DECISIONS OF THE

FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 30, 1967

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DECISIONS OF THE
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

Docket No. 65-5

PROPOSED RULE COVERING TIME LIMIT ON THE FILING OF OVERCHARGE CLAIMS

Decided June 27, 1966

Proposed rule prohibiting limitation of time within which claims for adjustment of freight charges may be presented to carrier to less than 2 years after date of shipment not promulgated as there is no showing that carrier-imposed time limitations have operated in an unlawful fashion under sections 17, 22, or 18(b) (3) of the Shipping Act, 1916, or section 2 of the Intercoastal Shipping Act, 1933. Carrier-imposed time limitations are not to be construed as in any way affecting right of shipper to file claim for reparation under section 22, Shipping Act, 1916, within 2 years of accrual of cause of action. Commission's discontinuance of proceeding is without prejudice to institution of further proceedings with respect to carrier-imposed time limitations.

REPORT

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

The Commission by notice of proposed rulemaking published in the Federal Register on March 27, 1965, instituted the captioned proceeding to determine the legality under various sections of the Shipping Act, 1916 (the 1916 act), and the Intercoastal Shipping Act, 1933 (1933 act), of provisions in tariffs of certain common carriers by water imposing a time limit on the filing of claims less than the 2-year period provided in section 22 of the act. The Commission alleged that such tariff rules appear to be contrary to:

1. Section 22 of the 1916 act by establishing a period for limitation of claims other than the 2-year period provided therein.
2. Section 18(b) (3) of the 1916 act and section 2 of the 1933 act by allowing the carrier to retain freight charges greater than those specified in its tariff.

299-843 O-68—2

3. Section 17 of the 1916 act as constituting an unjust or unreasonable practice.

The Commission stated that it was considering promulgation of the following rule:

Common carrier by water as defined in section 1 of the Shipping Act, 1916, as amended (46 U.S.C. 801), shall not by tariff rule or otherwise limit to less than 2 years after the date of shipment the time within which claims for adjustment of freight charges may be presented.

A total of 23 comments were filed by, or on behalf of 44 steamship conferences, two independent water carriers and 17 shipper or other organizations.[1]

Comments from the shipper groups were uniformly quite brief. All shipper groups commenting upon the proposed rule favored it maintaining that the Commission was correct that the conference provisions limiting the time within which claims might be made violated the statutes, and that practical necessity required that shippers be allowed 2 years in which to present claims. The specific contentions of the shipper groups may be summarized as follows:

1. The 6-months' limitation presently imposed by many carriers is unreasonable in that 6 months does not allow enough time to audit freight bills and submit claims.
2. Two years would provide ample time within which to make the audit and submit claims. Uniformity of time period to file claims against carriers is desirable.
3. The carrier-imposed time rules are contrary to section 22 of the Shipping Act, 1916, and to the interests of the shipping public.
4. A 6 months' tariff rule limitation misleads the shipping public as to their actual legal rights.
5. The Civil Aeronautics Board (CAB) and Interstate Commerce Commission (ICC) allow 2 and 3 years' time limitation, respectively, for filing claims with carriers.

On February 14, 1966, correspondence was received from the Assistant General Counsel of the General Accounting Office indicating that office's support of the proposed rule because of its practice of paying

[1] Alexander's Department Stores; Associated Dry Goods Corp.; Bloomingdale's; Burgess Cellulose Co.; Burroughs Corp.; Commerce and Industry Association of New York; Cyanamid International; Eastern Industrial Traffic League; Halliburton Co.; Ingersoll-Rand Co.; P. Lorillard Co., Inc.; McGreevey, Werring & Howell, Inc.; Mark Tennenbaum Co.; Mersco Wholesale Co., Inc.; Ocean Freight Consultants, Inc.; Radio Corp. of America; United States Borax & Chemical Corp.; Kirlin, Campbell & Keating, attorneys for the parties to Agreements Nos. 17, 59, 2744, 3863, 4189, 4490, 4610, 5700, 5850, 6080, 6190, 6200, 7100, 7540, 7550, 7590, 7650, 7670, 7690, 7700, 7890, 7980, 8040, 8054, 8080, 8120, 8240, 8300, and 8650; Lillick, Geary, Wheat, Adams & Charles, attorneys for the parties to Agreements Nos. 14 and 57; Terriberry, Rault, Carroll, Yancey & Farrell, attorneys for the parties to Agreements Nos. 134, 161, 5400, and 7780; Graham James & Rolph, attorneys for the parties to Agreements Nos. 93, 150, 3102, 5200, 5680, 6060, 6400, and 8660; Burlingham, Underwood, Barron, Wright & White, attorneys for the party to Agreement No. 8210; States Marine Lines and Isthmian Lines.

freight bills before performing audits on them and the necessity of allowing a considerable period for checking claims for overcharges. The letter further states that Government transportation officers cannot be expected as a routine matter to police errors in charges based on incorrect weight or measurement at their source, and tariff provisions requesting claims for adjustment of freight charges based upon such alleged errors to be submitted in writing before shipment leaves the custody of the carrier are, therefore, unreasonable.

The comments filed by the 44 steamship conferences and two independent carriers strongly object to the Commission's proposed rule. The various positions expressed in these comments may be summarized as follows:

1. The Commission has no authority to deal with carrier-imposed limitations on the presentation of claims for freight adjustment by rulemaking. The Commission has in effect already so held in its Docket No. 712, *Carrier-Imposed Time Limits for Freight Adjustments*, 4 F.M.B. 29 (1952). That case held that absent a showing on a record developed pursuant to hearing that such time limitations had operated in an unlawful manner there was nothing in sections 14, 14(a), 15, 16, 17, 18, and 22 that would allow the Commission to outlaw such time limitations in a rulemaking proceeding. The only section added to the Shipping Act since that proceeding and included here is section 18(b)(3), which does not allow the Commission to regulate in any way the substance of tariffs or other shipping documents, but only their form.

2. Section 22 of the Shipping Act, 1916, is a pure statute of limitations and does not inhibit the contractual freedom of carriers and shippers to set a period of less than 2 years for the adjustment of freight claims, either through filing of claims with the carrier or in actions before the Commission or the courts. Support for this position is found in the actions of the ICC prior to the amendment of its statute specifically forbidding the shortening of the statutory times for filing claims and bringing actions by carrier rule. The Carriage of Goods by Sea Act (COGSA), unlike the Shipping Act, also specifically forbids parties from stipulating for a lesser period of time for bringing suit than that contained in the statute. Prior to the passage of COGSA, parties were free to stipulate as to the time for filing claims and bringing suit.

3. In any case there is nothing in section 22 that would prevent a conference from controlling the time in which claims may be made before it rather than before the Commission or the courts. It is further contended by one party that a failure to file a claim with a conference within the conference-imposed time limit may be pleaded as a defense here or in a court.

4. Section 17 does not permit any regulation of the substantive provisions of the bills of lading or tariffs and was directed toward practices relating more directly to the handling of property by terminals. The first paragraph of section 17, moreover, deals only with rates, fares, or charges and not to practices, such as the one involved here.

5. An attempted rule of the sort the Commission proposed would be contrary to international law by running counter to the principle that the place of contracting controls the form and substance of a contract and the principle that in maritime contracts the law stipulated by the parties is to be controlling.

6. The proposed rule would preclude a reasonable and necessary investigation of claims. Conference tariffs as they now stand require claims based upon weight and measurement errors to be made while that shipment is still in custody of the carrier. This is reasonable because the carrier would have no way of checking upon such alleged errors once the cargo is removed from its custody. As far as other claims are concerned, it places no hardship on shippers to require them to file claims within a 6-month period.

7. The Commission-proposed rule is inconsistent with the requirements of section 22 because the statute of limitations period contained in section 22 has been construed as running from the date of freight payment while the rule would compute the limitation period as running from date of shipment.

Suggestions are made by one party that the Commission-proposed rule would be found less objectionable if it were (1) modified to exempt claims based upon alleged errors in weight, measurement, or description of cargo, or (2) modified to indicate that it refers only to claims filed with the Commission.

Suggestion is also made by one party that the Commission-proposed rule might be workable if limited only to carriers in the offshore domestic trades where section 18(a) suggests authority for the rule because the Commission is there granted power over the "substance" as well as the form of bills of lading.

Oral argument was heard on February 16, 1966, at which representatives of all but one of those who filed comments on behalf of the conference and two independent lines commenting on the proposed rule appeared. Ocean Freight Consultants (OFC) presented the shippers' position at the argument. Subsequent thereto OFC submitted to the Commission information purporting to substantiate its claim made at oral argument that several conferences were utilizing their self-imposed time limitations for filing of claims to discriminate as between shippers, sometimes paying and sometimes rejecting claims filed after the expiration of such time limitations.

DISCUSSION AND CONCLUSIONS

We have examined carefully the contentions of all parties to this rulemaking proceeding and in the light of such examinations and for reasons set forth below, will not promulgate our proposed rule at the present time.

We wish to make clear, however, that our failure to promulgate a rule at this time is not to be interpreted to allow carriers in anyway to limit the right of a shipper claiming injury under the 1916 act or the 1933 act to file a claim for reparation under section 22 of the Shipping Act with the Commission at any time within 2 years of accrual of the cause of action which is the basis of such injury and claim. We do not agree with the comments of the conferences and carriers which maintain that the 2-year statute of limitations contained in section 22 is a "pure statute of limitation" the purpose of which is merely to bar the bringing of stale claims, and which can be contracted away by agreement between shipper and carrier. The practice of the ICC prior to the amendments of the statutes under which it operates providing that claims against carriers and forwarders had to be made and that actions on such claims had to be brought within certain time limitations is not instructive for our purposes. Carriers and forwarders were allowed to stipulate as to the time within which actions could be brought at times when there were no time limitation provisions in the specific statutes under which they were regulated.[2] Once Congress had spoken, however, and had indicated a period during which actions could be brought, either before the Commission or the courts, a public policy with the force of law was established and such stipulations no longer had the sanction of law. The *Schou-Gallis* case cited in footnote 2 is particularly instructive in this respect. In that case the issue was the lawfulness of an attempt by a freight forwarder to limit the time within which claims could be filed with it. The ICC, although striking down the particular tariff rule by which the forwarder imposed such limitation as unlawful as too indefinite in form, upheld the validity of the principle of a time limitation for the filing of claims with forwarders. After a discussion of the loss and damage cases noted above, the ICC observes that part IV of the Interstate Commerce Act which regulates forwarders, unlike parts I and III regulating rail and water carriers respectively, "confers no specific authority upon this Com-

