route 10 covers *inter alia,* Mediterranean ports in France, Spain, Gibraltar, Malta, Italy, Trieste, Yugoslavia, Greece, Turkey, Cyprus, Syria, Lebanon, Israel, Morocco, Algeria, Tunisia, and Egypt.

the Mediterranean, or about the equivalent of a full ship's space for smaller vessels.

The WINAC trade gradually increased from a volume of 293,000 L/T in 1952 to one of 386,000 L/T in 1960 followed by a 3-year decline to 343,000 L/T in 1963.

The Italian forwarder has played a most significant role in the history of the WINAC trade. In Italy, the forwarder is known as a "caricatore," which, literally translated, means "loader." Although sometimes the word is translated as "shipper," and the actual shipper or owner of the cargo is designated as the "exporter." Congested facilities at Italian ports require that considerable care be exercised in scheduling cargo for loading into vessels. Goods are transported from inland points by such various means as rail, truck, and even horse cart, and it is imperative that their arrival be coordinated properly with vessel schedules. For these reasons, the Italian exporter relies almost completely on the forwarder to expedite shipment of his merchandise. The forwarder performs a variety of services, including reserving space aboard ship, arranging for transportation from shipper's warehouse to vessel, arranging custom clearance, preparing shipping documents, and providing weighing and marking. Shippers customarily make single lump sum payments to forwarders known as "forfait," which include payment for the above services as well as ocean freight. The forwarder generally assumes responsibility for the handling of the goods from point of origin to ultimate destination and usually selects the carrier. This authority to select the carrier, of course, places the forwarder in an advantageous bargaining position *vis-a-vis* the carrier with respect to exaction of brokerage and rebates.

Competition among the forwarders in Italy is intense. The number of forwarders servicing the WINAC trade is greatly in excess of the needs of the market. Several hundred of them service the Italian export trade. In 1952, the WINAC Conference listed 152 forwarders for the ports of Genoa, Leghorn, and Naples. Approximately 10 percent of these accounted for about 50 percent of the business. At individual ports, a small minority of forwarders handle the bulk of the business, forcing many small firms to compete intensively for the residue. This intense competition induces forwarders to seek reductions and concessions from carriers on the ground that such measures are necessary in order to stay in business. There is evidence that forwarders have played lines off against each other by alleging fictitious concessions which has in turn fomented unrest and suspicion among the lines.

The West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference was established pursuant to Agreement 2846, which was approved by a Commission predecessor on March 23, 1934. Originally, there were nine member lines. Membership has fluctuated, however, ranging from a low of five members before World War II to 24 in 1960. The headquarters of the conference is and has been located in Genoa except during the war when it was transferred to New York. After 1952, a slight increase in traffic already noted induced additional carriers to join the conference. At the present time the conference consists of the 11 respondent pool members and in addition Hellenic, Prudential, and Constellation. There is no significant nonconference competition now that Admiralty Line has been admitted to the conference. The conference employs a dual rate system, but in the opinion of Dr. Piacentini, director of liner activity for Costa Line, it has been easily evaded by forwarders using a different name.

The trade has in recent years proved unattractive to a number of lines. The 24 conference members in 1960 have been reduced to 14 in 1965. About 15 lines have since the war entered the trade and the conference only to withdraw. Since 1962 Mitsui O.S.K. Line, Fresco Line, Kulukundis Line; Waterman and Torm Line have left the trade and the conference.

The WINAC trade has a long tradition of special concessions to the shipper. Prior to World War II, a standard 4 percent brokerage was paid to Italian freight forwarders by conference members, also additional special commissions were paid by the lines to certain forwarders. However, the percentage amounts varied and not all forwarders received these special commissions. In addition to these commissions, a deferred-rebate system was in operation.

Since World War II rebates and special concessions have, in the opinion of the witnesses, been perpetuated by the seriously overtonnaged state of the WINAC trade.[9] With every line seriously short of sufficient cargo to fill the available space, the pressures toward rebates and other concessions were formidable. These pressures toward malpractice were made almost irresistible by the power of the Italian forwarder, who through his control over the booking of cargo sought and often obtained rate concessions from the carriers in his efforts to remain competitive with other forwarders. An added impetus toward malpractice was the lack of confidence among the lines. The witnesses

[9] In addition to Dr. Piacentini, Dr. Alto Mordiglia, attorney for the WINAC pool and conference, and Mr. A. Theodore DeSmedt, president of AEIL, also testified on the WINAC pooling agreement.

testified that when a forwarder undertook to play one line off against another, his statement of concessions offered would ordinarily be accepted as substantially true.

The economic pressures to malpractices are not inhibited in Italy by any legal proscription. Special discounts and rebates are both customarily and lawful in Italy. (Art. 1739, par. 3 of the Italian Civil Code.) In addition, the forwarders and many of the lines are active in trades other than those to the United States. Despite the fact that the WINAC Conference agreement forbids discounts, payments or returns to shippers without unanimous consent of all parties and provides that tariffs shall be strictly observed, concessions and rebates of one type or another have consistently plagued the WINAC trade. Effective curtailment of such practices in the WINAC trade is hindered because of their existence elsewhere since forwarders can be rewarded for WINAC cargo by large rebates, concessions, and commissions in Italian trades other than those involving the United States.

The WINAC Conference has undertaken a variety of efforts to eliminate malpractices. These have ranged from the appointment of a controller of cargo to investigate malpractices at Italian ports to a neutral body system of self-policing. All of the various attempts failed, either because they failed to win the necessary support of the conference membership or because the task proved too large for the particular device employed.

One such device rather clearly demonstrated the actual existence of malpractices. The Atlantic Cargo Inspection Corporation (ACIC) engaged by the conference to conduct spot checks on weights, measurements, and classifications reported that 325 misdeclarations out of 923 spot checks were uncovered. The ACIC also discovered instances of mismeasuremnt at Italian ports of loading although the conference had supposedly engaged sworn measurers at Leghorn and Genoa.

The most ambitious effort of the conference was represented by the neutral body program. On October 20, 1960, the conference appointed the accounting firm of Price, Waterhouse & Co. as a neutral body to police and enforce its regulations. The neutral body system did not work as well as expected, and in fact proved ineffective. This was not due to the deficiencies of Price, Waterhouse & Co. which was considerably the best and most qualified appointee available, but rather to the impossibility of obtaining actual evidence of the malpractices which everyone knew to be prevalent. All witnesses testified that every conference effort to control malpractices prior to 1961 was a complete failure.

By the fall of 1960 conditions in the WINAC trade had become so bad that AEIL, APL, and Concordia gave notice of their resignation from the conference; five additional lines shortly followed suit. They withdrew their notice only upon the assurance that rates would be opened on the principal commodities. It was the opinion of Dr. Piacentini, that the conference could not have survived these resignations.

In December 1960, rates were opened on about 40 of the principal commodities moving in the WINAC trade. This action greatly minimized the incentive to offer rebates and special concessions in order to obtain cargo. It was, however, disastrous to the financial position of the carriers. Rates fell to half or less of their prior level and Dr. Piacentini testified that they were shortly hovering just above the level of out-of-pocket cargo handling charges. Open rates made it extremely difficult for shippers to predict future rates for purposes of advance sales. Both Mordiglia and Piacentini stated that there is an inevitable tendency during an open-rate period to favor the large shippers.

Rates remained open throughout 1961. It was the opinion of the witnesses that had the open rate period continued much longer there would most probably have been a heavy migration from the trade, failure of some of the companies, and dissolution of the conference. In May 1961, the conference voted to extend the open rates until a pool should be formed among carriers in the trade.

The primary purpose of the lines in forming the WINAC pool was to bring the malpractices in the trade under control. All concerned were agreed that this could be done in no other way. A secondary purpose was to open at least the possibility of some rationalization of service, by reducing the largely excessive number of loading calls at the Italian ports.

There were pool agreements operating in at least 10 other export trades from Italy to destinations other than the United States. In the opinion of the witnesses they had worked well and were a natural road for WINAC to follow when all their other attempts to restrain malpractices had failed. The WINAC trade itself had operated under approved pooling agreements during part of the prewar life of the conference (e.g., agreement 6220 filed on June 10, 1938, and approved on July 14, 1938).

Almost the entire year of 1961 was devoted to negotiations over the formation of a pool in the WINAC trade. A drafting committee, on which the witnesses Piacentini and Dr. Amund Svendsen, Director of Mediterranean operations for Concordia, served, prepared drafts of the agreement. The major negotiating problem was the fixing of percentage participation for each line.

A great many factors, including past services, vessel types, ship capacity, and vessel speeds, were considered, but each line's historical participation in the trade was considered the most important. It was recognized by the parties that the larger carriers, such as AEIL, APL, Costa, and Fassio, would have to yield some of their share as indicated by historical carriage in order to gain the adherence of the smaller carriers by increasing their minimal share. Agreement was finally reached by the device of having each line schedule the share to which others than itself were entitled, averaging the results and scaling down to 100 percent.

Hellenic, Torm, Maersk, and Zim, though in favor of the pool, were dissatisfied with the share offered and did not join. Torm, Maersk, and Zim were quite small carriers in the trade, and their failure to join the pool at the outset was not of major importance. Hellenic, on the other hand, was a significant carrier, with about 4 percent of the total, and its failure to participate was of concern to the pool members; the pool can, however, operate with substantial success without Hellenic. It could not if a major carrier had refused to join. Torm, Maersk, and Zim subsequently joined the pool, though Torm has recently left the trade and resigned from the pool and the conference.

The conference members (except for Hellenic, Torm, Maersk, and Zim) finally reached agreement upon a pool on December 19, 1961, and as a result thereof the conference rates were closed effective December 23, 1961. The agreement was approved by the Commission on March 6, 1962.

The agreement carried an effective date of January 1, 1962, and was approved to be effective from that date. Dr. Piacentini testified that the January 1 effective date was probably indispensable to formation of the pool, as at least one member, and probably others, would not have agreed if their agreement were to be effective only from an uncertain date in the future. This was because the condition of the trade and the position of the carriers at that unknown date could not have been foretold by the signatories in December, and because the malpractices would otherwise have continued unabated for the indefinite period awaiting approval. Pending approval, the lines sent their manifests to the Secretary and statistics were maintained, and Dr. Piacentini testified that no other action was taken and no payments were made. Even with the comparatively short interval of 2½ months awaiting approval, some of the lines became restive and wished to re-examine their pool participation.

It is advantageous for a line to remain outside a pool which can function effectively without its participation. By doing so it gets the benefit of a stabilized trade without contributing and without any restriction upon its service or its carriage.

The pool when formed consisted of 12 of the 16 WINAC Conference lines. Since then Torm, Maersk, Hansa, and Zim have joined the pool, while Fresco, Mitsui, and recently Torm, have withdrawn from the trade. Hellenic has always been outside the pool. Prudential resigned from the pool on June 30, 1964. Constellation has entered the trade and joined the conference but not the pool. In consequence, 11 of the 14 conference members are now members of the pool. The members of the pool would be very glad to see the three nonmembers join, since, in their view, some pool objectives of stability of rates and service, and of mutual confidence of all lines in the trade may not be fully attained without the membership of all.

Hellenic's share of the trade has increased since the formation of the pool, as has that of the nonpool lines generally. In 1962 they carried 17 percent of the Range I cargo and 21 percent of that from Range II. Constellation for its part has no objection to the pool, and remained outside only because of a difference over its proper share. Even Admiralty Line, while complaining of nonadmission to the conference, did not object to the pool.

Prudential by letter of April 6, 1964, explained to the Commission its reasons for resignation from the pool. It said, "We know of no conditions which would adversely affect the general desirability of continuing the pool in this trade." It nevertheless explained its resignation on the ground that "We consider it essential for Prudential, as a small operator, to make every effort possible to improve its carryings and provide better service to shippers. The restrictions of the pool would hamper us in accomplishing these goals * * *." Prudential's pool history shows:

(a) Prudential overcarried in one range and undercarried in the other in 1962; it undercarried in both ranges in 1963, and in both ranges in the first half of 1964.

(b) In 1962 it carried only 254 F/T to Boston, in 1963 none, and in one-half of 1964 only 19 tons. Its pool payments for undercarrying to Boston in these periods aggregated $14,000, as compared to its 1962 overcarriage penalty of $4,540.

(c) In 1963 and one-half of 1964 its Italian sailings and American calls were all at or about the minimum requirements of the pool agreement.

(d) Even with its payments for not serving Boston, Prudential in the three periods received (because of undercarriage) in the net balance of pool accounts some $50,624 more than it paid.

Anticipation of the pool's approval by the Commission, in the view of the witnesses, curtailed malpractices, and it will continue to operate to this end by the simple mechanism of self-interest: If a line pays a rebate to obtain cargo, it loses money because the net freight must be paid into the common fund out of which the line derives a previously fixed percentage.

The effect was apparent from January 1, 1962, onward because the possibility of gaining nothing by malpractice, if the pool were eventually approved, was a sanction against improper concessions.

The witnesses could not speak as to the lines which were not members of the pools. They recognized that agents might out of their commissions make allowances which they would keep secret from their principals, or that shippers might on their own cheat as to description or measures of cargo. But insofar as the pool lines themselves are concerned, it is the judgment of all the witnesses testifying that malpractices have by virtue of the pool been reduced almost to the vanishing point. Witnesses for two nonpool lines agreed. It was further the judgment of the pool members that the beneficial results achieved were possible only through the operation of the pool, and if the pool were disapproved, they felt that the full tide of malpractice would at once recur.

In the opinion of the witnesses the WINAC trade is heavily overtonnaged, and its nearly 500 westbound sailings a year, in 1961, were a great deal too many for the volume of cargo. One objective of the pool was to permit some reduction of duplicating calls by pool members, with a consequent effort to rationalize the service offered and to reduce the costs of operation.

The objective has been realized in varying degrees by the pool members. The differences arise out of the nature of their services. The results for the lines the representatives of which testified in these proceedings have been:

(a) The quantity of Costa's service, confined to the Italy-U.S. North Atlantic trade, is fixed by the heavier eastbound carriage. As an Italian line, it feels obliged to serve each of the three major ports on each voyage. In result, it has achieved no reduction in service because of the pool.

(b) Concordia, on the other hand, has by virtue of the pool been able to reduce the number of Italian calls made by its vessels. It schedules only one or two calls for each of its two westbound services going through the Mediterranean instead of the three which would be required without the pool.

(c) APL is more nearly in the position of Costa. Its round-the-world vessels move on as regular a fortnightly schedule as possible and its interport carriage ordinarily requires calls at all three of the major ports. It has, however, been able to reduce the time spent at Naples where, by virtue of its subsequent itinerary, its service is the least attractive.

(d) AEIL, like Concordia, has by virtue of the pool been able to make a substantial reduction, of about 20 percent, in the number of its Italian port calls.

Overall, there has been a significant reduction in calls by conference members at the three major WINAC ports, so that the 1963 calls were about 20 percent less than in 1961.

It is the opinion of the witnesses that the reduction in calls has not impaired the adequacy of the service offered the shippers. There are about six sailings a week out of Genoa and Naples and four a week out of Leghorn which it is contended is much more than ample for the trade.

Insofar as the lines serving the trade are concerned there is no port of consequence to the Italy-United States trade on the mainland West Coast of Italy other than Genoa, Leghorn, and Naples. The small port of Marina de Carrara can only accommodate vessels of shallow draft and short length.

The witnesses stated that they did not think that the pool has eliminated all competition among its members. In their view, every line is anxious to maintain and improve its position in the trade, to retain its present customers and to attract new ones; this is because none can expect a pool to last forever and there is in any case need for a strong bargaining position in view of the yearly opportunity for renegotiation. Costa, as one example referred to, has only recently moved at considerable expense to a new pier in New York in order to offer better service to its consignees. There is no evidence that the operation of the pool would discourage the entry into the trade of nonpool competition.

The pool by curtailing rebates has largely been responsible for a much more stabilized and, in the opinion of the witnesses, nondiscriminatory level of freight rates. As compared to 1960, the last year before the rates were opened, the WINAC tariff rate level has by 1965 increased by only about 10 percent; some have not yet regained their 1960 level. The rates on the commodities selected for study in these 2 years have been:

	1960	1965	Increase
			Percent
Marble blocks	$43.50	$48.00	10
Cotton textiles	35.00	55.00	57
Silk textiles	35.00	24.00	[31]
		55.00	57
Wine	55.00	57.75	5
Tomato sauce	26.50	28.00	6
Tomatoes	26.50	28.00	6
Pistachio nuts	57.00	63.00	12

Testimony in the record indicates that steamship costs in general have increased over the 5-year period a great deal more than 10 percent.

There have, to the knowledge of the witnesses, been no complaints at the formation or the operation of the pool by shippers or ports.

The Medchi Trade

This trade covers cargo moving either directly or by transshipment to the U.S. Great Lakes from West Coast of Italy ports, between Ventimiglia and Santa Maria di Leuca, Sicily and Sardinia, Marseilles, Barcelona, Valencia and Seville, and Lisbon, and Leixoes.

The Medchi trade is seasonal because of the closure of the St. Lawrence Seaway during the winter months of December through approximately mid-April when ice conditions on the seaway prevent its use by ocean-going vessels. The seaway was opened on May 1, 1959, and it has since been opened for navigation each season beginning April 8 to 15 and closing officially on November 30, with navigation by ocean-going vessels continuing for a few additional days depending on the weather conditions.

The westbound trade from Mediterranean ports to U.S. Great Lakes ports is in a sense a byproduct of the eastbound trade, which is considerably larger, and also of the trade from Mediterranean ports to Canadian ports. All pool members operating in the Medchi trade necessarily operate via Canadian ports, and most of them were doing so before the St. Lawrence Seaway was opened. In terms of tonnage and revenue the westbound trade from Mediterranean ports to Canadian ports (Med Can trade) is about twice as large as the Medchi trade. A pooling agreement presently exists in the Med Can trade.

Approximately 51 percent of the tonnage carried by the pool members in the Medchi trade originates at Italian ports, and the Italian cargo represents approximately 62 percent of the total pool revenue.

Total cargo moving from pool ports for the years 1962–64 was as follows:

	Metric tons
1962	52,200
1963	45,412
1964	57,010

There are approximately 90 sailings during each shipping season by pool members. The trade is overtonnaged, with free space on the inbound sailings averaging something in the magnitude of 50 percent or more.

The members of the Medchi pooling agreement are members of the Medchi Conference.

The Medchi trade covers a broad range of Mediterranean ports [10] and the seven pool members are of relatively equal size. Several of the members operate ships specially designed and constructed for this trade and all the members operate both inbound and outbound. These features tend to distinguish the Medchi pool from the WINAC agreement. Thus, WINAC covers primarily three major loading ports and a relatively small selection of discharging ports, and the WINAC membership varies from some small lines to some extremely large lines with a resulting divergence of views. The relative equality in size of the Medchi Pool members creates a tendency toward unanimity of agreement in dealing with pool problems and this in the view of the witnesses is the major factor in the success of the pool. It is also the stated reason for allotting each member one vote on pool matters as opposed to the "weighted" vote in WINAC.

At the present time, there are no nonconference operators in the trade, although in previous shipping seasons there has been competition from nonpool operators, particular the Yugoslav Line, which is now a member of the pool. The Medchi lines, however, face competition, both with respect to rates and with respect to the solicitation of cargo, from lines operating from the Mediterranean to the U.S. North Atlantic, from the Mediterranean to the U.S. Gulf, and from operators offering services from Continental European ports to the North Atlantic and to the Great Lakes.

The Medchi pooling agreement was approved by the Federal Maritime Commission on July 1, 1963, and became effective for the 1963 shipping season, which began in mid-April 1963. There were originally six members of the pooling agreement, AEIL, Fabre, Concordia, Montship, Watts Watts, and Zim. Watts Watts subsequently left the trade and withdrew from the pooling agreement. Canada Orient Line entered the pooling agreement effective with the 1963 shipping season,

[10] The Mediterranean/American Great Lakes Westbound Freight Conference (Agreement 8260) covers "all ports served on the Mediterranean Sea from Gibraltar to Port Said including Marmara, Black Sea, and Adriatic ports and from Iberian Peninsula ports, North African ports including Morocco all inclusive to U.S. Great Lakes ports." In the opinion of the witnesses, it would be impractical for the pool to cover all conference ports because it would be impossible to fix sailing obligations of the members. Thus, the pool only covers 10 of the major Mediteranean ports. Prior to the pooling agreement almost every sailing of each line included calls at each of these ports.

pursuant to an amendment filed with the Federal Maritime Commission on April 20, 1964. Neither the amendment to the pooling agreement reflecting the withdrawal of Watts Watts Line nor the amendment setting forth the new membership of Canada Orient Lines has yet been approved by the Commission.

Although there is a substantial difference between the WINAC trade and the Medchi trade, the witnesses consider stability in the WINAC trade as of vital importance to stability in the Medchi trade. This casual interrelation is accounted for by the fact that the heart of the Medchi trade is the trade from Italy, and the major commodity movement in the Medchi trade is controlled by the same people who ship in the WINAC trade, mostly Italian forwarders. Additionally, the witnesses testified that if the Medchi Conference's effective rates on any specific commodity are too much above the rate to North Atlantic ports or to U.S. Gulf ports the cargo will be lost to carriers in these other trades.

The witnesses testified that each of the factors relating to rate instability and suspicion of rebates and malpractices existing in the trade from Italy apply equally to Italian cargo moving in the Medchi trade.

The reasons underlying the formation of the Medchi pooling agreement were explained by Mr. Amund B. Svendsen, the director of Concordia Line in charge of all of its Mediterranean operations, and Mr. Jacques Penaud, the manager of Montship/Capo Lines' combined operations. These men drafted the Medchi pooling agreement and were knowledgeable and informed as to all of the factors underlying the negotiations and drafting of the agreement.

The Medchi pool was formed in order to avoid the deterioration of the trade as had occurred in WINAC. There was at the time negotiations on the agreement began considerable fear and apprehension that factors which had disrupted the WINAC trade would also cause instability in the Medchi trade. Furthermore, when the St. Lawrence Seaway opened in 1959, a new group of reliable lines entered the trade (viz, Concordia, AEIL, and Zim). To those already in the trade these lines appeared determined to remain in the trade, each had substantial investments in the services which they were operating, and each offered services comparable to those of the existing operators. The pool was, therefore, a response of the parties thereto to the economic and competitive factors which existed in the trade and was thought necessary to avoid a useless and destructive rate war and a situation of rate instability, which in their opinion would benefit neither carriers nor shippers. Although the condition of the Medchi trade prior to the pool was never as serious as in WINAC, the lines were most anxious to prevent this happening and no one wanted to take the chance of awaiting developments. At the time when negotiations began for the formation of the Medchi pooling agreement, during 1962, the situation in the Medchi trade was tending toward instability although there was no opening of rates.

The witnesses testified that the pool has assisted in reduction of port calls by the individual lines and consequently a more direct service from particular Mediterranean ports to U.S. Great Lakes ports than would have been achieved without the pooling agreement.

Mr. Svendsen explained that without the pooling agreement his vessels would have to spend more time in port seeking cargo and would have to call at more Mediterranean ports on each sailing. For example, without the pool, Concordia would have to serve 12 or 15 Mediterranean ports, whereas under the pool, it can eliminate at least 4 ports per voyage. As a result, Concordia has been able to operate its service in the Medchi trade with 5 vessels instead of the previous 6 by cutting out uneconomic and unjustified port calls, since it has the assurance that all ports will be more than adequately served by all of the pool members collectively. Similarly, Mr. Penaud testified that Montship/Capo has also been able to reduce, for the same reason, its fleet from 6 vessels to 5 and at the same time has been able to provide a more direct and better service. If each line were to call at each Mediterranean port on every sailing, schedules would be difficult to maintain and the transit time from the first port of call to the first port of discharge would be inordinately long. Furthermore, vessels would at times be compelled to wait in port several days in order to obtain sufficient cargo. These undesirable circumstances are minimized under the pooling agreement. For example, with the pooling agreement, cooperation among the lines in making port calls and in arranging sailing schedules results in a more efficient service and economic operation. In the opinion of witness Svendsen such cooperation would be impossible without a pooling agreement. Witness Penaud testified that under the pooling agreement, by providing service to fewer ports on each sailing, his company has been able to shorten transit time by 4 or 5 days.

Under article 16 of the agreement the administration of the pool is primarily the task of the secretary. Rationalization of sailings is accomplished through the secretariat which acts as a clearing house for the dissemination of information supplied to him by the pool members. The members of the pooling agreement furnish to the pool secretary a 2-month schedule corrected weekly. The secretary can then determine if a particular port requires additional service and suggest in his advisory capacity that an undercarrying line should provide it. The same type of suggestion is made by the secretary in the case where two lines might provide service to the same port at the same time.

Tariff rates have risen only slightly since the Medchi pooling agreement became effective in the 1963 shipping season, which slight increase has been a partial reflection of increased operating costs. Even though there has been a slight increase in home rates in the Medchi trade, Mr. Penaud testified that the average rate for cargo moving in the trade has actually decreased. In this respect, the average rate per set ton of 1,000 kilos, in 1963, was $49.30 and after 1 year of pool operations it became $49.20.

The witnesses testified that the Medchi pool secretary maintains a close check on the cargo movement at the various pool ports and as an example, Messina shippers' requests for reefer space which the lines have not always been able to grant are now being taken care of by the agreement of Concordia to call with reefer facilities at Messina six times during the shipping season.

Carriage under the agreement displays considerable fluctuation in the position of the lines. Only AEIL's position of moderate overcarriage remained constant. Fabre went from a slight overcarrier to a substantial undercarrier; Capo nearly doubled its undercarriage; Concordia went from modest undercarriage to substantial overcarriage and Zim reduced its moderate overcarriage to slight undercarriage.

The Adriatic Trade

The Adriatic Pool covers cargo moving, either directly or by transshipment, from the Port of Venice to U.S. North Atlantic ports. Venice is served by AEIL and Jugolinija which constitute the membership of the pool. They operate roughly equivalent services, each making approximately 22 sailings a year, although AEIL's vessels are of a much larger capacity. The remoteness of the major Adriatic ports, Venice, Trieste, and Rijeka, renders the trade generally unattractive to shipping.

Cargo originating in the industrialized interior of northern Italy (Milan and Turin) and normally shipped out of Genoa may be routed via Venice. Inland transportation to Venice is excellent and while the land haul to Venice may be more expensive than to Genoa, cargo would be diverted when higher inland costs are offset by lower ocean freight rates.

The Adriatic Pool was instituted at the request of the members of the WINAC Pool to prevent diversion of WINAC pool cargo to Venice which port is not within the scope of the WINAC pool.[11] The WINAC membership is fully informed of the movement under the Adriatic pool through the use of a common secretary. The terms and provisions of the Adriatic agreement are most similar to those of WINAC.

Prior to the negotiation of the Adriatic pool, AEIL held about 45 percent of the Venice traffic and Jugolinija 55 percent. Under the original agreement AEIL achieved a 55 percent share due to its demonstration that while its prepool cargo originated in Venice and its natural hinterland a portion of Jugolinija's cargo was being attracted from the West Coast of Italy. Experience under the agreement, however, demonstrated that not as much of Jugolinija's traffic originated outside the Venice area as was originally thought and the pool shares were adjusted giving 52.5 percent to AEIL and 47.5 percent to Jugolinija. Operations under the pool show that both lines are exceeding their minimum sailing requirements and there has been no substantial overcarriage or undercarriage.

The Israeli Trade

The service between U.S. Atlantic ports and Israel is peculiar in that, for various reasons, the only regularly scheduled service is provided by the two national-flag lines, AEIL and Zim, each of which has approximately the same involvement in the trade. AEIL's total capacity is slightly greater, however, because of the larger size of its vessels.

Due to the political problem that exists between Israel and the Arab States, ships serving the Eastern Mediterranean have the election of serving either Israel or the Arab countries, but not both on the same voyage. AEIL is able to operate a service between U.S. North Atlantic ports and Israel because its operations to the Mediterranean are extensive, thereby enabling it to offer a separate Israeli service. A vessel serving Israel cannot serve Syria, Lebanon, North Africa, Egypt, Tunisia, Algeria or Libya, nor can it transit the Suez Canal. Cargo from the Arab States to the United States is from 1½ to 2 times greater than that from Israel to the United States, not counting the citrus fruit movements.

The proposed pool covers U.S. North Atlantic traffic moving to Israel (U.S. exports) and traffic moving from Israel (U.S. imports) to U.S. North Atlantic ports.

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[11] Venice is within the scope of the WINAC Conference but it was excluded from the WINAC pool because in the view of the WINAC members its inclusion would render accounting problems unwieldy and difficult.

The pool trade is covered by two separate conferences, one outbound and one inbound. Zim and AEIL are the only members of these conferences.

Zim and AEIL each enjoy substantial national flag preference by shippers, although initially (early 1950's), there was a strong shipper sentiment in favor of Zim.

Revenue earned by Zim and AEIL in the trade from Israel to the United States ("westbound") is only 10 percent of revenue earned in the trade to Israel from the United States ("eastbound") although the number of sailings in each trade is substantially identical.

To some extent, but not substantially, the traffic disparity between the eastbound and westbound Israeli trades is mitigated by the broader scope of other trades served on westbound voyages. This leads to the conclusion that the westbound Israeli trade is overtonnaged relative to the eastbound Israeli trade posing a threat to stability of rates and service.

The threat to the stability in the Israeli trades became imminent during the period 1962–63, when Zim determined to increase its participation and AEIL determined to maintain its position. Unlike the WINAC trade, which was beset by rebates and malpractices, Zim enjoyed a better position than AEIL in the Israeli trades because of its ability to grant favors to Israeli merchants who also used Zim in trades not in U.S. foreign commerce.

At least as early as October 1962, AEIL and Zim believed that a pool would be desirable in order to prevent the outbreak of destructive competition between them. AEIL and Zim met in Rome on January 29, 1963, to lay the groundwork for negotiating a pool.

AEIL believed that, based on future capability, the shares should be 60–40 in favor of AEIL eastbound and 60–40 in favor of Zim westbound. However, AEIL proposed a 55–45 division. Zim felt that past performance (last 3 years) should be the major factor in determining pool shares. During the negotiations, AEIL urged that the pool be on a 50–50 basis but receded to a 47.50 percent share eastbound and a 42.50 percent share westbound. Eventually, AEIL finally agreed to that westbound share and a 45 percent eastbound share.

Subsequent to April 5, 1963, Zim and AEIL worked out and agreed to further revisions in the pool draft and filed the final agreement with the Federal Maritime Commission for approval on August 2, 1963, to be effective August 1, 1963.

Full acounting records of the pool have been kept since August 1, 1963, but no financial settlements have been made.

It would have "very little" practical effect in the Israeli trades if the Federal Maritime Commission approved the pool effective as from the date of approval and not as of August 1, 1963.

Zim contends that the pool is not, and has not been, in operation since August 1, 1963.

There have been no serious problems between Zim and AEIL in the pool trades since August 1, 1963.

Agreement 9233 provides for 17 minimum sailings annually by both Zim and AEIL in each direction (art. 8). However, the present service of each line exceeds the minimum (24 AEIL sailings, 21 or 22 Zim sailings) and AEIL has no present plans to reduce its calls.

The service of AEIL and Zim, in terms of number of sailings, shows no significant change between such service prior to the negotiation of the pool and subsequent thereto.

The pool is expected to have the effect of improving service by inducing Zim and AEIL to schedule sailings so that their respective arrivals and departures do not coincide, thereby providing more comprehensive coverage of the berth.

There is nothing in the record to indicate that the successful negotiation of this pool in 1963 has led to increases in rates. However, that negotiation did have the effect of preventing rate decreases, a possible rate war and the breakup of the conferences.

The Marseilles Trade

There are nearly 200 sailings a year from Marseilles to U.S. North Atlantic ports. The liner cargo in this trade has been:

	L/T
1960	49, 686
1961	55, 685
1962	57, 132
1963	54, 977
Average	54, 370

The average loading is thus about 275 L/T per sailing. In consequence the trade is largely overtonnaged.

The trade is served by eight conference members: AEIL, APL, Fresco, Fabre, Fassio, Hansa, Zim, and (since 1964) Constellation. It is also served by Concordia, which because of malpractices resigned from the conference in 1962. Concordia carries perhaps 10–12 percent of the cargo. Additional nonconference competition is provided by a Norwegian tanker bulk service, which operates at least monthly on a round-the-world schedule taking parcel lots of bulk liquids. APL and AEIL are the largest carriers in the trade, followed by Fresco.

The conference in this trade was established in 1937. It covers the trade from Marseilles to the U.S. Atlantic coast. Marseilles is the only port of consequence in southern France. Very little cargo moves to the South Atlantic ports. All of the lines in the trade serve Marseilles in conjunction with other trades. A dual rate system has not been employed, but an agreement to that end is now pending Commission approval.

The forwarder is important in the Marseilles trade but to a much lesser degree than in the WINAC trade. Cargo is delivered to the terminal, rather than to ship's tackle, and delivery is accomplished by the exporter himself. The "forfait" system is not employed.

On cargo of local origin, the shipper pays the cost of loading cargo. On that from areas to the north, which might otherwise be diverted to North Europe ports, the handling costs are paid by the carrier.

Since about 1960 or 1961 malpractices have been a severe problem in the Marseilles trade. They did not reach the level of the WINAC trade prior to the pool but were a matter of major concern. The allegations were of rebates, improper measurements and absorption by the carrier of handling costs on local cargo.

The conference has no neutral body nor any self-policing system more elaborate than an inspection of the manifests. Experience in other trades has not led the members to believe that results would be commensurate with the cost, especially for a small trade. Some form of cargo inspection service, preferably at discharge, was considered desirable even if the pool be approved, to guard against shipper misdeclarations.

Because of malpractices, rates were opened on some commodities in 1962. The open rates were applied to aluminum, rubber tires, tanning, extracts, dried cherries, and ferromanganese. These commodities were thought most subject to malpractice, and made up about 60 percent of the trade. Except for wines they covered all of the heavy-moving commodities.

Concordia resigned from the conference in 1962 owing to its impatience with malpractices.

The Marseilles lines by 1962 had the example of the success of the WINAC pool in curbing malpractices. In addition, there was the example of at least 4 pools in other trades outbound from Marseilles.

Efforts to conclude a pooling agreement were made in 1962, in December 1963 and in the spring of 1964. The first two efforts broke down over the usually divisive issue of percentage shares. Concordia did not participate in the negotiations but Contellation did. Constellation did not join the pool because of its dissatisfaction with the share offered.

The pool agreement was reached because of the independent need of the trade to curb malpractices and not in response to any suggestion from WINAC. It would be theoretically possible to divert WINAC cargo to Marseilles but this was not, in the view of the lines, a very real practical possibility.

The Marseilles pool calls for division of gross revenue, not net revenue after carrying money. There are, unlike WINAC, no regular calls of passenger ships at Marseilles, so it is not considered inequitable to pool gross revenues. Again there are no loading costs to the carrier on most of the Marseilles cargo. The cargo loading that is paid by the carrier, with respect to the traffic subject to diversion to North Europe, is a variant that would have made a net revenue pool very complicated.

As filed the agreement is to be effective from July 1, 1964 to December 31, 1966, and thereafter to be extended for 1 year at a time, subject to 3 months' notice of resignation. This permits, after the initial period, yearly renegotiation of shares.

The minimum sailings and calls provided in article 10 are substantially below those usually made by the lines, and represent in the aggregate only about half of those now being made.

Since July 1, 1964, the lines have considered that the pool would probably be approved. This, just as in the interim period pending the WINAC approval, has sharply reduced the malpractices in the trade. By paying a rebate, the line would risk in the event of the pool's approval, loss of the rebate in order to contribute the tariff rate of freight to the common fund. Svendsen said that Concordia, operating outside the conference and the pool, had noted a marked improvement in the trade.

In response to this improved situation, and in the expectation that the pool would be approved, the conference in December 1964 closed the rates that had been opened in 1962.

The pool members have since July 1, 1964, been submitting their statistics to the secretary who has been compiling the necessary records. No actual payments have, however, been made, and the bank guarantees are conditioned upon approval of the pool.

Even though Concordia, with 10–12 percent of the trade, and Constellation, with about 7 percent of the trade, remain outside the pool, the witnesses were of the opinion it could probably operate, though it could more surely achieve its objectives if they were members. The pool could not, function, however, if a major carrier such as APL or AEIL, or probably Fresco, remained outside. Concordia is considering re-entry into the conference and perhaps into the pool in view of the probable curtailment of malpractices.

In the opinion of the witnesses, the pool should be about as effective as that of WINAC in eliminating malpractices and promoting confidence among the carriers, but on the other hand, if the pool were disapproved, the trade would deteriorate very rapidly, malpractices would immediately resume, and APL, at least, would want to revert to open rates.

The lines feel that the formation of the pool may serve to reduce the excessive and costly service from Marseilles. Zim has already made a marked reduction in its calls. APL upon approval of the pool would seek somewhat to rationalize its service, perhaps on some voyages calling only to discharge interport cargo.

The pool could lead to a moderate increase in the rates in the Marseilles trade which are severely depressed; for example, owing to the effect of malpractices upon the tariff, the rates on aluminum sheets and dried cherries are now lower than they were in 1960.

Concordia, though it had resigned from the conference and refused to participate in the pool negotiations, had no complaint and thought the pool a necessary step to preserve the trade from collapse. Constellation was of a similar opinion.

Discussion and Conclusions

Section 15 requires "that every common carrier by water * * * shall file immediately with the Commission a true copy * * * of every agreement with another such carrier * * * or modification * * * thereof * * * pooling or apportioning earnings, losses, or traffic * * *." Once such an agreement is filed section 15 further provides that,

> 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(s) * * *.

In approving the agreements in issue, the Examiner found that all the evidence of record supported approval and that there was a complete "lack of an iota" of evidence controverting approval of the pools. Consequently no finding could be made that the agreements in fact operated in one of the four ways set out in section 15. In so concluding the Examiner relied upon the recent decision of the Court of Appeals for the District of Columbia Circuit in *Aktiebolaget Svenska Amerika Linien (Swedish American Line) et al.* v. *F.M.C.* No. 18,554, decided June 10, 1965, wherein the court stated that, "The statutory language (of section 15) authorizes disapproval only when the Commission finds as a fact that the agreement operates in one of the four ways set out in the section by Congress."

The first of Hearing Counsel's three remaining exceptions is that "the Examiner erred in approving the agreements and amendments thereto on the grounds that there was no evidence weighing against approval." This exception contains two separable contentions. First, Hearing Counsel argues that the record is "replete with evidence that the pools will permit less service and higher rates than would otherwise prevail." And secondly, Hearing Counsel argues that the Examiner's ground for approval is based upon an erroneous interpretation of section 15, for in Hearing Counsel's view the Examiner's failure to recognize the existence of any adverse facts at all results in his holding that no derogation of section 15 standards is in anyway involved here. Hearing Counsel would have the Commission "clearly announce that pooling agreements which enable carriers to prevent rate and service competition are *prima facie* detrimental to the commerce of the United States and contrary to the public interest and may only be approved upon the basis of a compelling demonstration that the detriments of reduced service and increased rates will be offset by clear and substantial economic benefits."

Respondents find nothing in section 15 which gives rise to any *prima facie* unlawfulness of pooling agreements, and insofar as Hearing Counsel's contention seeks to shift "the burden of proof" to respondents, they contend that the law is clear that the burden rests with the Commission or anyone else seeking disapproval of the agreements. They urge that the Examiner was correct in restricting his decision to the simple finding that no derogation of section 15 standards is involved and contend that because the evidence of record demonstrates that the pools will establish "stability" of rates and effect a "reduction of excessive and duplicating calls in overtonnaged trades, the agreements are in the public interest and not contrary to it."

It is readily apparent that the area of disagreement here is relatively narrow and were its resolution not of significant importance for future consideration of agreements under section 15 we would not be inclined to deal with it at all in any great detail. However, the arguments here and those in some cases reveal a very real need for a clear statement of the ground rules, so to speak, which apply to our consideration of agreements filed for approval under section 15.

Of prime importance at the outset is the clear recognition that section 15 represents a departure from our national policy—the promotion of competition and the fostering of market rivalry as a means of insuring economic freedom. See Report of the Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955, chapter 1. The policy is one against "undue limitations on competitive conditions," *Standard Oil Co. of New Jersey* v. *United States* 221 U.S. 1 (1911), and is embodied in the Antitrust Laws, 15 U.S.C. sections 1 *et seq.* Agreements approved under section 15 of the Shipping Act are exempted from the provisions of the antitrust laws. This exemption was granted by Congress with clear recognition of the public interest in the promotion of free and open competition, and it was granted only after an intensive investigation by a congressional committee revealed that anticompetitive combination in the steamship industry was a lesser evil than the destructive rate wars which seem inevitably to result absent some anticompetitive agreement between the contending lines. Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade, House Merchant Marine and Fisheries Committee, 63d Congress (1914) pages 415–421.[12] The investigation made it clear that in the steamship industry there was no "happy medium between war and peace when several lines engage in the same trade." However, in the view of the committee "to terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong or to avoid a costly struggle, they would consolidate through common ownership." In the opinion of the committee, neither result could be prevented by legislation and "either would mean a monopoly fully as effective, and it is believed more so, than can exist by agreement."

Thus, Congress legalized agreements otherwise in violation of the antitrust laws primarily because it thought even stronger monopolies would result were such agreements completely prohibited, but in doing so it accepted the committee's condition that the anticompetitive combinations be subjected to "effective government control with power in the agency administering the law" to disapprove or cancel agreements which are "detrimental to commerce of the United States or contrary to the public interest." We think it now beyond dispute that "the public interest" within the meaning of section 15 includes the national policy embodied in the antitrust laws. For as the court said in *Isbrandtsen Co. Inc.* v. *United States*, 211 F. 2d 51 (D.C. Cir. 1954); cert. denied *sub nom. Japan-Atlantic & Gulf Conf.* v. *U.S.*, 347 U.S. 990 (1954):

[T]he Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under antitrust laws. The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure he conduct

[12] Also known as the Alexander Report.

thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute.

Thus, the question of approval under section 15 requires (1) consideration of the public interest in the preservation of the competitive philosophy embodied in the antitrust laws insofar as consistent with the regulatory purpose of the Shipping Act and (2) a consideration of the circumstances and conditions existing in the particular trade involved which the anticompetitive agreement seeks to remedy or prevent. The weighing of these two factors determines whether the agreement is to be approved. The essential ingredient in this process is, of course, information or data for without it no intelligent judgment as to the probable future impact of the particular agreement upon our commerce would be possible. Almost uniformly, the kind of information necessary to this judgment is in the hands of those seeking approval of the agreement and the resultant exemption of the proposed anticompetitive combination from the operation of the antitrust laws; and it is incumbent upon those in possession of such information to come forward with it. Thus, in this sense it can be said that pooling agreements are *prima facie* contrary to the public interest, and if this is the intent of Hearing Counsel's proposition we agree. For presumptively all anticompetitive combinations run counter to the public interest in free and open competition and it is incumbent upon those who seek exemption of anticompetitive combinations under section 15 to demonstrate that the combination seeks to eliminate or remedy conditions which preclude or hinder the achievement of the regulatory purposes of the Shipping Act. This is but a restatement of what has already been said most recently in our decision *California Stevedore & Ballast Co.* v. *Stockton Port District*, 7 F.M.C. 75 (1962) where we denounced a monopolistic practice, notwithstanding the lack of actual proof that the anticompetitive evils alluded to actually existed, because "healthy competition for business which is the best insurance against such evils has been destroyed." We went on to say:

> Respondents failed to advance evidence of economic or other advantages flowing from monopolistic arrangements, sufficient to justify them notwithstanding the evils and detriment to the public interest inherent in monopoly. Our national policy makes free competition the rule, and monopoly the exception which must be justified, and here respondents have failed to justify the desired monopoly.

This construction of section 15 is not novel with the Commission. The Civil Aeronautics Board, the agency dealing with transportation problems most closely akin to our own has said: [13]

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[13] Section 412 of the Federal Aviation Act under which anticompetitive agreements between air carriers are filed was modeled after sec. 15. See *McManus* v. *C.A.B.*, 286 F. 2d 414 (2d Cir. 1961).

> Where an agreement has among its significant aspects elements which are plainly repugnant to established antitrust principles, approval should not be granted unless there is a clear showing that the agreement is required by a serious transportation need, or in order to secure important public benefits. (*Local Cartage Agreement Case*, 15 C.A.B. 850, 852 (1952).)

And again in disapproving a traffic routing provision of a mutual aid pact between air carriers in cases of labor strike the Board said in *Six Carrier Mutual Aid Pact*, 29 C.A.B. 168 at 175:

> In weighing the objections to the traffic routing provisions of the agreement, we must recognize that our order of approval would grant immunity from the antitrust laws. We have, therefore, scrutinized the agreement to insure that the conduct thus legalized does not inhibit competition to any significant extent or, if it does that the restraint is necessary to serve the purpose of the regulatory statute. (*Local Cartage Agreement*, 15 C.A.B. 815 (1952); *North Atlantic Tourist Commission Case*, 15 C.A.B. 225 (1952).)
>
> Since the record fails to show any sound public justification for the restrictive provision, we cannot let it stand.

Respondents reject Hearing Counsel's contention of *prima facie* unlawfulness, but they do so only upon the basis of the record in this proceeding. Respondents contend that the record here does not support the conclusion that pools lead to reduced service and higher rates. To the contrary, assert respondents, all the evidence demonstrates that "the pools have led and will lead to the elimination of malpractices, as well as to a reduction in excessive and duplicating loading calls in painfully overtonnaged trades." This is but another way of saying that competition will be restricted. It matters not at this stage of the approval process that such competition takes the form of "malpracices" or "duplicating loading calls in painfully overtonnaged trades." The fact that the competition restricted is wasteful, destructive or even constitutes a breach of conference obligations is precisely that counterbalancing factor which would outweigh the public interest in competition which is free, open and above board as envisioned by the antitrust laws. But, we think it patently clear that agreements within the purview of section 15 are specifically intended by the parties to eliminate competition and in fact do so. And the evidence in the record before us unequivocally demonstrates that this is the case with the pools here under consideration.

Virtually all of the evidence in the record was voluntarily supplied by the respondents in an effort to justify approval of the agreements, and in our opinion they have succeeded in their attempt. For by demonstrating that conditions in the trades involved have deteriorated to the point where malpractices flourish, rate instability exists and competition is wasteful and destructive, they have also demonstrated that approval of the agreements will, among other things, achieve the regulatory objectives of restoring rate stability and eliminating malpractices. Moreover, while "rationalization of sailings" with a consequent diminution in service is one of the admitted goals of the pools it does not appear that the shipper will be harmed through service being reduced to a point of inadequacy. On the basis of the foregoing we concluded that conditions in the Mediterranean trades as demonstrated by respondents are such that approval of the agreements, under consideration here, if modified as set out below, will be consonant with the public interest in that while they run counter to that interest in the preservation and fostering of competition they are in furtherance of the regulatory purposes of the Shipping Act in that the competition to be eliminated by the agreements is destructive and wasteful and in itself tends to work hardship on shippers through discriminatory rebates and the creation of rate instability. Moreover, that the circumstances in the trades are inimical to the best interests of the carriers operating in them is clear from the record. Thus, we think respondents have clearly justified approval of the agreements by their demonstration that they are necessary to produce important public benefits and are based on a serious transportation need.

A word of caution seems appropriate, however. Respondents admit that most, if not all, of the competitive activity which the pools are designed to curtail constitutes a breach of the respective conference obligations. This is particularly true of the WINAC trade where it is also admitted that all efforts by the WINAC Conference at self-policing have proved inadequate. Section 15 requires that the Commission "disapprove any agreement which after notice and hearing on a finding of inadequate policing of the obligations under it." We view this as a requirement which cannot be permanently satisfied by the substitution of further competitive restrictions in the form of pooling revenue for an adequate system of self-policing of conference obligations. We fully expect respondents to continue their efforts to establish an effective system of self-policing. In exercising our responsibility of continuing surveillance over section 15 agreements, we shall keep this in mind.

Hearing Counsel also contends that "the Examiner erred in failing to require that the agreements and amendments thereto be modified as urged by Hearing Counsel."

Hearing Counsel proposed a considerable number of amendments which the Examiner rejected apparently because he could not find "upon their faces" that without them the agreements would be unlawful under section 15. Respondents, of course, urge that the Examiner was correct in rejecting all of the modifications for the reason that he did. Again there seems to be some misunderstanding as to the Commission's responsibilities under section 15. The Examiner seems to imply that unless an agreement on its face is contrary to section 15 the Commission is without power to require modification of the agreement as a condition to its approval. He further states:

> There is sound reason for the rule. First, the law authorizes disapproval or modification only where the agreement is found "to operate"; i.e., that it *really will operate* to the detriment of commerce, not that it *may*, in the future, *possibly* so operate; or where it is found that the agreement is contrary to the public interest, not where some act that *could* possibly occur in the future *might* make it so. Second, the Commission has a ready remedy if, under an approved agreement, the parties engage in activities the Commission did not expect when it approved, and will not sanction.

As we understand the Examiner he concludes that unless we can find as a fact that an agreement "will operate" in a way which is detrimental to the commerce of the United States, etc., we cannot order it modified. Again this confusion seems to stem from the court's decision in the *Swedish American Line* case, *supra*, particularly the statement that section 15 authorizes disapproval (or modification) only if "the Commission finds as a fact that the agreement operates in one of the four ways set out in the section by Congress." The Examiner found that some of the proposed amendments were grounded on fears "foolish on their faces" and others required respondents to do that which the statute already required of them. He concluded that the latter were better suited to the general rule rather than on the basis of agreement-by-agreement modification. He then concluded that it was unnecessary "to set out in *haec verba*" the proposed amendments "or to discuss their merits or demerits."

A word about the *Swedish American Line* case, *supra*, is appropriate here. The court's conclusion that before the Commission could disapprove a portion of the agreement before it, it "must find as a fact that the agreement operates in one of the four ways set out by Congress" in section 15 must be considered in the light of circumstances of that case. Significantly, the agreement under consideration had been approved by a predecessor of the Commission and operations had been conducted under it for a good many years. Thus, the particular language of the court, whatever its validity as an abstract proposition, becomes meaningful when it is applied to an already approved agreement of long standing. Thus, in the *Swedish American Line* case it could be found "as a fact" that the agreement either had operated to the detriment of the commerce of the United States, etc., or it had not. But this cannot mean that in passing on future agreements we must "find as a fact" that the agreement "really will operate" to the detriment of our commerce or really will be contrary to the public interest. Such a finding is without the realm of the possible. The most that can be done in such cases is to draw upon past experience and expertise and make a reasoned judgment, or perhaps prediction is a better word, as to the probable future impact of the agreement. This is far from finding as a fact that an agreement really will operate to the detriment of our commerce or be contrary to the public interest. After a careful analysis of the proposed modifications we find that we disagree with the Examiner's disposition of certain of them, and for the reasons set forth below our approval herein is conditioned upon the filing of appropriate modifications.

The modifications urged fall into two general categories: (1) those which Hearing Counsel urges are necessary to clear up ambiguities in the language of and inconsistencies within the agreements; and (2) those which Hearing Counsel urges are necessary to prevent operations under the pool from being detrimental to our commerce, etc. As to the former, these are termed "drafting" amendments by the respondents. They contend that draftmanship is their responsibility and even though they admit to many instances of ambiguity or inconsistency, they contend that the Commission is powerless to require a modification to remove them. An example of this kind of modification is the one which would replace the term "Neutral Body" which appears in article 13 of the WINAC agreement with the term "Control Committee." Hearing Counsel points out that the WINAC Conference agreement no longer provides for a neutral body but the WINAC pool does provide for a "Control Committee." Respondents concede the error in draftmanship and take the position that "section 15 cannot be directed to this sort of minutia" and further that different agreements even though filed by the same parties in the same trade, etc., need not be "consistent" with each other. We disagree.

On several occasions our predecessors have pointed out that, "All agreements should be complete and the language used should be so clear as to eliminate all necessity for interpretation as to the 'intent' of the parties." In the *Matter of Agreement No. 6510*, 1 U.S.M.C. 775–778, 2 U.S.M.C. 22; see also *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 3 F.M.B. 556, 581. Moreover, "To sanction two agreements under section 15 in conflict with one another would be contrary to the public interest," *Application of Red Star Line for Conference Membership*, 1 U.S.S.B.B. 504. The modifications upon which we condition our approval and a brief discussion of our reasons for requiring them are set out below. Proposed modifications of Hearing Counsel which are not required or otherwise specifically discussed are rejected as being unnecessary to the approvability of the agreements under section 15.

Article 2 of the WINAC Pool and article 9 of the Marseilles Pool provide in part:

* * * it being understood that the Line whose carryings are in excess of its share is bound to regulate its carryings as near as possible to its share, so that the amount to be paid or to be received from the pool shall be as small as possible.

In Hearing Counsel's view this provision is contrary to the public interest and detrimental to commerce because it binds carriers to adhere to the negotiated share thereby deterring the growth and expansion of the better services while perpetuating the poorer and it is completely unnecessary to carry out the proper objectives of the pool. Respondents simply take the position that while there may be no need for the provision there is equally no need for its elimination. We will require the deletion of these provisions. They are inconsistent with respondent's contention that service competition is not completely eliminated by the pools because each line is free to overcarry and pay the penalty therefor in order to be in a better bargaining position and increase its percentage when the pool shares are renegotiated at the end of the pool year. Our approval here is conditioned upon the removal of the objectionable language not upon a restatement of the intent of the parties, for the purported preservation of this modicum of competition was considered in reaching our decision to approve the agreements. Should the parties to these two agrements now state that they intend the lines to regulate carryings so as not to exceed their allotted shares, thus eliminaing this vestige of competition, we would have to reconsider our decision to approve.

Hearing Counsel would amend the title and the first sentence of article 4 of the WINAC pool to reflect the fact that the article not only excludes certain commodities from the coverage of the agreement but certain charges as well. Respondents contend that this is trivia and, again that the Commission lacks authority to "improve drafting." We have already answered the latter, and as to the former it is from just such "trivia" that future disputes over the coverage of agreements and the parties' authority thereunder arise. It is, of course, in the public interest to insofar as possible prevent such future disputes. The modification will be required.[14]

Article 13 of the WINAC pool eroneously refers to a "Neutral Body" rather than a "Controlling Committee." We have already discussed this modification and it will be required.

Article 15 of the WINAC pool and article 17 of the Marseilles pool refer to "the term as per previous paragraph." However, the

[14] Hearing Counsel would also add to each agreement a provision which provides for the filing of all modifications to the agreements for approval under section 15. Since the statute itself already requires this we see no need for an explicit statement of the requirement in the agreements. Respondents are presumed to know the law.

term indicated is not in the previous paragraph but the immediate one. These modifications will be required for the sake of clarity and ease of future handling of the agreements.

Article 15 of the WINAC pool, article 17 of the Marseilles pool and article 19 of the Adriatic pool all require that resolutions effecting changes in the membership of the respective pools shall be filed for approval under section 15 of the Shipping Act. However, in each of these agreements other articles provide that such resolutions shall be filed with the Commission only "for the information and records of the agency." It is not difficult to imagine the dispute which would arise if this inconsistency were allowed to stand. Respondents were clear in their desire to secure our approval of amendments to all the pools which would allow them to make so-called "interstitial" adjustments or changes in their agreements without the need for securing prior approval under section 15. Among the "interstitial" changes respondents would make without the necessity of approval are changes in membership. Yet they were unwilling to agree to Hearing Counsel's modification which was designed to remove an inconsistency which could possibly defeat the very purpose they sought to achieve. Such an unyielding stand for whatever reason taken does not square with respondents' later assertion of a willingness to cooperate in voluntarily modifying their agreements should we informally request them to do so, which of course is the only way respondents think the modifications may be accomplished. Here again respondents apparently misconceive section 15 and the nature of agreements approved thereunder. As we have previously stated a section 15 agreement is not a "sacrosanct private arrangement" with which only the parties thereto have rights. It is rather "a public contract impressed with the public interest and permitted to exist only so long as it serves that interest." *Pacific Coast European Conference*, 7 F.M.C. 27 (1961). The so-called "interstitial" amendments are more fully discussed below and the modifications here under discussion will be required.

Hearing Counsel would modify article 12 of the Adriatic pool, article 10 of the Israel pool and article 12 of the Medchi pool to provide for the filing of the provisional accounting statements drawn up by the secretary as well as the final statements.[15] These modifications will be required to insure the filing of the statements in aid of our responsibility of continuing surveillance of operations under the agreements.

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[15] These modifications are unlike those proposed by Hearing Counsel to WINAC and Marseilles, for in those agreements the requirement that the provisional statements be filed is already provided for in another article therein and to adopt Hearing Counsel's proposals would be to redundantly state the requirement twice.

Hearing Counsel would modify all five agreements so as to exclude from their coverage "all pool cargo on which open rates apply." Hearing Counsel, citing the statement of one witness that pooling of revenue on open rated cargo would be "impossible," says that it was not the parties' intent to include such cargo within the scope of the agreements. Respondents, however, state that the testimony was purely "speculative" since there are at this time no open rates in effect and that they should be allowed to deal with the problem of open rates if and when it arises.

There is nothing in the record which would preclude respondents from pooling open rated cargo if the means for doing so could be found. However, our failure to require the proposed modifications is in no way to be construed by respondents as any form of implied authority to fix rates under the pooling agreement when the conference has declared them open. Respondents themselves agreed to the deletion during the hearing of a provision which would have authorized them to fix rates under the pooling agreements in the event of the dissolution of the respective conferences. The modification will not be required.[16]

In a similar vein, Hearing Counsel would modify the agreements to provide for the automatic termination of the pool concurrently with the termination of the conference within the scope of which the particular pool operates. Hearing Counsel states that this merely makes it clear that the pool terminates when the rate-fixing authority of the conference ends. We will not require these modifications because if the pool members desire to apply for rate fixing authority under their pooling agreements, if and when the conference governing the trade dissolves, they should in our opinion be allowed to do so.

Other proposed amendments of Hearing Counsel fall into the "operational" category. Thus, Hearing Counsel would alter the "minimum tonnage" and "range of ports" provisions of the WINAC and Medchi pools, the minimum contribution provisions of the WINAC, Adriatic, and Israel pools and the "credit for calls" provision of Marseilles. All of these modifications are necessary in Hearing Counsel's view to prevent operations under the agreements from being detrimental to commerce and contrary to the public interest. We are of the opinion that Hearing Counsel has failed to muster enough record evidence to support his proposals. No detriment past or future has been shown. We will not require the modifications.

[16] Of a somewhat similar thrust is Hearing Counsel's proposed deletion of references to the "Inspection Service" in article 8 of the Marseilles pool. Hearing Counsel points out that the pool does not yet have an inspection service. Respondents, however, point out that it is in the process of establishing one. We will allow them to provide for this contingency in the agreement.

Paragraph 2 of article 17 of the Marseilles pool provides:

> Members who want to resign from the Pool before December 31, 1966, shall be allowed to do so, giving three months notice, subject however that such Member undertakes not to take any part whatsoever in the traffic covered by the Pool before December 31, 1966.

Hearing Counsel would delete this provision on the ground that it unnecessarily stifles competition by conditioning withdrawal upon cessation of all participation in the trade. Respondents on the other hand explained the provision as necessary to prevent disruption of the trade and the pool by reaping the benefits of the trade without any of the restrictions imposed by the pool. The purpose of the provision is to prevent resignations for "quick profit" reaped from a "trade" built up by pool members. In respondents' view there are only two reasons for withdrawing from the pool, either the line is withdrawing from the trade completely or it thinks it can make more money outside the pool. It is the latter which respondents seek to prevent. The Marseilles pool is due to expire on December 31, 1966.

The question here is whether the restriction is a reasonable exaction from a line desiring to reap the benefits of the pool. There is no evidence that the provision has harmed shippers or ports. In this instance we think the restriction is reasonable. However, should respondents seek approval of an extension of the pool, we shall have to reconsider the impact of this provision. The modification will not be required at this time.

Hearing Counsel would modify article 2 of the Israeli pool which conditions membership in the pool upon membership in both the inbound and outbound conferences in the trade. Hearing Counsel would condition pool membership only upon membership in the conference governing the particular trade be it inbound or outbound. There are at present no one-way operators in the trade and in our opinion the record does not justify adoption of the modification at this time. Should such an operator enter the trade and desire to pool, we will, of course, examine the condition afresh.

Hearing Counsel would amend article 17 of the Israeli pool and article 19 of the Medchi pool to make it clear that resolutions extending the duration of the agreements must be approved by the Commission before they become effective. When dealing with other provisions of WINAC, Marseilles and Medchi, respondents themselves agree that extensions of the duration of the agreements require approval under section 15 before taking effect. However, they refused to agree to these modifications. It is clear that extensions do require approval, thus the modifications will be required.

During the course of the hearing, respondents proposed to amend each agreement by the addition of an article which would allow the parties by resolution to make so-called "interstitial amendments" to the pooling agreements without securing prior approval under section 15 although copies of the resolutions would be filed with the Commission for its "information and records." Article 16 of WINAC which is typical provides:

The Governing Committee acting under Article 11 hereof is authorized by resolution carried by unanimous vote of all member lines: to admit new members to this Pool Agreement; to change the percentage division of net freight among the members as provided in Article 2; to change the minimum number of sailings and calls provided in Article 3; to add to or subtract from the list of commodities excluded from this Agreement by Article 4; to change the amount of the carrying money or the exceptions provided by Article 5; and to change the amount of the bank guarantee provided by Article 14. It is authorized by three-quarters of the voting power present at a meeting with a quorum to change the number of days or the amount of the fine or penalty specified in Article 8, Article 9 and in the 6th and 7th paragraphs of Article 11. The text of any resolution adopted under this Article 16 shall promptly be filed with the Federal Maritime Commission, or any agency succeeding to its function under the Shipping Act, 1916, for the information and records of such agency.

Certain of the amendments placed in issue by the order of investigation in this proceeding provide for such things as changes in membership, changes in the carrying money, etc. These have not yet been approved, and as a result certain lines have withdrawn from the pools and others have entered them in theoretical violation of section 15.

Behind these proposed amendments is the dispute between Hearing Counsel and respondents over our authority to approve section 15 agreements "retroactively" or as respondents and the Examiner would have it "agreements bearing earlier effective dates." Whatever nomenclature is employed, Hearing Counsel, the respondents, and the Examiner are all talking about the same thing—the authority of the Commission to approve an agreement for a period prior to the effective date of that approval. Hearing Counsel contends that section 15 forbids such an approval [17] while respondents and the Examiner find nothing in section 15 which prohibits it. For the sake of convenience and to avoid all possibility of an incorrect paraphrasing we set forth *in extenso* the Examiner's resolution of this issue:

There remains for consideration the question as to whether the Commission would approve the *Israel* agreement (filed August 2, 1963, effective date August 1, 1963) or the *Marseilles* agreement (filed July 23, 1964, effective July 1, 1964) and a number of amendments without requiring modification so as to provide effective dates not earlier than the date the Commission approves them. Hearing

[17] This is Hearing Counsel's fourth and final exception to the Initial Decision.

Counsel contend (1) that as a matter of law, the Commission *cannot* approve these agreements as they stand, and (2) that as a matter of discretion, the Commission *should* not approve them as they stand. In both contentions Hearing Counsel is incorrect.

The Commission's authority and all limitation thereon must be found in section 15 of the Act. Section 15 does not expressly or by implication forbid the Commission to approve an agreement because it bears a past effective date. Such an agreement *may* be disapproved by the Commission if *but only if* the Commission finds that it violates one of the standards set out in section 15, either because it bears a past effective date or because of something else. Section 15, by saying that the Commission shall disapprove agreements found to violate its standards, but "shall approve all other agreements" instructs the Commission to approve such other agreements regardless of what "effective dates" they bear.

It may be stressed again that section 15 is unambiguous . Even if it could be considered ambiguous, the Commission and its predecessor, the Federal Maritime Board, have for more than ten years considered that it authorized approval of agreements bearing effective dates prior to approval dates, and have approved such agreements. This consistent administrative construction of section 15 is well-known in the trade, and respondents had a right to rely upon it. Such long-continued administrative construction of a statute is given great weight by reviewing courts, and has almost the effect of law.[18] Nevertheless, the Commission—if convinced that it had in this particular been violating the law since the Commission was created—would not hesitate to reverse its predecessor and itself. It is not so convinced.

Section 15 contains no prohibition against "retroactive" approval, and even if such prohibition existed elsewhere, as it does not, that would not bar approval in this case, because approval of agreements bearing effective dates prior to their approval dates *is not retroactive.* It does not purport to authorize, legalize, validate, or exempt from the operation of the antitrust laws *in the past* any agreement or action, for this it *cannot* do in the face of the specific provisions of section 15 that any "agreement not approved * * * shall be unlawful"; that "before approval * * * it shall be unlawful to carry out such an agreement; and that only agreements "lawful under this section" shall be excepted from the provisions of the antitrust laws. As authorized, it does all these things for the future, and *only for the future.* Hearing Counsel's contention that by approving such antedated agreements in the past, the Commission approved unlawful conduct after it transpired, and thereby nullified violations of the Act and the antitrust laws, and would again do these things by approving here is unsupportable.

Hearing Counsel concedes that "the economic consequences of the *Marseilles* pool have already occurred and * * * *all that remains* (to be done) *is the settlement of accounts.* Those consequences may neither be done or undone by Commission approval, disapproval, or modification of the agreement" (emphasis supplied). The same may be said of the *Israel* agreement. It follows that all that would be accomplished by refusing to approve except upon condition that the effective dates be changed to the approval date would be frustration of

[18] Less than 100 days ago it was pointed out in *Aktiebolaget,* quoted above, that: "Where the disapproval follows a history of prior approvals, as here, * * * we think that the finding should be scrutinized by a reviewing court with greater care" (slip opinion, p. 5, footnote 5).

equitable division of pool revenues, a pointless punishment, in favor of which nothing has been or can be said.

No more has been or can be said against approval of the "antedated" amendments (see exhibits 7, 11, 12, 13) than has been said against approval of *Marseilles* and *Israel*, and this is stated on page 65 of Hearing Counsel's brief to be "that section 15 flatly precludes such approval." As this contention (which disclaims any argument that these amendments violate any of the four section 15 standards, and there exists no evidence to support a finding that either the agreements or any of the amendments do in fact violate any of these standards) is incorrect as a matter of law, the amendments as well as the *Israel* and *Marseilles* pooling agreements should and will be approved (*Aktiebolaget*, and pages 3–4, *supra*).

Situations may conceivably arise in which the approval of an agreement bearing an effective date in the past is shown to result in damage to somebody. This has not been shown here because it could not be shown. The one thing Hearing Counsel seeks to prevent—distribution of pool revenue—will damage nobody, and indeed it would be inequitable to prevent it under the circumstances of this case. The pooling agreements cannot be held contrary to the public interest because, *subject to the Commissioner's approval*, they authorize distribution to be effected *after such approval.* Not even the act to be performed by the conference (as distinguished from the Commission's act in approving); i.e., the division of pool revenue based on sailings made in the past, can be considered objectionably retroactive, for the measurement of present payments by past events (as in tax statutes) has many times come before the courts and been approved.

The most there is to be said for Hearing Counsel's position is that it suggests that a rule with respect to the dates of pooling agreements *might* be desirable *as a matter of policy*, and could be considered in a rulemaking proceeding in which all interested parties could thrash out the pros and cons (Cf. *Hasman & Baxt, supra*, page 13).

We disagree with this resolution of the issue.

Section 15 actually renders unapproved agreements unlawful in two situations. First, section 15 requires that agreements when reached must be "immediately" filed with the Commission. Thus, an agreement which is made but not filed for approval is unlawful even though no action is taken by the parties under it. *Unapproved Section 15 Agreements—North Atlantic Spanish Trade*, 7 F.M.C. 337. Secondly, section 15 makes it unlawful to carry out "in whole or in part, directly or indirectly" an unapproved agreement. Thus, where as here an agreement has been filed and is pending approval it is only unlawful for the parties to carry out the agreement, the agreement itself is not unlawful. All the parties and the Examiner agree that the Commission may not approve an agreement in such a way as to render lawful that which the statute explicitly declares unlawful, and therefore the Commission may not approve an agreement so as to validate conduct under the agreement prior to its approval. But while respondents and the Examiner agree to this they disclaim this effect as a result of the approval of the agreements here. The basic contention is that approval of the agreements with their present earlier effective dates is not offensively retroactive because it simply allows the parties to the pool to measure their future conduct (distribution of pool revenues) by past events (the percentages previously agreed upon). But if respondents are correct there is no need whatsoever for approval back to the earlier effective date. For by their own reasoning they have done nothing in the past which requires our approval and the only "carrying out" to be approved, the distribution of revenue, will take place in the future and subsequent to our approval. Respondents never successfully resolve this dilemma; nor in our opinion can they. The settling of accounts or the distribution of revenue under the pool is but the culmination or final act in the total carrying out of a pooling agreement. Prior to this, the parties agree to percentages, minimum sailings and port call requirements, fix bank guarantees and amounts of penalties and carrying money, and agree to various other features of the pool. A pool secretary is appointed, the lines submit their manifests to him and he draws up pool statements and issues debits and credits, and presumably the parties meet and discuss pool matters. It defies credibility to then assume that after establishing this elaborate plan for the curtailment of competition that the individual lines continue their operations in the precise manner they were conducted prior to agreement, particularly when as here operations were conducted under the assumption that our approval will allow them to distribute revenue on the basis of operations begun immediately. The record in this proceeding is filled with evidence that this is not in fact the case. In every trade here involved the witnesses noted "improvement" due either to approval already granted or more importantly to approval assumed to be forthcoming. The improvement cited is the return of rates upward from their previously "depressed levels" and the reduction of port calls and turnaround time. But it is contended that this improvement consisted of the elimination of "malpractices" and thus could not be found detrimental to commerce or contrary to the public interest under section 15, and thus, under the *Swedish American Line* case, *supra*, it is not grounds for disapproval.