[2] See on loss and damage claims—*Northern Pacific Ry.* v. *Wall,* 241 U.S. 87, 92 (1916); *St. Louis & S.F. Ry. Co.* v. *Keller,* 90 Ark. 308 (1909); *St. Louis, D.M. & S.F. Ry. Co.* v. *Starbird,* 243 U.S. 592 (1917); *Southern Pacific Co.* v. *Steward,* 248 U.S. 446 (1918); *Adams Express Co.* v. *Cook,* 172 S.W. 1096 (1915). On overcharge claims see—*Schou-Gallis Co.* v. *International Forwarding Co.* 268 I.C.C. 591 (1947); *Sachs* v. *Universal Car Loading & Distributing Co.* 78 F. Supp. 619 (1948).

mission to award damages as such in respect of either overcharges or unlawful rates charged shippers by freight forwarders. Also, * * * no periods of limitation are prescribed therein, and no reference is made of record specifically to any other statute which limits the time within which claims arising in respect of charges for services subject to part IV may be filed here or in the courts" (at 595).[3] The ICC thus allowed the forwarder to modify the time-limitation rule to make it lawful. The instant proceeding, however, presents an entirely different situation. This Commission is empowered by Congress to grant reparation for any violation of the statutes it administers. This was not the situation with respect to claims for forwarder overcharges before the ICC at the time of the *Schou-Gallis* case and has never been true with respect to claims for cargo damage. Such claims can only be brought in a court of law.[4] There is also a statute of limitations governing the time within which such reparation may be sought embodied in our statute itself—no reference for the applicable time limitation need be made to principles of general law or State statutes of limitation as was necessary under ICC practice before the amendments to the Interstate Commerce Act discussed herein. No cases are advanced which hold that a common carrier or other person subject to similar regulation may by contract change a time limitation for bringing a claim for reparation which is embodied in a statute of an administrative agency, nor will we permit it here.

As we have observed above, however, we will not promulgate our proposed rule with respect to the time within which claims may be presented to the carriers at this time.

As our predecessor agency, the Federal Maritime Board, noted in its Docket No. 712, *Carrier-Imposed Time Limits for Freight Adjustments*, 4 F.M.B. 29 (1952) carrier-imposed time limitations like those under investigation here cannot be declared unlawful unless there has been a showing that they operated in a fashion contrary to some provision of the statutes we administer. The notice of proposed rulemaking in this proceeding alleged that carrier limitations appeared to be contrary to sections 22, 18(b), and 17 of the Shipping Act, 1916, and section 2 of the 1933 act.

It is, of course, true that carrier-imposed time limitations might be utilized in such a way as to prevent shippers from filing or recovering reparation pursuant to claims with us for injury caused by violation of

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[3] The Interstate Commerce Act has since been amended to provide for actions at law for recovery of overcharges made by forwarders. See 49 U.S.C. § 1006a.

[4] I.C.A. § 20(11). See also *Reynolds* v. *Chicago M. St. P. & P. R. Co.*, 222 I.C.C. 42 (1937); *Fuel Sales Corp.* v. *Delaware L. & W.R. Co.*, 225 I.C.C. 288, 289 (1937); *Oneonta Fruit Co. Inc.* v. *Delaware & H.R. Corp.*, 269 I.C.C. 188 (1947).

our statutes. Such effect would, as noted above, be contrary to the public policy embodied by Congress in section 22 of the Shipping Act. There is no showing, however, that the limitations have had such effect.

Sections 18(b)(3) of the 1916 act and 2 of the 1933 act would not outlaw carrier-imposed time limitations as such. The statutory provisions merely prohibit a carrier from retaining freight charges greater than those specified in its tariff. A carrier could, of course, retain such charges if an action for reparation before the Commission were brought after 2 years from the time of accrual of the cause of action. The carriers' limitations would violate sections 18(b)(3) or 2 only if it could be shown that they had the effect of preventing shippers' recovery based on just claims prior to the expiration of the 2-year period. As noted above, there is no indication of such effect in this proceeding.

Finally, the second paragraph of section 17 of the Shipping Act, 1916, under which the carriers' limitations were alleged to be invalid by our notice of proposed rulemaking does not relate to the practices of the type here involved. It relates only to practices "relating to or connected with the receiving, handling, storing, or delivering of property," and its application has thus been confined to forwarding and terminal operations.[5]

Although there have been allegations from shippers and their representatives in this proceeding that the carrier limitation periods are insufficient and lend themselves to discriminatory treatment between shippers, there is no statutory provision in this proceeding which such conduct would, if existent, violate. Nor, moreover, does the information gathered in this proceeding substantiate such allegations. As we noted in *Carrier-Imposed Time Limits for Freight Adjustments*, *supra*, a rule like that here involved is not one which of itself "carries out the powers, duties, and functions" of this agency as provided in certain statutory sections. Such a rule can only be promulgated when both of the factors absent from this proceeding are present: (1) the allegation of a violation of a statutory provision under which practices, if proven to exist, would be unlawful and; (2) a finding that such practices did exist.[6]

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[5] "This paragraph relates to services performed at the terminal as distinguished from the carrying or transporting of the vessel." *Los Angeles By-Products Co.* v. *Barber S.S. Lines, Inc.*, 2 U.S.M.C. 106, 114 (1939).

[6] "[U]pon findings of unlawfulness, we are authorized to issue rules under the act prescribing action for the future," *Freight Forwarder Investigation—Etc.*, 6 F.M.B. 327, 358 (1961); See also *California* v. *United States*, 320 U.S. 577, 582, 583 (1944). A distinction must be made between a rule of this sort and rules implementing certain statutory provisions, which need no such basis: e.g., the adoption and maintenance of reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints, section 15, Shipping Act, 1916, as implemented by G.O. 14, 46 CFR 527; the

We do not imply that carriers' limitations like those which are the subject of this proceeding might not be prohibited under sections of the 1916 act or the 1933 act not involved in this proceeding.[7] Nor do we wish to indicate that violations of sections 22, 18(b) (3), or 2 could not be shown on a detailed record. The Commission does not, of course, prejudice itself by the discontinuance of this proceeding with respect to the institution of such further proceedings with respect to carrier-imposed time limitations on the presenting of claims as it may deem proper.

An appropriate order will be entered.

ORDER

Docket No. 65–5

PROPOSED RULE COVERING TIME LIMIT ON THE FILING OF OVERCHARGE CLAIMS

Notice of proposed rulemaking in the captioned proceeding having been published in the Federal Register, and the Commission having received comments from and heard oral argument by interested persons and having this day issued a report in this proceeding, which is hereby referred to and incorporated herein by reference,

Therefore, it is ordered, That this proceeding is discontinued.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

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policing of obligations under conference and other rate-fixing agreements, section 15, Shipping Act, 1916, as implemented by G.O. 7, 46 CFR 528. An exception does seem to exist to the requirement that a Commission-promulgated rule respecting carrier-imposed time limitations have a finding of unlawful conduct as its basis. The possibility exists as noted in *Carrier-Imposed Time Limits for Freight Adjustments*, *supra*, of promulgation of a rule under section 18(a) of the 1916 act, which grants the Commission power over the "substance" as well as the form of bills of lading of carriers in the offshore domestic trades. This section, however, was not included in this proceeding.

[7] There is, for example, a possibility that such limitations may run afoul of the provision of section 14 making it a misdemeanor for a carrier to "unfairly treat or unjustly discriminate against any shipper in the matter of * * * the adjustment and settlement of claims."

FEDERAL MARITIME COMMISSION

Docket No. 66–12

APPROVED SCOPE OF TRADES COVERED BY AGREEMENT 7840, AS AMENDED—ATLANTIC PASSENGER STEAMSHIP CONFERENCE

Decided June 28, 1966

Atlantic Passenger Steamship Conference and its member lines not required to delete portion of Agreement 7840 dealing with carriage of passengers between Europe and Canada.

Carl S. Rowe, *Edward R. Neaher*, and *Lino A. Graglia* for respondents, Atlantic Passenger Steamship Conference and its member lines.
Donald J. Brunner, Hearing Counsel.

REPORT

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

On March 10, 1966, we ordered respondents (the conference and its member lines) to show cause why their organic agreement governing Atlantic passenger traffic carried by the lines between ports of European, Mediterranean, and Black Sea countries, Morocco, Madeira, and the Azores, on the one hand, and all ports on the east coast of North America (United States, Canada, and Newfoundland), the St. Lawrence River, the Great Lakes, and U.S. Gulf ports, on the other hand, should not be modified to delete that portion covering the carriage of passengers between Europe on the one hand and Canada and Newfoundland on the other.[1] The order stated that since the Commission is without power to affect relationships and to grant immunities to the antitrust acts, pursuant to section 15 of the Shipping Act, 1916,

*Ashton C. Barrett, Commissioner, did not participate.

[1] As Newfoundland is now a part of Canada, the word "Canada" will be used herein to include it.

with respect to common carriers in foreign-to-foreign commerce and since, as a matter of policy, the scope of approved agreements should be coextensive with its jurisdiction, it appeared that the portion of the agreement dealing with the foreign commerce of Canada should be deleted. The matter of the scope of the agreement was said in the order not to involve any disputed issues of fact requiring an evidentiary hearing.

The conference filed affidavits of fact and memoranda of law as provided for in the order to show cause, and Hearing Counsel replied.[2] We have heard oral argument.

Positions of Parties

A. The conference maintains that this proceeding is unauthorized by law and, even if so authorized, should not be pursued as a matter of sound administrative discretion. Respondents argue:

1. The Commission's order to show cause fails to notify respondents of the factual and legal bases therefor. The conference alleges that the order contains no allegation of a violation of a section of the Shipping Act, and does not notify it of the matters of fact relied upon by the Commission in support of the proposed modification.

2. The Commission is not authorized to disapprove an agreement solely on the ground that it includes Canada within the scope. There has been no finding in this proceeding that an agreement including Canada is contrary to section 15, and agreements including Canada have been specifically approved by the Commission's predecessor agencies.

3. The modification proposed by the Commission would result in instability, probably leading to rate wars and complete disruption of the trade. Lower rates and fares at Canadian ports would cause diversion of traffic from American ports to the detriment of U.S. commerce and contrary to the public interest. Affidavits of fact submitted on behalf of the conference, the conference's member lines, United States Lines and American Export Isbrandtsen Lines indicate the existence of the following factors which show the inseparability of the Canadian and American trades in this conference:

a. The approved conference agreements between Europe and the United States have always included Canadian ports.

b. Only three member lines of the conference did not maintain a regular service to U.S. ports as well as Canadian ports in 1965, and only one line made no callings at U.S. ports.

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[2] Respondents also filed another memorandum at the oral argument. See p. 5, *infra*.

c. All lines maintain appointed travel agents in the United States which book a large number of passengers on voyages from Canada.

d. All conference member lines, whether serving U.S. ports, Canadian ports, or both, maintain general offices and/or agencies in both the United States and Canada, as well as large numbers of travel agents for the solicitation and sale of passenger bookings.

e. The American Society of Travel Agents includes Canadian travel agents within its membership and executive organs.