Section 15 does not distinguish in anyway between conduct under an agreement which is beneficial to commerce and conduct which is detrimental to commerce—it prohibits all conduct prior to approval of an agreement. The reason for this is eminently sound. For to adopt the other philosophy would place the Commission in the impossible position of disapproving conduct which has already occurred and which may have worked irreparable harm to shippers, other carriers, or ports. Respondents themselves seem to admit that retroactive approval of rate-fixing agreements would not be lawful under the statute; however, the reasonable and consistent result of their argument dictates that they could be approved if it could later be shown that the agreement was beneficial to our commerce. We think it clear that Congress never envisioned such a result. The granting of an exemption from the antitrust laws on condition that the anticompetitive combinations be brought under government control could not contemplate an *ex post facto* control which from the standpoint of effectiveness is no control at all. On the basis of the foregoing we conclude that section 15 clearly prohibits approval of an agrement or any modification or extension thereof which bears an effective date earlier than the date of our approval.

Respondents, however, offer a series of practical difficulties which they contend will flow from a construction of section 15 which precludes retroactive approval of pools. It will, they contend, be well nigh impossible to form an effective pool if its operative effect is to be from some indeterminate date in the distant future because the incentive to malpractice continues until approval. Additionally, respondents point out that certain lines have withdrawn from and others have joined the various pools and that the amendments effecting these changes have not yet received approval—thus, these lines are operating in "technical violation" of the Act. As to the former, our own experience has been that at least part of the delay has been attributable to the failure of parties to section 15 agreements to accompany their filings with any information or data explaining the purpose of the agreement and the circumstances existing in the particular trade which warrant its approval. And in some instances when this information is informally requested, it is refused thus necessitating resort to formal process.

As to the problem of getting quick approval for changes in membership and other interstitial amendments, that has been rendered moot by our action below on the proposed amendments dealing with "interstitial changes."

We consider these proposed amendments lawful under section 15. It has long been recognized that "every" agreement within the literal meaning of section 15 is not of necessity required to be filed for Commission approval and that some actions may be viewed as routine. *Section 15 Inquiry*, 1 U.S.S.B. 121, 125 (1927). It is not necessary here to set out seriatim those matters which have been found routine and those which have not. The relevant test is whether or not the agreement as filed sets out in adequate detail the procedures to be followed under it. *Joint Agreement Between Member Lines of the Far East Conference and Member Lines of the Pacific Westbound Conference*, Docket 872, decided July 28, 1965. The matters covered by the proposed amendments do not result in new anticompetitive procedures or devices. The filing requirement coupled with our responsibility for continued scrutiny of operations under the agreement should afford adequate protection against excesses or abuses. The modifications will be approved.

There remain only a number of modifications urged by Hearing Counsel as necessary to prevent approval of the agreements under consideration retroactively. While Hearing Counsel contends that we are without power to approve these agreements so long as they bear their present earlier effective dates, he recognizes that this construction of section 15 overrules at least a decade of consistent administrative interpretation the other way. It is evident that respondents relied on this interpretation in filing their agreements. The question is whether it would be equitable to hold respondents liable for activity done in reliance upon this prior construction of section 15. We think not. Nor would withholding our approval in this instance serve any regulatory purpose under the Shipping Act. The situation we find ourselves in here is somewhat akin to that of the National Labor Relations Board when it reversed its long standing refusal to assert jurisdiction over the building and construction industry. When the assertion of jurisdiction was made retroactively the court said:

> The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing the law abhors. *NLRB* v. *Guy F. Atkinson Co.*, 195 F. 2d 141 (9th Cir. 1952)

Because of the circumstances present here we will approve the agreements bearing their earlier effective dates, but we wish to stress that future agreements filed with the Commission will not receive such approval. This action renders moot all but two of Hearing Counsel's proposed modifications dealing with retroactivity; i.e., the deletion of the phrase "effective in the manner and on the date agreed by such unanimous consent" from article 15 of the WINAC pool and article 19 of the Adriatic pool which articles deal *inter alia* with extensions of the duration of the pools. We will require these amendments lest there be some confusion in the future over respondents' right under the language in question to extend a pool with a retroactive effective date.

The agreements as they were considered and approved by the Examiner were those appearing in exhibit 93 of the record in this proceeding. During the hearing a succession of amendments were agreed to by the parties and approved by the Examiner. However, due to an oversight these amendments were not included in the agreements as they appeared in exhibit 93. Respondents submitted revised pages to the agreements incorporating the amendments. The revised pages have been inserted in exhibit 93 and are now part of the record. The Examiner's approval of these amendments with which we agree is set forth below:

(1) Paragraph 1 of article 6 of the WINAC agreement to be amended by deleting language which respondents concede "would set up an improvised rate-making conference without some of the terms required by section 15 (of the Act) and without having all of the necessary terms of that agreement spelled out" (Hearing Counsel's Brief, 89–90; Respondents' Answering Brief, 35–36).

(2) Article 10 of the WINAC agreement to be amended so as to require that minutes and pool statements shall be filed "promptly" (Hearing Counsel's Brief, page 92; Respondents' Answering Brief, page 37).

(3) The last paragraph of article 13 of the Medchi agreement to be deleted and the following substituted:

> The secretary shall submit immediately to the Federal Maritime Commission full and complete reports including all material facts relating thereto, of all complaints, disputes and matter presented to, and all actions taken by the parties and/or the arbitrators.
>
> All records of the pool and that of the arbitrators with respect to the provisions on the above requirements shall be available for inspection by the Commission or its representatives. Nothing contained in this agreement shall interfere with the rights of the parties hereto under the Shipping Act, 1916, as amended, or the jurisdiction of the Federal Maritime Commission under said Act.

The last paragraph of article 13 presently provides:

> At the termination of each pool period, a report giving a general description of every complaint or other matter disposed of during such pool period by the arbitrators pursuant to this article shall be promptly furnished the governmental agency charged with the administration of section 15 of the Shipping Act, 1916.

The substitute language is taken from article 13 of the WINAC agreement, and, as Hearing Counsel demonstrates, it is obviously preferable from a regulatory angle. (Hearing Counsel's Brief, pages 100–101; Respondents' Answering Brief, page 40.)

(4) Article 13 of the Adriatic agreement to be amended identically with the amendment to article 13 of the Medchi agreement (see (3) above), and for the same reasons (Hearing Counsel's Brief, pages 104–105; Respondents' Answering Brief, page 41).

(5) Paragraph 3 of article 2 of the Israel agreement to be eliminated (Hearing Counsel's Brief, pages 107–108; Respondents' Answering Brief, page 42).

(6) Article 11 of the Israel agreement to be amended identically with the amendments to article 13 of the WINAC agreement and article 13 of the Adriatic agreement (see (3) and (4) above), and for the same reason (Hearing Counsel's Brief, page 112; Respondents' Answering Brief, page 43).

(7) The last two sentences of paragraph 1, article 8 of the Marseilles agreement to be deleted. This is in line with the agreed amendment to article 6 of the WINAC agreement, indicated in (1) above (Hearing Counsel's Brief, pages 117, 89; Respondents' Answering Brief, pages 45, 35–36).

(8) Articles 11 and 12 of the Marseilles agreement to be amended in line with article 10 of the WINAC agreement (see (2) above) and for the same reason (Hearing Counsel's Brief, pages 120, 92; Respondents' Answering Brief, pages 46, 37).

(9) Article 15 of the Marseilles agreement to be amended in line with article 13 of the Medchi agreement and article 13 of the WINAC agreement (see (3) above) and for the same reasons (Hearing Counsel's Brief, pages 121, 100; Respondents' Answering Brief, pages 46, 40).

For the foregoing reasons, and if they are modified to conform with our decision herein, we will approve the agreements. An appropriate order specifying the required modifications and conditioning our approval thereon will be issued.

COMMISSIONER JOHN S. PATTERSON, concurring and dissenting:

I concur that Agreements Nos. 8680, 9020, 9060, 9233, and 9361, together with amendments or modifications by respondents of Agreements Nos. 8680–3, 8680–4, 8680–5, 9020–2, 9020–3, 9020–4, 9020–5, and 9060–1, referred to in our Orders served December 16, 1964, March 11, 1965, April 2, 1965, and May 28, 1965, in Docket No. 1212, titled "Mediterranean Pools Investigation (Discontinuance of Dockets 1169 and 1178)" should be approved, but dissent from requiring modifications by the Commission as a condition of approval and from the decision that the aforesaid agreements may be approved as lawful from their effective dates instead of from the date of our approval.

A. As the preceding report has noted, we have before us exceptions to an Examiner's initial decision approving, pursuant to section 15 of the Shipping Act, 1916, as amended (Act), pooling agreements filed by respondent common carriers by water in foreign commerce, as defined in the first section of the Act, as follows:

1. Thirteen common carriers in trade between the West Coast of Italy, Sicily, and Adriatic ports and United States North Atlantic ports, westbound service (Agreement No. 8680 and amendments 1 through 6, exhibit No. 11).

2. Eight common carriers in the trade between Mediterranean and U.S. Great Lakes ports, westbound service (Agreement No. 9020 and amendments 1 through 7, exhibit No. 12).

3. Two common carriers in the trade between Adriatic and U.S. North American ports, westbound service (Agreement No. 9060 and amendments 1 through 3, exhibit No. 13).

4. Two common carriers in the trade between Israel and U.S. ports, both westbound and eastbound service (Agreement No. 9233, no amendments, exhibit No. 14).

5. Seven common carriers in the trade between Marseilles, France, and U.S. North Atlantic ports, westbound service (Agreement No. 9361, no amendments, exhibit No. 15). (Each agreement and its amendments are herein referred to as an "agreement".)

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

1. Each of the five agreements listed above should be approved, without requiring modifications not heretofore accepted by the respondents.

2. The Commission's approval should apply from the date of the order of approval and should not relate to obligations or acts before the date of our order.

3. The Commission should expressly rule on all exceptions presented.

C. My conclusions in 1. and 2. above result from the following proposed rulings on the four exceptions made herein:

1. The exception that the Examiner erred in approving the subject pooling agreements on the grounds that there was no evidence weighing against such approval should be sustained.

2. The exception that the Examiner erred in rejecting every proposed finding of fact offered by Hearing Counsel on the grounds that the facts were irrelevant or unsupported should be sustained.

3. The exception that the Examiner erred in failing to require that all the agreements be modified as urged by Hearing Counsel should be overruled.

4. The exceptions that the Examiner erred in approving Agreement No. 9233 and Agreement No. 9361 (items A.4. and A.5.) retroactively; and erred in approving various new amendments to the previously approved Agreement No. 8680, Agreement No. 9020, and Agreement No. 9060 retroactively (items A.1., A.2., and A.3.) should be sustained.

As regards my conclusions and proposed rulings, the reasons in support of them and of my decision are advanced as follows:

1. A majority of the Commissioners reasons that the "pools here under consideration" eliminate competition and are *prima facie* contrary to the public interest in the sense that the burden of proving otherwise is on respondents, but these agreements are also "in furtherance of the regulatory purposes of the Shipping Act in that the competition to be eliminated by the agreements is destructive and wasteful

and in itself tends to work hardship on shippers through discriminatory rebates and the creation of rate instability." These statements are preceded by a description of prior agency decisions on these subjects and of conditions thought to exist.

My reasoning begins from another starting point, namely, that the record proved, after inspection of evidence, that the agreements either have caused or will provide an incentive to make fewer calls at fewer ports (i.e., provide less service) at higher freight rates than prevailed before the agreements existed.[19] As a matter of fact, these consequences were part of the acknowledged purposes of the agreements. It was not proven, however, that service diminished and rates increased in two of the five trading areas covered by the agreements, but the evidence of such conditions in three of the five areas, coupled with expert opinion regarding possibilities elsewhere and the agreement provisions authorizing service changes, permits the conclusion that the conditions may be realized. Such evidence contradicts what the Examiner stated, and there is plenty of evidence warranting consideration against approval. The evidence supporting disapproval was responsive to the initiating order; therefore, the evidence was relevant and required for a rational determination of the issues created by the order. For these reasons the first exception should be sustained.

2. Higher rates and less service, without more, are detrimental to commerce and contrary to the public interest because increased costs and diminished profitability to shippers tend to occur and inhibit the maximum international exchange of goods in foreign commerce. If we stop at this point, disapproval would be required. The record proved a great deal more, however.

It was proven:

a. The diminished service has not gone below the needs of shippers and American consignees. The diminished service provides more efficient service for shippers, and is less wasteful for carriers.

b. The agreements ended a threat of competition so severe as to imperil the ability of competing carriers to provide any service from the Italian and Marseilles areas to the United States.

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[19] WINAC—service, exhibits 6, 11; rates, exhibit 45. Medchi—service, exhibits 12, 25, 39; rates, no exhibits. Adriatic—service, exhibits 13, 40, 87 (tonnage in relation to calls shows good service); rates, no exhibits. See: West Coast of Italy North America Conference tariff in FMC files. Israel—service, exhibit 88, schedule B, Tr., 784. The only two carriers are each subsidized or financed by governments and service is governed by political, geographical, and economic factors not related to competition. No change of service before and after pool. Rates, record refers to threatened ability to start a rate war. Exhibit 88, schedule A, telex 3/2/63 Lewison to DeSmedt. Tr., 756, 781–782, 815. No record agreement led to increases. See: exhibit 46. Marseilles—service, no exhibits, rates, exhibit 47 (wine and aluminum only).

c. The tariff rates were not the effective rates, because of actual or threatened malpractices, until the agreements came into effect. Thereafter the incentives for malpractices were removed and shippers could trust the integrity of posted rates. The rates were made and the practices existed in foreign countries not otherwise controllable from the United States.

d. The agreements remove the incentives for service competition in excess of needs of ports, causing the carriers wasteful costs in commerce with the United States.

e. There is an excess of carrier capacity over shipper demand westbound compared to eastbound. A lesser demand for capacity causes an incentive to lower rates below economic levels to capture westbound cargoes. The agreements provide an incentive to maintain fixed rate levels.

(All the above factors were not proven as to all five areas, nor any factor as to any area to the same degree, but were shown to exist to some extent or potentially.)

The above factors offset and outweigh the detriment to commerce and contrariety with public interest established by other evidence, not by presumption. Increased costs and diminished profitability are restraints on private commerce which have to be considered in a context of many other economic factors. The result of the equation using detrimental or contrary factors offset by substantiated economic benefits is an evaluation requiring approval of the agreements under section 15.

All the above factors on both sides were developed from the record evidence and were summarized in proposed findings offered by Hearing Counsel. They were substantiated by similar proposed findings by respondents. The findings were supported by evidence necessary to the validity of arguments as to offsetting economic factors and relevant to the Order of Investigation. The Examiner was mistaken in rejecting the proposed findings; therefore, the second exception should be sustained.

3. Hearing Counsel asked that 19 subjects be covered by modifications before approval of the agreements. Some modifications of agreements were agreed to by respondents and adopted by the Examiner. I have no disagreement as to approval of agreed-to modifications. The third exception asserts the Examiner failed to rule properly on the remaining modifications. I would overrule the third exception and approve the respondents' agreements without requested modifications dealing with the following subjects covered by the designated agreements:

(1) Objection is made to an obligation to limit carryings. The carrier "whose carryings are in excess of its share, is bound to regulate its carryings as near as possible to its share * * *" (No. 8680, art. 2, and No. 9361, art. 9). This obligation deters growth and expansion of better services and perpetuates poor service. To the extent of a need to restrict overcarriage, the penalties provide the remedy. A carrier should, however, be allowed to pay the penalties if there is an advantage to do so and to expand service. The unmodified agreement would normally be held a detriment to commerce. In oral argument it was stated the agreement had been translated from Italian into English and in briefs the legal term "bound" was said to have limited application or to be qualified to "as near as possible" and consistently with a carrier's own purpose and plans. I assume we are dealing with honorable people and when they amplify these terms to state the true meaning to be, in effect, that each carrier will not be precluded from improving service, taking more shipments, and paying penalties, this interpretation and action will be put into effect. No breach of contract in addition to penalties will be asserted. The implications of the inconsistent penalty and other provisions will be honored, and there is no need to modify the language to eliminate the obligation. If we should ever find out such an interpretation is not being observed, a far more serious situation will be presented, but there is no need to assume such actions.

(2) Objection is made to a minimum tonnage provision at ports. Departures from other than specified ports are credited to designated ports provided "a minimum of 300 tons of weight cargo has been loaded" at the designated ports in the case of one agreement. Other specified places and minimums apply to the other agreement (No. 8680, art. 3, and No. 9020, art. 9). The purpose of such customarily used restrictions is to prevent competition from forcing uneconomic calls on carriers. In most cases the minor ports are located near major ports and carrier service is provided to the area in any event. The limit also promotes regular service. Modification is not required.

(3) A provision would be added to allow carriers to obtain credit for outport departures from ports other than Naples (No. 8680, art. 3, and No. 9020, art. 9). Testimony showed no port other than Naples loaded cargo in the specified trade range. We ought not to rewrite agreements to develop unproven trade possibilities in foreign countries, nor should we compel, once the principle of a pooling agreement is accepted, the uneconomic diversification of service. A pooling agreement purports to provide minimum adequate and regular service to achieve greater efficiency. There is no doubt there may be less

service under a pooling agreement and the public at eliminated ports loses direct service, but this is thought to be necessary to achieve the dominant consideration of greater economy and efficiency of ship operation without sacrificing service to an entire area.

(4) Objection is made to a reference to exclusion of certain charges in a section title and in an introductory sentence. The text of the obligating provision covers the subject adequately and the proposed references merely serve to improve the drafting (No. 8680, art. 4).

(5) A provision would be added to cover the subject of open-rated commodities; i.e., commodities on which freight rates are fixed by each carrier rather than by the conference. Open-rated cargo does not have to be expressly excluded from the agreements' obligations (Nos. 8680, 9020, 9060, 9233, and 9361). The difficulties of administering agreement provisions in such an eventuality are speculative and do not now exist. If carriers use the absence of any obligation on the subject, together with existing provisions, to distribute losses during a rate war or to operate collectively as a "fighting ship" forbidden by section 14 of the Act, other facts and issues not now foreseeable will arise which may be dealt with later.

(6) Objection is made to an obligation to make a minimum pool contribution measured per 1,000 kilos carried regardless of rate basis. The purpose of the minimum contribution is to ensure that no member carries cargo without pool accounting because the rate is less than the handling charge and to avoid any effort by low-cost lines to force a rate down to the average handling costs or below. The required minimum contribution provides a cushion over 1961 handling costs to discourage noncompensatory rates. The purpose is legitimate and no modification should be required. (No. 8680, art. 5, No. 9060, art. 5, No. 9233, art. 5.)

(7) A provision would be added to terminate the agreements when conference rate-fixing authority ends. There is no doubt there can be no rate-fixing authority without express approval under section 15, but it does not follow that failure expressly to provide for termination of the agreements when they become unworkable for lack of conference rates violates the tests of section 15 (Agreements Nos. 8680, 9020, 9060, 9233, and 9361).

(8) A provision would be added to compel submission to the Commission of quarterly statements in addition to annual statements. If the Commission requires information it may be requested pursuant to section 21 of the Act or required by rules applicable to all equally, but not compulsorily by creating obligations intruded into private con-

tracts. The absence of the quarterly information obligation from the agreements violates no section 15 standard (No. 8680, art. 9, and No. 9361, art. 11).

(9) Objection is made to the reference to "Neutral Body" instead of "Controlling Committee," because there is no "Neutral Body" provision in the related conference agreement. Respondents have conceded the error, but challenged the authority to require modification under section 15. Agreements should tell the truth, and variances creating false information ought to be eliminated, regardless of authority to compel accuracy, although public interest would be served by greater accuracy. Nevertheless, respondents' statement that the parties can be trusted to modify ("clear up") the agreement without Commission action is acceptable (No. 8680, art. 13, and No. 9361).

(10) Objection is made to an erroneous reference to a term "as per previous paragraph" instead of the immediate one. Here, too, inaccuracy may be contrary to the public interest, but the commitment to correct is acceptable (No. 8680, art. 15, No. 9361, art. 17).

(11) Modification would be required to reflect the consensus that advance, properly-provided-for changes in membership obligations require no further approval under section 15. Respondents agree, but challenge authority to compel the modification. Respondents' assumption of responsibility, which is taken to be an honorable assumption of a duty to modify, is acceptable (No. 8680, art. 15, No. 9060, art. 19, and No. 9361, art. 17). In my opinion, withdrawal and addition of signatories to an agreement is not routine or interstitial, and a duty to file exists by virtue of section 15, regardless of any contract obligation to the contrary.

(12) Objection is made to certain terms covering effective periods of agreement. In addition to the issue of whether agreements may be performed before Commission approval, the issue is made that agreements to be performed in the future may include phrases which make the agreement "effective in the manner and on the date agreed by such unanimous consent" (No. 8680, art. 15, No. 9060, art. 15); or "valid for the period, August 1, 1963," through a specified date (No. 9233, art. 17); or "effective as from" a specified prior time to a specified date (No. 9361, art. 17); all meaning that agreements may be performed before approval dates. The conclusions herein as to the invalidity of any retroactive effect of Commission approval eliminate a need to require modification because the provisions may not legally be performed by the carriers, no matter what terms are used. The proposed language may not confer authority to disregard the law. A retroactive amendment of the annual extension provision by any vote would

equally violate the prohibitions of section 15. I would agree that amendment of the duration provision of agreements requires express Commission approval, but no modification of these agreements is required.

(13) A provision would be added compelling modifications to be filed with the Commission. All agreements described in section 15, including modifications, are required by law to be filed. The compulsion of section 15 of the Act is all that is needed. Compelling an additional contract obligation to do what the law requires is an unauthorized intrusion into carriers' private contracting rights (no opinion is expressed here to what may be "interstitial" or "routine" as distinguished from modifications requiring filing) (Nos. 8680, 9020, 9060, 9233, and 9361).

(14) Objection is made to provisions for setting aside money to pay for an inspection service if one is established by the conference (No. 9361, art. 8). Questions are raised as to the wisdom or policy of the provisions, but detriments to commerce and the offense to the other tests of section 15 are not shown. The facts as to the inspection service have not materialized to a point where any showing can be made. The details have yet to be embodied in contract obligations. When the administering provisions are negotiated and subscribed to, there will be time enough to review the future filed agreement.

(15) Objection is made to a provision authorizing a committee to give credit (i.e., waive penalties) for a discharging call at ultimate port of destination on request "in special circumstances" not described (No. 9361, art. 10). It is not shown how the lack of standards for waiving penalties or possible conflict with another article (art. 18) are discriminatory, detrimental to commerce, or otherwise in violation of section 15 standards.

(16) Objection is made to a provision obligating a resigning carrier not to take any "part" in the "traffic covered by the pool before December 31, 1966," but if the pool is disbanded before then prior resigning lines shall not be precluded from serving (No. 9361, art. 17). The object is to prohibit carriers from receiving the benefits of a stabilized trade without contributing to the condition and without accepting any of the restraints. The provision unquestionably stifles competition, but is one of the sacrifices for other benefits, and therefore is not an undue restraint of otherwise contrary to section 15 tests. There is not enough testimony to establish whether the penalty on the resigner is excessive.

(17) Carriers should be compelled to file with the Commission provisional statements and divisions of accounts in addition to annual

statements (No. 9020, art. 12, No. 9060, art. 12, No. 9233, art. 10). For the reasons given above under item (8) the agreement need not be modified.

(18) Objection is made to the provision which denies carriers freedom to enter into a pooling arrangement eastbound if they do not desire to have one westbound or vice versa (No. 9233, art. 2) and any member of the eastbound or westbound conferences in this trade should have the right to become obligated with respect to operations in one direction only. At the moment there are only two parties to this agreement, each to some extent government-supported by the nations at either end of the trading route: the United States and Israel. There has been no other operator for the last 5 years, and no new operations appear contemplated as far as this record shows. The present agreement has the unanimous support this type agreement requires for success. If any new carrier later chooses to become a party on the terms of a one-way participation and shows on facts developed at that time that refusal to allow one-way participation would violate the Act, the issue of one-way versus two-way participation rights may be adjudicated. The agreement before us on the present facts should not be disapproved for lack of obligations dependent on abstract or presently nonexisting factors.

(19) Modification of the termination or extension provisions by requiring that new agreements on such subjects be filed with the Commission is requested (No. 9020, art. 19, No. 9233, art. 17). For the reasons given in items (7) and (13) above, the modification is not necessary to approval.

For the reasons given in items (1) through (19), modifications should not be required, and the third exception that the Examiner erred in failing to require all the modifications, as urged by Hearing Counsel, should be overruled.

4. One of the issues ordered in this proceeding is whether any provisions of the agreements may be approved "for any period of time prior to such approval or can be made applicable to any period of time prior to such approval" (pp. 8–9, item 15, Order served December 16, 1964). The Examiner decided, after stating his reasons in favor of approval of "antedated agreements", "* * * the amendments (of Agreements Nos. 8680, 9020, 9060) as well as the Israel (Agreement No. 9233) and Marseilles (Agreement No. 9361) pooling agreements should and will be approved." The Examiner made retroactive approval contingent on factual findings supporting or not supporting detriments to commerce, discrimination, etc., under section 15. My colleagues, by a majority, say they "disagree with this resolution of

the issue" and decide (a) "where * * * an agreement * * * is pending approval * * * the agreement itself is not unlawful," but may not be approved "so as to validate conduct * * * prior to its approval" and (b) to "approve the agreements bearing their earlier effective dates." The results between (a) and (b) above conflict. If the agreement is approved the conduct is validated. The distinction made between the "agreement itself" and "conduct" under the agreement is conceptual and has no practical basis. When parties create obligations to do certain things and to change power relations between them by agreement as of a certain date, they do not engage in frivolous activity, but undertake serious responsibilities having practical effects. It is impossible to approve agreements bearing earlier effective dates without also approving the parties' conduct for the period between the effective date and the date of approval. We are dealing with realities, not abstractions. For the purpose of my reasoning there is no difference between the words of agreement and the obligation to alter conduct immediately after the effective date. Agreements may be entered into and be dated any time the parties choose, but the effective date of obligations to alter conduct may not be until the moment of the Commission's order of approval and language does not change the situation.

Having concluded that my colleagues' reasoning is on shifting sands, the next question is to decide why the date of the Commission's order establishes the beginning of lawfulness for all of the agreements before us. The resolution of this question applies to both the amendments and the agreements to be approved for the first time. It is decided both law and policy require the above conclusion, and section 15 may not be qualified by equitable considerations.

The other Commissioners hold that an interpretation of section 15 which "overrules at least a decade of consistent administrative interpretation the other way" would not be "equitable," and they say that "because of the circumstances present here we will approve the agreements bearing their earlier effective dates * * *." The result accomplished must be that it is lawful to carry out the agreements between the effective date stated in the agreements and the date of the approving order. The effective date of the agreements may be before the date of the order. I see at least two objections to reasoning in support of this result. First, the statute forbids the result by its terms, and, second, there is nothing equitable about the result.

The applicable language of section 15 is as follows:

"Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; * * *" (there follows nonapplicable provisions relative to tariffs covered by section 18(b)).

The statute makes unlawful agreements "not approved" and makes agreements lawful only "when and as long as approved." The "when and as long as" language marks out the beginning and duration of lawfulness of all agreements, whether filed or not, that might otherwise be unlawful because in violation of the Act of July 2, 1890, "An Act to protect trade and commerce against unlawful restraints and monopolies," as amended, and sections 73 through 77 of the Act approved August 27, 1894, as amended (15 U.S.C. 1–11), and excepts the agreements from the provisions of these laws generally regarded as "the granting of an exemption from the antitrust laws" as the preceding report states. Unapproved agreements are not only unlawful, but before approval it is unlawful to "carry out"; i.e., perform any agreement "in whole or in part, directly or indirectly." Therefore, before the date of the Commission's order of approval and right up to the moment of approval both the agreements and the performance thereof are unlawful, no matter what date or dates may be in the agreements. The sole and only significant date is the date on our order which concludes adjudication under section 15. This interpretation is consistent with the policy of the law which is to protect the public from the consequences of potentially anticompetitive activity until after the Commission has reviewed the provisions of filed agreements and on the basis of its analysis has concluded that the activity will not result in discrimination or detriments to commerce, and will meet the tests of section 15 in spite of any anticompetitive effect. There is no need to assume anyone is going to be prosecuted for an unlawful agreement between the date of filing and the date of approval; and speculations about a gap in the law ought to remain theoretical as long as no one performs the agreement during this period. As far as this reasoning is concerned, it does not matter whether respondents take out any "effective date" language or not, because the requirements of law are going to be the same with or without the offending language. The reasoning of my colleagues' report seems to agree, when they state section 15 "prohibits all conduct prior to approval of an agreement," and Congress never intended "retroactive approval," but the full meaning is extracted only by examining the consequences to which the rhetoric leads in action or by considering its full effect. When they state further after saying it would not be equitable: "Because of the circumstances here we will approve the agreements bearing their earlier effective dates," I can only conclude that both the agreement and performance thereof, before the date of our order, is approved and the consequences and effect of their decision are identical with the Examiner's "resolution of the issue" that the agreement and the actions before the date of our order are lawful and section 15 has not been violated. The inconsistency is not removed by stressing "that future agreements filed with the Commission will not receive such approval." On the contrary, the error becomes conviction by the prejudgment of future adjudications or the announcement of a rule of future conduct without going through rulemaking procedures prescribed by section 4 of the Administrative Procedure Act, whichever is intended by the decision.

I dissent from reasoning which reaches one result by a correct interpretation of the law and the conclusion that puts the opposite result into effect and that provides one decision for these respondents and another for everyone else.

My reasoning on the "equitable" issue is that that (1) a balancing of interests between respondents and the public will show there is no equity in favor of respondents, and (2) equity is served by making respondents assume the consequences of their own interpretation of the law.

The quality of being equitable is discovered after balancing opposing advantages and disadvantages. My colleagues refer only to the disadvantages of holding respondents "liable for activity done in reliance on a prior construction of section 15," as though only disadvantage to respondents is involved. We should balance against holding respondents liable the consequences to the public of not holding respondents liable. By not holding respondents liable, the public is deprived of protection from otherwise prohibited activities during the period before approval. From the effective date of agreements obligations are created and actions follow. For example, (1) the commodities moving in foreign commerce which are subject of the agreement and thus affected by the tendency to higher rates are designated; (2) accounting and other pertinent information of the otherwise competing pool members is made available to the pool administrator for the purpose of making decisions as to how much each has earned is to be divided among them in accordance with the percentages agreed upon; (3) the minimum number of cargo loading and discharging calls at assigned ports is specified affecting competitive service at such ports; (4) percentages of undercarriage and overcarriage are agreed upon for the purpose of measuring payments among lines and tonnage limitations are observed; (5) faithful performance guarantee money, administrative expense money, is fixed and deposited subject to disbursement by the pool administrator; (6) amounts allowed carriers as "carrying money" before credits to a common fund; i.e., percentages of gross manifested freight charges to cover certain fixed expenses; and (7) the carriers in the trade who are to be included and excluded from the agreement are selected by negotiation. In short pool carriers operate in many respects as one carrier with the concentrated competive power such an aggregation would have. The allocation by percentages of money required by the acts performed (even though not finally distributed), the service required by the agreement, and the acts controlling the allocations were all accomplished without review of their effect on the section 15 standards of discrimination, unfairness, the public interest, or detriments to foreign commerce before the date of an order adjudicating the disapprovability of the agreement. The public's interest in the determination of whether statutory tests are met before anything happens outweighs any possible equity in protecting the applicants for approval of pooling agreements.

Nevetherless, it seems to be reasoned, we will not allow retroactive approval in the future for others, thus protecting the public in the future. This reasoning is reflected in the statement that we will "require" amendments deleting the phrase "effective in the manner and on the date agreed by such unanimous consent" (art. 15 of Agreement 8680 and art. 19 of Agreement 9060) "lest there be some confusion in the future over respondents' right under the language in question to extend a pool with a retroactive effective date." The reasoning reflects the fallacious distinction between rhetoric and action.

The decision applies only to this case because it "overrules at least a decade of consistent administrative interpretation the other way." It is not believed the consistent administrative interpretation exists in the form of an express agency interpretation of the law one way or the other. The administrative interpretation exists only by inference from the fact of many approved agreements having earlier dates than the approval date, but without any discussion of the real issue of approving acts and obligations before a certain date, nor of the significance of the date and without any proven statement of agency position on retroactive approval. Applicants for approval may have acted as though they interpreted approval to relate back to the dates they chose and the agency may have failed to demur, but this action and failure is not an administrative interpretation. This conduct is only risktaking by past applicants and silence and inaction by the agency. Silence and inaction ought not to be translated into consistent administrative adoption of misinterpretation. See: *H. Kempner* v. *FMC*, 313 F. 2d 586 (1963), *certioraria denied* October 14, 1963. Approval under section 15 of an exclusive patronage contract dual rate system by silence was held unauthorized. "The discriminatory rates here involved were not approved by the regulatory agency merely because it was silent concerning them. . . ."

Assuming I am mistaken about the meaning of past actions, equity is not served by departing from the rule that an interpretation of the law by an adjudicating agency merely states what the law has always been an speaks for the future only with regard to the same facts. Agencies are always free to change decisions even if to do so may injure those taking action in reliance on earlier interpretations. Equity is not abused by adjudicated decisions changing earlier interpretations, assuming my colleagues are changing their views. A great many court decisions invalidate past actions. I have never known misplaced reliance on legal interpretation to be a problem, either for these respondents or anyone else. The man who trusts the decision of an inferior court or trusts his own interpretation of precedent takes a chance of miscalculation as one of life's risks. His misplaced trust is no different from any other misconception of duties. There is no reason for treating these respondents more favorably in the name of equitable results. We are always subject to suffering for lack of ability to prophesy accurately. The respondents, no less than anyone else, are entitled to no insurance against being losers. (See Commissioner Patterson's dissent in *The Dual Rate Cases*, 8 FMC 16, and Merrill, Circuit Judge, decision in *Pacific Coast European Conference, et al.* v. *Federal Maritime Commission and United States of America*, 350 F. 2d 197 (9th Cir. 1965).) My colleagues' willingness to add an equitable exception to section 15 to ease what I interpret as their rationalizing problem is not acceptable. If precedent is needed to sustain these observations, see *Central Land Company* v. *Laidley*, 159 U.S. 103 (1894) (erroneous decision of a state court construing a statute less favorably to validity of a deed than earlier decisions does not involve a taking of property without due process); *Helvering* v. *Hallock*, 309 U.S. 106 (1940) (administrative decisions may change to cause loss of former advantage).

Equitable considerations aside, it is believed the need for consistency implied in a need to apply 10 years' administrative "interpretation" by silent consent to this case is far outweighed by a policy of maintaining correct legal principles, by not adopting misinterpretation.

For reasons of either law, equity, or policy, the fourth exception regarding retroactive approval of agreements should be sustained.

D. Summary.

For the reasons advanced above, my ultimate conclusion requires my concurrence in the other Commissioners' decision in regard to approval of Agreements Nos. 8680, 9020, 9060, 9233, and 9361, and their amendments in Nos. 8680–3, 8680–4, 8680–5, 9020–2, 9020–3, 9020–4, 9020–5, and 9060–1, and my dissent in regard to (1) requiring as a condition of approval modifications not acceptable to the respondents; (2) failing to decide the date of any initial approval must be the date of the Commission's order herein; and (3) failing to rule expressly on Hearing Counsel's exceptions.

The initiating order did not notify the respondents of any charge they were carrying out agreements before approval; consequently, no findings are made on this subject.

The initiating order referred to 15 topics for determination of issues. To the extent these topics have not been expressly dealt with herein, they are no longer relevant or have been covered by the reasoning or the conclusions required to be decided under the Act. There is a fully adequate response to these issues in the Reply Brief of Hearing Counsel (pp. 4–11).

COMMISSIONER HEARN concurring and dissenting:

In my opinion on this record the five separate agreements which are the subject of this proceeding, as amended to date and if further modified in accordance with the majority's opinion, are not contrary to the Shipping Act, 1916, and are approvable, except that I disagree with the majority and hold that the Israel and Marseilles pools, or any other agreements subject to section 15 of the Shipping Act, may not be approved *nunc pro tunc*. My judgment in this regard is based on the clear meaning of that section:

> Any agreement * * * 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 * * *

The contention that the agreements will not be carried out until *after* Commission approval, because the accounts of pool members will be settled only then, is a patently defective argument. It is an argument, nevertheless, which has mesmerizing qualities. The central point of this argument is that since accounts will not be settled until *after* approval (and in the event that approval is denied, money or credits will not be transferred among the parties), then no agreement within the purview of section 15 has been carried out. But the settlement of accounts is only the final step in the total scheme, and that step is the one with which the Commission is least concerned. The anticompetitive activities adopted by the parties are the principal concern of the Commission. And in passing upon agreements tendered for approval, ours is the obligation to determine whether such restrictions render the proposed conduct of the parties lawful or unlawful under the Shipping Act *before* they are carried out.

It is beyond doubt that the carrying out of an unfiled agreement is a violation of section 15. And it is likewise well settled that the failure promptly to file an agreement or present it for approval constitutes a violation of that section. *Unapproved Sect. 15 Agreements—S. African Trade 7 F.M.C. 159 (1962). Unapproved Sect. 15 Agt.—Coal to Japan/Korea, 7 F.M.C. 295 (1962).*

The authority of the Commission to approve anticompetitive conduct *in futuro* only, is pointed to in *Oranje Line et al.* v. *Anchor Line, Ltd. et al.*, 6 F.M.C. 199 (1961) where our predecessor stated:

> The purpose of Sec. 15 was to place in Board custody information and proofs which the Board could review and analyze and make up its mind about whether the requirements of the second paragraph of Sec. 15, public interest, etc. were being followed.

Clearly, if "the requirements of the second paragraph of section 15 * * * (unjustly discriminatory, detrimental to the commerce of the United States, contrary to the public interest or in violation of the Act) being followed" were to be determined after the agreement was completely executed (save inter carrier bookkeeping), the Commission would be without any meaningful power to protect the public interest. It is impossible to do this except *in futuro*, and that to attempt it retroactively subjects the Commission to one more added pressure to approve an agreement. Our obligations to measure prospective section 15 agreements against the standards enunciated in that section are indeed grave. *Nunc pro tunc* cases, by the very nature of things, are virtually impossible to overturn. In such cases the only alternatives are legitimization of otherwise unlawful conduct, or a declaration of unlawfulness with consequent jeopardy for penalties. Unfortunately, neither alternative provides for the protection of the public interest, which is the principal concern of the Commission.

APPENDIX

The pools, the respondents and their short form designations are:

"WINAC"—Italy/U.S. North Atlantic Freight Pool, Agreement No. 8680.
- "AEIL"—American Export Isbrandtsen Lines, Inc.
- "APL"—American President Lines, Ltd.
- "Concordia"—Concordia Line A.S.
- "Costa"—Giacomo Costa fu Andrea.
- "Fabre"—Compagnie Fabre—Societe Generale de Transports Maritime.
- "Fassio"—Villain & Fassio E Compagnia Internazional di Genova.
- "Hansa"—Deutsche Dempschifffahrts Gesellschaft "Hansa."
- "Italia"—"Italia" Societa per Azione di Navigazione.
- "Jugolinija"—Jugoslavenska Linijska Plovidba.
- "Maersk"—A. P. Moller—Maersk Line.
- "Zim"—Zim Israel Navigation Co., Ltd.

"*Medchi*"—Medichi Freight Pool, Agreement No. 9020 AEIL.
- "Concordia/Niagara"—Concordia Line Great Lakes Service and Niagara Line (Oranje Lijn N. V.) Fabre.
- "Jadranska"—Jadranska Slobodna Plovidba.
- "Montship/Capo"—Gestione Esercizio Novic—G.E.N.—Montship Lines Limited.
- "Canada Orient"—United Arab Maritime Co.
- Zim.

"*Adriatic*"—Adriatic /North Atlantic Range Freight Pool Agreement No. 9060.
- AEIL.
- Jugolinija.

"*Israel*"—Israel-U.S.A., U.S.A.-Israel Freight Agreement No. 9233.
- AEIL.
- Zim.

"*Marseilles*"—Marseilles-North Atlantic U.S.A. Freight Pool Agreement No. 9361.
- AEIL.
- APL.
- Favre.
- Fassio.
- "Fresco"—Stockholms Rederiaktiebolag Svea and Redereck-tienolag Frederika.
- Hansa.
- Zim.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1212

MEDITERRANEAN POOLS INVESTIGATION

ORDER

This proceeding having been instituted 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 conclusions thereon, which Report is hereby referred to and made a part hereof;

It is ordered, That Agreements 8680, 9361, 9060, 9233, and 9020, as they appear in exhibit 93, be modified as herein set forth:

1. Agreement 8680

(*a*) *Article 2:* Delete the following language from the last paragraph:

> * * * it being understood that the Line whose carryings are in excess of its share, is *bound* to regulate its carryings as near as possible to its share, so that the amount to be paid or to be received from the pool shall be as small as possible. (Emphasis supplied.)

(*b*) *Article 4:* Amend the title of the article to read:

> Commodities and Charges Excluded From This Agreement.

and amend the first sentence of article 4 to read:

> The following commodities and charges are excluded from this agreement:

(*c*) *Article 9:* Modify the final sentence of paragraph 3 to read:

> Copies of quarterly provisional and final yearly statements shall be promptly filed with the Federal Maritime Commission.

(*d*) *Article 13:* Delete in the first sentence of the first paragraph the term "Neutral Body" and the reference to "article 12" and substitute in lieu thereof, and respectively, the term "Controlling Committee" and the reference "article 17."

(*e*) *Article 15:* Modify the last clause of the last sentence of paragraph 2 to read as follows:

* * * if one or more other Members have meanwhile given due notice of withdrawal on or before March 31, 1966, on March 31 of any subsequent year.

(*f*) *Article 15:* Delete the phrase "or change in Membership" on line 4 of paragraph 5 and insert the word "or" between the words "termination" and "extension."

(*g*) *Article 15:* Delete the phrase "effective in the manner and on the date agreed by such unanimous consent" from paragraph 5 at lines 2 and 3.

2. Agreement 9361

(*a*) *Article 9:* Delete the provision immediately following the enumeration of pool percentages which states:

* * * it being understood that the Line whose carryings are in excess of its share is bound to regulate its carrying as near as possible to its share, so that the amount to be paid or to be received from the Pool shall be as small as possible.

(*b*) *Article 17:* Modify the final sentence of paragraph 4 to read as follows:

Irrespective of this term of notice, any Member may present valid notice of withdrawal within ten days prior to the date of expiration of the pool, if one or more other Members have meanwhile given due notice of withdrawal on or before September 30th, 1966, or September 30th of any subsequent year.

(*c*) *Article 17:* Delete the phrase "or change in membership" on the third line of paragraph 7, and insert the word "or" between the words "termination" and "extension."

3. Agreement 9060

(*a*) *Article 12:* Restate the final paragraph as follows:

Copies of annual pool statements of settlements as between the parties under this Agreement; Division of Accounts; and Provisional statements as provided for by Article 10 shall be filed promptly with the Governmental agency charged with the administration of section 15 of the Shipping Act, 1916.

(*b*) *Article 19:* Delete the phrases "or change in Membership" and "effective in the manner and on the date agreed by such unanimous consent" from the last paragraph at lines 3, 4 and 5.

4. Agreement 9233

(*a*) *Article 10:* Amend the final paragraph to include, between the words "all" and "Pool" on the first line, the following:

Provisional statements and.

(*b*) *Article 17:* Modify the present final paragraph by inserting the words "as prescribed in the preceding paragraph" between the words "agreement" and "shall" on line 2, and add the following sentence to the end of the paragraph:

This Freight Pool Agreement may, however, be terminated at an earlier date or extended beyond the periods foreseen above by unanimous consent and notice of such termination or extension shall be furnished promptly to the aforementioned agency for approval.

5. *Agreement 9020*

(*a*) *Article 12:* On the first line of the final paragraph insert between the words "all" and "annual" the following:

provisional statements and

(*b*) *Article 19:* Delete the phrase "unless otherwise resolved by unanimous decision of all Members" from the first sentence of the first paragraph and modify the final paragraph to read as follows:

This Freight Pool Agreement may, however, be terminated at an earlier date or extended beyond the periods foreseen above by unanimous consent and notice of such termination or extension shall be furnished promptly to the Federal Maritime Commission for approval.

It is further ordered, That Agreements 8680, 9361, 9060, 9233, and 9020, as modified herein, are hereby approved, provided, however, that if respondents fail to submit the required modifications within 60 days from the date of service of this order the approval granted herein shall be null and void.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1136

INVESTIGATION OF INCREASED SUGAR RATE IN THE ATLANTIC/GULF—PUERTO RICO TRADE

Decided January 25, 1966

Increased rate on refined bagged sugar from ports in Puerto Rico to ports in the United States mainly on the Gulf of Mexico found not to be unjust or unreasonable. Proceeding discontinued.

William N. Ruqua, *Edward M. Shea*, and *John Mason* for Association of Sugar Producers of Puerto Rico, Central Aguirre Sugar Co., Central Roig Refining Co., Puerto Rican American Sugar Refinery, Inc., and Western Sugar Refining Co., interveners.

Mark P. Schlefer and *T. S. L. Perlman* for Lykes Bros. Steamship Co., Inc., respondent.

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

REPORT

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

This is an investigation to determine the lawfulness under the Shipping Act, 1916 (the act), and the Intercoastal Shipping Act, 1933 (the 1933 act), of the increased rate of 85 cents on sugar refined or turbinated, in bags (refined sugar), from ports in Puerto Rico to ports in the U.S. mainly on the Gulf of Mexico, of respondent Lykes Bros. Steamship Co., Inc. (Lykes).

The Association of Sugar Producers of Puerto Rico and four of the member refiners intervened in opposition to the increased rate.

Hearings were held before Examiner Charles E. Morgan who issued an initial decision to which exceptions and replies have been filed.

The prior rate of Lykes was 75 cents. Respondent Lykes' 85-cent rate was protested by the Commonwealth of Puerto Rico, but was not suspended, and it became effective on August 10, 1963.[1] Two of the four refiner interveners do not ship to Gulf ports.

Generally, 1962 cost figures were accepted in the record as pertinent to the issues because they had been available for detailed study.

In 1962, and 1964, no bagged refined sugar was carried by Lykes from Puerto Rico to U.S. Gulf ports. In 1963, Lykes carried a total of 2,445 long tons of this sugar on three voyages, all at the 75-cent rate.

Respondent's rate previously was increased from 59 cents to 75 cents effective January 4, 1963. The rate of Waterman Steamship Corp. of Puerto Rico on refined sugar from Puerto Rico to U.S. Gulf ports is 75 cents. It became effective on April 14, 1964, and also was an increase from a rate of 59 cents. American Union Transport and Alcoa Steamship Co., Inc., two carriers providing service from Puerto Rico to U.S. North Atlantic ports, both provide rates on refined sugar of 75 cents in lots of less than 500 tons, and 65 cents in lots of 500 tons or more.

Lykes calls at Puerto Rico as part of its Line A service. Its vessels in this service also call at ports in the West Indies, the Canal Zone, the Dominican Republic, Haiti, Colombia, and Venezuela. Two C–2 vessels have been used in the recent Line A service, and the duration of a round voyage is roughly 4 weeks.

In 1962, Lykes made 26 sailings in this combined domestic-foreign service, carrying 61,739 payable tons of foreign cargo. Also, in 1962, in addition to the above 26 sailings, Lykes made 2 sailings which served only foreign ports, carrying 8,576 payable tons. The total in the foreign segment of the service was 70,315 payable tons for 28 sailings or an average of 2,511.25 revenue tons per sailing.

The domestic (Puerto Rican) cargo on the 26 sailings in the combined domestic-foreign service in 1962 totaled 156,280 payable tons, or an average of 6,010.73 tons per sailing.

These 26 sailings made 169 direct port calls at ports outside of the continental United States, of which 91 calls or almost 54 percent were in the foreign trade, and 78 calls or 46 percent were at ports in Puerto Rico.

A computation by interveners of straight line mileages to foreign ports and to Puerto Rican ports times the number of calls at the ports shows 54.2 percent of the mileage so computed to be to the foreign ports, and 45.8 percent to the Puerto Rican ports.

Lykes prepared a statement of its vessel operating results for 1962 in the Puerto Rico trade in accordance with the Commission's General

[1] The Commonwealth did not participate in the hearing and did not file a brief.

Order No. 11, promulgated June 2, 1964. Total vessel operating revenue of $3,506,631.47 was exceeded by total vessel operating expense of $3,585,876.22, leaving a direct loss on vessel operations of $79,235.75. After allowances for depreciation, inactive vessel expense, and losses from other shipping operations and related companies, the total loss for 1962 was $542,441.75 in the Puerto Rico trade.

The details of the operating results for 1962 shown by Lykes are.

Total vessel operating revenue	$3, 506, 631. 47
Total vessel expense	1, 282, 291. 41
Agency fees and commissions	123, 178. 80
Wharfage and dockage	119, 907. 68
Other port expense	123, 069. 02
Stevedoring and other cargo expense	1, 895, 200. 95
Other voyage expense	42, 219. 36
Total vessel operating expense	3, 585, 867. 22
Direct loss from vessel operation	(79, 235. 75)
Overhead	322, 100. 00
Depreciation	79, 664. 00
Net loss from vessel operations	(480, 999. 75)
Inactive vessel expense	485. 00
Loss from other shipping operations	9, 240. 00
Loss of related companies	51, 717. 00
Total new loss	(542, 441. 75)

The cost of moving a long ton (2,240 pounds) of sugar in the Puerto Rico trade by Lykes in 1962 was computed by the respondent to be $26.69 includes the following items:

Vessel expense	$9. 28
Agency fees	. 89
Wharfage and dockage	. 87
Other port expense	. 89
Stevedoring and other cargo expense:	
Loading	5. 23
Discharging	6. 31
Other voyage expense	. 31
Overhead	2. 33
Depreciation	. 58
Total	26. 69

No cost elements are included above for inactive vessel expense, or losses on other shipping operations or related companies.

Lykes' long ton vessel expense, other voyage expense, overhead, and depreciation computations are based on the ton-mile method of allocating expenses to the Puerto Rico trade. Lykes' total of 156,280 revenue tons in the Puerto Rico trade in 1962 amounted to 138,205 long tons. Dividing this tonnage into the total vessel expense of $1,282,291.41 produced the figure above of $9.28 vessel expense per long ton. The other expenses per long ton above were computed similarly except that stevedoring and other cargo costs were based upon actual costs on two voyages on which sugar was carried in 1963, being voyage No. 65 Gibbs Lykes, and voyage No. 77 William Lykes. These actual costs were $5.23 per long ton for loading and $6.31 per long ton for discharging sugar.

In contrast to the above total cost for sugar of $26.69 per long ton, the revenue at the 85-cent rate amounts to only $19.04 a long ton, or a loss of $7.65 a long ton.

While interveners did not offer any specific figures or results in accordance with their criticism of the figures of Lykes, the latter made such a calculation in the rough per long ton:

Vessel expense	$7.32
Agency fees	.89
Wharfage and dockage	.87
Other port expense	.89
Stevedoring and other cargo expense:	
Loading	5.23
Discharging	6.31
Other voyage expense	.24
Overhead	1.82
Depreciation	.45
Total	24.02

Vessel expense as recomputed by Lykes using methods designed to meet interveners' criticism totals $1,011,274.26 or about 78 percent of the $1,282,291.41 of vessel expense as computed under respondent's revenue ton-mile prorate. Lykes took the difference of $271,017.15, and divided it by 138,205 long tons to obtain a reduction of $1.96 a long ton from $9.28 to obtain the recomputed vessel expense per long ton of $7.32 shown above. The other voyage expense of $.31 per long ton, overhead of $2.33 per long ton, and depreciation of $.58 per long ton were each reduced to 78 percent to obtain the respective figures above of $0.24, $1.82, and $0.45. The agency fees, wharfage and dockage, other port expense, and loading and discharging figures were not changed. As seen above, the revised total cost per long ton of $24.02 still exceeds the revenue of $19.04.

The Initial Decision

The Examiner found in his initial decision that Lykes' 85-cent rate was not unlawful. In so finding he placed some reliance upon a ton-mile method of allocating expenses although he also maintained that the finding that the contested rate was not unlawful would have been sustained under any allocation method of record in the proceeding.

Discussion and Conclusions

We believe that interveners' exceptions are without merit and that the 85-cent rate of Lykes is lawful.

Basically, interveners except to the Examiner's use of the ton-mile formula in allocating certain costs of Lykes (total vessel expense; other voyage expense; overhead; and depreciation) to its domestic service. They contend that these costs are directly assignable, and that the ton-mile method of allocation is further deficient in failing to segregate vessel expense at sea and vessel expense in port.

As we have often said in proceedings to determine the reasonableness of rates, "cost finding is not an exact science." See, e.g., Docket 1066, *Alcoa Steamship Co.—General Increases in Rates in the Atlantic Gulf Puerto Rico Trade*, mimeo p. 15; *Increased Rates on Sugar*, 7 F.M.C. 404, 411 (1962).

We believe that the use of the ton-mile formula for the allocation of the above-mentioned costs to Lykes' domestic service is proper in this proceeding. The relative merits and faults of the ton-mile formula were discussed at length in Docket 1066, *supra*, in which that formula was applied in the allocation of vessel expenses, overhead and depreciation. The observations made in that case are applicable here.

All voyages of Lykes are inseparably in both services and the costs mentioned above are not directly assignable. As Lykes operates, vessels would not be proceeding to or stopping at Puerto Rico unless they were also carrying cargo in the foreign trade, nor would they move to or call at foreign ports unless they were carrying Puerto Rican cargo. Furthermore, vessel depreciation and overhead occur at all times, not only during those periods in which vessels are used in one particular service.

The ton-mile formula does in fact consider steaming expense and port expense. Steaming expense is closely correlated to distance. However, for a very sound reason, the ton-mile formula limits the steaming miles used to those representing the shortest navigable distance between the port of lift and the port of discharge. Through this device excess steaming expenses due to circuitous routes, storms at sea, ballast legs, etc., and all vessel expenses incurred while in port, are allocated on the basis of the most efficient transportation (i.e., shortest route possible) for each specific ton of cargo.

Although interveners challenged the use of the ton-mile formula in this proceeding, they did not propose an alternative method of allocation. It moreover appears that studies to determine expense at sea and vessel expense in port would be economically prohibitive in this case.

Lykes, in fact, attempted to answer the objections of interveners by recomputing the nondirectly assignable expenses along lines suggested by interveners. The difference between Lykes' directly assigned costs ($14.19 per ton) and the revenue allowed at the 85-cent rate ($19.04 per ton) is $4.85. It is not possible that the allocated costs for total voyage expense, other voyage expense, overhead and depreciation could be less than $4.85 under any reasonable allocation method. Interveners are not bound by Lykes' recomputation purporting to show that the 85-cent rate is noncompensatory. However, even if "corrections" of the ton-mile formula suggested by interveners are used, a rough calculation shows that the 85-cent rate would be noncompensatory. This would be true even if the costs assigned by Lykes to the domestic trade were reduced by as much as 61.2 percent.

Interveners also maintain that the initial decision (1) was unfavorably influenced against them because of the small amount of the commodity at issue which moves by respondent's service, (2) holds erroneously and irreleventl that interveners are not damaged by the challenger rate, and (3) fails to make proper expense and revenue allocations for costs relating to vessel repair time, time in preparation for vessel redelivery to the Maritime Administration, and passenger revenue.

The ton-mile formula appears adequate for this proceeding for the reasons stated above, and no other formulas would have produced substantially different results as far as the compensatoriness of Lykes' rate was concerned. It would be highly unfair to require Lykes, which carries very little of the commodity involved, to be put to the expense of developing the detailed information for the use of alternative formulas resulting in the same conclusion. A finding as to whether or not interveners will not be damaged by the challenged rate in unnecessary in the light of the fact that the 85-cent rate is noncompensatory, and there is no evidence showing it is unreasonably high or otherwise unlawful.

Costs relating to vessel repair time, time in preparation for vessel redelivery to the Maritime Administration, and passenger revenue are insignificant. Moreover, the repair and redelivery expenses are offset by similar expenses assigned to other services of respondent when vessels were not operating in the A Line trades, and passenger revenue is offset by increased stevedoring expenses not considered in respondent's computations.

It is concluded that the increased rate of respondent Lykes here under investigation is not unjust or unreasonable. An order discontinuing the proceeding will be entered.

No. 1136

INVESTIGATION OF INCREASED SUGAR RATE IN THE ATLANTIC/GULF—PUERTO RICO TRADE

ORDER

Full investigation of the matters and things involved in these proceedings having been had, and the Commission on this date 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, in which it found that the increased rate of respondent Lykes Bros. Steamship Co., Inc., here under investigation is not unjust or unreasonable;

It is ordered, That this proceeding is discontinued.

By the Commission.

[SEAL]

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65–42

AGREEMENT 8765

ORDER TO SHOW CAUSE

Decided February 7, 1966

Where circumstances warranting approval of agreement under section 15 cease to exist, the agreement will be cancelled. Agreement 8765 disapproved.

Donald J. Brunner and *Richard L. Abbott* as Hearing Counsel

REPORT

BY THE COMMISSION:

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

This is a show cause proceeding [1] to determine whether we should continue our approval of Agreement 8765 or whether we should cancel it. As originally approved in *Agreement 8765—Gulf/Mediterranean Trade*, 7 F.M.C. 495 (1963), the agreement was between five U.S.-flag carriers (respondents) all members of the Gulf/Mediterranean Ports Conference [2] and Kulukundis Maritime Industries, Inc., Levant Line Joint Service, and T. J. Stevenson & Co., Inc.—the U.S.-flag carriers operating in the Gulf/Mediterranean trade as independents. Under the agreement the independents were obligated to adhere to the uniform rates, charges, rules and regulations established in the conference tariff on nine designated commodities.[3] The three independent lines

[1] The proceeding was instituted pursuant to Rule 5g of the 1953 revision of the Commission's Rules of Practice and Procedure. General Order 16 (46 FR 13604) effective December 1, 1965, superseded the 1953 revision.

[2] The Conference lines were, and remain, Central Gulf S.S. Corp., Isthmian Lines, Inc., Lykes Bros. S.S. Co., Inc., States Marine Lines, Inc./Global Bulk Transport Inc. (as one party), and Waterman S.S. Co.

[3] These commodities were Cornmeal, in Bags; Cornmeal, in Barrels, Boxes or Cases; Wheat, in Bags; Flour, Wheat, in Bags; Flour, Wheat, in Barrels, Boxes or Cases; Milk, Powdered Skimmed, "For Charitable Purposes Only—Not for Resale"; Shortening; Rice, Clean, in Bags; Rice, Clean, in Bales or Cartons.

have advised the Commission of their withdrawal from the agreement.[4] There are presently no independent carriers parties to the agreement.

Subsequent to the withdrawal of the last of the independents, T. J. Stevenson, Mr. L. M. Paine, Jr., Secretary of the Conference, was requested to advise the Commission of the reasons for continuing the agreement. Mr. Paine's reply stated simply that:

> The members of Agreement 8765, in view of the amount of time consumed and money spent in effecting this agreement, as well as the fact that it is quite possible that the conditions responsible for this agreement could change, definitely desire and ask that this agreement be allowed to continue in full force. If the agreement is allowed to remain in force and should the conditions which warranted approval of the agreement return, it would enable the members to readily have the protection the agreement presently affords without having to spend additional time and expense in having another such agreement approved.

Under the terms of the order to show cause, respondents were directed to show cause why their agreement remained subject to section 15 and why the Commission should not order it cancelled. Because there appeared to be no disputed issue of fact involved, the proceeding was limited to the filing of affidavits of fact and memoranda of law and oral argument before the Commission. Hearing Counsel filed a memorandum of law and appeared for oral argument. Respondents neither filed an affidavit and memorandum nor appeared at oral argument. Mr. Paine, however, did by letter dated December 15, 1965, advise the Commission's Secretary, Mr. Thomas Lisi, that respondents found nothing in sections 15 or 22 of the Shipping Act "outlining the requirement of showing the cause requested" and "reminded" the Commission that Agreement 8765 "is a duly approved agreement, continues to meet the requirements of law, is not discriminatory and is not detrimental to the commerce of the United States." Mr. Paine then requested that the Commission inform respondents:

> . . . under what section of the Shipping Act, 1916, as amended, the members are required to incur the additional expense that would be resultant, as a result of its request, for the purpose of justifying the continuance of this section 15 agreement and also on what provision of the law the Commission feels it can arbitrarily cancel this agreement.

By letter dated December 22, 1965, the Commission informed Mr. Paine that his letter of December 15, 1965, did not meet the requirements of the order to show cause nor did it conform to the Commission's rules of Practice and Procedure and therefore it was not accepted as a pleading in response to the show cause order. Mr. Paine

[4] Advice of the resignation of Kulukundis was first received by the Commission on November 24, 1964, and repeated on May 14, 1965. Advice of the resignation of Levant Line and T. J. Stevenson was received on November 8, 1963, and July 16, 1965, respectively.

was further advised that the proceeding would be consummated in accordance with the terms of the order to show cause.

DISCUSSION AND CONCLUSIONS

Hearing Counsel urge disapproval of Agreement 8765 on two grounds: (1) that respondents have failed to make the showing required in the Order to Show Cause instituting this proceeding, and (2) section 15 requires the cancellation of any agreement no longer operative.

While on this record summary disapproval of the agreement for failure to comply with our Order to Show Cause would not result in a denial of due process and thus would be within our authority under the Shipping Act, our first duty not only to these respondents but to the entire regulated industry is to, wherever possible, afford guidelines for future conduct.[5] Therefore, we shall set forth our reasons for cancelling Agreement 8765 in the hope that we may forestall future disputes in similar cases.

It is possible to view Agreement 8765 in two ways: (1) as an agreement between two groups of carriers, the conference lines and the independents, and (2) as an agreement between the conference lines only to offer *in futuro* to enter into an agreement with unspecified carriers entering the trade. When viewed as the former it has ceased to exist as an agreement, and it may no longer enjoy approval under section 15 since that section only extends to agreements. A somewhat different problem is posed, however, if it is viewed as an agreement between respondents. As such it would be approvable under section 15, since it is an agreement, if it meets the standards of section 15. We think it clear that it cannot.

Both initial and continued approval of any agreement under section 15 are dependent upon a determination that the agreement approved is not unjustly discriminatory as between carriers, shippers, exporters, importers, or ports or between exporters from the United States and their foreign competitors or contrary to the public interest or otherwise in violation of the Act and that it does not operate to the detriment of the commerce of the United States. Thus, one prerequisite for approval of an agreement is the actual existence or immediate probability of transportation circumstances in the trade covered by

[5] That the show cause procedure is valid is now beyond dispute. Section 22 empowers the Commission within the limits of due process to conduct whatever type of proceeding is best suited to the discharge of its responsibilities under the Shipping Act. Rule 5(g) now Rule 5(f) of the Commission's Rules of Practice and Procedure clearly outline the requirements of the show cause procedure. For the most recent Court decision upholding the show cause procedure see *American Export & Isbrandtsen L. v. Federal Maritime Com'n*, 334 F. 2d 185 (9th Cir. 1964).

the agreement which warrant approval. *Mediterranean Pools Investigation*, Docket 1212 served January 19, 1966.

When we approved Agreement 8765, we did so because we found that "a serious [rate cutting] situation existed in the trade" and concluded "that the conference lines [respondents here] were justified in attempting, within the ambit of section 15 of the Act, to find a satisfactory solution with the carriers concerned" [the independents]. Our approval was granted because we concluded that the agreement "was a reasonable solution under the circumstances." *Agreement 8765—Gulf/Mediterranean Trade*, 7 F.M.C. 495 at pages 498–499. But with the withdrawal of the independents, these circumstances have ceased to exist. There can be no rate-cutting since respondents as members of the conference are bound to adhere to conference rates and there are no U.S.-flag independents presently in the trade. When the circumstances warranting approval cease to exist so should the agreement grounded upon them. Respondents, however, urge that the circumstances may recur and that they should not be forced to seek approval of a new agreement in that event. But who is to judge when they do? Respondents would have themselves be the judge for continued approval if the agreement would permit respondents to invite each independent to become a signatory as it entered the trade without the necessity of securing our approval. We think it clear that the statute will not permit this. Continued approval of Agreement 8765 would constitute nothing but a delegation of authority in derogation of our responsibility under the Shipping Act to protect the public interest by fostering competition insofar as compatible with the regulatory purposes of that Act. *Isbrandtsen Co. Inc.* v. *United States*, 211 F. 2d 51 (D.C. Cir. 1954) *cert denied sub nom Japan-Atlantic & Gulf Conf.* v. *U.S.*, 347 U.S. 990 (1954). The agreement will be cancelled.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65–42

AGREEMENT 8765

ORDER TO SHOW CAUSE

ORDER

This proceeding having been instituted 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 conclusions thereon, which Report is hereby referred to and made a part hereof;

It is ordered, That Agreement 8765 is hereby cancelled.

BY THE COMMISSION.

[SEAL] (Signed) THOMAS LISI
Secretary.

259-715 O-67-23

FEDERAL MARITIME COMMISSION

No. 1205

SEA-LAND SERVICES, INC.

v.

SOUTH ATLANTIC & CARIBBEAN LINE, INC.

Decided February 7, 1966

The use of split bills of lading, dock receipts, and terminal stops at Jacksonville, Fla., where respondent has a terminal but never calls, and the further practice of absorbing freight charges between Jacksonville and Miami, Fla., where respondent's vessel loads or discharges all cargo carried in its Puerto Rican service, implementing a substituted service rule in its tariff, is unjustified, as it diverts from a port providing adequate direct-call service, traffic which is naturally tributary to it and which would normally move through it, unduly preferring the port of Miami and unduly prejudicing the port of Jacksonville, in violation of section 16 First of the Shipping Act, 1916, as amended.

C. H. Wheeler (*H. H. Shull, Jr.*, substituted after hearing), for Sea-Land Service, Inc., complainant.

John Mason, for South Atlantic & Caribbean Line, Inc., respondent.

Edward T. Cornell and *John C. Bradley*, for TMT Trailer Ferry, Inc., intervener.

F. C. Hillyer, for Jacksonville Port Authority.

Robert J. Blackwell, *Donald J. Brunner* and *Thomas Christensen*, as Hearing Counsel.

REPORT

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

This proceeding was instituted by the complaint of Sea-Land Service, Inc. (complainant), a common carrier by water in the domestic offshore trade, alleging that South Atlantic & Caribbean Line, Inc. (respondent), another common carrier by water in the domestic offshore trade, is engaged in port equalization, rebating, and absorption of inland freight charges in violation of sections 14, 16, and 17 of the Shipping Act, 1916 (the Act), and contrary to section 8 of the Merchant Marine Act, 1920 (the 1920 Act).

Specifically, it is alleged that respondent has provided in its tariff for substituted service whereby respondent ships cargo by rail or truck from Jacksonville, Fla., where it has a terminal, but never calls vessels, to Miami, Fla., where all cargo is loaded or discharged in its Puerto Rican service. This, complainant says, is not true substituted service, but rather an unlawful diversion of traffic naturally tributary to the port of Jacksonville. As a result, traffic from complainant's own service has been diverted to respondent, and complainant seeks an order directing respondent to cease and desist from such practice. Reparation is not sought.

Interveners were TMT Trailer Ferry, Inc. (C. Gordon Anderson, trustee) (TMT), a common carrier by water in the domestic offshore trade, providing a regular service by towed seagoing barge between Jacksonville and Puerto Rico; Jacksonville Port Authority, a State agency whose principal objective is promotion of world commerce through the port of Jacksonville, and which also operates certain facilities in the port; and Hearing Counsel.

Hearings were held in Washington and Jacksonville before Examiner Walter T. Southworth, who found in his Initial Decision that respondent's substituted service practices were in violation of section 16 First of the Act. Respondent and Hearing Counsel except.

Oral Argument was heard and the proceeding is now before us for decision.

FACTS

Respondent commenced operations in the South Atlantic-Puerto Rico trade in early 1962, with two vessels on a triangular service between Miami, Savannah, and San Juan. The Savannah service was unprofitable and was abandoned late in 1962, when one of the vessels began to call at Jacksonville. Thereafter, direct weekly service was maintained between Miami and San Juan, and between Jacksonville and San Juan by alternating the two vessels. Losses continued and in July 1963, one of the vessels was taken out of service and returned to its owners. For a short time thereafter respondent attempted to maintain weekly service from both Jacksonville and Miami with the remaining vessel, but was unable to do so, and direct calls at the port of Jacksonville were discontinued in August 1963.

While no direct call has been made at Jacksonville since that time, respondent continued to show Jacksonville, Miami, and San Juan as its terminal ports, with ocean freight rates between Jacksonville and San Juan identical with those between Miami and San Juan, although wharfage and handling charges remained slightly lower at Jacksonville than at Miami. Respondent's single remaining vessel now operates between Miami and San Juan only; service from Jacksonville is maintained by rail and truck between Jacksonville and Miami, purportedly in accordance with the substituted service provision in respondent's tariff. This provision, designated Rule No. 8–A, is as follows:

CARGO DISCHARGED OR LOADED AT A PORT OTHER THAN THE PORT NAMED IN THE BILL OF LADING

When the Carrier elects, for reasons within his control, to load or discharge cargo at a port or terminal other than that named in the bill of lading, such cargo shall be transported at the risk and expense of the Carrier to or from the bill of lading port or terminal; cargo to be received or delivered only at the regular terminals used by the Carrier at the bill of lading port or terminal, except in accordance with applicable Tariff provisions.