B. Hearing Counsel argue that this proceeding is procedurally valid, as a matter of law, and that sound policy requires that the Canadian portion of the subject agreement be deleted. They maintain:

1. The order instituting this proceeding clearly sets forth sections 1 and 15 of the Shipping Act as the legal bases for this proceeding and indicated that the specific issue involved the "power to affect relationships and to grant immunity to the Antitrust Act with respect to common carriers in foreign-to-foreign commerce * * *." The Commission's authority to determine questions of law in a show cause proceeding has been upheld by the courts, and the jurisdictional question presented here involves no factual issues.

2. There are no cases dispositive of the issue of whether the Commission must approve agreements covering foreign-to-foreign as well as foreign-to-United States trades.

3. Jurisdiction cannot be conferred on the Commission by agreement of the parties. The Commission has no jurisdiction over Canadian foreign commerce or carriers engaged therein. Lines engaged in such commerce have no right to participate in conferences which fix or regulate rates or otherwise control competition in trades in our commerce. No longstanding policy requires approval of the foreign-to-foreign portion of this agreement. The Commission is empowered to protect our commerce under the Shipping Act whether one conference covering both Canadian and American trades or individual conferences covering these two trades exist. Sound regulatory policy requires that the Canadian portion of the subject agreement be deleted.

Discussion and Conclusions

It cannot be seriously maintained at this stage of the Commission's history that the order to show cause by which this proceeding was instituted was in any way unauthorized by law or procedurally defective. The power of the Commission to issue an order to show cause and the procedural sufficiency of an order substantially the same as that here in issue were upheld in *American Export and Isbrandtsen Lines* v. *Federal Maritime Commission*, 334 F. 2d 185 (9th Cir. 1964). Sections 1 and 15 of the Shipping Act are clearly set forth as the legal

bases for the order. The Commission's jurisdiction is referred to as limited to activities by "common carriers * * * engaged in the transportation by water * * * between the United States * * * and a foreign country," and the Commission describes itself as "without power to affect relationships and to grant immunities to the antitrust acts * * * with respect to common carriers in foreign-to-foreign commerce." The sole question of law is whether or not an agreement covering a foreign-to-foreign trade may be approved by the Commission. There appeared no disputed issues of fact. However, the order to show cause allowed respondents to submit affidavits of such facts as they thought relevant to the issues and memoranda of law. They submitted both. The affidavits of fact were not disputed by Hearing Counsel.

Moreover, in the interests of procedural fairness, respondents were allowed to submit at the oral argument an additional "reply memorandum" which was not provided for in the order to show cause and which was presented to the Commission at the argument without prior notice.[3]

On the question of the approvability under section 15 of the agreement in its present form, after careful consideration of the arguments of the parties, we find nothing in the record which constrains us to depart from the decision of our predecessor, the Federal Maritime Board, in *Maatschappi "Zeetransport" N.V. (Orange Line) et al.* v. *Anchor Line Limited et al.*, 5 F.M.B. 714 (1959), which we find dispositive of the issues raised herein. (See also *States-Marine Lines, Inc.* v. *Trans-Pacific Freight Conference*, 7 F.M.C. 204 (1962), aff'd *sub nom Trans-Pacific Freight Conference of Japan* v. *F.M.C.*, 314 F. 2d 928 (C.A. 9, 1963)). Accordingly, we will not order the deletion of that portion of the agreement covering the carriage of passengers between Europe and Canada.

Accordingly, the proceeding is discontinued.

(Signed) THOMAS LISI,
Secretary.

[3] Respondents' only allegation of harm resulting from the alleged deficiency in the order is that they are unable to prepare "an effective reply and case in opposition" to the order. The two memoranda filed by respondents contain detailed and cogent arguments on precisely those issues raised by the order, thus demonstrating their complete awareness of the issues.

FEDERAL MARITIME COMMISSION

No. 65–7

IMPOSITION OF SURCHARGE AT UNITED STATES ATLANTIC AND GULF PORTS ON CARGO MOVING BETWEEN SAID PORTS AND LATIN AMERICAN PORTS

Decided June 29, 1966

Under uniform dual rate contract provision requiring 90 days' notice of rate increase unless "extraordinary conditions * * * impede, obstruct, or delay the obligations of the carrier", surcharge on 30 days' notice did not violate the contract where circumstances surrounding a strike of longshoremen and subsequent port congestion were so unprecendented as not to be foreseeable by respondent conferences by the exercise of a high degree of diligence.

Imposition of the surcharge by respondents did not violate sections 14b, 15, 16 First, 17, or 18(b)(5) of the Shipping Act, 1916.

David Orlin, *John R. Mahoney*, *John G. McGarrahan*, and *Edmond Smith* for respondent conferences and respondents Grace line and Roval Netherlands Steamship Company.

Donald Mcleay and *Harold E. Mesirow* for respondent Delta Steamship Lines, Inc.

Phillip G. Kraemer for intervener Traffic Board of the North Atlantic Ports Association.

Sidney Goldstein, General Counsel; *F. A. Mulhern*, Attorney; and *Arthur L. Winn, Jr.*, *Samuel H. Moerman*, *J. Raymond Clark*, and *James M. Henderson* for intervener Port of New York Authority.

Don A. Boyd and *F. P. Desmond*, Commerce Counsel, for intervener E. I. du Pont de Nemours & Co.

J. E. Moody, General Counsel, *Thomas J. O'Reilly*, Assistant General Counsel; and *Paul J. Fitzpatrick*, Attorney for intervener General Services Administration.

Alfred K. Kestenbaum for witness E. R. Liggett.

Michael C. Bernstein and *Phillip Weinstein* for witnesses of New York Branch, U.S. Fresh Fruit and Vegetable Association.

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

REPORT

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

The Commission initiated this proceeding on April 2, 1965, to determine the lawfulness of certain 10-percent surcharges imposed by nine steamship conferences operating between Atlantic and Gulf ports of the United States and the Caribbean Islands (excluding Puerto Rico and the Virgin Islands), the north coast of South America, Panama, the west coast of Central America, and the west coast of South America.[1] The Commission named these conferences as respondents as well as those independent lines which also imposed a surcharge. The proceeding contains five issues for determination involving sections 14b, 15, 16 First 17, and 18(b)(5) of the Shipping Act, 1916;[2] namely:

1. Whether the surcharges were imposed in violation of section 14b and the dual rate contracts approved thereunder, especially with respect to the application of the term "extraordinary condition" to the longshore strike;
2. Whether the imposition of the surcharges by the respondent conferences is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, between exporters from the United States and their foreign competitors, or operates to the dertiment of the commerce of the United States, or is contrary to the public interest, as proscribed by section 15;
3. Whether the imposition of the surcharges at all U.S. Atlantic and Gulf ports makes or gives any undue or unreasonable perference or advantage to any person, locality, or description of traffic in any respect whatsoever, or subjects any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, in violation of section 16 First;
4. Whether the surcharges are rates, fares, or charges, which are unjustly discriminatory between shippers or ports in violation of section 17; and
5. Whether the surcharges are rates or charges which are so

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[1] The conferences are: Atlantic and Gulf/West Coast of South America Conference; Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference; U.S. Atlantic and Gulf-Jamaica Conference; Leeward and Windward Islands and Guianas Conference; East Coast Colombia Conference; West Coast South America Northbound Conference; U.S. Atlantic and Gulf/Haiti Conference; Atlantic and Gulf/West Coast of Central America and Mexico Conference, and U.S. Atlantic and Gulf/Santo Domingo Conference.

[2] 46 U.S.C. 813a, 814, 815, 816, and 817(b)(5), respectively.

unreasonably high or low as to be detrimental to the commerce of the United States in violation of section 18(b)(5).

This proceeding is before us now on exceptions in the Initial Decision of Examiner E. Robert Seaver.

On March 5, 1965, the conferences, except the Venezuelan Conference, announced the 10-percent surcharges to be effective April 5, 1965, on all shipments to or from the U.S. Atlantic and Gulf ports.[3] The surcharge was to expire not later than October 3. On April 2, 1965, the Venezuelan Conference announced its 5-percent surcharge, effective May 3, 1965. The Venezuelan Conference had initially decided to adopt the 10-percent surcharge, but due to the opposition of the Venezuelan Government the conference decided to adopt a 5-percent surcharge. The nonconference carriers adopted a 10-percent surcharge on 30 days' notice, but approximately eight nonconference lines did not adopt a surcharge.[4]

Toward the end of May, the conference decided to terminate the surcharges as of August 30, 1965, and to adopt a permanent rate increase in the amount of 6 to 7½ percent of normal rates, effective August 30, 1965, to cover their added costs resulting from the new labor contract with longshoremen.[5]

For many years the successive labor contracts between the steamship lines and the longshoremen have been entered into for periods of 2 years each. A strike of longshoremen has occurred every time the contract expired, or nearly every time. After the strike of 1963, a panel appointed by the President devised certain guidelines for future negotiations between labor and management for the longshore contract. The contract was again due to expire on September 30, 1964, so in order to avoid last-minute bargaining, negotiations for a new contract were begun in June 1964. Negotiations were predicated upon the formula devised by the President's panel. Bargaining on behalf of management was conducted by representatives of the New York

[3] In the absence of the authority to suspend rates, *pendente lite*, the Commission sought an injunction against respondents' imposition of the surcharges in order to maintain the status quo until this proceeding could be completed. The court refused to enter the injunction but declared that its decision covered only the question whether irreparable harm to shippers would result if the surcharges were permitted to become effective and was not to be considered a precedent governing the issues in the instant proceeding. *Federal Maritime Com'n.* v. *Atlantic & Gulf/Panama Canal Zone*, 241 Fed. Supp. 766 (S.D.N.Y. Apr. 27, 1965).

[4] Hereafter, discussion relating to the conference lines is equally applicable to those nonconference lines which established a surcharge. The Commission named individually as respondents American Plate Line, Atlantic Lines, Ltd., Azta Line, Delta Steamship Lines, Inc., Grace Line, Ozark Navigation, Inc., Peruvian State Line, Royal Netherlands Steamship Co., Surinam Navigation Co., Ltd., and Tica Line.

[5] Other conferences affected by the strike adopted rate increases and gave 90 days' notice, with the average effective date sometime in May 1965.

Shipping Association (NYSA), and the longshoremen were collectively represented by the International Longshoremen's Association (ILA).

NYSA represents 145 American and foreign steamship lines and contract stevedores in the Port of New York. NYSA is empowered to negotiate the entire contract for New York and the master contract, which covers the essential items of wages, fringe benefits, the duration of the contract, and the hours to be worked for North Atlantic ports from Searsport, Maine, to Hampton Roads, Va.

In other Atlantic and Gulf ports the ILA negotiates with other representatives of steamship lines. However, the master contract worked out in New York is usually adopted in these other ports, except as to questions peculiar to a local port which are negotiated locally.

The NYSA and ILA had not reached agreement when the longshoremen's contract expired on September 30, 1964, so the Government sought and obtained the 80-day injunction against a strike under the provisions of the Taft-Hartley Act, and work was not interrupted when the contract expired. Negotiations continued. Also, a panel headed by Assistant Secretary of Labor James Reynolds made a series of recommendations in line with those made earlier by the President's panel. On December 16, 1964, 4 days before the injunction was to expire, the Reynolds' recommendations were accepted by both sides.

The NYSA negotiators had previously obtained their principals' approval of the terms that were ultimately agreed upon between the negotiating groups on December 16, 1964. It remained, however, for the terms to be ratified by the rank and file membership of the union. Neither management, its bargaining representatives, nor the union representatives doubted that this approval would be forthcoming as a matter of course, after the necessary time had expired to conduct the voting. In the meantime, the Taft-Hartley injunction had expired on December 20, 1964, but, contrary to experience in previous strikes, the longshoremen had agreed to stay on the job. Despite the confidence of the bargaining representatives, the longshoremen refused to accept the agreement, a unique situation in collective bargaining in the steamship industry.

The strike of longshoremen started on Monday, January 11, 1965, in substantially all Atlantic and Gulf ports. On January 21, 1965, the ILA membership in the Port of New York, and some other ports, voted again and ratified the same agreement, but local disputes which were interfering with settlement of the negotiations in certain South Atlantic and Gulf ports prevented the termination of the strike. In

order to cause pressure to be put on these ports to come to a settlement, the ILA invoked an "all-port-no-port" rule under which the union refused to return to work at any port until agreement was reached and the dispute settled at all the ports. This came as a complete surprise to management because of a permanent injunction of many years' standing against the ILA demanding that NYSA bargain for all Atlantic and Gulf ports.

At this time President Johnson issued a statement critical of the failure to terminate the strike and mobilizing Government forces to attempt to bring the parties to agreement. The National Labor Relations Board obtained an injunction against the ILA on the ground that it was engaging in an unfair labor practice by the all-port tactics, and the court directed the union to return to work in the Port of New York. As a result of this and the President's appeal, the strike ended in North Atlantic and some of the Gulf ports on February 12, 1965. Negotiations over local disputes continued for as long as a month in the other ports, the strike being settled on various intervening dates at the remaining Gulf and Atlantic ports. The last of the ports to settle was Miami, Fla., where the longshoremen returned to work on March 13, 1965.

The combination of the strike and lack of anticipation and preparation for the strike by the carriers resulted in congestion of cargoes and ships at the various ports after the strike that exceeded any such congestion that had previously been experienced. The degree of congestion varied from port to port, of course. In the worst places, the condition was chaotic; in other ports, the congestion was severe; and in a few ports, the congestion was substantially less.

Incoming cargoes were impeded by export cargoes accumulated on the piers during the strike. Severe demands were made on longshoremen after work commenced because of the backlog. Parcels of cargo were shortloaded, out of conformity with the bills of lading. The storage of cargo was a severe problem. This congestion prevented the orderly loading of cargoes for ease of discharge as the various ports of call were reached, with the result that in many instances cargoes had to be offloaded to reach deeper stored cargoes destined for the port, and then reloaded. Extensive vessel delays were experienced at the various ports in waiting for berths and because of delays in loading and unloading, the delay running in some instances in excess of 3 weeks. The additional costs incurred as a result of the strike and the congestion were quite substantial to the respondents because the trades included here involve comparatively short sea runs and more frequent loading and discharge than in most other trades. The congestion grad-

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ually decreased after a time and came back to normal proportions at varying times in the respective ports. There is some controversy about the time of return to normal, but the record shows that all was normal by June 15, 1965.

Carriers are normally able to anticipate the occurrence of a strike long enough in advance to take action to minimize the resulting expenses and losses. Ships are quickly loaded and dispatched from the strike ports. Other ships are laid up or sent in for periodic inspection, surveys, drydocking, and repairs. Crews are dismissed and office help is sent on annual vacations. Carriers adjust sailing schedules so as to balance the placement of the ships at the strike's end, and they place ships in other trades. They do not charter additional tonnage on the eve of the strike or dispatch vessels to the area of the labor dispute.

The carriers experienced losses during the strike and its aftermath through lost vessel days resulting from the strike, and the port congestion, shortage of berths, increased expense of loading and discharging due to the congestion, shortage of longshore workers, offloading and reloading improperly stowed cargo, and other abnormal expenses.

The shipper testimony established the fact that shippers in these trades frequently quote prices 60 days, 90 days, or even longer in advance of delivery of the merchandise and that, because of one factor or another, shippers cannot in many instances pass along to the purchaser increased costs resulting from the surcharges. This would be the case when goods are sold c.i.f., or other basis where the seller pays the freight, in the absence of an escalator clause. Likewise, the difficulty in amending import licenses granted by some of the Latin American countries, or changing letters of credit, caused shippers to absorb the increase in some instances. The shippers absorbed the surcharges in other instances because competition required that they do so. Several shippers testified that it is their practice when they quote a price to a customer to make good that quotation when costs, such as freight rates, have gone up in the meantime, even though they are not legally bound to do so. The record does not establish the total amount of those freight increases that could not be or were not passed along to the ultimate consumers of the commodities, but a fair sampling was brought out.

As a result of the port congestion and the strike, shippers suffered expenses in addition to the amount of the surcharges. In some instances, they had to pay for additional storage during the time their commodities were waiting to be loaded, and for waiting time of

truckers. One or two of the shippers believed that they lost business by reason of the surcharges, but no particular sales were lost outright.

Duel-rate contract systems are in use by the conferences in all of the outbound trades. The only import trade where dual-rate contracts are employed is that from the east coast of Colombia, and only coffee shipments are covered there.

Under article 9(a) of the dual-rate contract, the conferences are prohibited from making rate changes except as provided by section 18(b)(2).

In addition, this article requires the conferences to give 90 days' notice of rate increases, insofar as such increases are under the control of the carriers. If the increase is not acceptable to the contracting shipper, this article permits him to tender notice of termination of the agreement at least 30 days before the effective date of the increase, and the termination shall be effective as of the date of the proposed increase, unless the conference, having received such notice, shall elect to maintain the existing rates.

Article 10(a) permits the carriers to suspend the agreement in the event of war, hostilities, warlike operations, embargoes, blockades, regulations of any governmental authority pertaining thereto, or any other official interferences with commercial intercourse arising from these conditions, which affect the operations of the carriers. Article 10(b) provides that, in the event of any of the conditions enumerated in article 10(a), the carriers may increase any rates affected thereby on not less than 15 days' written notice to the shipper. The shipper is allowed to suspend the agreement if an increase is imposed in these circumstances unless the carrier's notice of increase is rescinded.

The article directly involved in this proceeding, being the one relied upon by the respondent conferences as authority for the present rate increase on less than the 90-day notice, is article 10(c), which provides:

> In the event of any extraordinary conditions not enumerated in article 10(a), which conditions may unduly impede, obstruct, or delay the obligations of the carriers, the carriers may increase any rate or rates affected thereby, in order to meet such conditions: *Provided, however*, That nothing in this article shall be construed to limit the provisions of section 18(b) of the Shipping Act, 1916, in regard to the notice provisions of rate changes. The merchant may, not less than 10 days before increases are to become effective, notify the carriers that this agreement shall be suspended insofar as the increases are concerned, as of the effective date of the increase, unless the carriers shall give notice that such increase or increases have been rescinded and canceled.

The number and size of the nonconference carriers are somewhat inexact, but apparently there are some 15 to 18 nonconference lines that serve one or more of the trade routes. The largest of these lines makes

27 calls per year in the Venezuela trade; for example, as compared to Grace's 52 calls per year. Another comparatively large nonconference line, the Peruvian State Line, has a total of 20 sailings in these trades in 1964, as contrasted with 100 for Grace Lines. That particular nonconference carrier, and some of the others, adopted a 10-percent surcharge on 30 days' notice, like that adopted by the conferences. An executive of one conference line and the conference chairman as much as admitted that they consider the nonconference service to be inadequate, although they did testify that there was extensive nonconference competition. About 98 percent of the shippers using the conference lines have signed dual-rate contracts. If the conferences had ceased to function on April 5, 1965, the nonconference lines that had not adopted a surcharge could not have provided adequate service for all the shippers in these trades during the period of the surcharge. In this sense the nonconference service could be deemed to be inadequate, even though the independent lines undoubtedly could have adequately served some of the shippers who might have elected to terminate their dual-rate agreements.

Under article 10(c) of the contract, dual-rate shippers were entitled to withdraw from the dual-rate contract upon the announcement of the surcharges. One out of the 7,000 dual-rate shippers in these trades exercised that right. The parties are in disagreement as to whether this oppportunity afforded any relief since there is a question whether nonconference service is adequate to meet the needs of shippers.

DISCUSSION

The Examiner found that there is no showing of prejudice or disadvantage to any person, locality, or description of traffic as prohibited by section 16 First and no showing of unjust discrimination between shippers or between ports as prohibited by section 17. Neither, according to the Examiner, will the record support a finding that the level of the surcharge was so unreasonably high as to be detrimental to the commerce of the United States contrary to section 18(b)(5) since the surcharge did not cause loss of sales or prevent the movement of cargo. No exceptions were filed to these conclusions, and we sustain them.

Hearing Counsel, however, except to the Examiner's finding that the longshoremen's strike and its aftermath were the "extraordinary conditions" within the meaning of article 10(c) of the dual-rate contract.

The Examiner resolved the issue of whether "extraordinary conditions" existed to the factual determination of whether the carriers "in the exercise of a high degree of diligence in the exercise of business

judgment" should have foreseen or anticipated the conditions upon which the surcharges are based. If the carriers could have foreseen the consequences of the strike through such diligence, they would be required to give 90 days' notice.

Using this test, the Examiner found the events involved here could not have been foreseen by the exercise of this high degree of diligence. On the contrary, he found that during the negotiations ending on December 16, 1964, and thereafter, until the longshoremen walked out on January 11, 1965, a decision that a strike was imminent would have been unwarranted. The unprecedented refusal of the union members to accept the contract, the insistence of the union on all-ports-or-none rule despite the existing court injunction against all-port bargaining, and the unprecedented port congestion that followed the strike could not have been foreseen by the exercise of a high degree of diligence, as these factors were outside the control of the carriers. The Examiner, therefore, concluded that these occurrences constitute extraordinary conditions within the meaning of article 10(c), justifying the imposition of the surcharges on 30 days' notice.