Respondent's service has been a "roll-on-roll-off" container service, using truck-trailers as containers. Refrigerated cargo is carried in reefer trailers equipped with self-contained refrigerating units. Respondent's tariff provides that it will spot trailers within the city limits at port of loading or discharge for loading or unloading by the shipper, and return the loaded or empty trailer to the carrier's terminal. Less than trailer load (LTL) cargo may be delivered for loading to carrier's terminal or, at carrier's option, to carrier's pallets, sheds, containers, or vans, at the terminal, subject to additional charges.

Eagle, Inc., is the agent for respondent in Jacksonville and Miami. As such, Eagle performs various functions, including solicitation of freight; preparation of ocean bills of ladings, manifests, and export declarations; collections and disbursements; and, in certain instances, receiving and delivering freight. Eagle's activities in respondent's behalf will be treated as respondent's, whether done in respondent's or Eagle's name.

Respondent's Jacksonville terminal is located on waterside property of Southern Railway and it occupies the premises pursuant to an oral agreement with the railroad, subject to short notice to vacate. Respondent's facility consists of an office in a house trailer adjacent to a siding which could be used only for cargo arriving via Southern. A portable ramp which had been used to load the vessels remained on the premises. Respondent also maintains dry cargo trailers on the premises for LTL cargo and overflow shipments.

Eagle has only two regular employees at Jacksonville. One employee is available at any hour of the day or night to receive cargo and to issue dock receipts on cargo passing through Jacksonville which is not actually unloaded at the terminal. Temporary help is used when required to load or unload trailers and boxcars.

Except for nonperishable LTL shipments, freight will not be booked at Jacksonville without prior confirmation from Miami. Respondent's procedures with respect to the handling of Jacksonville cargo differ according to the nature and source of the cargo. Dry cargo shipped by rail to respondent at Jacksonville is unloaded from the railroad cars into trailers at the Southern siding at respondent's terminal or at the public team track; the loaded trailer is then hauled, by a common carrier's tractor, to Florida East Coast Railway's piggy-back ramp for trailer-on-flat-car (TOFC) movement to Miami. Thus, when the delivering rail carrier is other than Southern Railway, the shipment does not physically pass through respondent's Jacksonville terminal; however, arrangements for local handling and forwarding to Miami are made by respondent's Jacksonville manager. If the shipment originates at Jacksonville, respondent's trailer is spotted at the shipper's plant for loading, pursuant to its tariff, and is hauled directly to the Jacksonville TOFC ramp of the Florida East Coast Railway. LTL cargo, however, may be assembled and loaded into a trailer at respondent's Jacksonville terminal and then taken to the TOFC ramp. At Miami, trailers are hauled by common carrier from the TOFC ramp to respondent's Miami terminal for loading aboard ship.

Refrigerated or frozen cargo, which has consisted only of eggs and frozen poultry, is received in reefer trailers which are loaded at the shipper's place of business and hauled over the road to Miami, via Jacksonville, by common or contract motor carrier. At Miami, the refrigerated cargo is transferred to a reefer trailer of respondent which is put aboard the vessel. These reefer trailers are never forwarded from Jacksonville by rail because the gasoline fueled refrigerating engines may require attention which is not feasible in TOFC movement. Moreover, shipping by unregulated motor carrier permits some latitude in negotiation of rates. Shipments of frozen poultry from Canton, Ga., and Boaz, Ala., are hauled straight through by an over-the-road motor carrier from point of origin to Miami, with a token stop at Jacksonville terminal, under an arrangement by which the shipper pays 50¢ per 100 lbs. for the haul to Jacksonville, and respondent pays 25¢ per 100 lbs. for the Jacksonville-Miami part of the run. For a time, respondent made this payment to the shipper, who in turn paid the motor carrier, but respondent now pays the carrier against his invoice.

It does not appear that any shipper ever retained any part of such payments made by respondent. The motor carrier's rate of 75¢ from Canton, Ga., and Boaz, Ala., to Miami, including the allocation of 25¢ thereof to the Jacksonville-Miami portion of the haul, was negotiated by the shipper, with respondent's approval as to its part of the rate. The agreed allocation did not give the shipper a lower rate than it otherwise would have obtained for shipment to Jacksonville. The same shipper has paid the same motor carrier a flat rate of $204 per trailer when shipping frozen poultry to Jacksonville for carriage to Puerto Rico by complainant. At 50¢ per 100 lbs., the amount paid by the shipper for the movement to Jacksonville for transshipment by respondent out of Miami has been less than $204 per trailer in some instances but more than $204 in others, depending of course on the weight of the particular shipment. It is 360 miles by road from Jacksonville to Miami, and about the same distance from Canton, Ga., to Jacksonville.

In the poultry operation the shipper prepares two bills of lading, one showing itself as a shipper from Canton, Ga., (or Boaz, Ala.), delivery to be made to respondent at its Jacksonville terminal; the other shows respondent as shipper from Jacksonville to itself at Miami. Both show the Puerto Rican customer as consignee. The truck driver stops at respondent's Jacksonville terminal, where he is given a "dock receipt" and instructed to deliver to respondent's Miami terminal; the driver then proceeds to Miami, where he delivers the trailer load to respondent and receives another dock receipt. On at least one occasion the driver failed to check in at the Jacksonville terminal. An ocean bill of lading covering the shipment, showing the port of loading as Jacksonville and the port of discharge as San Juan, is made up at Miami after the shipment arrives there. This is the procedure with respect to all southbound substituted service shipments.

Another variation of respondent's substituted service is that of milk trucks shipped by drive-away from the plant of Murphy Body Works, at Wilson, N.C. The drivers are hired by Murphy and paid on a mileage basis for the Wilson to Jacksonville haul. Respondent pays the drivers for the Jacksonville to Miami haul at the same rate of compensation they received from Murphy. They pay their own return expenses. At first, respondent reimbursed Murphy for the driver's mileage from Jacksonville to Miami; now, however, respondent reimburses the driver by check to his order at Murphy's plant. When the drivers leave Wilson, they are instructed to go to respondent's Jacksonville terminal and proceed from there to Miami. At Jacksonville, the driver is given a "dock receipt" and a form letter stating that the "cargo" is to be delivered to respondent's Miami terminal. On one or two occasions drivers went through to Miami, in error, without stopping at Jacksonville. Murphy considers that it tenders the vehicles to respondent at Jacksonville, and that any damage thereafter would be for respondent's account.

Occasionally, through clerical error, shippers have been charged wharfage and handling charges at the Miami rate on Jacksonville cargo. Miami rates are a little higher than the Jacksonville rates.

Since respondent stopped calling its vessel at Jacksonville, it has not generally solicited Jacksonville traffic. Respondent's substituted service traffic is attractive to it as long as it utilizes vessel space that would not otherwise be used, but it would result in an operating loss if too much cargo were handled that way, rather than by sending a vessel to Jacksonville.

Respondent's operations are now profitable. At the time of hearing, respondent was planning to close a contract for the construction of a vessel for which designs had been developed to the tank testing stage. Respondent then expected the vessel to enter service within ten months, after which resumption of direct call service at Jacksonville was intended. The completion of the vessel was expected to be in April 1966. Subsequently, at oral argument, the date was extended to July of that year.

Complainant's Service

Complainant inaugurated common carrier service in the Puerto Rican trade in 1958. In 1959, complainant began carrying Jacksonville to Puerto Rico cargo. Until 1962, this was an indirect service with transshipment to another vessel of complainant at the port of New York. In April 1963, complainant started a weekly service direct from Jacksonville to San Juan, but reverted to the weekly service with transshipment at New York in July 1963. Direct weekly service was resumed May 2, 1964, and has since been continued. Complainant's service has been a "lift-on-lift-off" container service.

Complainant carries eggs, frozen poultry, and general cargo between Jacksonville and Puerto Rico. Its rates on general cargo are higher than respondent's by about $100 per trailer. Complainant's rate on eggs is identical with that of respondent's. In the case of frozen poultry, complainant maintains a rate which is identical to respondent's, subject however to a minimum of 40,000 lbs.

TMT's Service

Intervener TMT offers an ocean-going barge service from Jacksonville to Puerto Rico. TMT uses non-self-propelled LST's which carry 60 trailers each. It has operated its service since prior to 1963. TMT's transit time is greater than that of the vessels operated by respondent and complainant.

The tariffs of both complainant and TMT contain substituted service rules similar to respondent's Rule 8–A. Complainant has shipped overland between San Juan and Mayagüez or Ponce, Puerto Rico, when emergency conditions required its vessel to bypass a port, but no other use of the rule was shown.

Discussion

The Examiner in his Initial Decision found that respondent SACAL's substituted service at Jacksonville is violative of section 16 First of the Act. The Examiner found that substituted service, as a species of port equalization, could not meet the conditions that section 16 First imposes upon port equalization.

Section 16 provides in relevant part:

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

SACAL's substituted service rule provides that SACAL may ship or absorb the cost of shipping cargo by rail or truck from Jacksonville, where SACAL has a terminal but never calls a vessel, to Miami where a vessel loads cargo for Puerto Rico. We agree with the Examiner that this is port equalization in the general sense and that it is, therefore, appropriate to measure the substituted service rule under section 16 First in accord with standards previously announced regarding port equalization.

Port equalization means the allowance or absorption by the ocean carrier of such amount as will make the shipper's cost of overland transportation identical, or substantially so, from his inland point of origin to any one of two or more ports. Its purpose is to enable the ocean carrier to compete for cargo without calling at the port closest to, or enjoying the lowest inland transportation costs from, the point where the cargo originates. The most recent decisions of the Commission hold that port equalization violates section 16 of the Act where it (1) diverts traffic from a port to which the area of origin is naturally tributary, to a port to which the area is not naturally tributary, and (2) is not justified, in the shipper's interest, by lack of adequate service out of the port from which traffic is so diverted. *City of Mobile* v.

Baltimore Insular Line, Inc., 2 U.S.M.C. 474 (1941); *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 2 U.S.MC. 500 (1941) and 2 U.S.M.C. 699 (1943); *City of Portland* v. *Pacific Westbound Conference*, 4 F.M.B. 664 (1955) and 5 F.M.B. 118 (1956); *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 F.M.B. 48 (1960); *Stockton Port District* v. *Pacific Westbound Conference*, Docket No. 1086 (Sept. 24, 1965).

Port equalization is accomplished in various ways. In its simplest form (sometimes called "equalization" in contradistinction to "proportional rates" or "transshipment"), the carrier pays to the shipper or, sometimes, to the inland carrier directly, the amount by which the cost to the shipper of overland transportation to the port of loading exceeds the cost of overland transportation from the same point of origin to the nearest port; *City of Portland* cases, *supra; Stockton Port District* v. *Pacific Westbound Conference*, *supra.* A more complicated method involves "proportional rates," accomplished through the deduction of specified differentials from ocean tariffs where shipments originate at certain points defined in the tariff, *City of Mobile*, *supra.* A similar method, although relatively limited in scope, was proposed in *Proportional Commodity Rates on Cigarettes and Tobacco*, *supra.* There the basic commodity rates on certain tobacco products, from New York to Puerto Rico, were to be subject to deduction of specified differentials according to the location of the Virginia or North Carolina manufacturing plant at which the shipment originated. In each case, the differential specified in the tariff would have been equivalent to the exact amount by which the motor-carrier rate from point of origin to New York exceeded the motor-carrier rate from the same point to Baltimore. By means of these so-called proportional rates, the carrier would achieve precise equalization against the port of Baltimore on the commodities.

Port equalization may also be effected through "transshipment." [1] As used here transsshipment refers to the movement of cargo, usually by land carrier, in the water carrier's name and at its expense, from a dock or terminal at the port where it is originally delivered by the shipper to the water carrier, to the dock or terminal at another port where it is loaded aboard a vessel of the water carrier. Although sometimes employed when the water carrier, for operating or other reasons, does not make a scheduled call at the port where the cargo is delivered, transshipment is also recognized, along with equalization, as a method of meeting the competition of carriers who call

[1] This is not to be confused with the ordinary transfer of cargo from one vessel to another for on-shipment beyond the limits of a carrier's service or division thereof.

directly at a port where the equalizing or transshipping carrier does not call, *City of Portland*, 4 F.M.B. at 665, footnote 1; *Stockton Port District*, *supra; City of Portland*, 5 F.M.B. at 133, and footnote 3. In the latter *City of Portland* case, the Commission's predecessor warned that its condemnation of unjustified equalization could not be thwarted by transshipment. Thus, diversion of cargo from a port through which it would normally move would be unjustly discriminatory and unfair between ports "if accomplished by transshipment to the same extent as if accomplished by equalization." 5 F.M.B. at 134.

It is evident that respondent's practice of receiving general cargo at Jacksonville and shipping it, by land carrier at its own expense, to its loading terminal at Miami is exactly the same in every material detail as the "transshipment" practice described above. Respondent's practice with respect to poultry and eggs and milk trucks is more like "equalization" as described in the *City of Portland* case and in *Stockton Port District*, particularly where the driver fails to check in at respondent's Jacksonville terminal to pick up his "dock receipt" before proceeding to Miami. Whether respondent converts such equalization into "transshipment" by meticulously observing its prescribed ritual of terminal calls, dock receipts, and split bills of lading is not important, in view of the rationale of the port equalization cases in general and, particularly, the warning of the Commission's predecessor in the second *City of Portland* case.[2]

The record shows that the traffic accorded "substituted service" originated in areas which geography and normal inland transit routes make tributary to the port of Jacksonville and not tributary to the port of Miami. The record reveals, with regard to the diversion of traffic from Jacksonville, that the refrigerated egg and poultry movement from Canton, Ga., and Boaz, Ala., and the milk truck trade from Wilson, N.C., to Puerto Rico, are attracted by considerations of time, distance, and cost factors to the port of Jacksonville. From the poultry shipping area of Canton, Ga., which is near Atlanta, to Jacksonville is 360 miles. From Jacksonville to Miami is 360 miles. All told, from origin to distination under the respondent's substituted service, the distance is some 700 miles and time and cost necessarily depend on distance. This applies with equal force to the orginating areas of Boaz, Ala., and Wilson, N.C. The fact that the movement

[2] That admonition was: "While the record does not entirely bear out Public Counsel's statement that the Board's condemnation of unjustified equalization is presently being thwarted by transshipment, we feel that, since this situation may arise, it is advisable to point out that the diversion of cargo from a port through which it would normally move would be unjustly discriminatory and unfair between ports within the meaning of section 15 of the Act . . . if accomplished by transshipment to the same extent as if accomplished by equalization." 5 F.M.B. at 134.

notwithstanding goes to Miami, in spite of these logical inducements to ship to Jacksonville, attests to the diversion of traffic which would otherwise move to Jacksonville.

Consequently, we hold that the record is adequate to support complainant's allegation of diversion of traffic from a naturally tributary area. This is because respondent's rates, although lower in some instances, are not so when the cost of the Jacksonville-Miami segment of the haul is added. Assuming, *arguendo*, there were savings to be realized on the Canton-Jacksonville portion of the haul under respondent's substituted service, the additional cost of on-carriage from Jacksonville to Miami would more than cancel any savings and the net result would be a higher rate notwithstanding for the overall Canton-Miami run. We conclude that but for the free inland transportation provided by respondent under its substituted service, the refrigerated freight would not have moved via Miami. However, SACAL would probably have handled the milk truck traffic in any event because Sea-Land never solicited the business and because TMT's transit time was longer and its service exposed the trucks to a greater risk of water damage. Nevertheless, we find that SACAL's substituted service rule has permitted SACAL to lift substantial tonnage at Miami which otherwise would have moved through the port of Jacksonville.

Finally, regarding adequacy of service from Jacksonville, the evidence shows complainant has had ample capacity to transport additional cargo from Jacksonville to Puerto Rico. Sea-Land's available space per vessel ranges from 196 to 226 trailers. The lift per sailing from Jacksonville has varied from 49 to 150 containers. While Sea-Land carried other loaded trailers on the voyage of record, it does not appear that they were a significant consideration insofar as extra capacity at Jacksonville was concerned. TMT also had additional space for Jacksonville cargo.*

The application by respondent of Rule No. 8–A to service from Jacksonville diverts from the port of Jacksonville traffic which is naturally tributary to Jacksonville and not tributary to the port of Miami, and which would normally flow through the port of Jacksonville. The diversion of this traffic is not justified by inadequacy of direct-call service at the port of Jacksonville or by emergency or exigent conditions affecting respondent's operations as a common carrier by water. Thus, the diversion of traffic unduly prefers the port of Miami and is unjustly prejudicial to the port of Jacksonville, in violation of section 16 First of the Shipping Act, 1916.

SACAL contends that the Examiner erred in considering this to be a question of equalization. In arguing that this is not an equalization

*See deletion, page 352.

case, SACAL relies heavily upon *Puget Sound Tug & Barge Co.* v. *Alaska Freight Lines*, 7 F.M.C. 550 (1963). In this proceeding, the Commission found lawful under the Intercoastal Shipping Act, 1933, a tariff rule which provided for the substitution of an overland haul for a portion of water transportation offered, but not presently served, by the water carrier.

The Examiner distinguished *Puget Sound* because in that case the question of the propriety of "substituted service" under section 16 simply was not an issue before the Commission. SACAL argues that the issue was, indeed, before the Commission because it fell within the broad language of the order of investigation, because the issue was raised and argued by the complainant, and because the issue was the subject of questioning from the bench at oral argument. But the critical question remains: did the Commission decide whether the substituted service rule diverted traffic unlawfully? The Commission neither discussed nor decided the matter. *Puget Sound* holds only that such a rate could be filed under section 2. This does not include the question of legality of the practice, in operation, under section 16. Consequently, the port equalization decisions previously alluded to are not overruled by *Puget Sound*, nor are they made inapplicable to questions of substituted service.

Next SACAL argues that the Examiner erred in not finding that Jacksonville is a point on SACAL's route. However, this finding is appropriate to the controversy considered in the *Puget Sound* case—filing of rates under section 2 of the 1933 Act; it is not controlling here. No matter whether Jacksonville is a point on SACAL's route, we find that substituted service in this case results in an unwarranted diversion of traffic. Whether Jacksonville is a point on SACAL's route is immaterial to this finding. We, therefore, overrule this exception.

SACL would further distinguish the port equalization cases because the care and custody of the cargo under substituted service varies greatly from equalization generally. However, we are concerned here with unlawful diversion of traffic, not niceties of documentation, care, or custody. We overrule the exception as immaterial.

SACAL contends that the substituted service rule does not divert revenue from Jacksonville because SACAL maintains an adequate marine terminal there and pays wharfage and handling on cargo moving under substituted service. These facts may limit the impact upon the port of Jacksonville of the diversion of cargo, but they do not completely obviate this impact. The port and the carriers that serve the port have lost traffic which would have generated income to the multiple services and labor at Jacksonville. Certainly, actually handling additional cargo would contribute far more to the port economy than handling and wharfage alone. Furthermore, there is an absolute loss to the carriers who provide service at Jacksonville. In *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 2 U.S.M.C. at 505, we held that a port and its transportation services are indissolubly linked together, are interdependent, and a practice harmful to one injures the other. Thus, here there is harm to Jacksonville obviously not recouped by the charges paid by cargo moving under substituted service.

SACAL argues that the record does not support the Examiner's finding that service at Jacksonville, excluding SACAL's substituted service, is adequate. The fact remains, however, as we discussed above, that two carriers, Sea-Land and TMT, offer regular service at Jacksonville with ample capacity to carry additional cargo.* We find this service to be adequate in general for shippers who use or may wish to use Jacksonville. This is so even though Sea-Land's rates may be higher generally than SACAL's or TMT's, or TMT's service may be less suited to the needs of some shippers. The service is sufficiently adequate so that the traffic naturally tributary to Jacksonville should not be artificially diverted elsewhere. Certainly, Jacksonville could handle some significant portion of the diverted traffic. It should be given the opportunity to do so.

SACAL argues that the service is inadequate at Jacksonville since milk trucks in no event would move through Jacksonville. However, we are here speaking of adequacy of service generally. The fact that a particular shipper must or wishes to use a certain port does not justify an across-the-board absorption practice, for the rationale of our decision is that cargo should move in the direction determined by the myriad costs and requirements facing shippers, not by artificial tariff concessions.

According to SACAL, the Examiner erred in finding that Sea-Land had ample capacity to carry additional cargo from Jacksonville. Again, the record shows that there is space available at Jacksonville. The record does not show that Sea-Land would be forced to shut out cargo at other ports by booking more cargo at Jacksonville. The point is that Jacksonville has adequate service, and cargo that normally would be induced to move there should not be diverted. We do not hold that cargo tributary to Jacksonville must move to this port, nor do we say that service must be adequate to accept all cargo. We hold simply that a carrier cannot utilize a substituted service rule to siphon off cargo some of which would otherwise move through Jacksonville. In *Stockton Port District* v. *Pacific Westbound Conference*, *supra*, at 27, the carriers contended that equalization was proper where service was unsatisfactory in any respect. We rejected this

*See change on page 352.

qualification in favor of our previous legal test of equalization: if the equalization destroys the right of a port to traffic naturally tributary to the port, the equalization is unduly prejudicial to the port where service from the port is adequate. We will not require more.

SACAL argues that the Examiner failed to make the findings necessary for a violation of section 16. We have set forth above in some detail the legal test to be applied to port equalization. Our findings have been made in accord with that legal test. Consequently, we overrule this exception.

The remainder of the execptions of SACAL are immaterial to the result we reach here.

Hearing Counsel's exceptions to the Initial Decision urge that Sea-Land has wholly failed to prove its case. Hearing Counsel argue that it is necessary that complainant, a carrier, prove that a locality, Jacksonville, has been unlawfully deprived of traffic to which it is entitled. Hearing Counsel urge that Sea-Land has failed to meet the necessary standards of proof in this respect; in particular, that SACAL's substituted service has diverted cargo from Jacksonville to Miami that would have moved through Jacksonville *but for* the substituted service of SACAL. And they argue that this finding cannot be sustained.[3]

We have previously endorsed the Examiner's test to be applied in equalization cases under section 16 First. Hearing Counsel would define "diversion of traffic" to mean traffic that would have moved through Jacksonville instead of Miami *but for* the substituted service rule. They cite *Phila. Ocean Traffic Bureau* v. *Export S.S. Corp.*, 1 U.S.S.B.B. 538, 541 (1936).

We reject the "but for" test advocated by Hearing Counsel. In *Phila. Ocean Traffic Bureau*, our predecessor formulated an extreme requirement for a finding of violation of section 16 First. To the extent that this language relates to port equalization or qualifies our expression of the applicable standards for port equalization cases, *Phila. Ocean Traffic Bureau* is overruled.

As we said in answer to SACAL's exceptions, we do not hold that cargo tributary to Jacksonville must move to this port, nor do we say that service must be adequate to accommodate all tributary cargo. Furthermore, we have discussed above at pages 346–347 the evidence establishing that cargo moving in substituted service was naturally tributary to Jacksonville, not Miami, substantial tonnage was diverted,

[3] Hearing Counsel also claim the record is defective since it does not show the excess of revenue derived from direct-call service over present expenditures at Jacksonville in connection with substituted service. We disposed of this argument above at page 349 in dealing with SACAL's exceptions.

and that this diversion is not justified by inadequacy of direct-call service at Jacksonville. It is unnecessary to reiterate this discussion. For the reasons stated above, we overrule Hearing Counsel's exception that Sea-Land has failed to meet the necessary standards of proof.

We, therefore, hold that SACAL's Rule No. 8–A operates in a manner which is in violation of section 16 First of the Shipping Act, 1916. An appropriate cease and desist order will be entered.

Commissioner Hearn's concurring opinion:

I concur in this decision for the reasons stated by the majority as well as those stated in my dissent *Stockton Port District* v. *Pacific Westbound Conference*, *Docket* 1086, served September 24, 1965. I find these cases legally indistinguishable.

ORDER*

Full investigation of the matters and things involved in this proceeding has been had, and the Commission on February 17, 1966, has made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof. The Commission found in said report, *inter alia:*

The application by respondent South Atlantic & Caribbean Line, Inc., of Rule 8–A of its tariff, which provides for substituted service at the port of Jacksonville, diverts from the port of Jacksonville to the port of Miami traffic which is naturally tributary to Jacksonville and not tributary to Miami. This diversion of traffic is not justified by inadequacy of direct-call service at the port of Jacksonville or by emergency or exigent conditions affecting respondent's operations as a common carrier by water. Therefore, Rule 8–A of respondent's tariff unduly prejudices the port of Jacksonville and unduly prefers the port of Miami in violation of section 16 First of the Shipping Act, 1916 (46 U.S.C. 815).

Therefore, it is ordered, That the respondent cease and desist from the application of its Rule No. 8–A to traffic between Jacksonville, Florida, and Miami, Florida, within 30 days after the date of this order.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

*Stay of order, page 352.

FEDERAL MARITIME COMMISSION

No. 1205

STAY OF ORDER*

Decided March 17, 1966

The effective date of the Commission's order of February 17, 1966, that respondent cease and desist from the application of its Rule 8–A to traffic between Jacksonville, Florida and Miami, Florida is hereby stayed pending action by the Commission on Respondent's Petition to Reopen for Reconsideration.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

*Further order of stay granted to April 25, 1966.

Note: The text changes referenced in the footnote on pages 347 and 349 is as follows:

The sentence at page 347 reading,

"TMT also had additional space for Jacksonville cargo." is deleted.

The sentence at page 349 reading,

"The fact remains, however, as we discussed above, that two carriers, Sea-Land and TMT, offer regular service at Jacksonville with ample capacity to carry additional cargo."

is changed to read,

"The fact remains, however, as we discussed above, that Sea-Land offers regular service at Jacksonville with ample capacity to carry additional cargo."

The above changes are contained in the Denial of Petition for Reopening decided by the Commission March 29, 1966.

FEDERAL MARITIME COMMISSION

No. 65–38

ISRAEL/U.S. NORTH ATLANTIC PORTS WESTBOUND FREIGHT CONFERENCE EXCLUSIVE PATRONAGE (DUAL RATE) SYSTEM AND CONTRACT

Permission granted repsondents, under the authority of section 14b of the Shipping Act, 1916, to institute an exclusive patronage (dual rate) system.

Edwin Longcope for respondent Zim Israel Navigation Company Ltd.

James N. Jacobi for respondent American Export Isbrandtsen Lines, Inc.

Howard A. Levy and *Richard L. Abbott*, Hearing Counsel.

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER [1]

This proceeding was initiated by the Commission pursuant to sections 14b and 22 of the Shipping Act, 1916, as amended (the Act), to determine whether:

(1) the proposed system and the form of the exclusive patronage (dual rate) contract meet the requirements of section 14b, or will be detrimental to the commerce of the United States, contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; and (2) the application for permission to institute the proposed contract/noncontract system and the use of the proposed form of exclusive patronage (dual rate) contract should be permitted pursuant to the requirements of section 14b of the Shipping Act, 1916.

The conference is composed of American Export Isbrandtsen Lines, Inc., an American national line, and Zim Israel Navigation Co. Ltd., an Israeli national line. Both are engaged in the foreign commerce of the United States and therefore are subject to the provisions of the act. Operating under F.M.C. Approved Agreement No. 8420, they serve the trade moving from Mediterranean ports of Israel to U.S. North Atlantic ports (Hampton Roads/Portland, Maine range).

The member lines have learned from experience in the trade that a substantial amount of cargo which would normally be expected to move via the conference lines moves through indirect and unnatural

[1] This decision became the decision of the Commission on March 9, 1966, and it was ordered that this proceeding be discontinued.

routings. For the most part these routings have been through European countries, principally Turkey, Greece, and the Northern European ports of Antwerp, Rotterdam and Hamburg. Such routings result in an instability in the rate structure in the trade between Israel and the United States and an uncertainty of service provided shippers and U.S. importers. While no central control exists from which the member lines can estimate the tonnage diverted to these indirect routings traffic solicitations disclose this diversion to be substantial. It has brought about a diminution of the service they provide and a consequent loss of revenue.

The proposed dual rate system is conceived as a means of relieving this situation and providing conference vessels with that nucleus of cargo required to sustain the provision of regular and efficient service. The conference lines believe that in the particular circumstances of this trade the desired result can only be achieved by utilizing the full 15 percent spread authorized by the act.

Hearing Counsel contend that the introduction of an effective and fair dual rate system in this trade will serve to foster efficient, modern and economical ocean transportation thereby promoting commerce between Israel and the United States in the interest of both nations; that the record in this proceeding is full and adequate; and that the proposed dual rate contract form (Exhibit 1), which was extensively modified following the issuance of and in accordance with the Commission's order of investigation, (1) meets the requirements of section 14b of the act and (2) incorporates the uniform provisions prescribed by the Commission's decision in *The Dual Rate Cases*, 8 F.M.C. 16.

CONCLUSIONS

It is found and concluded that the proposed dual rate contract form conforms to the general standards enumerated in section 14b, the express requirements of section 14b (1) through (9) of the act, and the criteria established by the Commission in its decision in *The Dual Rate Cases, supra.* There is no evidence that the institution of a dual rate contract system by the conference will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors.

The application for permission to institute the proposed dual rate system and employ the proposed form of dual rate contract is approved and the proceeding is discontinued.

FEBRUARY 25, 1966 (Signed) JOHN MARSHALL
Presiding Examiner.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1095

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

Decided March 24, 1966

Agreement No. 150–21 as modified by No. 150–29, and Agreement No. 3103–17 as modified by No. 3103–26, approved pursuant to section 15, Shipping Act, 1916.

Section 15 does not require that modifications to conference basic agreements be adopted by unanimous vote of the parties.

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

Charles F. Warren and *John P. Meade* for respondents.

Robert J. Blackwell and *Roger A. McShea III* as Hearing Counsel.

REPORT

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

This proceeding which is before us upon exceptions to the Initial Decision of Examiner John Marshall is concerned with the validity of the self-policing systems of respondents, the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic & Gulf Freight Conference.[1]

The proceeding was originally instituted as a show cause proceeding and on October 30, 1963, we issued a report and order upholding the validity of respondents' then-proposed neutral body system. States Marine then appealed our decision to the Court of Appeals for the District of Columbia Circuit, *States Marine Lines, Inc.* v. *Federal Maritime Commission*, No. 18,227. In its brief to that Court States

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[1] The self-policing systems of both respondents are identical and are embodied in arts. 10, 12, and 25 of the basic agreements. Art. 10 covers Breach of Agreement, art. 12 calls for Faithful Performance, and art. 25 establishes the Neutral Body and its procedures. For the full text of these provisions as presently approved see app. A.

Marine relied heavily on a recent Supreme Court decision in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (May 20, 1963)—a case decided subsequent to oral argument in the original proceeding and not cited to us by States Marine. We nevertheless petitioned the Court to remand the case to us in order that we might reconsider our decision in the light of *Silver*.

In requesting the Court to remand the case to us, we indicated our intention to "vacate the existing report and order" and to reopen the proceeding to afford the parties "full opportunity to offer evidence and argument in the reopened proceeding."

The order reopening the proceeding placed in issue the approvability of proposed modifications to the respondents' basic agreements.[2] By subsequent order we granted a motion of States Marine to specifically include in the investigation the issue of the validity of articles 10, 12 and 25 "as they now stand approved" in both agreements. We further amended the order reopening the proceeding to include the question of whether unanimous vote of the parties was required for modifications to agreements approved under section 15 notwithstanding that the agreement might provide for modifications by vote of a lesser majority.

Just before the close of the hearings, conference counsel sought to introduce further modifications to articles 10 and 25 which he urged were responsive to a number of the objections made by States Marine to the then-proposed modifications. These modifications, adopted by the conferences over the objection of States Marine had been filed earlier and designated Agreement No. 150–29 and Agreement No. 3103–26. States Marine opposed their inclusion in the proceeding. The Examiner ruled that the new agreements went beyond the scope of the order of investigation insofar as the question of their approvability was concerned but admitted them solely for the purpose of showing "States Marine motivation" in protesting approval of the agreements. The Examiner closed the record and respondents thereafter moved the Commission to amend the order of investigation to include the new agreements. We denied the motion stating in our order of March 31, 1965:

> Of course, there is nothing to preclude counsel for the conference from setting forth in their briefs any proposals for modification of the contested clauses which alleviate the dispute between the parties.
>
> Our decision in Docket 1095 will resolve the issues between States Marine and the conferences as to what the conferences self-policing provisions may and should include and all proposals by counsel for the parties will be considered.

[2] The Trans-Pacific Conference operates pursuant to Agreement No. 150. The proposed modification (No. 150–21) would amend art. 10, 12 and 25. The Japan Atlantic & Gulf Conference operates pursuant to Agreement No. 3103. The proposed modification (No. 3103–17) would also amend art. 10, 12 and 25 of the agreement.

The Examiner quite correctly interpreted the above "to constitute assurance to respondent conferences that any proposals for modification of contested provisions which alleviate the disputes between the parties will be considered." The Examiner accordingly considered the proposed modifications in his initial decision.

FACTS

This proceeding is the outcome of several years of controversy between protestant States Marine and the two respondent conferences, Trans-Pacific Freight Conference of Japan (Trans-Pacific) and Japan-Atlantic & Gulf Freight Conference (JAG). States Marine is a member of both conferences, one of which serves Pacific Coast ports and the other of which serves Atlantic and Gulf Coast ports of North America inbound from Japan.[3]

It is helpful to review the events which led to the present proceeding.

In the early 1950's extreme competition in these trades resulted in a rash of malpractices and caused instability in the trade. To combat this, Trans-Pacific in 1958 held a meeting in Hakone, Japan, to initiate a neutral body self-policing system to investigate complaints alleging malpractices by member lines, and to assess fines therefor. Article 25 of the conference's agreement was the result.

The international accounting firm of Lowe, Bingham & Thomsons (Lowe) was retained to serve as the original Neutral Body. States Marine subscribed to the conference's agreement with Lowe. Lowe was chosen because it possessed desired qualifications such as international connections, accounting expertise, and professional character.[4]

Lowe, in performance of its duties as Neutral Body, sought in 1959 to investigate a complaint against States Marine. The complaint alleged that States Marine had granted Japanese mandarin orange shippers free passage from San Francisco to Japan. In January of 1959 Lowe representatives visited States Marine's Tokyo office to investigate the complaint. Evidence of a request for free passage was found but there was no indication that it had in fact been honored.