Hearing Counsel contend that emergency rate changes on short notice are exceptional and disturbing in foreign trade; therefore, the provisions of dual-rate contracts which grant authority for such changes should be strictly construed. Hearing Counsel point out that longshoremen's strikes occur regularly upon the expiration of the contract and that congestion occurs after every longshoremen strike, although in the past strike, it appears to have been somewhat more severe because of the length of the strike. Likewise, conditions returned to normal at the latest in most ports by mid-May. Consequently, Hearing Counsel contend that the strike and subsequent congestion have not been shown to be the type of conditions contemplated by the Commission when it drafted article 10(c). Hearing Counsel also argue that the surcharge was improperly imposed because it was not limited to the duration of the condition which impaired the obligation of the carrier but continued afterward into a period of normal operation.

Respondents argue that the strike certainly was extraordinary as the term is generally understood, since both the NYSA and ILA negotiators were uniformly confident that the strike would be averted. And the carriers acted upon this assumption to their later disadvantage. Furthermore, respondents assert that the strike itself, the disruption of schedules, the costs to carriers, and the ensuing congestion meet the test of extraordinariness as compared with previous longshoremen's strikes. Respondents also state that they were justified in imposing a surcharge which continued to apply after the termination of the

congestion because this permitted them to recoup their losses with a 10-percent surcharge while a surcharge, limited to the actual period of the extraordinary condition, would have been considerably higher and considerably more disastrous to shippers.[6]

Under section 14b, the Commission may authorize the use of dual-rate contracts which meet certain standards. In *The Dual Rate Cases*, 8 F.M.C. 16 (1964), the Commission approved the contract of the respondent conferences.[7] In drafting the contract, the Commission recognized that while the dual-rate contract bound shippers to patronize only conference carriers, in exchange for the shipper's promise of exclusive patronage the carriers should agree to give 90 days' notice of rate increases, subject to the proviso in article 10(c) which permits 30 days' notice of rate increases in the event of extraordinary conditions which may unduly impede, obstruct, or delay the obligations of the carrier.

In *The Dual Rate Cases*, 8 F.M.C. 16 (1964), the Commission described the conditions which justify rate increases on short notice as follows:

> Rate increases necessitated by emergency conditions outside the control of the carriers are permitted under a separate contract provision which will be discussed below. 8 F.M.C. at 28.
>
> The proposed contracts generally contain provisions which would permit the suspension of service or rate increases on short notice where abnormal conditions beyond the control of the carriers are present. 8 F.M.C. at 47.
>
> The approved clause would also permit the continuation of the contract system at higher rates imposed in compliance with section 18(b) of the Shipping Act in other extraordinary circumstances which unduly impede or delay the carrier's service. 8 F.M.C. at 48.

The key words, therefore, are "emergency conditions outside the control of the carriers", "abnormal conditions beyond the control of the carriers", and "extraordinary circumstances which unduly impede or delay the carrier's service." The criteria are apparent: the condition must be outside or beyond the carrier's control, the condition must impede or delay the carrier's service, and there must be an emergency, an abnormal condition, or an extraordinary circumstance. The language of article 10(c) reflects the Commission's intent:

> In the event of any extraordinary conditions not enumerated in article 10(a), which conditions may unduly impede, obstruct, or delay the obligations of the carriers, the carriers may increase any rate or rates affected thereby, in order to meet such conditions * * *.

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[6] In effect, the conferences claim that once rate action was authorized under art. 10(c), they were free to select any reasonable device, surcharge, or rate increase, to meet the extraordinary condition.

[7] Therefore, we are not here concerned with the approvability of the contract; rather, we are interpreting certain language in the contract, specifically, art. 10(c).

The longshoremen's strike was beyond the control of the carriers, and it unduly impeded and delayed the carrier's service. Consequently, we need only be concerned with the question of whether the strike and its aftermath constitute emergencies, abnormal conditions, or extraordinary conditions.

The words—emergency, abnormal, extraordinary—are subjective; they presuppose some lack of foreseeability.[8]

Thus, the carriers must provide 90 days' notice of rate increases to dual-rate shippers if the conditions that give rise to the need for the increase are "normal"; that is, foreseeable by the carriers. For example, where such conditions as rising salaries, costs of vessels, fuel, or increased stevedoring expense require additional freight revenue, then 90 days' notice is required because the carrier is expected to anticipate these needs. This is so because exporters, in conducting their business, need the stability afforded by a guarantee of 90 days' notice. Indeed, this is one of the most important inducements to shippers to commit themselves to an exclusive patronage contract with a conference. In this context, under the dual-rate contract, the notice requirement is highly important. Carriers have a strict duty to anticipate the need for rate increases and give timely notice thereof to dual-rate signatories.

The factual question, therefore, is whether the carriers, in the exercise of a high degree of diligence should have foreseen or anticipated the conditions which unduly impeded, obstructed, or delayed the obligations of the carriers.

A preponderance of the evidence establishes that the events involved here could not have been foreseen by the exercise of this high degree of diligence. During the negotiations ending on December 16, 1964, and thereafter, until the longshoremen walked out on January 11, 1965, a decision that a strike and the ensuing severe congestion were imminent; that the carriers should lay off crews, furlough office-workers, drydock and layup ships, and take other steps to mitigate the full thrust of the strike would have been unwarranted. The unprecendented refusal of the union members to accept the contract their leaders had worked out for them, the ensuing intransigence of the union in insisting on all-ports-or-none rule despite the existing injunction against all-port bargaining, and the unprecedented port congestion that followed the strike could have not been foreseen by the

[8] Webster's New Collegiate Dictionary (G. & C. Merriam Co., 1961):
emergency—an unforeseen combination of circumstances.
abnormal—deviating from the normal condition or from the norm or average; markedly or strangely irregular.
extraordinary—beyond or out of the common order or method, not ordinary; exceeding the common degree, measure, or condition; remarkable.

exercise of a high degree of diligence. We, therefore, conclude that these occurrences constitute extraordinary conditions within the meaning of article 10(c), justifying the imposition of the surcharges on 30 days' notice.

As noted above, Hearing Counsel argue that the longshoremen's strike was not the type of condition contemplated by article 10(c) and that the surcharge itself was not a proper rate because it was not limited to the duration of the impairment of the carriers' obligation.[9] Thus, Hearing Counsel assert that since shippers were compelled to absorb the surcharge because it was imposed on 30 days' notice, imposition of the surcharge was contrary to the public interest. According to Hearing Counsel, the 90-day notice provision in the dual-rate contracts was an important inducement for shippers to execute such contracts and should not be readily avoided. This is, of course, true. This is the rationale of the Commission's requirement of 90 days' notice in the dual-rate cases.[10] But this requirement is subject to article 10(c). Therefore, if the carriers met the prerequisites of article 10(c), they were justified in exercising their contractual right to adjust rates on 30 days' notice.

While Hearing Counsel would invoke the public interest because some shippers as a business necessity absorbed the surcharge, it is clear that the Commission determined in *The Dual Rate Cases* that the overall public interest required some flexibility under the contracts in extraordinary circumstances. Furthermore, the Commission permitted shippers as well to avoid strict adherence to the contract by the exercise of the right to cancel the contract if the rates were increased on short notice.[11] The flexibility thus provided was a recognition by the Commission that both carriers and shippers should not be required to adhere to dual-rate contracts under conditions of an abnormal nature to which neither party agreed or for that matter could have foreseen.

Hearing Counsel basically rely on the contention that the strike was not the type of condition contemplated by article 10(c). We agree that strikes per se do not automatically invoke the exception of article

[9] The General Services Administration, although it did not except to the Initial Decision, filed a brief to the Examiner and argued orally before the Commission that the 1965 longshoremen's strike was not an "extraordinary circumstance" because such strikes have occurred in 10 of the last 15 years. Therefore, GSA contends that not only did the respondents violate the Shipping Act and the terms of the dual-rate contract by imposing a surcharge on 30 days' notice, but also that the imposition of the surcharge was not warranted regardless of notice.

[10] Sec. 14b itself does not require such notice. However, the Commission added the clause because of its recognition that many mercantile transactions require rate stability for at least 90 days.

[11] In view of the somewhat inferior nonconference service, this right was illusory to some extent here.

10(c). However, as we found above, this strike was indeed extraordinary and unforeseeable.

Hearing Counsel further aver that the surcharges are in reality permanent rate increases effectuated on 30 days' notice and later adjusted downward to a 6 to 7½ percent increase over the prestrike rates. Consequently, Hearing Counsel claim that the net result was a permanent rate increase implemented on less than 90 days' notice.[12] This argument fails to appreciate the true import of article 10(c). If conditions warrant, carriers may increase rates. This may be done by increases of regular rates or by surcharges. As we have said, the carriers were justified in imposing a surcharge to meet unforeseen additional costs. Actually Hearing Counsel do not allege that the present rates are inordinate. Therefore, the fact that these rates were later adjusted does not render the original rate less justifiable. Hearing Counsel also argue that a proper balancing of the equities will reveal the Examiner's error. For instance, the Examiner found that carriers are entitled to adopt rates that are adequate to cover expenses and return a profit, and that respondents in the present case would be unable to recoup a substantial portion of expenses if the surcharges were disapproved. However, Hearing Counsel advocate that, while everyone suffered losses as a result of the longshoremen's strike and subsequent congestion, shippers suffered additional expenses for trucking, storing, etc.; but, unlike the carriers, shippers are unable to assess temporary charges to recoup their losses because, for business reasons, shippers are frequently unable to pass last-minute expenses on to their customers. The argument is illusory. Of course, the Commission recognized the needs of shippers for long-range rate stability. On the other hand, the entire regulatory scheme of the Shipping Act is based upon the recognition that carriers are obliged to observe reasonable, nondiscriminatory standards, but they are also entitled to fair remuneration for their services. Here, there is no indication that the carriers assessed rates which were other than reasonably compensatory.

We also must reject the argument that the surcharge violates the public interest because it remained in effect for a time after the port congestion ended. The conferences here decided to spread the surcharge over a longer period than the duration of the congestion in order to reduce the rate of the surcharge. This was a reasonable means of recouping the losses occasioned by the strike. The Commission recently considered the legality of a surcharge imposed at the Port of Manila

[12] Hearing Counsel alluded to the actions of other conferences—establishing general rate increases on 90 days' notice as support for their argument. This is irrelevant since there was no proof concerning conditions in other trades and since, if respondents qualify under art. 10(c), it does not matter what other conferences do.

because of congestion and delay in unloading cargo there. In *Surcharges on Cargo to Manila*, 8 F.M.C. 395 (1965), the Commission found that, "the basic purpose behind surcharges such as those in issue here is to reimburse the carriers for additional costs temporarily incurred by the performance of their services, and which costs the carriers are not recovering through their basic freight rates." Revenue to be derived from the surcharge at Manila was found to be a "reasonable approximation" of the costs incurred in calling at that port. In effect, the Commission simply permitted the carriers to recover their additional expenses. That is precisely the situation here; the carriers increased their rates a reasonable amount over a reasonable period to the extent necessary to recoup their losses.

For the aforementioned reasons, the surcharges are not contrary to the dual-rate contract or section 14b nor are the surcharges contrary to the public interest or other standards of section 15. Therefore, Hearing Counsel's exceptions are overruled.

ULTIMATE CONCLUSIONS

Respondents have acted in accordance with the provisions of the dual-rate contract and the Shipping Act, 1916, in imposing a surcharge on 30 days' notice. This proceeding is hereby discontinued.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 873

INVESTIGATION OF PASSENGER STEAMSHIP CONFERENCES REGARDING TRAVEL AGENTS

*Decided July 14, 1966**

Provisions of Conference Agreement No. 7840 requiring unanimous accord of the member lines in deliberations to raise or lower the maximum commission rate payable to the lines' agents on sales of passenger transportation (unanimity rule) found detrimental to the commerce of the United States and contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916, and disapproved.

Provision of Conference Agreement No. 120 and rules adopted thereunder prohibiting the member lines' agents from selling, without prior permission, transportation on competitive nonconference lines (tieing rule) found unjustly discriminatory as between carriers, detrimental to the commerce of the United States and contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916, and disapproved.

Carl S. Rowe, *Frank B. Stone*, *Edward R. Neaher*, *Lino A. Graglia*, and *Joseph Mayper* for Trans-Atlantic Passenger Steamship Conference and Atlantic Passenger Steamship Conference, respondents.

Robert J. Sisk and *Harold S. Barron*, for American Society of Travel Agents.

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

REPORT ON REMAND

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett, George H. Hearn, *Commissioners:*

The proceeding is before us again upon remand from the U.S. Court of Appeals for the District of Columbia Circuit, *Aktiebolaget Svenska Amerika Linien (Swedish American Line)*, *et al.* v. *Federal Maritime Commission*, 352 F. 2d 756 (1965).[1] Originally instituted by our predecessor the Federal Maritime Board, the proceeding was the out-

*Jan. 30, 1964, decision is reported at 7 F.M.C. 737.

[1] Unless the context of this report requires otherwise, the Court of Appeals for the District of Columbia Circuit and its decision in *Svenska* will be referred to simply as "the Court of Appeals" and "the opinion."

growth of a petition filed with the Board by the American Society of Travel Agents. The Society (or ASTA) requested the institution of an investigation into certain activities of two conferences, the Trans-Atlantic Passenger Steamship Conference (TAPSC) and the Atlantic Passenger Steamship Conference (APSC), established and governed by Agreements 120 and 7840, respectively, both of which were approved by a predecessor agency under Section 15 of the Shipping Act, 1916. The inquiry thus begun was the first comprehensive investigation of the relationship between passenger conferences and travel agents since the passage of the Shipping Act in 1916.

After extensive hearings, an initial decision by Examiner E. Robert Seaver and exceptions thereto, we heard oral argument and served our final decision in February 1964. While we disapproved several other practices of respondent conferences, they sought judicial review of our order only insofar as it disapproved two provisions of their agreements: (1) The provision of the Atlantic Passenger Steamship Conference's agreement requiring unanimous vote of the membership to fix or alter the maximum commission payable to travel agents appointed by the conferences to sell passenger bookings on conference vessels (the unanimity rule); and (2) the provision of the Trans-Atlantic Passenger Steamship Conference agreement which prohibits travel agents appointed by the respondents from selling passenger bookings on competing nonconference steamship lines without prior permission from respondents (the tieing rule).

In June of last year, the Court of Appeals issued its decision reversing our disapproval of the unanimity and tieing rules and remanding the proceeding to us: (1) "to either make supporting findings which adequately sustain the ultimate finding that the unanimity rule operates to the detriment of the commerce of the United States, or if this cannot be done, to vacate that ultimate finding * * *" and approve the rule, and (2) to either make "an adequately supported ultimate finding * * * which warrants disapproval under the statute or if such finding can not be made on the record" to approve the tieing rule under section 15. We ordered reopening of the proceeding on the remanded issues. The reopening was limited to the filing of briefs and oral argument by the parties. Respondent conferences, ASTA and Hearing Counsel filed opening briefs, the conferences and Hearing Counsel replied, all parties argued orally.

The Operation and Effect of the Unanimity Rule Provisions of Agreement 7840

The Atlantic Passenger Steamship Conference came into being in 1946 with the approval under section 15 of the Shipping Act of Agree-

ment No. 7840.[2] The APSC's current voting membership is identical with that of the Trans-Atlantic Passenger Conference, except that APSC includes American President Lines and does not include Spanish Line. The conference is headquartered in Folkstone, England, and six of its member lines serving only Canadian ports do not render passenger service at any port on the U.S. Atlantic coast.

Article 6(a) of Agreement 7840 sets forth the unanimity rule and provides:

(a) Rates of commission and handling fees which Member Lines may pay to their general agents or subagents shall be established by unanimous agreement of the Member Lines.

Conference meetings, including those at which agents' commissions were dealt with, were conducted on an informal basis and votes by the members were neither recorded nor filed with the Commission. Prior to the meetings of the principals, a committee of the conference, called the A.C. Subcommittee, which has initial responsibility on commissions and rates, meets to consider matters which it may present or recommend to the principals. Article 3(d) of Agreement 7840 provides:

* * * Conference action shall be by unanimous agreement of the member lines, except as may be otherwise provided herein.

This has been construed by the conference to require that all recommendations by the A.C. Subcommittee must be based upon the unanimous accord of its members.

In 1950 the maximum rate of commissions payable to travel agents was 6 percent. The minutes of March 8, 1950, show that lack of unanimity prevented the A.C. Subcommittee from recommending an increase in commissions. The minutes of March 9, 1950, demonstrate that again lack of unanimity prevented a recommendation to increase commissions even though "all lines expressed a willingness in principle to an increase in agency commission" and "the majority of the lines * * * were prepared to increase the commission to 7½ percent all classes all seasons." A year later, on March 1, 1951, when commissions were finally increased to 7½ percent, the increase excluded, again against the views of the majority, sales made in the so-called high or summer season. On these sales the 6-percent commission remained in effect.

In October of 1951, a majority of the lines again attempted to increase the commission level, but "it was not possible to reach unanimous agreement," and again the failure to increase commissions was in the face of "a strong majority in favor of applying 7½-percent commission to all classes through the year." Lack of unanimity pre-

[2] For the full text of sec. 15, see app. A.

cluded any recommendation by the Committee to the principals on commission increases and the matter was "deferred for consideration at the Statutory Meeting in March 1952." At the March 1952 meeting the principals deferred the matter of agents' commissions for consideration in June of that year by the A.C. Subcommittee, but in June the Subcommittee deferred it again for consideration at the conference meeting to be held in October 1952. In October, when the Subcommittee finally took up the matter of commission levels, it was again unable to make a recommendation to the principals because "unanimity could not be reached on a proposal to extend the off-season basis to bookings for seasonal sailings." [3]

The record sheds no light on any further conference action on the level of commissions until a 7-percent year-round commission was set at a special meeting in May 1956. Prior to this the matter had been discussed at a regular February–March meeting in 1956, but apparently no minute was kept on this meeting and none was filed with the Federal Maritime Board. However, the records of United States Lines, a member of the conference, reveal that at this meeting one of the lines exercised its veto power under the unanimity rule to prevent the conference from at once putting into effect "an immediate adjustment in commission to 7 percent all year."

At the time of the hearing in this proceeding, the airlines paid a 10-percent commission on the air portion of foreign inclusive tours; i.e., selling air tickets in conjunction with a land tour. At this same time APSC members paid only 7 percent on the water portion of such tours. At the APSC meeting in October 1957, Cunard Line complained that "the steamship lines are seriously handicapped by not giving this (10 percent tour commission) concession." The travel agents themselves pointed out that the difference in tour commission levels was a factor contributing to the "definite tendency to sell air travel." In May 1960 a majority of the principals favored establishment of a 10-percent commission for tours. However, it was not until December 1962, 2½ years later and after close of hearings in this proceeding but before initial decision, that the percentage level for sea portion of tours was increased to equal that of the airlines.

At the present time the percentage level of commissions for booking sea passage is the same as that paid for booking air travel, 7 percent for point-to-point bookings and 10 percent for tours. But as we pointed out in our previous opinion in this proceeding, the effective level of

[3] The matter of commissions was on the principals' agenda for a meeting in March of 1953, but action was deferred to the Subcommittee meeting to be held in June 1953. The matter was again deferred by the Subcommittee in June. In these two instances the reason for deferral does not appear.

commission for sea passage is less because the many unique arrangements which must be made when booking sea passage consume three to four times as much of the agent's time as is spent booking air travel. Many potential travelers (the record shows somewhere between 15 and 60 percent) come to travel agencies undecided as whether to go by air or sea. The travel agent is, of course, in a position to influence such a traveler's decision. As the Examiner found there is no question but that there is "an economic advantage * * * to the agent in selling air transportation instead of steamship passage * * *." Thus, while we do not mean to imply that the agent in this situation is unmindful of the traveler's interest, he, the traveler, is nevertheless confronted with an agent whose economic self-interest would make him desire that the client chose air travel rather than sea travel. The record discloses no evidence that a specific traveler has been persuaded to air travel against his desires or to his disadvantage. But this is not surprising and such a showing in our view is not necessary to a disapproval of the unanimity rule. Any such testimony by an agent would inevitably place him in an unfavorable position with his steamship employers.[4] As a consequence of this dilemma, the record reveals a "definite tendency" on the part of agents to push air over sea travel in such cases.[5]

Since May of 1956 the agents have actively sought increases in the general level of commissions. They were told by the representatives of the conference members that the difficulty in securing unanimity of the membership prevented any increase in commissions.

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[4] An example of this unhappy dilemma is found in the following testimony excerpted from the record.

"* * * (Agent) * * * . Q. Would it be fair to say that primarily in recommending whether a patron go by sea or by air you try to find out what he really wants to do most?

"A. That's right.

* * * * * * *

"Q. And not necessarily your own pecuniary profit?

"A. Well, both things are considered * * * .

* * * * * * *

"We walk a tightrope, let's say. We have the profit motive."

[5] See the following statement by Ralph Edell, conference appointed travel agent:

"Q. What is your personal policy regarding potential clients who do not manifest a particular desire to go to Europe either by plane or ship? A. There is no policy involved, but if it is easier to sell someone an airline ticket and if it is a tour where you make more money, there is a definite tendency to sell air travel.

"Q. Is it in fact more difficult and does it take more time to sell a steamship ticket than an air ticket? A. We would estimate generally speaking three time as long overall."