Subsequently, on three occasions in the course of its attempt to investigate the complaint, Lowe tried to obtain records from the New York office of States Marine or its subsidiary Isthmian Lines, Inc. Each time the party seeking the documents was Price, Waterhouse and Co. (Price), acting under the direction of Lowe. Price

[3] The Trans-Pacific conference with 20 members serves the trade from Japan, Korea and Okinawa to United States and Canadian Pacific Coast ports. The Japan-Atlantic and Gulf conference with 15 members serves the trade from Japan, Korea and Okinawa to Atlantic and Gulf ports of North America.

[4] JAG also retained Lowe under an identical "Neutral Body" system.

is the New York correspondent of Lowe. Later developments disclosed that Price is also the regular auditor of United States Lines Co. which is a member of Trans-Pacific and a competitor of States Marine and Isthmian in that trade.

When Price first sought access to States Marine's records, States Marine proposed that its own regular auditors make the investigation under the directions of Price. Price rejected this offer and States Marine thereupon refused to allow Price access to the records. The Neutral Body levied a fine of $10,000 (maximum fine for first offense) on States Marine for refusing access, a breach of the neutral body agreement.

States Marine objected to the fine, and alleged that Lowe was not qualified to serve under the Neutral Body agreement because of the affiliation of its correspondent Price with United States Lines, a conference member. States Marine filed a complaint with the Commission (Docket 920).

While the proceeding in Docket 920 was pending, Price again sought access to States Marine's records. States Marine again refused and was fined an additional $15,000 (maximum fine for second offense). States Marine again objected and filed a second complaint with the Commission (Docket 920–1).

Price made a third attempt to gain information about the mandarin orange shipment, this time seeking to investigate the records of Isthmian, a wholly owned subsidiary of States Marine. Isthmian refused and was fined $10,000, upon which it filed a complaint with the Commission.

The Commission in its Report and Order in Docket 920 and 920–1 found Lowe's appointment as Neutral Body to violate the neutrality requirements of the Neutral Body agreement insofar as the original agreement had not provided for a Neutral Body which could be affiliated with another conference line. Although Trans-Pacific subsequent to Lowe's appointment, had deleted certain neutrality requirements, the Commission found such deletion illegal as a "modification" of the agreement which was never approved by the Commission. The fines were ordered cancelled. *States Marine Lines, Inc.* v. *Trans-Pac. Freight Conf.*, 7 F.M.C. 204 (1962).

On appeal by Trans-Pacific the Ninth Circuit Court of Appeals upheld the Commission. *Trans-Pacific Frgt. Conf. of Japan* v. *Federal Maritime Com'n*, 314 F. 2d 928 (9th Cir. 1963). Neither the Commission nor the Court dealt with the question whether a Neutral Body could be lawfully affiliated with a conference member. Both merely held that Trans-Pacific had neither in its original Neutral Body system nor by approved modification provided for a Neutral

Body which could be so affiliated, and therefore the appointment of Lowe was in contravention of the agreement as approved and thus in violation of section 15 of the act.

Before the Commission issued its decision in Docket 920, Trans-Pacific and JAG respectively filed presently pending modifications (Nos. 150–21 and 3103–17) which provided that a Neutral Body must disclose any professional or financial affiliation which it has with any member line. Such affiliation, however, will not disqualify the Neutral Body from serving, unless the affiliation is with an accused line. In such a case the Neutral Body must appoint an unaffiliated agent to conduct the investigation.

Discussion and Conclusion

The Examiner would approve respondents' self-policing system as it is set forth in Agreement No. 150–21 as modified by No. 150–29 and Agreement No. 3103–17 as modified by No. 3103–26. States Marine took 18 numbered exceptions to the Examiner's decision many of which are but restatements of others and all of which can be reduced to the following alleged errors of the Examiner insofar as he:

1. Failed to properly apply the Supreme Court's decision in *Silver*, *supra*, and concluded that respondents' agreements are unlawful thereunder—specifically with respect to right of appeal from decisions of the Neutral Body.
2. Failed to adopt States Marine's proposals regarding notice, confrontation of witnesses, weight of evidence, hearing, and notice of decision.
3. Failed to require the establishment of "criteria" for the assessment of fines.
4. Concluded that an accounting firm may serve as a Neutral Body when it serves as the regular auditor for a conference member.
5. Failed to conclude that modifications adopted by less than unanimous vote are contrary to the public interest and detrimental to the commerce of the United States in violation of section 15 of the Shipping Act, 1916.
6. Approved the present signature of the conference used in submitting proposed modifications and failed to require that conference minutes show by name the members opposed to any proposed modification.
7. Approved Agreement Nos. 150–29 and 3103–26.[5]

[5] Hearing Counsel also filed exceptions to the initial decision which will be discussed where appropriate in our treatment of the exceptions of States Marine.

We shall deal first with the alleged error in considering the modifications embodied in Agreement Nos. 150–29 and 3103–26.

The proposed modifications which were included in respondents' brief in accordance with our action on respondents' motion to amend the order of investigation were designed to narrow the issues for final decision by meeting certain of States Marine's objections to the Neutral Body system as it appeared in Agreement Nos. 150–21 and 3103–17. For example, a 2-year period of limitation was placed on investigations in answer to States Marine's objection that the Neutral Body was free to investigate any alleged violation no matter how stale it has become through the passage of time. States Marine's argument against considering these modifications is simply that they were not in evidence and not at issue. All further discussion of the amendments merely shows that as far as States Marine is concerned the amendments do not go far enough in satisfying its objections to the system, but this is no ground for excluding them from our consideration.

Exclusion of the proposed amendments would achieve nothing more than a delay in their ultimate consideration. They have been filed with us for our approval. They raise no new issues and they cannot prejudice States Marine since they seek to remedy defects in the system alleged by States Marine itself. Moreover, our authority under section 15 of the act is not simply the sterile power to accept or reject that which parties to agreements file with us. Section 15 expressly grants us the power to modify agreements filed with us.[6] Thus, even if respondents had not expressed their willingness to meet certain of States Marine's objections to the system by voluntarily amending their agreements, we could order them to do so as a condition precedent to our approval of the system. The only difference between the two courses of action is that the latter takes more time because we cannot force parties to accept a particular agreement—they always have the option of no agreement at all. Our situation here is much the same as that of the Federal Power Commission in *Florida Economic Advis. Coun.* v. *Federal Power Com'n*, 251 F. 2d 643 (D.C. Cir. 1957) when it granted a certificate of public convenience subject to certain curative conditions imposed after close of hearings. The petitioner claimed he would be adversely affected if not heard on these conditions. In

[6] Sec. 15 provides in relevant part:

"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."

denying the petition the Court stated, "the conditions only resolved issues raised, argued, and briefed in the hearing. They involved no surprises except insofar as they may have gone further or not so far as petitioner would have wished." This contention is plainly without merit and is rejected.

States Marine next excepts to the Examiner's application of the *Silver* case.

Silver involved a suit by a securities dealer against the New York Stock Exchange under the antitrust laws for the concerted refusal of the Exchange's members to continue private teletype and stock ticker service to the plaintiff, a nonmember of the Exchange. The Exchange had discontinued these services and refused to tell the plaintiff the reason in spite of numerous requests by plaintiff. The Court found that, notwithstanding Silver's prompt and repeated requests, he was not informed of the charges underlying the decision to invoke the Exchange rules and was "not afforded an appropriate opportunity to explain or refute the charges. * * *" The Court stated that:

> Congress in effecting a scheme of self-regulation designed to insure fair dealing cannot be thought to have sanctioned and protected self-regulative activity when carried out in a fundamentally unfair manner. 373 U.S. 364
>
> * * * * * * *
>
> [N]o justification can be offered for self-regulation conducted without provision for some method of telling a protesting nonmember why a rule is being invoked so as to harm him and allowing him to reply in explanation of his position. No policy reflected in the Securities Exchange Act is, to begin with, served by denial of notice and an opportunity for hearing. 373 U.S. 361

The Examiner distinguished *Silver* on several factual and legal grounds. He pointed out that:

> *Silver* was an antitrust case, this is not; States Marine is a member of both conferences, Silver was not a member of the Exchange; the Shipping Act specifically exempts agreements approved thereunder from the antitrust laws, the Securities Exchange Act does not; the problems and considerations having to do with stock exchange self-regulation differ materially from those having to do with steamship conference self-regulations; notice and hearing, the only two specific safeguards in issue in *Silver* are expressly provided for under the conferences' proposed system; and States Marine chose to join the conferences thereby surrendering some sovereignty.[7]

Notwithstanding the legal and factual distinctions quoted above, and noting that the term "due process" is nowhere to be found in the body of the majority opinion, the Examiner found the *Silver* case "persua-

[7] The Examiner noted that a practical *caveat* was present in any consideration of States Marine's "true freedom of choice" to operate outside the conference when and if the respondents' dual rate systems are approved and go into effect. Nonconference lines would then be largely precluded from carrying cargo of shippers signing dual rate contracts.

sive" insofar as it "clearly supports a requirement for 'fundamental fairness' in industrial self-policing systems, but not for the so-called defensive safeguards and techniques historically identified with constitutional due process of law."

We agree with the Examiner's treatment of *Silver* and think it eminently sound. The real thrust of States Marine's argument regarding *Silver* is that the Neutral Body system is required to assure a conference member accused of a breach of the conference agreement virtually all the safeguards the criminal law affords a person charged with a crime. *Silver* clearly will not support such a proposition, and to adopt anything like it here would in our view render any self-policing system totally ineffectual and thus defeat an express statutory purpose of Congress.[8] Moreover, the only indication in *Silver* as to what type of notice and hearing should be afforded in a self-policing system is contained in footnote 17 at page 364 of the Court's opinion:

> The basic nature of the rights which we hold to be required under the antitrust laws in the circumstances of today's decision is indicated by the fact that public agencies, labor unions, clubs, and other associations have, under various legal principles, all been required to afford notice, a hearing, and an opportunity to answer charges to one who is about to be denied a valuable right.

Thus, the Court makes it clear that the kind of notice, hearing and opportunity to answer charges which should be afforded is that found in "public agencies, labor unions, clubs and other associations." The procedural safeguards accorded in these institutions are not the same as those accorded a criminally accused. The association-type enterprise traditionally follows less rigid standards which, as long as they comport to the necessarily indefinite standard of fundamental fairness can be almost anything to which the members agree to be bound.

We think respondents' self-policing system as ultimately proposed by them meets this standard of fundamental fairness.[9]

States Marine, however, takes specific exception to the Examiner's conclusion regarding notice, confrontation of witnesses, weight of evidence necessary to find a violation, hearing, and notice of decision.

Right to Notice.—The conference's latest proposal regarding notice to a line accused of a violation provides in substance that upon receipt of a complaint the Neutral Body would have authority to call upon the members named in the complaint and without prior notice inspect records, correspondence, documents, and other materials deemed by the Neutral Body in its sole discretion to be relevant to the complaint.

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[8] Public Law 87–346 amended sec. 15 so as to empower us to disapprove a conference agreement upon a finding of inadequate policing of the obligations of the members under it. The legislative history of this amendment is replete with instances of total disregard of conference obligations by member lines and malpractices resulting from the disregard.

[9] For the full text of art. 10, 12, and 25 as proposed in Agreements Nos. 150–21, as modified by 150–29, and 8103–17, as modified by 8103–26, see app. B.

After investigation the accused will be advised as to whether or not there are reasonable grounds to believe that a violation occurred. If so, he will be informed of the nature of any alleged violation and of the evidence concerning it which can be revealed without jeopardizing the confidentiality of the Neutral Body's source of information. The accused is then afforded a hearing (art. 25(b) (3)).

The Examiner found that since the proposal provides for notice and hearing before final decision, it is clearly in keeping with the standards of fairness prescribed by *Silver*, since *Silver* imposed no requirement of notice before investigation. As the conference witnesses testified, notice prior to even the investigation would facilitate the concealment of incriminating records and thus effectively frustrate the investigation. The primary purpose of notice is to inform the accused of the charges against him and to afford him an opportunity to defend himself. This should not include the opportunity to hide or conceal evidence of a malpractice. The Neutral Body upon receipt of a complaint must find evidence to support the charges contained therein if such evidence exists. The only real possible source of such evidence is the records of the accused. If there is to be any kind of workable Neutral Body system, the Neutral Body cannot be deprived access to its only source of information. It could be so deprived, however, if the Neutral Body were required to give notice to an accused prior to investigation.

Under the proposed provisions regarding notice, an accused would be afforded an adequate opportunity to defend itself, not by concealing incriminating evidence, but in the more conventional manner of offering rebutting evidence to known charges.

The proposal on notice does provide the accused with information concerning "the nature of the alleged breach and the evidence concerning it." This is sufficient to inform the accused of "why a rule is being invoked to harm him and allowing him to reply in explanation of his position." This satisfies the fundamental fairness requirements of *Silver*.

States Marine also objects to that portion of the notice provision stating that evidence will not be disclosed if such disclosure will result in the identification of the accuser. We will deal with this *infra* in conjunction with the issue of confrontation.

Confrontation.—Article 25(e)(1) as last proposed by the conferences reads, "The Neutral Body will under no circumstances disclose the name of the complainant to the respondent * * * unless specifically authorized to do so by the complainant."

Article 25(f)(3) states "In so advising the respondent [of the nature of the breach] the Neutral Body shall disclose the actual evidence which it has at its disposal unless for reasons compelling to it such disclosure would tend to reveal the identity of the complainant or otherwise jeopardize the confidentiality of the Neutral Body's sources of information."

On these points the Examiner found that fair play requires and article 25(f)(3) anticipates, that the accused will be informed of the factual basis of the Neutral Body's conclusions and will be afforded an adequate opportunity to reply or explain. He further found that a requirement necessitating the disclosure of the identity of the complainant would seriously cripple the Neutral Body since few complaints would then be filed.

States Marine relies on *Silver* and several other cases in excepting to these findings of the Examiner. The language of *Silver* quoted by States Marine in support of its position that confrontation and cross-examination of the accuser are required reads as follows:

> In addition to the general impetus to refrain from making unsupportable accusations that is present when it is required that the basis of charges be laid bare, the explanation or rebuttal offered by the nonmember will in many instances dissipate the force of the *ex parte* information upon which an exchange proposes to act. 373 U.S. 362.

We do not understand this statement as requiring confrontation and cross-examination of the accuser. Quite the contrary, the Court simply states that by laying bare the basis of the charges and affording the accused an apportunity of rebutting them "the force of the *ex parte* information" upon which the charge is made may be dissipated—not that the charge may not properly be made on the basis of *ex parte* information. *Silver* does not support States Marine's contention.

The several other cases cited by States Marine involved either criminal rights or government action against an accused and are not applicable to this type of private voluntary association.[10]

States Marine's desire to know the identity of the accuser must be balanced against the unwillingness of the member lines to file complaints if they are to be identified as the accuser. Their very real concern is that almost invariably the complaint will alienate a preferred shipper should the identity of the complainant be known. In our view such a requirement would render the Neutral Body system unworkable.

But both States Marine and Hearing Counsel argue that an accused will not be guaranteed that he will be confronted with all the evidence against him in view of the discretion given the Neutral Body in reveal-

[10] States Marine relies primarily on *Greene* v. *McElroy*, 360 U.S. 474 (1959) which involved security clearance revocation by the Department of Defense and *Greene* v. *U.S.* where the same plaintiff sought damages for revocation of his security clearance.

ing confidential information. The Examiner correctly observed that in those instances where evidence relied upon for decision should not be shown to the accused in its original form because of undesired disclosures, it would certainly be within the "basic precepts of fair play" for the Neutral Body to go as far as it reasonably can without disclosing the identity of complainants or sources of confidential information, to inform the accused of the substance thereof as material to an adequate understanding of the charges and findings. The substance of the evidence relied upon in reaching a finding that a breach has been committed must be disclosed to the accused in sufficient detail to give him an opportunity to show that it is untrue otherwise the elements of fundamental fairness are missing.

Investigation and Hearing.—The Examiner concluded that the conference proposals on these matters satisfied the requirements of *Silver.*

The proposals regarding investigation provide the Neutral Body with authority to investigate written complaints and in doing so to inspect and copy "correspondence, records, documents, signed written statements or oral information and/or other materials" at the offices of the member lines (art. 25(d)).

States Marine would have the investigation made by an accused line's regular auditors under the Neutral Body's direction. States Marine seeks this as a matter of convenience and to avoid exposing its confidential business affairs. Inherent in this position is the unstated and in our view unwarranted assumption that the Neutral Body will make unwarranted and unauthorized disclosures of States Marine's business affairs. We have difficulty imagining such conduct on the part of accounting firms such as Price, Waterhouse or Lowe. There is no basis here for predicting such conduct no matter who is ultimately selected as the Neutral Body.

The conference proposals regarding hearing which were approved by the Examiner provide for notice and disclosure of evidence and, "within fifteen (15) days, or within such reasonable time thereafter * * *, if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or attorney, and offer to the Neutral Body such explanation and/or rebutting evidence as it may deem proper and desirable. At such hearing the Neutral Body shall consider all of the available evidence * * *." (Art. 25(f)(3).)

In making its decision "the Neutral Body will not be restricted by legal rules of evidence or the burden of proof required to establish criminality, or even a civil claim. Instead, it will employ rules of common sense * * * and the only standard required is that the information developed is persuasive to the Neutral Body itself that the breach occurred." (Art. 25(f)(2).)

States Marine's objections here are but a repeat of its objections to the provisions for disclosure of evidence. Again, States Marine urges that there can be no fair hearing or opportunity to explain when there is no guarantee that an accused will be adequately informed of the charges or of the evidence supporting such charges and again it is our view, if the accused is not sufficiently informed of the charges against him and the evidence in support thereof so as to prepare his rebuttal, the elements of fundamental fairness are missing.

Mitigating Circumstances.—The latest proposed modifications to the agreements provide: "Notwithstanding the difficulty in assessing such damages precisely, in determining the amount of liquidated damages to be assessed the Neutral Body shall consider such mitigating circumstances as it may deem relevant." (Art. 25(f)(4).) The Examiner approved this language.

States Marine argues that such a standard is inadequate; that due process requires specific criteria (such as whether the violation was purposely committed, whether it is a first offense, whether it is also a violation of law, etc.) to be followed in determining the nature of the fine. Hearing Counsel feel that the agreement should be amended to provide a graduation of fines based on gravity of offense. The Examiner correctly concluded that there is no evident basis for anticipating that the Neutral Body will not exercise fundamental fairness in determining and considering such mitigating circumstances as may be reasonably determinable and relevant in each case. But as evidence that the Neutral Body does not exercise fairness in such matters, States Marine offers the fines assessed against it and subsequently invalidated in Docket 920. In each instance the maximum fine was assessed. To begin with, the fines were invalidated not because the amounts were unreasonable but because the appointment of the Neutral Body itself was not in conformity with the conference's basic agreement. Moreover, we cannot say that the maximum penalty allowed is unwarranted for a refusal to allow the Neutral Body access to company records. We do not find the instances of other fines by other Neutral Bodies in other conferences persuasive here.

Neutrality.—Under the presently approved system the conferences appoint a Neutral Body from responsible accountants or other persons. The appointee may not be employed by nor financially interested in any party to the basic agreement. The conference's latest proposed system provides for the appointment of an impartial, independent person, firm, or organization, subject to disclosure to the conference of any professional, business or financial interest it may have, then or later, with any member line. In the event of a complaint against a member with which it has any such interest, the Neutral Body would have to disqualify itself and appoint a substitute agent having no such interest. Any financial interest in any member line, however, will defeat appointment and if acquired after appointment will be disqualifying (art. 25(a)). The Examiner approved the latest proposal, thereby authorizing the Neutral Body to be professionally affiliated with any conference member (including the complaining line) other than the accused.

States Marine excepts to this finding. It feels a Neutral Body which has an affiliation with any member line, especially with the complaining line, cannot be neutral so as to be able to sit and judge objectively and without bias. States Marine urges the time honored proposition that any person or body sitting in judgment, be it called judge, arbitrator or referee, etc., must be free from all bias or interest in the outcome of the case. Hearing Counsel feel that to be consistent any interest in either the accused or the complainant should be disqualifying. Be that as it may, we do not agree that being under contract to perform professional auditing services of a member line of the conference other than the accused gives the Neutral Body an interest such as would disqualify it.

Mr. Ralph S. Johns, Chairman of the Ethics Committee of the American Institute of Certified Public Accountants, testified that proposed article 25 was not inconsistent or incompatible with the Code of Ethics of the Institute and that a member's affiliation with a complainant would not impair its independence. Johns pointed out by way of emphasis, that "It is a common situation among the larger accounting firms to serve two or more competing enterprises and in my own personal experience in Chicago not only do we, as the same firm, serve the two largest farm implements corporations, but we serve them right out of the same office and we have done so for over 50 years." We think the Examiner was correct when, after a summary of the testimony, he stated:

> In view of the fact that the Neutral Body functions are fact finding rather than judicial; that the conclusive facts are usually, if not always, obtained from the books of account and records of the accused; that accounting firms are uniquely qualified both professionally and by procedural and ethical standards, to perform this work; that fees are paid on the basis of time devoted to a case, and without regard to whether the complaint of malpractice is sustained or dismissed; that there is no evidence of actual bias or nonneutrality relating to any of the firms heretofore used; and that the application of unduly broad exclusions will disqualify or bring about the disinterest of most, if not all, of the otherwise eligible firms, thereby destroying this self-policing system, contrary to the public

interest and to the detriment of commerce, it is found that a Neutral Body should not be disqualified because of a disclosed business relationship, i.e. independent contractor for professional or business services, with a conference member line other than the accused.

States Marine offers nothing on exceptions which would affect the Examiner's findings with which we agree.

Right to Appeal.—Neither the presently approved nor the latest proposed modifications to the agreements contain any provision for appeal from the Neutral Body's decision. The latest proposal states that "the members agree to accept the decisions of the Neutral Body as valid, conclusive, and unimpeachable." (art. 25(g)).

The Examiner found that provision for the right to appeal to arbitration would not be necessary for approval of the self-policing systems.

States Marine in exceptions contends that the *Silver* doctrine of "due process fairness" requires provision for appeal from the Neutral Body's decision to an arbitration panel; the fees and expenses of the arbitrators being paid by the conference. They believe appeal is necessary to prevent "runaway decisions by a neutral body."

Hearing Counsel consider the right to arbitration to be desirable as a double check on arbitrary action.

An appeal is, of course, not required by law. Where a federal statute denied an appeal of Tax Court determination in renegotiation cases, the Ninth Circuit Court of Appeals in *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560 at 565 (1950) rejected a contention of unconstitutionality, concluding "* * * that there is no constitutional right of appeal is well phrased in *Luckenbach Steamship Co.* v. *United States*, 1926, 272 U.S. 533 at 536 * * * 'the well-settled rule applies that an appellate review is not essential to due process of law, but is a matter of grace.'"

The testimony of record demonstrates why appeal would render the self-policing system ineffective. It would cause delays and is unnecessary since the Neutral Body is better qualified to decide than a panel of arbitrators. Disclosure of the identity of the complaining line would result from resort to arbitration. Some of the candidates for the Neutral Body position indicated they would not serve if their decisions were to be subject to appeal.

Since the law does not require appeal and since other reasons exist for not requiring appeal, we find that it is unnecessary to have such a provision in this Neutral Body agreement.

Knowledge of Acquittal.—States Marine opposed the original proposals because they contained no provision for notice of acquittal to an accused. The conferences' latest proposal provides for notice in the event of either acquittal or conviction. The Examiner approved this latest proposal. States Marine does not object to the substance of the provision, but has doubts as to whether it was properly before the Examiner for consideration. We have found that the Examiner's consideration of these proposals was proper. We also found the Examiner's approval of the provision for notice of acquittal as well as conviction was well founded and proper and it is upheld.

Unanimity.—The present voting requirements of the respondent conferences are set forth in articles 18 and 19 of the basic agreements. They provide that four-fifths of all parties entitled to vote constitute a quorum when changes in the basic agreement are being considered. Once a four-fifths quorum is present, all parties agree to be bound by changes made with the consent of two-thirds of all parties entitled to vote.

Throughout this proceeding States Marine has contended that section 15 requires that such modifications to the conference agreement can only be approved upon unanimous adoption by all members of the conference. Accordingly, they contend that the Neutral Body proposals in question here cannot be approved since States Marine has not endorsed them.

The Examiner found that a unanimous vote is not required, and States Marine takes exceptions thereto. The contention is that a nonunanimous amendment rule has been contrary to the public interest and has operated to the detriment of the commerce of the United States in violation of section 15. States Marine, in support of this contention, maintains that the present rule has caused a high coefficient of friction in the conferences, that it makes it impossible for States Marine to retain control over its own business and corporate affairs, and that it pledges the company to adhere to contracts never formulated by its management.

In our previous report we said:

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

these analogies improper. Private contracts, normally between two parties, cannot reasonably be equated with agreements approved under section 15. An agreement providing for the organization of a conference to operate in our foreign commerce is of necessity an agreement which attempts to reconcile a number of divergent interests insofar as is consistent with Congressional policy and the public interest in the free flow of our foreign commerce. Such an agreement must provide for the continuing commercial operations of a relatively large number of conference members with as little friction and obstruction as possible. The very heart of such an agreement is that each individual line relinquishes some of its freedom of action, in exchange for the benefits resulting from participation in the conference arrangement.[2]

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

States Marine has offered nothing which causes us to change our views as expressed above. We would only add that in our view unanimity could well work to increase rather than decrease friction among the members of the conferences. The record here clearly demonstrates that if the respondent conferences each had the unanimity rule, there would be no Neutral Body system presently before us for approval. Therefore, the respondents' attempts to satisfy their statutory obligations to adequately police their obligations under the respective agreements would be frustrated. Such a result would of course be contrary to public interest and detrimental to commerce within the meaning of section 15.

There remains States Marine's objection to the way in which modifications to the agreements are subscribed to by the conference chairman. The conference chairman executes a standard form of subscription in submitting proposal agreement modifications to the Commission for approval. This form provides:

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

> IN WITNESS WHEREOF the [conference], the members of which are all hereinafter listed, has authorized the foregoing amendments by resolution passed at its regular conference meeting held ————, 19———, in Tokyo, Japan.

There follows a typed list of the membership and the signature of the conference chairman as such. States Marine contends that this creates "a record which on its face is misleading, a half truth, and may be utterly false" in that the signature of the conference chairman on behalf of the entire membership implies that the modification was carried unanimously.

We agree with the Examiner's finding that this contention is without merit.

He stated:

> Conference chairmen are merely accomplishing the ministerial function of filing duly adopted modifications on behalf of the conference and in so doing are listing the lines currently holding memberships, all of whom are bound by the modifications. Such listing has nothing whatever to do with a vote tally or representation of unanimity. Both the Commission and the individual member lines are on direct notice that under the provisions of articles 18 and 19, *supra*, resolutions referred to in the standard form require the affirmative vote of only two-thirds majority. On this record, it cannot be found that the form is actually misleading or otherwise in violation of the act.

Since States Marine's objections to the proposed Neutral Body systems here under scrutiny are based almost exclusively upon the Supreme Court's decision in the *Silver Case*, our discussion of them has been primarily concerned with the applicability of the *Silver* standards to the systems. What we have said makes it clear that the proposed systems are fully in accord with the standards of *Silver* insofar as they can be said to be applicable to industry's self-policing agreements under the Shipping Act. More importantly, we think it equally clear that the proposed systems are fully in accord with the standards and requirements of section 15, and should enable respondent conferences to satisfy their responsibility to police adequately their obligations under their respective agreements. There is nothing in this record to show that the systems will in any way operate in a manner which would be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports or between exporters from the United States and their foreign counterparts, or detrimental to the commerce of the United States, or contrary to the public interest, or in violation of the Shipping Act.

VICE CHAIRMAN JOHN S. PATTERSON, *dissenting:*

This case is before the Commission for the second time because the United States Circuit Court of Appeals for the District of Columbia granted our petition to remand our first report and order of October 30, 1963, shortly after the intervenors herein had appealed our order as authorized by the Review Act of 1950, but before a final adjudication by the Court of Appeals. Our petition acknowledged that our decision was made without considering a recent Supreme Court precedent in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963) (herein referred to as "*Silver*"), and we expressed a desire to reopen and reconsider this case in the "light of *Silver*." The *Silver* case held the New York Stock Exchange did not have the power to deny private teletype and stock quotation "ticker" service to a nonmember broker without first according fair procedures pursuant to self-regulation rules of the Stock Exchange authorized under the Securities Exchange Act.

After the remand ordered March 16, 1964, we vacated our first report and order. Additional hearings before an Examiner were ordered and completed, followed by a decision by an Examiner concluding that the agreements should be approved. Exceptions were filed.

The purpose of the entire proceedings is to adjudicate whether the two agreements which contain similar provisions should be disapproved in response to the protests of the intervenors. The protested provisions relate to procedures for policing the obligations under the agreements. The purpose of this particular phase of the proceeding is to rule on the exceptions and then to decide whether or not the Examiner was in error in approving the agreements.

Dissent is made to the preceding decision and to its rulings on the exceptions for the reasons:

> *First*, there has been a failure to decide in conformity with changed conditions in law requiring modified actions as we represented to the court of appeals in our petition. The agreements should be disapproved.
>
> *Second*, the agreements considered by the Examiner and subject of the rulings are not part of the record herein and are not subjects of this proceeding.

A. We have before us 18 exceptions by intervenors and 2 exceptions by Hearing Counsel to the Examiner's initial decision approving, pursuant to section 15 of the Shipping Act, 1916 (Act), Agreements Nos. 150–29 and 3103–26, instead of Nos. 150–21 and 3103–17 which were before the court of appeals and which were approved in our first report. Agreements Nos. 150–29 and 3103–26 were the subject of our order titled "Denial of Motion to Amend Order Reopening Proceeding", denying, on March 31, 1965, a motion to amend the order reopening the proceeding after the record had been closed and the hearings concluded on March 3, 1965. The denied motion was for the purpose of making "these revised self-policing provisions" in Agreements Nos. 150–29 and 3103–26 a part of the record. Therefore, my rulings on the exceptions are confined to the question of approval or disapproval for adequacy of self-policing provisions of Agreements Nos. 150–21 and 3103–17 which are part of the record.

B. Based on the record before me in this proceeding, my conclusions are that Agreements Nos. 150–21 and 3103–17 should be disapproved because after notice and hearing it is found Agreements Nos. 150–21 and 3103–17 contain inadequate policing under the obligations of the previously approved Agreements Nos. 150 and 3103, contrary to the requirements of the third paragraph of section 15 of the act.

C. My conclusions result from the following proposed rulings. These rulings apply to the numbered exceptions of each party as stated by them and set forth in appendix C hereto. Intervenors' exceptions 1 through 7 and 12 through 17 should be sustained. Intervenors' exceptions 8 through 11 and 18 and both of Hearing Counsel's exceptions should be rejected.

D. As regards my conclusions and proposed rulings, the reasons in support of them and for my decision are advanced in the following discussion.

The facts consist entirely of the agreements subject to the applications for approval in the first hearing, and "affidavits and memoranda, replies thereto and oral argument" pursuant to the terms of our order served March 14, 1963, and in the second hearing testimony and exhibits pursuant to the terms of our order served April 3, 1964, as amended to expand the issues to be resolved. Agreements Nos. 150–29 and 3103–26 were never subject either to hearing or to cross-examination.

The two agreements subject of this proceeding are between common carriers by water in foreign commerce associated as the conferences identified above and respondents herein. The purpose of the agreements is to establish a procedure for policing the obligations under the agreements. The procedures for policing the obligations were in amendments of the agreements (Agreements Nos. 150–21 and 3103–17) which we are required to approve or disapprove pursuant to the directive in the third paragraph of section 15 of the act, pertinent portions of which have been underscored:

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

The issue underlying all others is the adequacy or inadequacy of the provisions for policing of the obligations under the agreements proposed by the respondents. Before this issue may be decided we have to know which two out of the four agreements presented to the Commission one way or another are to be reviewed for adequacy. The Examiner considered he had Agreements Nos. 150–29 and 3103–26 before him for review. On the other hand, I consider I have Agreements Nos. 150–21 and 3103–17 before me. The latter agreements are located in exhibits 1 and 2 and consist of identical provisions in article 10 titled "Breach of Agreement," article 12 titled "Faithful Performance," and article 25 titled "Neutral Body," which amend or modify the first approved agreements of respondent conferences. Only the provisions of article 25 are questioned or challenged as to adequacy.

Exclusion of the proposed amendments (i.e., Agreements Nos. 150–29 and 3103–26), it is stated, would achieve nothing more than a delay in their ultimate consideration and there is "no ground for excluding them [the undeleted provisions of appendix B containing the provisions of Nos. 150–29 and 3103–26] from our consideration." There are, to the contrary, both reasons for delay and grounds for exclusion. The reasons for delay are that intervenors will be given their presently denied opportunity, because the agreements were submitted after the record was closed, to furnish evidence, cross examine, and argue against adequacy and approval. Such opportunity founded on rights to be heard may not be denied for reasons of expediency. The grounds for exclusion are that we have already excluded Agreements Nos. 150–29 and 3103–26 by our order served on March 31, 1965. We have not issued any order opening the record for their admission. The latter agreements may not at the same time be excluded by order and included by considering and approving them anyway. If adequacy is found, the agreements must have been reviewed and considered; and, to review, the agreements must have been read. We may only read and pass on what is in the record. The Examiner has obviously read and passed on the excluded nonrecord evidence. No matter how justifiable such reading may seem to avoid delay or how unfair disregard of improvements or compromises may seem on second thought, we may only make decisions upon material issues of fact presented on the record if we are to obey section 8 of the Administrative Procedure Act. I elect to obey this section.

Perhaps exclusion of the proposed amendments may be thought to be precluded because we invited respondents to set forth "in their briefs any proposals for modifications of the contested clauses which alleviate the disputes between the parties." These agreements with higher numbers, however, are being approved as new agreements in the record, not as modifications proposed and imposed by the Commission. Any such invitation would also misconceive our objective when we adjudicate approvability of agreements. We are approving and disapproving agreements and we are not alleviating disputes. Agreements come into the record because they are admitted by an Examiner as evidence subject to cross-examination and argument before disapproval, rather than as proposals to "alleviate" disputes. Neither are agreements automatically in the record by filing with the staff. The Commission is finding adequacy or inadequacy and thereafter adjudicating approval or disapproval. Any other objective deprives intervenors of serious rights, and we should delay as long as necessary to accord them their rights.

It should be clear that both the subject the Examiner and I are reviewing and the objective the Examiner and I are trying to accomplish are entirely different. For these reasons, the first exception to Examiner's approval of Agreements Nos. 150–29 and 3103–26, when the modifications therein were not in evidence as a result of a Commission denial of a motion to reopen the record to consider them, should be sustained.

The next step is to find out whether the agreements in the record have adequate or inadequate self-policing provisions. We must compare the standards for self-regulation in the *Silver* case as we said we would do in our representations to the court of appeals in our remand petition. Our petition referred to our Rules of Practice and Procedure, Rule 16(a), stating the Commission might reopen and reconsider and may modify a report or order if such action is found to be required "by changed conditions in fact or law." The expression "self-regulation" in the *Silver* case applied to Stock Exchange regulations is the same as "policing the obligations" in section 15 of the act applied to conference agreement provisions. As a result changed conditions in law have been shown requiring a change in my earlier conclusions.

The agreements herein have been approved in spite of the disclosure that the *Silver* case changed conditions in law applicable to self-regulation of the Stock Exchange which must now be applied as an interpretation of the act before a conclusion of adequacy or inadequacy of the policing provisions may be reached. In discussion of later exceptions, I find the agreements violate two of these new standards, which are now law, in addition to the existing findings supporting lack of fundamental fairness as stated in my dissent to the Commission's Report in this docket served October 30, 1963 (7 FMC 653, beginning p. 659). For these reasons the agreements are found to violate the new laws for industry self-regulation, and the second exception should be sustained.

Correct consideration of this case in the light of the new standards in the *Silver* case requires more than a comparison and a finding of nonapplicability based on distinctions and arguments alone.

The Examiner's "treatment" of *Silver* is thought to be "eminently sound." My difficulty with the soundness of the treatment is that the distinctions and arguments all existed at the time the earlier remanded report was being reviewed by the court of appeals. All the distinctions and arguments might have been presented to the judges at that time without asking for the remand. A representation serious enough to induce a court to remand a case to us for more expensive and time-consuming adjudication ought to involve some new discoveries and a shift of position rather than the preappeal decision reached once again by now finding that the law of the precedent either does not apply, or to the extent the new law applies the respondents' self-policing system "meets the standard of fundamental fairness" and is presumably adequate. The reasons assigned to justify the remand, for better or for worse, completely changed the comparisons to be made, and it is too late to act as though our representations about changed conditions in law in *Silver* do not change anything else. The Commission is committed to considering the changes seriously. We could not foresee what was to come, nor prejudge, but at the time I believed we had the serious purpose of applying the precedent. I am attempting to give such consideration and application, as I indicate herein, because we chose not to take up the opportunities to argue when we were subject to the Court's judgment and elected to use the opportunities only when we got the case back subject to our judgment. One must now get on with this assignment. Accordingly, it is believed I must not only disagree with the treatment of the *Silver* case, but must reconsider my own position in my previous dissent.

Section 15, as amended by Public Law 87–346 in 1961 to add the third paragraph, establishes as a principle that self-policing is a governmentally recognized method of enforcing conference agreements. Given such a principle, the consequences to government policing must be that short of displacing government enforcement of laws, some displacement of Commission concern with enforcement of conference agreement obligations affecting conformity with the act is inevitable. Loss of protection to the public caused by any displacement may be restored by assurance of fair procedures in administering a self-policing plan. To me, this is the lesson of or the "light" cast by the *Silver* precedent. Stated in other words, equally applicable to the third paragraph of section 15, the Supreme Court wrote:

> "Congress in effecting a scheme of self-regulation designed to insure fair dealing cannot be thought to have sanctioned and protected self-regulative activity when carried out in a fundamentally unfair manner." 373 U.S. 341 (1963) at p. 364.

Whatever may have existed before, a fundamentally unfair manner is now equivalent to inadequacy. We protect the public when we assure adequate procedures.

I do not believe, however, that what is fundamentally fair for the New York Stock Exchange operating in conformity with the Securities Exchange Act for the purpose of protecting licensees and promoting fair dealings among Exchange members within the United States is to be regarded as an imperative for ocean freight rate-fixing conferences operating in conformity with the Shipping Act for the purpose of protecting shippers and carriers under the traditions of international shipping. Nevertheless, some concessions to public protection are necessary to achieve fundamental fairness. For the reason that the Examiner made no concession to public protection beyond what existed before, there has been a failure to apply standards, and the failure amounts to an incorrect consideration of this case in the light of *Silver* in line with our petition, and the third exception should be sustained.

Procedural safeguards established under Agreements Nos. 150–21 and 3103–17 for shipping conferences may differ from those for securities exchanges and be less sophisticated and exacting because carriers are dealing with each other. Also, procedural requirements derived from our own jurisprudence need not guide impositions on conference members, most of whom are nationals of countries where traditions are not the same as ours. The jurisprudence of which official notice may be taken in many conference member nations is inquisitorial rather than adversary in nature, and adequacy of self-policing procedures may take this factor into account. The possibility of international retaliatory regulation, not present in national securities exchange regulation, also argues for restraint in imposing our traditions. The differing subjects of regulation, the less sophisticated conference procedures, differing traditions of jurisprudence among those to be regulated, and other international considerations dictating restraint are all factors which justify minimum procedural requirements to achieve fundamental fairness as qualification of adequacy. It is concluded that, to restore assurance of public protection and avoid inadequacy, at least some, but not all, of the argued-for procedural safeguards of *Silver* are required. For these reasons the fourth exception to the Examiner's conclusion, that Agreements Nos. 150–21 and 3103–17 establish a fundamentally fair system of industry self-regulation within the meaning of *Silver* when none of the procedural safeguards specifically named are provided, should be sustained.

Without findings of fact and only with arguments, the Examiner approved agreements without procedures for giving an accused carrier (1) notice of complaint, (2) opportunity to confront, (3) the evidence used to reach decisions, (4) a hearing (including if essential cross-examination) before a decision, and (5) notice of the decision, including a specification of the charges found proved and those found unproved as urged by the intervenors. The agreements approved were not in the record. If the above five standards do not apply to the record agreements, we ought to know what facts or other argued considerations cause the standards not to be applicable. Intervenors supplied quite a few facts which they argued showed inadequacy, detriments to commerce, and absence of public interest if all the standards were not found applicable. Parties are entitled to a refutation based on factual findings. If the findings are absent the conclusions may not be made. The fifth exception as to conclusions despite lack of findings of fact on the agreements in issue should be sustained.

The sixth exception, together with my ruling on the fourth exception, leads to a question of what standards must be applied to agreements as tests of adequacy. It has already been decided above that some but not all of the proposed procedural safeguards must be applied and that it is error to apply none of them. Which particular ones apply depend on practicalities and circumstances of international ocean shipping traditions.

The essential basis for fundamentally fair procedures is to encourage discovery of as much of the truth about a commercial transaction as is possible so that a truly neutral judge may know most of what is relevant for deciding who is right and who is wrong after a complaint of malpractices. Fair procedure is not a ritual for the benefit of disputants, nor an assurance of personal "rights," but is a practical means for helping out a truly neutral adjudicator. The new tests need not have anything to do with "due process" observed by courts nor with distinctions between criminal and civil jurisprudence. If they are simply practical aids to truth finding, they are adequate for policing the obligations. A system providing only for a power referee would be inadequate. Almost any procedures, varying from conference to conference, that facilitate disclosure should meet the *Silver* standards of fairness as tests of adequacy.

Applied to the five proposed tests, these considerations lead to choosing notice of complaint, disclosure of evidence used to reach a decision, and a hearing of some sort before decision. Neither confrontation nor notice of decision are necessary, although the latter would seem to be reasonable and not be a controversial point. Disclosure of evidence and hearing with cross-examination might all be at the same time and place after preparation and might occur in the presence of the adjudicator. The notice and hearing (including disclosure of evidence) are essential to provide an opportunity to answer charges by one who is about to be deprived of valuable commercial privileges or fined.

In the subject agreements, article 25 contains eight subarticles (a) through (h). Of these none provides for notice, and the closest they get to notification is a power given the neutral body "to call upon a member or its agents at any of their offices during office hours and inspect * * *" etc. Subarticle (f) refers to a "hearing for the respondent" in the title, but this phase occurs, if it can be called a "hearing," "on concluding its investigation" and after the body decides "in its absolute discretion whether the facts * * * constitute a breach * * *," but the promise of the title is barely kept because the respondent is allowed, after arrival at a "tentative decision," if requested by respondent, to meet with the Neutral Body and offer explanations. The privileges offered are too late and too little. The "Neutral Body" is in effect the adjudicator. The purpose of a notice is to give the accused the opportunity to bring in all the proof he has to support whatever he has done or to refute what is claimed he did. Obviously, the accused will be motivated by a desire to defend himself and will at least produce some facts in his favor which would be useful to the adjudicator. It is equally to be assumed the complainer will already have porduced what supports his case. A hearing procedure will assure that the adversaries will provide the adjudicator with a large number of facts. Notice is an essential practical move, at least to start the fact assembling process, and the notice should be at the earliest possible time to be useful, and certainly before any decision is made. To the extent the agreements before us for approval contain no notice provision or any agreement delays notice until after a decision, they should be disapproved as inadequate if the lessons of the *Silver* case are to be taken seriously.

Confrontation does not seem essential because commercial transactions of the type involved in malpractices are largely documented, involve payments and measurements, and tend to be impersonal. Secret unsupportable accusations and wrongs of a civil or criminal nature where various states of mind are material are less apt to occur in commercial transactions, and malice, vindictiveness, intolerance, prejudice, or jealousy are less apt to be present. The fact that conference agreements are formulated by carriers of many nationalities from a diversity of legal systems does not preclude application of the lessons of the *Silver* case, even under a policy of restraint and minimal standards. The truth is discoverable without confrontation or even disclosure of the identity of the complainer consistently with adequacy.

Investigation and hearing are essential from the adjudicator's point of view for the purpose of adding to or explaining the facts previously supplied by the complainer and the accused. During this stage, both sides may reply with other facts and the adjudicator as an auditor or accountant may go out and assemble business records. A procedure such as that in article 25, which does not make explicit where the evidence must come from, in this regard is inadequate. The adjudicator may, consistently with a hearing procedure as I envision it, simply meet with the parties to allow them to offer explanations or further answering evidence which the adjudicator should then consider and thereafter decide on whether it proves a malpractice or not.

A combination of adversary and inquisitorial procedures having in rudimentary form and simple terms at least the above two elements would satisfy adequacy requirements of section 15 of the Act qualified by the *Silver* decision.

To the extent my dissent in the earlier proceeding approved use of procedures without the elements of notice and hearing, it has been reconsidered and revised by the foregoing in response to what is thought to be the Commission's commitment to the court of appeals.

To the extent the Examiner fails to find policing of the obligations inadequate under the standards of the *Silver* precedent as related to notice and hearing, the sixth exception should be sustained; and, to the extent the Examiner fails to adopt proposals for modification to include the new standards of adequacy in the subject agreements, the seventh exception should be sustained. No need is found for passing on that part of exception 6 questioning whether the self-policing systems operate to the detriment of the commerce or are contrary to the public interest.

Exceptions 8, 9, 10, and 11 deal with failures to find, consider, or recommend agreement provisions relating to criteria for assessment of fines and appeal and review of neutral body decisions. The facts all deal with past abuses and oppressions by respondents, such as the imposition of maximum or disproportionate fines for refusal to reveal company files to a suspected hostile auditor, and situations potentially resulting in virtual bankruptcy of defendants by excessive fines without appellate review. The facts as to intervenors alone do not establish the necessity of an appeal as a condition to adequacy modified by fundamental fairness lessons. Past history on the facts of this case indicates some appellate restraint on a Neutral Body might be advisable in these particular agreements, but offsetting proposed procedural safeguards should supply the restraint. Apart from procedures, appellate need is eliminated when added to the court-supported principle that appellate review is not an essential to due process, but is a matter of grace, and to the consideration that appeal does not improve the finding of truth but rather improves the application of law. Absence of a right to appeal or restraint on fines does not result in inadequacy. The 8th, 9th, 10th, and 11th exceptions dealing with these subjects may be rejected.

The 12th and 13th exceptions are to the Examiner's conclusions that an accounting firm employed as an auditor by a conference member line may serve as a Neutral Body and may consider a complaint of the member which employs it as auditor (subarticle (a), item (2), 2d paragraph). The issue in both exceptions is whether it is fundamentally fair to use such a person as a neutral in any controversy and whether procedures authorizing such use are inadequate. The reasons for finding provisions of an agreement containing such procedures are inadequate are stated in my dissent in this proceeding in our first report referred to above. Such provisions do not provide a system of true neutrality. In spite of the now reasserted reasons advanced at that time, there still seems to be a misconception of the issue when the Examiner refers to professional accounting firms as being uniquely qualified both professionally and by ethical standards to perform this work. There is no question that this finding or opinion is correct, and nothing stated earlier or here questions qualifications or ethical standards. The issue, at least as I see it, is not individual professional ethics, qualifications, or conduct, but the effect of an existing business relationship on the purity of the system itself to assure true neutrality and dangers to public interest without such assurance. Any appearance of bias or favoritism must be avoided. Our concern ought to be with the tendency to corruption of decision and with the consequent erosion of public confidence. Suspicion about all decisions is the by-product of existing provisions and the respondents no less than intervenors have much to gain by strict adherence to assured neutrality. Whatever may be said about professional behavior, the provisions allow the policing agency to have a special or closer relation to one and not to the other of two adversaries if he is the auditor of the complainer. The relation with one side unavoidably destroys assurance of siding with neither of two adversaries, an essential ingredient of the true neutrality referred to in the earlier dissent.

By missing the two points of a need for provisions assuring (1) the integrity of the system used and (2) the true neutrality of the policing body, the Examiner has not approved a fundamentally fair system of policing the obligations. For these reasons the 12th and 13th exceptions to the Examiner's conclusions that an accounting firm may serve as a Neutral Body even though it is the regular auditor of a member line and may consider a complaint and render a decision on an accused when serving as auditor of the complainant-accuser ought to be sustained.

The 14th through the 17th exceptions are to the failure of the Examiner to find facts related to the issue of approving agreements by less than all conference members and that the facts create agreements detrimental to commerce and to the conclusion of the Examiner that such agreements may be approved when submitted in the name of all members, including those who oppose the agreement. The exceptions raise an issue as to what is an "agreement" within the meaning of section 15 of the Act. Such an issue ought to be resolved before getting to any other issue as to inadequacy of provisions.

The Examiner held in effect that agreements submitted to the Commission under section 15 may be accepted for filing and approved even though they are not signed by all of the parties to be obligated. He holds that if an earlier agreement provides that later agreements modifying the earlier one may be amended by less than unanimous consent all of the parties are nevertheless obligated by the later modification.

The error of his position is in assuming that a change of an agreement is within the scope of the agreement. A change or amendment is inevitably outside the scope, but is nevertheless an agreement under section 15 if properly accepted. The Examiner fails to distinguish between actions within the scope of an agreement accomplished after vote and changes of the agreement itself which are to enlarge or restrict the scope. The latter require either unanimous consent or obligate at the most only those who accept the terms offered and evidence their acceptance by authorized signatures. The issue here is not one of inadequacy, but whether there is any agreement at all as described in section 15. The issue is legal, involving the law of contracts, and the best advice available convinces that a reservation by some parties to a contract of an unconditional future right to determine the nature of performance by changing the scope of the agreement makes the promise too indefinite to be enforced and the contract is not complete. (Williston, *Contracts*, 3d ed., sec. 37) If agreements may be changed for all parties by less than all parties, they have no ascertainable meaning for all the parties at the time they are entered into because a later nonagreeing party has no way of knowing what his obligations are at any time during the life of the contract. The dissenter may be obligated in ways never assented to. There is no meeting of minds, no accepted offer, at the moment of agreement about what is to happen if less than all parties may change later the scope of performance. I would hold that a later agreement not accepted at the time of later change by all the parties to be obligated is an agreement only of those who accept and does not obligate those who do not accept, notwithstanding any earlier agreements to be bound by votes of other parties because the earlier agreements create an indefinite and unenforceable contract.

The foregoing is based on legal advice and may not be subject to final adjudication before this agency forum. Agreements under section 15 may not be equated with contracts known to law, but up to now it has never been necessary to resolve this issue. Accepting the premise that the courts may prove my efforts at legal opinions poorly advised, I would nevertheless hold that agreements under section 15 must show unanimous consent before they may be approved We are not dealing with any abstract concept of majority rule either as known to political science or the management of internal association affairs. We are dealing with agreements, *first*, which only after approval are lawful and when lawful are excepted by the fifth paragraph of section 15 from the provisions of specified laws commonly known as the "antitrust laws;" and, *second*, which both enlarge and restrict commercial relationships of all member carriers. The first creates valuable privileges to make pricing decisions free from competitive restraint, and the second substantially affects opportunities for profit by foregoing competitive opportunities. The less-than-unanimity imposition of obligations outside the scope of the initial conference agreement enables less than all the associated carriers to force a carrier against managerial judgment to engage in noncompetitive activity or to be exempt from the otherwise applicable laws when a carrier's management wants to resort to competition. It is a paradoxical interpretation of section

15 to say we must accept for filing and thereafter approve an agreement compelling, rather than permitting, noncompetitive activity. Considered abstractly, I wholeheartedly endorse conference association, but it should not be compelled in this manner. The less-than-unanimity rule affects opportunities as shown by testimony that intervenor's management because of its past difficulties was not "going to join or continue in a conference * * * unless we absolutely as a matter of staying in the trade, have to do it" (Tr. 414). What this means is the company found it impossible to retain control over its business and corporate affairs by committing it to contracts not formulated by management but formulated by its competitors. Conflict among business associates likewise may affect profits. The unsupplied facts and findings by the Examiner would have shown a long history of disputation and resultant indecision (Tr. 355, 412) with the less than unanimous rule inducing nonreconciliation. The rule has provoked friction on this record.

The generalized considerations of this discussion alone may not be persuasive reasoning to support detriments to commerce and lack of public initerest dictating disapproval even if a fileable agreement is proven. Combined with the facts of a long history of dissension, a conclusioin of disapproval is warranted. If less than all parties may not amend an agreement, a statement at the end of an agreement that all of the members of the conference have "authorized the foregoing amendments," including in a list the names of carriers voting against the amendment, cannot be an entirely true statement. Misleading or false statements are not in the public interest and agreements containing them should be disapproved. Amending agreements are the same as an initial agreement under section 15 and ought to bear the signatures or otherwise evidence approval by all the parties to be obligated and not be signed by the secretary or some other conference official.

For these reasons exceptions 14, 15, 16, and 17 dealing with failure of findings of fact relating to the issue of approval by less-than-unanimous votes; failure to find amendments adopted over a member's dissent operate to the detriment of the commerce and are contrary to public interest; the conclusion that amendments are approvable when adopted by a less-than-unanimous vote; and approval of a form of agreement submitted in the name of all members should be sustained.

The 18th exception to the Examiner's failure to find the minutes of conference meetings should show by name which member lines voted against the adoption of an amendment is rejected as not necessary to a final decision in view of the prior rulings. A ruling is not required for a reasonable decision as to adequacy of policing of obligations under the agreements, nor to approvability of the agreements.

Hearing Counsel excepts (1) to the failure to find the agreements should contain certain proposed provisions and (2) to the Examiner's interpretation of a court precedent. It is not considered we are proposing desirable agreements, but are only disposing of applications for approval of agreements that have been contested. Absent any showing of inadequacy or precedents compelling disapproval of what we have before us, the proposals are irrelevant to anything we are doing. I agree with Hearing Counsel that the finding that the Examiner ought to make is related to adequacy of obligations, but our order of investigation raised the issue of whether the agreements before us should be "approved, disapproved, or modified" on the premise that we must "disapprove" inadequate agreements; therefore, the Examiner's choice of rhetoric was correct, whatever he may have said about court precedents. For these reasons, Hearing Counsel's two exceptions should be rejected.

To sum up:

1. This report, unlike the decision of the Examiner,

(a) reviews and disapproves the agreements in the record rather than agreements as modified by agreements excluded from the record; and

(b) adjudicates approvability of agreements rather than attempts to reconcile disputes between respondents and intervenors by accepting nonrecord modifications.

2. The agreements reviewed are inadequate and must be disapproved because, in the light of the changed conditions in law introduced by the *Silver* case, the provisions for policing obligations do not provide for:

(a) notice of complaints, or

(b) a hearing, including the production of evidence and opportunity to argue and explain, or

(c) fundamentally fair procedures through true neutrality.

3. Changes in the scope of the agreements must be made by all of the parties to the agreements (i.e., by unanimous consent),

(a) in order to be legally binding agreements, or

(b) to be approvable under section 15 of the Act.

4. The foregoing permit rulings as follows:

(a) sustaining intervenors' exceptions 1 through 7 and 12 through 17,

(b) rejection of intervenors' exceptions 8 through 11 and 18, and

(c) rejection of Hearing Counsel's two exceptions.

To conclude:

After notice and hearing herein, Agreements Nos. 150–21 and 3103–17, for which respondents have applied for approval under section 15 of the Act, should be disapproved on a finding of inadequate policing of the obligations under the aforesaid contracts, and a finding of non-unanimous consent thereto.

COMMISSIONER GEORGE H. HEARN, *dissenting in part:*

I do not subscribe to the majority view *in toto.*

A steamship conference, of course, is a voluntary association, a cooperative venture, and it must be grounded upon the good faith of its members, not only for the furtherance of the public good, and the protection of the shipper, but for the efficient, reasonable, practical, and harmonious day to day business and commercial betterment of its members. No one will deny that procedural safeguards are granted to persons and corporate entities under the constitution, or that many fundamental rights are protected by the great body of common law; nevertheless, when a steamship line elects through the exercise of its managerial judgment to become a member of a conference, for the benefits inuring therefrom, it may contract away some of its rights and privileges for what it considers to be business expedience but it cannot agree to an abrogation of obligations cast upon the group by law. It is my opinion that certain rights and privileges which are not essential to the public interest need not be observed; on the other hand, some fundamentals which do not impair the reasonable and practical day to day functions of the business need not be obviated. Here, an erosion of fundamental rights, while neither enhancing the self-policing duties nor perfecting the better flow of business of the conference, may well set a precedent for future agreements wherein important necessary and fundamental rights, as well as practices, are omitted. Therefore, I would modify the proposed self-policing agreement in several respects.

My proposed modifications, however, are not dictated by the decision in the *Silver* [1] case which is clearly distinguishable from the instant case, the principal point being that *Silver* involved a nonmember of the New York Stock Exchange while States Marine is a member of the conference herein.

First, the Neutral Body should be neutral in all respects. I am not convinced that the duties of the Neutral Body could not be undertaken by accountants, attorneys, or men schooled in the steamship business. I do not subscribe to the theory that the calling to conference policing is so specialized that there are only a handful of qualified men able to

[1] *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963).

perform the functions of a Neutral Body. Moreover the access to the private business operations of competitors requires, in my mind, that the Neutral Body conducting the investigation of alleged wrongs have *no* relationship with or interest in *any* of the activities of the members of the conference. To the extent, therefore, that the proposed amendments to these agreements permit the slightest affiliation between the conference's Neutral Body and any of the members of the conference for any reason whatsoever, I would not approve them.

Second, I would not approve the agreements to the extent that they permit a Neutral Body to investigate, on its own motion, the business affairs of a conference member. The better view, I believe, is to permit investigation by the self-policing organization only upon receipt of a written complaint which asserts, with some specificity, a breach of any of the obligations of the conference agreement by one of the members. A Neutral Body should be discouraged from going on fishing expeditions, thereby establishing the necessity for its self-perpetuation and possibly satisfying the majority of the conference members at the expense of one member. Since one of the reasons for a conference is the betterment, businesswise, of each individual member, as well as all of the members thereof, it is presumed, in theory, that they will each conduct themselves toward each other in the highest ethical traditions of the business and commercial world.

Third, I believe that reasonable notice of the gravaman of the complaint, but not the identity of accuser, should be given the accused, before the complaint is investigated, at least before the Neutral Body undertakes a visitation through the accused's papers, books, files, records, etc., for the alleged violation. This restraint, in my view, would limit odious harassments initiated by an unknown and disgruntled accuser.

Fourth, while I agree that the investigation should be conducted by the conference's Neutral Body, the agreements should make it clear that the accused has the right to have its own accountant, attorney or other representative present during the visitation, at which time the accused members' books, documents, files, etc. are reviewed for the specified breach of violation.

Fifth, the Neutral Body's investigation should be limited by the gravaman of the complaint. Fishing expeditions, especially those where the searcher stands to be financially rewarded, should not be encouraged. Under the proposal of the conference concerning this item, if the accused is found guilty by the Neutral Body, the cost of the entire investigation is assessed against the accused. In my view the conference, as the employer of the Neutral Body, should underwrite all of its expenses. I fear this could at least be an involuntary instruction to the Neutral Body to have its investigation result in finding a violation or a breach based upon any minor technicality. In my opinion the cost of the investigation should be borne by the conference, since it is incumbent upon all members to see to it that their particular conference at all times is acting in the public interest.

An order approving the agreements will be issued. By the Commission.

No. 1095

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

ORDER

This proceeding having been initiated by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a Report containing its findings and conclusions thereon, which Report is hereby referred to and made a part hereof;

It is ordered, That Agreement No. 150–21, as modified by No. 150–29, and Agreement No. 3103–17, as modified by No. 3103–26, are hereby approved.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

10. *Breach of Agreement.*—(a) In the event of any violation of this agreement by any of the parties hereto and/or their respective agents, except as provided in articles 25 and 30 hereof and as otherwise agreed upon for specific violation covered by conference resolution passed in conformity with the provisions of the basic agreement, such party or parties shall be subject to the payment of damages for each and every violation which shall be decided and assessed to the satisfaction of all parties hereto, except the party or parties charged with the violation, but if the party and/or parties hereto committing the alleged violation of this agreement are dissatisfied with the decision come to, such party and/or parties shall have the right to appeal, in which event the question of breach of agreement and damages shall be left to the determination of three arbitrators to be nominated within 30 days from the day on which the appeal of the party and/or parties charged with the violation will be received at the conference office.

One of the arbitrators will be nominated by two-thirds of the parties hereto, except the party or parties charged with the violation, one by the party or parties charged, the third shall be appointed in agreement of the two arbitrators so nominated. The arbitrators shall make their award friendly and the decision of two or more of the arbitrators shall be final and binding on the parties hereto. There shall be no appeal against the award of the arbitrators.

Any fine assessed by the Neutral Body under this agreement shall be paid to the conference. All conference members agree that the existing twenty-five thousand dollars ($25,000) U.S.A. currency faithful performance bond already posted with the conference shall also serve as a guarantee of the faithful performance of the foregoing and of prompt payment of any fine which may accrue against any party for its acts or the acts of its agents, subagents, subsidiary and/or associate companies under this agreement. Fines collected under this agreement shall be used toward defraying the expenses of the Neutral Body and other expenses which may be incurred in connection therewith. The maximum fines shall be:

(a) First offense, ten thousand dollars ($10,000) U.S.A. currency or equivalent in yen at the official mean rate of exchange.

(b) Second offense, fifteen thousand dollars ($15,000) U.S.A. currency or equivalent in yen at the official mean rate of exchange.

(c) Third offense, twenty thousand dollars ($20,000) U.S.A. currency or equivalent in yen at the official mean rate of exchange.

(d) Fourth offense and subsequent offenses, thirty thousand dollars ($30,000) U.S.A. currency or equivalent in yen at the official mean rate of exchange.

(b) In addition to the payment of damages, the offending party at the option of the conference shall be liable to expulsion from the conference or suspension of voting rights for such period of time as the conference may determine. Determination in the first instance as above as to a violation of this agreement and/or of any rules, regulations or tariff provisions of the conference, and whether the penalty shall be expulsion, suspension of voting rights and/or the payment of damages, and if the latter, the amount thereof, shall be made in accordance with article 19.

(c) In no case shall the party complained against have any vote in the determination of any of the foregoing matters. The party complained against shall have the right to be heard and to offer a defense against the accusation even though such party may not be afforded the right to vote on his guilt or innocence.

(d) No expulsion shall become effective until and unless notice thereof, with a detailed statement of the reason or reasons therefor, shall have been airmailed or cabled to the governmental agency charged with the administration of section 15 of the United States Shipping Act, 1916, as amended. Notice of suspension of voting rights pursuant to this article shall be furnished promptly by airmail or cable to the aforementioned governmental agency.

12. *Faithful performance.*—(a) As a guarantee of faithful performance hereunder, and of prompt payment of any liquidated damages which may accrue against them or of any award or judgment which may be rendered against them hereunder, the parties hereto agree to deposit with the conference the sum of twenty-five thousand dollars ($25,000) in United States Government bonds, or in the United States currency, or security bond of like amount satisfactory to the conference, which shall be deposited or invested as may be agreed by the parties pursuant to article 19. Any interest accruing thereon shall be for the account of the party making such deposit and shall be remitted promptly to such party if received by the conference. Each of the parties further agrees to deposit additional cash or security upon demand so as at all times to maintain cash or securities or any combination of both of a total market value equivalent in United States currency to the amount hereinabove specified. Such deposits or the proceeds thereof shall be applied to the payment of any damages imposed in accordance with article 10 or elsewhere in this agreement, unless otherwise fully paid or previously satisfied.

(b) In the event of the termination of this agreement or the termination of membership or withdrawal of any of the parties hereto, the deposits made by the parties concerned shall be returned to them, together with any accrued interest in the possession of the conference, but only after any indebtedness to the conference has been fully satisfied.

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

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

The maximum fines assessed by the Neutral Body shall be:

(a) First offense up to a maximum of U.S. $10,000.

(b) Second offense up to a maximum of U.S. $15,000.

(c) Third offense up to a maximum of U.S. $20,000.

(d) Fourth offense and subsequent offenses up to a maximum of U.S. $30,000.

5. To report to the extent appropriate the result of its investigation to Ethics Committee but without disclosing the names of complainants. The Ethics Committee shall notify the member lines through the conference Chairman.

6. To give directions as to payment of fines after assessment and notification to the Ethics Committee.

7. The undersigned lines promise to report immediately to the Neutral Body directly any apparent or alleged deviation from the conference agreement of its rules and regulations of correct and ethical practices thereunder which come to their attention or knowledge.

All lines agree to accept the decision(s) and any assessment(s) of fines thereof by the Neutral Body as final and binding.

8. To enable complaints to be investigated, the conference shall make available to the Neutral Body all records, correspondence and documents of every kind wherever located and give all assistance and information whatsoever verbal or otherwise which may be required by the Neutral Body at their absolute discretion. All the records of the freight conference at the secretary's office will also be available to the Neutral Body.

9. The conference members jointly and severally shall indemnify the Neutral Body against any liability to third parties including employees under any libel or other action which might be brought against the Neutral Body arising from the performances of its duties under this agreement. The conference members jointly and severally shall have no right to claim against the Neutral Body or their agents in any such libel or other action.

10. The retainer fee and other compensation for services of the Neutral Body shall be as agreed between the member lines and the Neutral Body.

APPENDIX B

The original version is agreement 150–21. Modifications proposed by agreement 150–29 are indicated by crossing out (delete) and underlining (add).

Article 10. Breach of Agreement:

~~(a) Except as provided in articles 25 and 30 hereof and as otherwise agreed upon for specific breaches covered by conference resolution passed in conformity with the provisions of the basic agreement, in the event of any breach of this agreement by a member and/or its agents, such member shall be subject to the payment of damages for each and every such breach. The determination of a breach and the amount of damages payable therefor shall be decided and assessed by vote of the conference under article 10 hereof; provided however that the member charged with breach shall not have a vote.~~

(a) In the event of any breach of the terms of this agreement by a member and/or its agents, such member shall be subject to the payment of damages for each and every such breach. The determination of a breach and the amount of damages payable therefor shall be decided and assessed by vote of the conference under article 19 hereof; provided however that the member charged with a breach shall not have a vote; and provided further that breaches of the terms of articles 25 and 30 and breaches involving malpractices as defined under article 25 shall not be determined hereunder.

If the member committing the alleged breach of this agreement is dissatisfied with the decision, such member shall have the right to appeal, in which event the questions of breach of the agreement and damages shall be left to the determination of three arbitrators to be nominated within thirty (30) days from the date of receipt of said member's appeal at the conference office.

One arbitrator shall be nominated by two-thirds of the members, excluding the member charged with breach, one by the member charged and the third shall be appointed by agreement of the two arbitrators so nominated. The arbitrators shall make their award by decision of two or more of them, and the award shall be final and binding on all members. There shall be no appeal against the award of the arbitrators. Nothing contained in this agreement shall interfere with the rights of any member line under the provisions of the Shipping Act, 1916, as amended, or the jurisdiction of the Federal Maritime Commission under said Act or any other pertinent Federal laws.

(b) In lieu of or in addition to the payment of damages, the offending member, at the option of the conference, shall be subject to expulsion from the conference or suspension of voting and other rights for such period of time as the Conference may determine. The determination of breach and assessment of the penalty of expulsion or suspension and, if suspension, the duration thereof, shall be in accordance with paragraph (a) above.

(c) In no case shall the member complained against have any vote in the determination of any of the foregoing matters. The member complained against shall have the right to be heard and to offer a defense against the allegations even though such member shall not be afforded the right to vote on the matter.

(d) No expulsion shall become effective until and unless notice thereof, with a detailed statement of the reason or reasons therefor; shall have been furnished the expelled member and a copy airmailed or cabled to the governmental agency charged with the administration of section 15 of the United States Shipping Act. 1916, as amended. Notice of suspension of voting rights pursuant to this article shall be furnished promptly by air mail or cable to the aforementioned governmental agency.

Article 12. Faithful Performance:

(a) As a guarantee of faithful performance hereunder, and of prompt payment of any liquidated damages which may accrue against them or any award of the Neutral Body, or any other award of judgment which may be rendered against them hereunder, the members agree to post and maintain with the conference the sum of twenty-five thousand dollars ($25,000) in United States currency or United States Government bonds, which shall be deposited or invested as may be agreed by the parties pursuant to article 19.

(b) In lieu of United States currency or United States Government bonds provided for in the preceding paragraph a member may post and maintain with the conference one or more irrevocable letters of credit in the total sum of twenty-five thousand dollars ($25,000); provided that those letters of credit create an absolute obligation for the bank to pay against drafts drawn by the conference chairman or the Neutral Body accompanied by a debit note bearing a date not later than thirty (30) days prior to said notice and, in the case of a Neutral Body assessment, a copy of the Neutral Body report; and further provided, that no other conditions for payment may be inserted in such letters of credit; that they are at all times maintained in the total sum of twenty-five thousand dollars ($25,000); and that they are in all other respects satisfactory to the conference.

(c) The deposits and letters of credit provided for in paragraphs (a) and (b), and the proceeds thereof, if any, shall be applied to the payment of any dues, damages or Neutral Body assessments payable under articles 10 and 25 or elsewhere in the agreement, unless fully paid or previously satisfied before they become delinquent in accordance with article 28 hereof. In the event a letter of credit is posted in lieu of United States currency or United States Government bonds, the Neutral Body will have the authority to draw drafts under the credit, accompanied by a copy of its report finding a breach and assessing damages and also a copy of the delinquent debit note, and to receive payment of the amount assessed from the bank on behalf of the conference.