In this regard the Examiner stated, "* * * The record itself does not establish precise data on the extent of this (diversion) because it is not the sort of activity one would volunteer to disclose in detail, but it is clear that this practice is prevalent enough to constitute a substantial competitive disadvantage for the shiplines and an interference with a free and objective choice between the two modes of transportation by potential travelers."

The Operation and Effect of the Tieing Rule Provision in Agreement No. 120

The Trans-Atlantic Passenger Steamship Conference began operation in 1929 with the approval of Agreement No. 120 by a predecessor agency. The tieing rule has been a part of the agreement since 1933 and has never been amended. The conference is headquartered in New York and its membership comprises all of the lines operating regular passenger vessels in the Trans-Atlantic trade and some lines operating freighters which can accommodate up to 12 passengers. These lines carry about 99 percent of all of the passengers traveling by sea between the United States and Europe. The remainder of the passenger traffic is handled by nonconference lines operating freighters which can carry a limited number of passengers. Like the conference lines, they must rely upon the travel agents for passenger bookings.

The tieing rule is found in article E(e) of Agreement No. 120 which provides:

(e) *Subagencies selling tickets for nonmember lines.*—A subagency shall be prohibited from selling passage tickets for any steamer not connected with fleets of the member lines for which it has been duly appointed or from representing in any capacity any steamship company operating such a steamer, if such steamer is operating in any competitive Trans-Atlantic trade (unless written permission to do so is first obtained from the member lines), or acting or representing itself as agency for, or as entitled to do business with any member line it does not represent by regular appointment. This rule shall not prevent any subagent from booking for any U.S. Government Line.

The record contains the admission by respondents that the tieing rule is intended to eliminate nonconference competition. Both the conference and the agents treat the rule as an absolute prohibition on the sale of nonconference passenger transportation, and agents have lost some prospective bookings because the rule prevented them from selling nonconference passage desired by the traveling public.

Discussion and Conclusions

The briefs of the parties in this proceeding contain widely differing interpretations of the Courts' opinion remanding this case to us. Respondents on the one hand contend that the remand was for the limited purpose of finding or specifying additional facts demonstrating that both the unanimity rule and the tieing rule violate one of the standards of section 15. According to respondents' reading of the decision we are precluded from "rearguing * * * questions already decided by the Court * * * ." Thus, any expansion of our previous discussion as to why the already existing facts of record dictate disapproval of both rules under section 15 is, according to respondents,

prohibited by the remand. Hearing Counsel and ASTA take precisely the opposite position.

We do not find any such restriction in the Courts' opinion, nor do we read the opinion as precluding us from expanding and clarifying our perhaps too brief discussion of the law, nor even from disagreeing with the Court where the clear intent of Congress and our own experience and best judgment dictate. From our reading of the opinion we are sure the Court would welcome such an approach and because we read the Courts' opinion this way nothing need be said about the powers of an administrative agency when a proceeding has been remanded to it by a court.

Section 15 of the Shipping Act exempts steamship conferences and other anticompetitive groups from the antitrust laws when and only so long as the agreements establishing such groups are approved by us under that section, *Carnation Company* v. *Pacific Westbound Conference*, No. 20, Supreme Court 383 U.S. 213 (1966). 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 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 * * * .

In deciding whether continued approval should be allowed the unanimity and tieing rules they must be examined in the light of the four criteria enumerated in section 15. Before applying these criteria to the individual rules in question a word about our general powers and responsibilities under section 15 would seem appropriate.

In determining whether to approve initially or to allow continued approval of an agreement under section 15 we are called upon to reconcile, as best we can, two statutory schemes embodying somewhat incompatible policies of our country—the antitrust laws, designed to foster free and open competition and the Shipping Act which permits concerted anticompetitive activity which in virtually every instance, if not unlawful under the antitrust laws, is repugnant to the basic philosophy behind them. While it is valid to say that the congressional policy is that of encouraging or at least allowing the conference system in the steamship industry it is less than valid to contend that this represents a complete and unqualified endorsement of the system. One committee of Congress, after a recently conducted and exhaustive investigation of monopoly problems of the steamship industry concluded:

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The Shipping Act of 1916 * * * constituted a cornerstone of American maritime policy for almost half a century. It rests upon the assumption that the prosperity of our foreign commerce and the maintenance of a strong and independent merchant marine can best be secured through strict administrative surveillance of shipping conferences, agreements, and operations, insistence upon fair play and equal treatment for shippers large and small, protection of cargo and ports against unfair discrimination, and prevention of practices designed to eliminate or hamper independent carriers. (The Ocean Freight Industry, Report of Antitrust Subcommittee, House Committee on the Judiciary, H. Rept. No. 1419, 87th Cong. 2d sess., page 381, often referred to as the Celler report.)

One needs only a hasty review of the history of the congressional investigations and agency reorganizations under the Shipping Act, the most recent of which created the present Commission, to conclude that the experience under the shipping Act has been a good deal less than satisfactory at least from Congress' standpoint.[6]

The task of reconciling the desire to preserve open competition with section 15's exemption from the antitrust laws which Congress has entrusted to us is, at best, a delicate one and difficult of discharge with precision.

The determination to approve or to allow continued approval of an agreement requires, on the one hand, consideration of the public interest in the preservation of the competitive philosophy embodied in the antitrust laws, and, on the other, a consideration of the circumstances and conditions existing in the particular trade in question which the anti-competitive agreement seeks to remedy or prevent. Thus, before we legalize conduct under section 15 which might otherwise be unlawful under the antitrust laws, our duty to protect the public interest requires that we ". . . scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute." *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, 57 (C.A.D.C. 1954); cert. denied *sub nom Japan-Atlantic & Gulf Conf.* v. *U.S.*, 347 U.S. 990

Section 15's authorization of agreements "pooling or apportioning earnings," for instance, does not dictate approval simply because such an agreement is filed and approval is desired by the parties to the agreement. The parties seeking exemption from the antitrust laws for their agreement must demonstrate that the agreement is required

[6] In this regard "a history of prior approvals" no matter how long, may be an indication of nothing more or less than a failure to scrutinize operations under the particular agreement, which failure may or may not have been justified in the particular case. (See Celler report, ch. XI, the Federal Maritime Board—A Study in Desultory Regulation.) In any event the difficulties encountered by the member lines under the unanimity rule far outweighs any prior approval of it. Moreover, a prior approval under sec. 15, no matter how long ago granted, may not be converted into a vested right of continued approval simply because the parties to the agreement desire continued approval.

by a serious transportation need, or in order to secure important public benefits. Otherwise, and whatever may have been the policy of our predecessors, it is our view that the public interest in the preservation of competition where possible, even in regulated industries, is unduly offended, and the agreement is contrary to that interest within the meaning of section 15. *Mediterranean Pools Investigation*, F.M.C. Docket No. 1212 9 F.M.C. 264. *California Stevedore & Ballast Co. v. Stockton Port District*, 7 F.M.C. 75 (1962). This is equally true where the agreement in question has received prior approval and the determination to be made is whether to allow that approval to continue unmodified. Disapproval of an agreement on this basis is not grounded on any necessary finding that it violates the antitrust laws but rather because the anticompetitive activity under the agreement invades the prohibitions of the antitrust laws more than is necessary to serve the purposes of the Shipping Act and is therefore contrary to the public interest.[7] The foregoing, in our view, constitutes the basic policy to be applied in determining whether to initially approve or to allow continued approval of any section 15 agreement. With this in mind we proceed to a consideration of the rules in question.

The Unanimity Rule

Respondents begin their argument for approval of the unanimity rule by urging that the proper context for our consideration of the rule was that framed by the Courts' opinion remanding the case, wherein it was noted that,

> * * * our country has adopted a policy in the international transportation field, of encouraging, or at least allowing U.S. carriers to participate in steamship conferences, and to be governed by unanimity in respect of matters covered by conference agreements, barring disapproval under the standards prescribed by (sec. 15) * * *.

We have already noted that congressional allowance of the conference system was and is conditioned on the subjection of conferences, agreements, and operations under such agreements "to strict administrative surveillance," to insure fair play, equality of treatment, and protection from discrimination.[8] As to the congressional policy of encouraging or at least permitting carriers "to be governed by unanimity in respect of matters covered by conference agreements," the

[7] For a similar construction of sec. 412 of the Federal Aviation Act which was modeled after sec. 15 see *Local Cartage Agreement,* 15 C.A.B. 815 (1952) ; *North Atlantic Tourist Commission Case* 15 C.A.B. 225 (1952) ; *Six Carrier Mutual Aid Pact,* 29 C.A.B. 168 (1959).

[8] See also in this regard the Alexander report, H. Doc. No. 805, 63d Cong., 2d sess. 1914), vol. 4, p. 418, where the Committee stated its belief "* * * that the disadvantages and abuses connected with steamship conferences * * * are inherent, and can only be eliminated by effective Government control * * * ."

Court of Appeals on remand to us footnoted a statement made by the then Chairman of the Civil Aeronautics Board in an article entitled the "Future of the International Carrier," appearing in Flight Forum 7 (September 1964), wherein he said:

> IATA [International Air Transport Association, an organization somewhat similar to the conferences presently before us] will continue to be the machinery for developing fares and rates * * *. This will be true whether or not the unanimity voting rule continues to apply as it has in the past. This rule, originally adopted and insisted upon by the United States to protect each carrier's right of individual action, admittedly has its deficiencies. However, I am inclined to conclude these are less than those which would stem from a form of majority vote. (Bracketed material the Court's.)

Unanimity in respect of matters under agreements of international air carriers may well be the policy of the United States, but we do not find such to be the policy which governs water carriers under section 15 agreements. Additionally, it would appear that it was not an unqualified unanimity which received this country's encouragement for air carriers. For in *IATA Conference Resolution*, 6 C.A.B. 639 (1946) the proceeding in which the Civil Aeronautics Board approved the IATA resolution authorizing international air carriers to fix rates in concert and the one apparently discussed in the statement quoted above, the Board, after observing that unanimity was necessary to insure preservation of the American air carrier's right of individual action, said at page 645:

> It is further understood that it is not intended that a rate established by a conference agreement thereafter can be changed only by unanimous action. Such a requirement would enable a single carrier to freeze the rate structure, and would create an intolerable situation.