(d) In the event of the termination of this agreement or termination of a membership or withdrawal of any of the members, the deposits made by the members concerned shall be returned to them, together with any accrued interest in the possession of the conference, or in the case of letters of credit, they will be revoked, but only after any indebtedness to the conference has been fully satisfied and three (3) months have elapsed from the date of termination or withdrawal or until a decision is made in any Neutral Body cases pending against such member on the effective date of termination or withdrawal or in any case filed within said subsequent 3-month period.

Article 25. Neutral Body:

(a) Appointment and Qualifications of the Neutral Body:

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

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

Prior to such appointment a candidate will be required to divulge to the conference any ~~material~~ "professional or business relationships or financial interests" ~~or service contracts~~ (hereafter in this article simply "interests") which it may have with any of the members, their "employees, agents, subagents, or their subsidiaries or affiliates" (hereafter in this article simply "agents"). The candidate will also be required to agree, in the event of appointment, to divulge any future proposals it might receive to create such interests, and promise to obtain conference approval thereof before accepting any such proposal. Such interests so divulged, if any, exclusive of financial interests, will not affect the qualification of the Neutral Body when appointed by the conference with knowledge thereof, and the members will not raise an objection, based on such grounds, to an investigation or decision made or damages assessed by the Neutral Body or its agents; provided, however, that the Neutral Body will be required before appointment to agree to disqualify itself in the event of a complaint against a member with which it may have such an interest. After disqualifying itself the Neutral Body is authorized to appoint an agent without such interest in the respondent to conduct the particular investigation and handle the complaint on behalf of the Neutral Body and such appointee shall have all of the authority and duties of the Neutral Body for that particular matter up through the date when the appointee reports its decision to the Ethics Committee under this article 25(f)(4).

(3) The Neutral Body will have the authority and responsibility to engage agents, lawyers and/or experts, including shipping experts, who can assist with its investigation and consideration of complaints and to pay on behalf of the conference all costs incidental thereto. Such agents or experts appointed by the Neutral Body must not have any interest in the particular member named in the particular complaint~~,~~ although they will not be disqualified because they may have an interest, exclusive of a financial interest, with any other member or its agents.

(4) For purposes of this paragraph (a), the words "financial interests" do not include professional or business relationships whereby the Neutral Body or its agents or experts are engaged as independent contractors for professional or business services.

(b) Jurisdiction of the Neutral Body:

(1) The Neutral Body shall have jurisdiction to handle, in accordance with the procedures of this article all written complaints submitted to the Neutral Body by the conference Chairman or a member alleging breach of the conference agreement, tariff rates, or rules and regulations, involving malpractice or, on its own motion, any breaches of the terms of this article 25~~; provided, that nothing herein contained shall change the functions of the Misrating Committee.~~

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

(3) The Neutral Body shall have no authority to investigate any breach involving a malpractice which occurred more than two years before the filing of a written complaint pursuant to article 25(b)(1), or more than two years before the discovery thereof under article 25(f)(1).

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

(1) The members and/or the conference Chairman shall report promptly to the Neutral Body in a written complaint any and all information of whatsoever kind or nature coming to their knowledge which, in their opinion, indicates a breach of the conference agreement, tariff rates, or rules and regulations involving malpractice or any breach of this article 25 by a member or its agents, and failure to report such information by any member will be a breach of this article.

(d) Investigation:

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

(2) Correspondingly each of the members shall have the duty and responsibility to supply such materials, and to cooperate in interviews promptly upon demand made in person by the Neutral Body or its agents and without prior screening, whether said materials or personnel are located in the members' own offices or in its agents' offices. Failure of a member or its agents to supply the materials required by the Neutral Body or its agents promptly will constitute a breach of this agreement by the member, and the member undertakes to thoroughly inform its agents of the members' liability for their conduct and obtain their commitment to comply with the conference agreement, tariff rates, or rules and regulations. In addition the members undertake an affirmative duty to cooperate and assist the Neutral Body in obtaining other required information whenever possible.

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

(e) Confidential Information:

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

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

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

(1) On concluding its investigation, the neutral Body will consider the information obtained and decide in its absolute discretion whether the facts have been sufficiently established to constitute a breach of the agreement, tariff rates, or rules and regulations, <u>involving a malpractice</u>, and if a breach <u>involving a malpractice</u> is found which was not covered by the complaint, such breach may also be reported and damages may be assessed thereon against any member liable.

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

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

(3) After the Neutral Body has completed its investigation, it shall advise the respondent either that a breach has not been found or that there are reasonable grounds to believe that a breach occurred. In the latter event, the respondent will be informed at this time of the nature of the alleged breach, and the evidence concerning it which the Neutral Body in its absolute discretion is able to disclose. In so advising the respondent, the Neutral Body shall disclose the actual evidence which it has at its disposal unless for reasons compelling to it such disclosure would tend to reveal the identity of the complainant or otherwise jeopardize the confidentiality of the Neutral Body's sources of information. In all cases, however, the Neutral Body will inform the respondent of the nature of the alleged breach, bearing in mind basic precepts of fairplay. Within fifteen (15) days, or within such reasonable time thereafter as the Neutral Body may in its sole discretion grant, if the respondent so requests, it may meet with the Neutral Body, with or without its own accountant and/or attorney, and offer to the Neutral Body such explanations and/or rebutting evidence as it may deem proper and desirable. At such hearing, the Neutral Body shall consider all of the available evidence and make its decision in accordance with the standards set forth under article 25(f)(2) hereof.

(4) ~~The Neutral Body will then make its final decision and either discharge the respondent or assess liquidated damages against him.~~ On the basis of its decision, the respondent shall either be advised that a breach has not been found or, should a breach be determined to have been committed, assessed liquidated damages. In assessing said damages, the members recognize that breaches of the conference agreement, tariff rates, or rules and regulations cause substantial damages, not only in lost freight but in consequent instability of the conference rate structure. The members further recognize that the damages caused are cumulative with the number of breaches, but the members further recognize that it is difficult to assess such damages precisely. Therefore the Neutral Body is authorized to assess liquidated damages in accordance with the following schedule:

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

(b) Second breach: maximum of fifteen thousand dollars ($15,000) U.S.A. currency, or equivalent in yen at the telegraphic transfer selling rate of exchange of exchange banks on the date of payment.

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

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

Notwithstanding the difficulty in assessing such damages precisely, in determining the amount of liquidated damages to be assessed the Neutral Body shall consider such mitigating circumstances as it may deem relevant.

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

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

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

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

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

(h) Payment of Damages:

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

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

APPENDIX C

NUMBERED EXCEPTIONS OF STATES MARINE LINES, INC.

1. Approves Modification 150–29 to Agreement 150–21 and Modification 3103–26 to Agreement 3103–17 when these modifications were not in evidence and the Commission denied a motion to reopen the record to consider them.

2. Approves Agreements 150–21 as modified and 3103–17 as modified, when these agreements, with or without the modifications, violate the standards for industry self-regulation set forth by the Supreme Court in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963).

3. Fails correctly to consider this case in light of *Silver* v. *New York Stock Exchange*, although the Commission requested the court of appeals to remand the proceeding to the Commission in order to reconsider it in the light of that case.

4. Concludes that Agreements 150–21 and 3103–17 establish a fundamentally fair system of industry self-regulation within the meaning of *Silver* when none of the procedural safeguards specifically named in *Silver* are provided in such agreements.

5. Concludes, despite the lack of findings of fact on the agreements in issue, that conferences may establish a system of self-regulation which authorizes the assessment of fines upon a finding of breach of the conference obligations without giving an accused:

(a) Notice of a complaint:

(b) Opportunity to confront and cross-examine adverse witnesses;

(c) The evidence upon which the determination of guilt or innocence will rest;

(d) A hearing prior to a determination of guilt; and

(e) Notice of the decision rendered, including specifications of which charges were found proved and which unproved.

6. Fails to find that a system described in paragraph 5 above (a) is illegal under *Silver* v. *New York Stock Exchange* and other applicable precedents; (b) operates to the detriment of the commerce of the United States; and (c) is contrary to the public interest.

7. Fails to recommend adoption of the States Marine proposals concerning notice, confrontation, investigation, hearing, and posthearing procedure.

8. Fails to find that the conference agreements should include criteria for the assessment of fines, in order to prevent assessment by the Neutral Body of excessive, unreasonable fines which in the past have operated to the detriment of the commerce of the United States and have been contrary to the public interest.

9. Fails to make any finding of fact on the necessity of allowing an appeal from the Neutral Body's decision.

10. Fails to consider, and rejects the applicability of *Silver* v. *New York Stock Exchange*, insofar as *Silver* held that there should be a review of industry-imposed self-disciplinary procedures and penalties.

11. Fails to recommend approval of the States Marine proposal for appeal of the Neutral Body's decision to arbitration.

12. Concludes that an accounting firm may serve as Neutral Body, even though it is the regular auditor of a member line of the conference.

13. Concludes that such an accounting firm, serving as Neutral Body, may consider a complaint and render judgment on an accused when the Neutral Body serves as the regular auditor for the complainant-accuser.

14. Fails to make any findings of fact with respect to the evidence adduced at the hearing relating to the issue of whether amendments to conference agreements may be approved when adopted by a less-than-unanimous vote of the conference members.

15. Fails to find that amendatory agreements adopted over the dissent of any conference member operate to the detriment of the commerce of the United States and are contrary to the public interest.

16. Concludes that amendments to agreements are approvable under section 15 of the Shipping Act (46 U.S.C. sec. 814) when adopted by a less-than-unanimous vote of all parties to the agreement.

17. Approves the form of submission of amendments to conference agreements which is submitted in the name of all member lines of the conference, including members who opposed the adoption of the amendment.

18. Fails to find that the minutes of conference meetings should show, by name, which member lines voted against the adoption of an amendment.

NOTE: The respondent did not file exceptions, and the exceptions of Hearing Counsel are not susceptible of framing in summary statement form.

FEDERAL MARITIME COMMISSION

No. 65–27

MARSEILLES/NORTH ATLANTIC U.S.A. FREIGHT CONFERENCE EXCLUSIVE PATRONAGE (DUAL RATE) SYSTEM AND CONTRACT

Decided March 31, 1966

Proposed dual rate system and dual rate contract form of the Marseilles/North Atlantic U.S.A. Freight Conference, modified in accordance with this decision, meet the requirements of section 14b of the Shipping Act, 1916, and are permitted pursuant to that section.

Benjamin W. Boley and *Warner W. Gardner* for respondent.
Howard A. Levy and *Donald J. Brunner*, as Hearing Counsel.

REPORT

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

This is a proceeding under section 14b of the Shipping Act, 1916, for the approval of an exclusive patronage (dual rate) contract to be used by respondent conference. In his initial decision, Examiner Edward C. Johnson approved the proposed dual rate system and the dual rate contract form. No exceptions to the Examiner's decision have been filed. The proceeding is before us upon our own motion to review.

After careful consideration of the record, we are of the opinion that the Examiner's findings and conclusions were proper and well founded except insofar as he approved the use of the phrase "or via" in article 1(a) of respondent's contract.

In *The Dual Rate Cases*, 8 F.M.C. 16, at page 33, we approved for all dual rate contracts then before us the following clause:

The Merchant undertakes to ship or cause to be shipped all of its ocean shipments moving in the trade on vessels of the Carriers unless otherwise provided in this agreement.

Article 1(a) of respondent's proposed dual rate contract complies generally with the provisions of the above required clause. It reads as follows:

The Merchant undertakes to ship or cause to be shipped all of its ocean shipments, for which contract and noncontract rates are offered, moving in the trade from *or via* the port of Marseilles, France to ports on the Atlantic Coast of the United States in the range from Hampton Roads to Portland, Maine, on vessels of the Carriers unless otherwise provided in this agreement.

After conceding that the inclusion of the phrase "or via" was a "deviation," the following was offered by way of explanation:

The effect of this language is to expressly provide that cargo transshipped at Marseilles on a separate bill of lading (as distinguished from transshipped on a through bill) is subject to the contract. This provision is not objectionable and merely expresses the implied intent of previously approved contracts.

The explanation is insufficient and serves to raise more questions than it resolves. In the first place the term "or via" does not accomplish the distinction between through bills and separate bills which is the prime reason for the deviation from the approved form of other contracts. We have indicated before that we will allow departures from the normally approved language where circumstances peculiar to the trade warrant them. Nothing of this sort has been offered here. Accordingly, and in order that respondent may utilize its dual rate contract in the interim, we will permit the use of the proposed form of exclusive patronage contract subject to the deletion of the phrase "or via" in article 1(a).

This permission is without prejudice to respondent filing a future modification to article 1(a) to accomplish the avowed purpose of the phrase "or via," accompanied by a statement of the circumstances of the trade warranting the modification.

An appropriate order will be issued by the Commission.

FEDERAL MARITIME COMMISSION

No. 65-27

MARSEILLES/NORTH ATLANTIC U.S.A. FREIGHT CONFERENCE EXCLUSIVE PATRONAGE (DUAL RATE) SYSTEM AND CONTRACT

ORDER

This proceeding having been instituted by the Federal Maritime Commission, and the Commission having fully considered the matter and having this day made and entered of record a Report containing its findings and conclusions, which Report is hereby referred to and made a part hereof;

It is ordered, That the Marseilles/North Atlantic U.S.A. Freight Conference exclusive patronage (dual rate) contract, be modified as herein set forth:

Delete the words "or via" on line 3 of article 1(a)

It is further ordered, That the Marseilles/North Atlantic U.S.A. Freight Conference exclusive patronage (dual rate) contract, as modified herein, is hereby approved, provided, however, that if respondent fails to submit the required modification within 60 days from the date of service of this order, the approval granted herein shall be null and void.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 65–6
PACIFIC WESTBOUND CONFERENCE
AMENDMENT TO DUAL RATE CONTRACT

Decided April 4, 1966

Petition of Pacific Westbound Conference to amend the charter-exclusion clause in its dual rate contract so as to exclude proprietary cargo not raised, grown, manufactured, or produced by the merchant, denied.

Edward D. Ransom and *Gordon L. Poole* for respondents.

Jerome H. Heckman and *Robert R. Tiernan* for Dow Chemical Company and Dow Chemical International, S.A., *Don A. Boyd* and *Francis P. Desmond* for E. I. du Pont de Nemours and Company, *Edwin Longcope* for Mitsubishi International Corporation, and *Elkan Turk, Jr.*, for Far East Conference, intervenors.

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

REPORT

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

This proceeding arises out of a petition filed by the Pacific Westbound Conference (Conference) requesting permission to amend the "charter-exclusion" clause of its dual rate contract. Protests to the proposed amendment were filed, and we instituted this investigation to determine whether the proposed revision meets the requirements of section 14b of the Shipping Act, 1916 (the Act) and should be permitted, or modified, pursuant to that section.

The Far East Conference, E. I. du Pont de Nemours and Company (Du Pont), Dow Chemical Company and Dow Chemical International, S.A. (Dow and Dow, S.A.), and Mitsubishi International Corp. (Mitsubishi) intervened in this proceeding. Mitsubishi withdrew after the prehearing conference. Examiner C. W. Robinson issued an Initial Decision, denying the Conference petition, to which exceptions and replies have been filed.

FINDINGS OF FACT

1. The Pacific Westbound Conference is composed of nineteen common carriers by water who serve the trade from United States and Canadian Pacific Coast ports to ports in Japan and other Far East countries.

2. Cotton is one of the principal commodities moving in the trade. In the past, the Conference has carried about 99 percent of all cotton moving from Pacific Coast ports to Japan. In 1960 cotton accounted for 30.6 percent of the total revenue tons handled by Conference lines to Japan. The corresponding figures in 1963 and 1964 were 27.9 percent and 13.8 percent respectively; through March 1965, cotton accounted for 15.7 percent of the total revenue tons. Revenue from cotton moving to Japan amounted to roughly $6.2 million in 1960. In 1963 this was approximately $4.3 million, dropping to $3.6 million in 1964 and to $2.2 million for the first four months of 1965.

3. Cotton export markets (including Japan) have dwindled in recent years apparently due primarily to the Federal Government's cotton pricing and subsidy programs. Despite this decline, cotton remains an important source of revenue to Conference carriers.

4. The movement of cotton in the trade is seasonal, moving most heavily from October or November through May. Shipments vary between 100 and 500 bales, and average about 4 bales to the short ton.

5. Cotton shipped through Pacific Coast ports to Japan comes principally from California, Arizona and New Mexico. The raw baled cotton is purchased by U.S. traders from growers, grower cooperatives or cotton ginners for sale to counterpart traders in Japan. The Japanese traders in turn sell the raw cotton to spinners. (Thus, cotton traders neither grow nor gin cotton; neither do they spin it nor manufacture cotton products.) Vessel bookings are controlled and made by buyers in Osaka, Japan, the main cotton center.

6. The Conference has been granted permission to utilize a dual rate contract system in the trade pursuant to the Commission's Order in *The Dual Rate Cases*, 8 F.M.C. 16 (1964). As required by that Order, the Conference dual rate contract contains the following exclusion for shipments made on owned or chartered vessels:

> ARTICLE 1(d)(2) This agreement shall not include any shipments by Merchant when carried in vessels owned by Merchant or in vessels fully chartered by Merchant for the exclusive use of the Merchant for a period of not less than six months.[1]

7. Mitsubishi, a Conference dual rate contract signatory, is an American subsidiary of Mitsubishi Shoji Kaisha, a very large and diversified

[1] The agreement defines the term "merchant" as "an exporter and/or importer of merchandise."

Japanese trading company. It procures in this country all the products needed by the Mitsubishi firms in Japan. On October 21, 1964, Mitsubishi, relying on its right to charter under the terms of Article 1(d)(2), quoted above, time chartered the Liberian vessel SS ONSHUN for a period of seven to nine months. The first sailing thereunder was from San Diego, Calif., on December 24, 1964, with a full load of cotton (20,000 bales). On or about February 21, 1965, Mitsubishi again employed the ONSHUN in the Conference trade for the movement of a partial shipload of cotton combined with other commodities.

8. Shortly after the ONSHUN sailed the first time, Toyomenka, Ltd., another large Japanese concern engaged in trading cotton and numerous other commodities, chartered the vessel MEIKO MARU for the movement of a full shipload of cotton (approximately 16,000 bales) to Japan. Three other charter sailings carrying either full or partial loads of cotton were made by that company in the Conference trade between January 25, 1965, and April 15, 1965.[2]

9. Toyomenka has its head office in Osaka, Japan. It operates in this country through an office in San Francisco and through the Toyo Cotton Company of Dallas. Upon inquiry, the Conference learned that the San Francisco office "didn't have anything to do with cotton, they didn't ship cotton" and that apparently only the San Francisco office, rather than the parent in Osaka or the Dallas subsidiary was bound by the Conference contract. Therefore, although it is not clear from the record, it is quite possible that some of the shipments made by Toyomenka may not have been made under the charter-exclusion clause.[3]

10. As a result of the six charter movements made by Toyomenka and Mitsubishi, the Conference lines estimate their losses as 16,847 net tons (64,795 bales), totaling $661,244.75 in revenue.[4]

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[2] The four charter sailings of Toyomenka were described in the record as follows:

"1. MEIKO MARU, sailing 1/20/65, full load of cotton.

"2. ROBERT KABELAC, 1/25/65, cotton and other cargo.

"3. MEIKO MARU, 4/15/65, full load of cotton.

"4. BAYMASTER, 4/15/65, cotton and other cargo."

[3] With reference to whether the Toyomenka's shipments were made under the charter-exclusion clause, Mr. William C. Galloway, Conference Chairman, testified as follows:

"Q. They [Toyomenka] were not contract signers at the time?

"A. That's the question. We thought they were. Our problem in the contract isn't limited to the charter-exclusion clause. We had such a narrow definition of who the merchant signed is and whose entity is covered. We had, apparently the U.S. or San Francisco Company and not the parent company in Osaka.

"Q. This sailing may not have been exclusively under the exemption for charter vessels; it may have been made partly under some other arrangement?

"A. That is entirely possible."

[4] None of the chartered vessels involved are owned by member lines of the Conference.

11. After ascertaining the facts with respect to these sailings the Conference concluded that such charters were technically not in breach of the provisions of the existing charter-exclusion clause of their dual rate contract. However, in order to forestall occurrences similar to those just described, and "to conform the language and the use of the charter exclusion to the purpose and intention as expressed by the Commission," the Conference filed a petition requesting amendment of its charter-exclusion clause. In its petition, the Conference asserted that the proposed revision was necessary as a means of furnishing adequate protection against spot-raiding of its cargoes by nonproprietary traders. The proposed revision, which is the subject of this proceeding, reads as follows (the additions are italicized):

ARTICLE 1(d)(2). This Agreement shall not include any shipment by Merchant *of Merchant's proprietary cargo* when carried in vessels owned by Merchant or in vessels fully *time or bareboat* chartered by Merchant for the exclusive use of the Merchant for a period of not less than six months. *As used herein "proprietary cargo" means cargo which has been raised, grown, manufactured, or produced by Merchant and is marketed by Merchant in its name as its own product. It does not include goods purchased by Merchant for resale or bought and sold by Merchant on behalf of others. It excludes all goods of agents, traders, or commission merchants.*

12. Whereas there are perhaps 10 traders in Japan, as well as other traders in the Far East generally, who deal in a variety of products and are potential charterers, only a few American cotton traders are large enough to charter a ship for full loads for any period of time. Probably the largest shipper is California Cotton Co-operative (Calcot), a corporation which acts as agent or trader for cotton growers in California. The growers, as members and stockholders in the corporation, consign their cotton and its title to the corporation, which then sells it. Dividends are paid to the growers at the end of the year if there has been a profit. The proposed amendment would prevent Calcot from taking advantage of the clause as the corporation is not a manufacturer, raiser, or grower of cotton. Some of the 66 trader-members of Western Cotton Shippers Association are large enough to charter, and most of the members ship regularly in the trade; all of them that ship to Japan are signatories to conference contracts.

13. Two small cotton traders (Conference contract signatories) testified that they supported the Conference's proposed amendment. Neither trader could say, however, that the charter movements had prevented him from having a good year in exporting cotton to Japan.

14. Although neither the Conference nor the two cotton traders who testified know of other cotton charters, either in the past or contemplated, they are concerned lest the idea of chartering spread to other commodities or a combination of commodities.

15. The record does not show that the freight cost to Mitsubishi or Toyomenka, when using chartered vessels was any less than the cost of transporting cotton to Japan by Conference carriers, nor is there evidence of any recent history of instability in the Conference rates on cotton as a result of the charters.

16. Intervener Du Pont requests that the petition be denied. Intervener Dow requests denial of the petition in its broad terms but does not oppose "limited relief, if relief is deemed appropriate." In that connection, Dow suggests that the existing Conference charter exclusion clause remain intact but that the following exception be added: "*Provided, however*, That this right of exclusion shall not be available for shipments of raw baled cotton."

Discussion and Conclusion

In his initial decision, the Examiner recommended denial of respondent's petition on the grounds that the proposed amendment was not in conformity with the charter-exclusion clause prescribed by the Commission in *The Dual Rate Cases*, *supra*, and that the Conference had failed to make a showing sufficient to warrant a Commission approved departure from the prescribed clause. Except to the extent modified herein, we find the examiner's findings and conclusions to be proper and well-founded.

The entire subject of dual rate contracts was extensively treated in our report in *The Dual Rate Cases*, *supra*. In that single proceeding, we gave final approval to the dual rate contracts of some 60 steamship conferences and one independent carrier. In our report in *The Dual Rate Cases*, we took cognizance of the desire of Congress that "insofar as was possible dual rate contracts should be standard or uniform" in order to simplify the problem of shippers regarding the meaning and application of contract provisions.[5] The present form of charter exclusion contained in the Conference's dual rate contract is that prescribed in *The Dual Rate Cases*. Respondent would now have us approve a different charter-exclusion clause on the grounds that this proposed amendment is dictated by a change of circumstances in the

[5] The validity of the procedures used by the Commission in consolidating hearings upon issues and of filing a consolidated report was upheld (except as to certain matters not relevant herein which were remanded to the Commission) by the United States Court of Appeals, Ninth Circuit, in *Pacific Coast European Conference* v. *United States*, 350 F. 2d 197 (1965), *cert. denied* 382 U.S. 958 (1965). The Circuit Court stated:

> "In our judgment the terms and conditions under which dual rates might be charged were the subject of rule making. In this area the Commission was acting in implementation of § 14(b); its action was legislative rather than judicial in character. It was a prospective determination of the standards under which the conferences were to be permitted to act in the future rather than an adjudication as to whether those standards in a particular case had been met." 350 F. 2d at 205.

trade and by the facts of record in this proceeding. We do not agree. For reasons stated below, we find that the Examiner was entirely correct when he concluded that "the petition of the conference to amend the charter-exclusion clause in its dual rate contract has not been shown to be justified," and that the petition should therefore be denied.

Section 14b requires that we permit dual rate agreements unless we find that "the contract [or] amendment * * * will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors," and provided that the agreements meet the eight specific requirements of section 14b(1) through 14b(8). In addition, section 14b(9) gives us authority to require or permit such other provisions as are not inconsistent with section 14b.

It was under the "other provisions" section (14b(9)) that we required the "charter exclusion" clause to be included in all dual rate contracts.

The legislative history of section 14b demonstrates that a limited exemption for merchant owned or chartered vessels was one of the matters which Congress clearly intended that the Commission should deal with in its approval of dual rate systems. Thus, in its report on the bill which ultimately became Public Law 87-346, the Senate Committee on Commerce stated:

> A second matter which the Commission should resolve by rule or regulation involves the extent to which, if at all, dual rate contracts should exclude full cargoes which move in shippers' private or chartered vessels. Obviously, unless this question is carefully considered, it is quite possible that one of two things might result: First, large shippers would be able to gain substantial competitive advantage over their smaller competitors; or second, contract shippers could not make fair and legitimate use under certain circumstances of their own or chartered vessels. S. Rept. No. 860, 87th Cong., 1st sess. (1961) p. 15.

Thus, in *The Dual Rate Cases*, *supra*, we stated:

> Exclusion from contract coverage of a merchant's goods moving on the merchant's owned or chartered vessels would primarily benefit larger shippers. However, neither the economic philosophy of the United States nor section 14b of the Shipping Act require that a merchant be deprived of all normal economies which go along with largeness. An important purpose of the Shipping Act is to facilitate the flow of commerce, and while it recognizes that a proper conference system can contribute to this end, it does not undertake to give the conference prior claim on all cargoes nor afford the conferences protection from all possible competition. We therefore are requiring that all contracts, whether or not they previously did so, shall permit merchants to transport cargoes on their owned vessels, or on vessels chartered by the merchant provided the term of the charter is 6 months or more. By limiting this to charters for periods of some duration, the conferences are accorded reasonable protection from spot raiding of cargoes and merchants accorded the right to engage in bona fide proprietary carriage under reasonable conditions. 8 F.M.C. 16, at 42-43.

The clause as finally formulated by the Commission strikes what we believe to be a fair balance between carrier and merchant interests, and to be in the best interest of the parties concerned, the public, and the commerce of the United States. It is now incumbent upon the Conference to come forward with such facts and circumstances peculiar to its trade as would warrant departure from the uniform clause. As we pointed out in *The Dual Rate Cases*, *supra*, at page 21, departures from the clauses prescribed therein will be allowed to suit "the reasonable commercial needs of a particular trade" [6] upon a showing by substantial evidence that such a change is needed or warranted.[7] Thus, the Examiner was correct when he found that the Conference must justify any departure from its present clause, and we find the Conference's first four exceptions, all of which deal in one way or another with the requirement that it "justify" its proposed amendment, not well taken.

But respondent further contends that the evidence in this proceeding is sufficient to support the approval of the proposed amendment and that "no barrier to approval thereof is posed by section 14(b) of the Shipping Act, 1916." On this record, we are compelled to find to the contrary.

As previously seen, the only charters known to have been executed in the Conference trade are those of Mitsubishi and Toyomenka. In its exceptions, the Conference characterizes the alleged revenue loss incurred as a result of these charter movements as "sizeable and seri-

[6] Cf. *Persian Outward Freight Conference—Exclusive Patronage (Dual Rate) Contract*, Docket No. 1079 (served August 31, 1964) ; *Japan-Atlantic & Gulf Conference—Exclusive Patronage (Dual Rate) Contract*, Docket No. 1078/1080 (served October 30, 1964).

[7] The Conference argues that its proposed amendment does not work a departure from the prescribed clause, but rather it makes explicit the true intent of the Commission in *The Dual Rate Cases*. In this regard, it is respondent's position that in our decision in *The Dual Rate Cases* contemplated approval of an owned/chartered vessel exclusion clause which would be limited to cargoes raised, produced or grown by the merchant and marketed in its own name as its own product. In our view, respondent is suffering from a misconception of the intent and purpose of the owned/chartered exclusion clause prescribed by us in *The Dual Rate Cases*.

In drafting the clause at issue herein, it was not our intention to exclude from the operation of the contract such of the merchant's cargo as he merely *owns*, as distinct from what he grows, manufactures or produces. We did not, directly or indirectly, put a restriction on the type of nonbulk cargo which the merchant might carry, so long as it was of a proprietary nature. And absent an agreement or statutory expression to the contrary, ownership of or other appropriate legal interest in cargo is the basic test of what is proprietary. That there is no implied requirement that the cargo be raised, grown, manufactured, or produced by the merchant, has been decided by us on at least one other occasion. In *The Persian Gulf Outward Freight Conference Exclusive Patronage (Dual Rate) Contract*, Docket No. 1079 (served August 31, 1964), a case that involved Commission approval of a proposed form of dual rate contract, we stated:

> "In conformance with our Order on Reconsideration in *North Atlantic Westbound Freight Association—Exclusive Patronage* (Dual Rate) Contract, Docket No. 1059 (served August 3, 1964), the exclusion has been worded so as to make it clear that chartered vessels are limited to the carriage of the merchant's *owned*, cargo." (Italic supplied.)

ous." When the total volume of the three full and three partial charters is considered, however, it is found that such volume was only approximately sixteen percent of the total cotton tonnage handled by the Conference in 1964. Expressed another way, the alleged loss of 16,847 tons of cotton because of the charter movements represents only slightly over two percent of the total revenue tons carried by the Conference of all commodities for 1964. Even these percentages are probably less since it appears that some of the charter movements made by Toyomenka were not made under the Conference's owned/chartered vessel exclusion clause. Be that as it may, however, we are of the opinion that such a limited adverse effect on the interests of the Conference carriers does not justify the sweeping change proposed by respondent.

Fears have been voiced by Conference representatives that other commodities or combinations thereof are somehow likely to move on chartered vessels in precisely the same manner as has cotton. These fears, however, are entirely unfounded on the basis of the present record. In sum, whether or not there will be further charter movements in the Conference trade cannot be determined from the record and a finding one way or the other would be the product of unallayed speculation. This Commission has said that the mere possibility that a conference agreement may result in a violation of the Act is insufficient reason to disapprove the agreement. *Agreement 8492—Alaskan Trade*, 7 F.M.C. 511, 519 (1963); *Agreement 134-24—Gulf/Mediterranean Ports Conference*, Docket No. 1158 (served March 15, 1965). Likewise, the mere possibility that large traders may utilize the charter-exclusion clause would not justify the granting of the present petition.

Shipper and Conference witnesses agree that rate instability has not developed in the trade as a result of the charters, but the Conference expresses a fear that cotton traders will put a squeeze on its members for a lower rate. This fear is somewhat neutralized by the fact that the Conference, effective August 16, 1965, instituted a general rate increase of $1 per revenue ton (although this increase occurred subsequent to the hearing, the Examiner took official notice thereof as do we). The Conference is also worried lest the continued use of chartered vessels, especially for commodities other than cotton, weaken the Conference and make it necessary for some of the member lines to consider withdrawing from the trade. This record is also devoid of any evidence which would support this course of action. Thus, the Conference's exception to the Examiner's "conclusion" that departures from the required clause cannot be made "until serious adverse effects * * * are incurred" by the conference is not well taken. We do not read the Examiner's decision that way. He simply found as do we that the record here does not justify such departure. If slightly over two percent of all revenue tons carried is objectionable, then presumably the Conference would have a charter-exclusion clause which would in fact exclude nothing.

On the other hand, to tighten the charter-exclusion clause in the broad manner here sought would adversely affect the rights of many shippers whom the Conference admits have caused it no problem. It would effectively preclude merchant shippers, such as Dow and Du Pont, from utilizing chartered vessels to transport those goods which they own but which they have not grown, produced or manufactured. Thus, the restrictive clause proposed by the Conference would place the merchant-shippers, who do not make or grow the product that they sell, at an obvious commercial disadvantage, *vis-a-vis*, those merchant-shippers who do. The evidence in this record does not justify this result. Consequently, we find that the imposition of a limitation on the right of all shippers to utilize proprietary carriage is "unjustly discriminatory [and] unfair as between shippers" in violation of the standards set down in section 14b of the Shipping Act, 1916.

In the light of all the foregoing considerations, we conclude that the Conference has advanced neither facts nor arguments of sufficient weight to establish that its proposed departure from the Commission prescribed charter-exclusion clause is justified or lawful. The Conference's petition to amend is therefore denied.

Finally, respondent excepts to the Examiner's failure to consider the more limited amendment proposed by Dow; i.e., a clause which would provide that the charter exclusion right shall not be available for shipments of raw, baled cotton. In his initial decision, the Examiner determined that "it [was] unnecessary to discuss the amendment offered by Dow" since it appeared that the Conference was unwilling to consider alternatives to its proposed amendment. We believe that the Examiner has correctly interpreted the record and was perfectly justified in questioning the willingness of respondent to accept an alternative to its proposed clause. Consequently, respondent's exception in this regard is not well taken. The record demonstrates clearly that at the hearing in this proceeding, respondent was adverse to any change or modification of the proposed amendment. In light of the Conference's present posture in regards to Dow's proposed amendment, however, it remains for us to determine on the merits whether Dow's proposal applicable to cotton only, is supported by the facts and arguments in this proceeding. In this regard, we find that the present record no more supports the Dow proposal than it did the Conference's and that our rationale denying approval to the Conference proposal applies with equal force here. Respondent's exception to the contrary is found to be without merit.

Vice Chairman JOHN S. PATTERSON, concurring

Consistency with the Commission's decision in *The Dual Rate Cases*, 8 F.M.C. 16 (1964) requires that the Commission overrule the exceptions and sustain the Examiner's Initial Decision. I do not necessarily agree with the reasoning used in the preceding report to reach this conclusion, but would confine myself to finding that there has not been a sufficient showing of special circumstances to warrant a departure from a precedent.

An appropriate order will be entered.

No. 65–6

PACIFIC WESTBOUND CONFERENCE

AMENDMENT TO DUAL RATE CONTRACT

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 the petition of the Pacific Westbound Conference to amend the owned-chartered vessel exclusion clause in its exclusive patronage (dual rate) contract so as to exclude proprietary cargo not raised, grown, manufactured, or produced by the merchant, be, and hereby is, denied.

By the Commission.[8]

[SEAL] (Signed) THOMAS LISI.

[8] Commissioner Hearn did not participate.