Moreover, the CAB apparently reserved unto itself the power to disapprove any rate fixed by agreement under the IATA resolution.[9]

Our problems under the Shipping Act would appear quite different from those of the Civil Aeronautics Board under the Federal Aviation Act, 1958. Steamship conferences are not required to submit their individual rates and fares to us for our approval. Indeed, it was not until 1961 that conferences were by statute required to file their rates with us. Whatever may have prompted a policy of encouraging or allowing unanimity in international air transportation, such is not in our view the policy of this country in international transportation by sea. In the Senate report which accompanied H.R. 6775, the bill which

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[9] We note with interest that the maximum levels of agents' commissions paid by airlines, which are also apparently fixed by unanimous vote appear to be subject to approval by the CAB which has made it quite clear on any number of occasions that it will not approve a rate or commission resolution which is not limited in duration to "a reasonable period of time." *North Atlantic Tourist Commission Case*, 16 C.A.B. 225 (1952).

became Public Law 87-346, a recent comprehensive amendment to the Shipping Act, the Senate explained its failure to enact legislation on voting requirements in section 15 agreements in the following way:

> And a third matter which, it seems to us, should be handled by Commission rule or regulation, is one which is not limited to the question of dual-rate contracts but rather Commission approval of section 15 agreements. For some time shippers and shipper groups have been urging Congess to amend section 15 so that no conference agreement could be approved which on rate matters required more than a majority vote of the voting carriers. Because of the widely varying needs and membership of the many conferences serving ports of the United States, and because of the detailed studies which should be made . . . before any such decision were reached we think it would be most unwise to legislatively mandate an answer. (S. Rept. No. 860, 87th Cong., 1st sess. at p. 15.)

Thus, far from encouraging unanimity for steamship conferences Congress has expressed doubt as to its worth in the conference system and has left resolution of the question to us to be settled by rule or regulation if we determine it necessary to resolve the issue on an industrywide basis.

The remainder of respondents' argument for approval of the unanimity rule may be summarized as follows: (1) The rule "is merely the procedure" by which the level of commissions is fixed and in the absence of a finding that the particular level is "unreasonably low" or "detrimental to commerce" the "procedure" may not be disapproved; (2) the fact that "the wishes of the majority may be blocked temporarily or in an extreme case even permanently" is not a sufficient reason to disapprove the rule under section 15; (3) our own statements in our previous report in this proceeding lead inevitably to the conclusion that "economic factors entirely beyond the control of respondents" and not the unanimity rule account for the trend away from sea travel, and (4) no other basis exists for disapproval.

ASTA on the other hand contends that the rule has caused detriment to commerce and injury to the public interest; represents an excessive and unwarranted invasion of antitrust principles and, since no justification or need for its continuation has been shown, should be and was properly disapproved. Hearing Counsel in a somewhat similar vein contend that the unanimity rule should be disapproved as contrary to the public interest and detrimental to the commerce of the United States because it has frustrated or delayed all attempts by the majority to raise commission levels, thereby keeping the steamship lines at a competitive disadvantage vis-a-vis the airlines, and because it encourages the travel agents' economic self-interest at the expense of the agents' duty to the public.

While it may be correct in one restricted sense to say that the rule

is "merely the procedure" by which a given maximum level of commissions is fixed, it is entirely incorrect to conclude that the particular level fixed must be found unlawful before the "procedure" itself can be ordered modified. In dealing with the unanimity rule itself we are faced with a consideration as to what degree we will permit the respondends to go in rigidifying or circumscribing the flexibility of their operations under an anticompetitive agreement—a far different substantive determination than one as to whether a given rate, fare, charge, or commission fixed under a particular procedure is itself valid under the law. The former goes to what conditions in furtherance of the purposes and policies of the act we will impose upon the continued enjoyment of antitrust immunity under an approved section 15 agreement. The latter goes to whether or not a given rate, etc., fixed under the procedures we authorize under such an agreement runs counter to the statute's prohibition against rates, etc., which are detrimental to our commerce. The one is not dependent upon the other.

All the record need show is that the rule itself has resulted in activity unlawful under section 15. Indeed the record clearly shows that this rule, as implemented contrary to the considered business judgment of nearly all of the conference members, has worked to the detriment of the commerce of the United States.

As heretofore noted, the booking of sea passage takes three to four times longer than air passage for an agent to handle, consequently, the effective rate of commission on sea travel is much lower than on air passage. The recognition by the member lines of the diversion from sea to air caused by the lower rate of commission on sea bookings has long led the majority of the lines to attempt to solve the diversion problem by trying to increase the levels of commissions paid to their travel agents. As Cunard Line stated in its letter of February 15, 1951, urging an increase in the commission:

> Evidence is mounting to confirm our belief that the higher rate of commission paid by the Airlines on Trans-Atlantic bookings is strongly influencing agents toward increasing their business for Air Services, and we feel that the steamship lines can only continue to disregard this fact to their detriment.

The unanimity rule clearly has had an effect inconsistent with the desires of most of the steamship lines to meet the air challenge. The "lack of unanimity" has on several occasions prevented the conference's subcommittee, which has the initial responsibility for commissions, from even reporting the positions of the member lines to the principals, respondents' assertions to the contrary notwithstanding.

The subcommittee minutes for the meeting of October 1951 show that although "there was a majority in favor" of a commission increase,

"it was not possible to reach unanimous agreement," and the matter was "deferred for consideration at the statutory meeting in March 1952." Again in June 1952 the subcommittee deferred the matter of commissions "for consideration at the meeting of principals in October 1952." The subcommittee a third time deferred the matter of agents' commissions in June 1953.

While it may be true as an abstract proposition that any matter could be placed on the agenda by a member line, and that the matter of commissions was held "always in mind" by the principals, the facts remain that there is no instance in the record of action taken by the principals without strong concurrence by the subcommittee and that the present agents' commission is below the level advocated by a majority of the conference lines as long ago as March 1950.

If the subcommittee is as unimportant as petitioners claim, one is inclined to question the application of the unanimity rule to its deliberations and the necessity for unanimous accord by its members before any recommendation can be made to the principals. Moreover, it is of no significance that the principals have at times taken positions opposed to those of the subcommittee, for these have been in the nature of a watering down of actions favored by at least a majority of the lines. Nor is it any answer to say that had the lines really wanted to raise the commission they could have eliminated the unanimity rule, because elimination of that rule itself required unanimous vote under the conference agreement.

Respondents' references to conference consideration of commission levels "in virtually every year covered by the Commission's investigation" are not impressive. There appear to be few years in which the matter of commissions was in any real sense "considered," due no doubt to the stultifying effect of the unanimity rule and the necessity for subcommittee approval as a condition precedent to conference action. In fact, the conference minutes indicate only six instances in which the principals considered the problem of commission levels since March 1950: Minutes of meeting March 1951; March 1952; minutes of meeting May 1956; minutes of meeting March 5, 1953; minutes of meeting October 1953; minutes of meeting of May 3, 1960. Moreover, the meeting of October 1953 related to an interpretation of the previously set commission level in reference to prepaid commissions.

The effect of the rule on the deliberations of the principals is thus clearly shown by the many instances in which the rule defeated the subcommittee's referral of, or prevented it from making recommendations to, the principals on the matter of commission.

Respondents' contention that "the record fails to show a single example of the unanimity rule frustrating a desire of a majority of the

lines as authoritatively expressed by the principals," is not accurate. The principals' meeting of May 3, 1960, shows such an instance. Moreover, the principals' meeting of February–March 1956, shows a case in which the principals were unable to act because of the action of one line. As has been noted, there is no conference minute on the matter of commissions for this meeting. Determining the effect of the unanimity rule upon actions of the principals, as we pointed out, has been rendered difficult because of the conference's failure to keep complete minutes of its meetings and to file them with us. Votes of the principals were neither taken, recorded, nor filed with the Commission, although the approved agreement of the conference required it to furnish the Commission with full records of its activities.[10] The conference's own failure to keep and provide the requisite records has caused whatever evidentiary sketchiness exists in this proceeding as to the effect of the unanimity rule, and the responsibility for that failure cannot be shifted to the Commission.

The unanimity rule blocked attempts by a majority of the lines to change the general commission level for at least 6 years and the tour commission level for over 2½ years. The general commission level was still below the 7½ percent advocated by a majority of the lines 13 years before 1963, the last year of record in this proceeding. Since the increase to 7 percent in 1956, the record shows several attempts to increase the commission level. The logical inference to be drawn from all of this may well be that the present level of commission is still, because of the unanimity rule, frozen at a level undesired by a majority of the conference members. The fact, however, that the record does not affirmatively show whether or not a majority of the conference members would decide not to raise the commission level is irrelevant. If the rule has been shown to operate to the detriment of the commerce of the United States, to wait until there is evidence that it again operates in that fashion before the rule is outlawed would be to suggest that illegal actions cannot be disapproved once they may have ceased. This reasoning would destroy the purpose of regulation.

The evidence of the blocking of the desires of a majority of the member lines to achieve their goal present in this proceeding is a sufficient reason for declaring the unanimity rule detrimental to the commerce of the United States.

Conference procedures must be reasonably adapted to the goal of conference activity; namely, the voluntary effectuation of the desires

[10] Art. 9(j) of exhibit 2, provides that "copies of all minutes and true and complete memoranda record of all agreed action which is not recorded by minute shall be furnished promptly to the governmental agency charged with the administration of sec. 15 of the U.S. Shipping Act, 1916, * * *"

of the member lines in achieving the concerted action which they, within the limits of the law, feel is appropriate. An essential factor in achieving this goal, is, of course, sufficient flexibility under the conference agreement to alter action which the members may have once found desirable but later appears to thwart their desires. At one time 6 perecnt appeared to the members of the conference to be an appropriate maximum commission level to be paid to their agents. For at least some 6 years, however, this no longer seemed to be the case, so far as a majority of these lines were concerned. The level was finally raised to 7 percent. It was still below the level advocated by a majority of the lines 13 years before and may well be, as noted above, below the level which they now desire.

Outlawing of unanimous voting requirements, because they failed voluntarily to effectuate the desires of the conference members, has often occurred.[11] A predecessor of this very Commission had occasion to examine an agreement which contained a unanimous voting requirement which enabled one party to prevent changes in port differentials desired by the other parties. Such effect of the unanimity rule was there said to defeat the purpose of the conference—the carrying out of the voluntary action of its members, "[W]hen a rate or rule is once adopted and one party consistently and selfishly refuses to cast its consenting vote which would remove or change that rule or rate the conference to all intents and purposes ceases to be voluntary." [12] The agreement, with its unanimity provision, was thus declared unlawful as being "unfair as between carriers" and "detrimental to the commerce of the United States."

Such results, moreover, have not been limited to situations where the desired freezing effect was caused by a veto. In *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761, 774 (1946), a voting rule "providing that no change shall be made affecting rates unless agreed to by not less than 75 percent of water carrier members" was declared unlawful as "unfair as between such carriers and other members" and "detrimental to commerce."

In the instant proceeding evidence exists of both veto usage and blocking of the desires of a strong majority of the member lines for many years. Such results are clearly deterimental to the commerce of the United States as inimical to the very nature of the conference as a voluntary association and unfair as between the majority of carriers

[11] We have already observed that a sister agency has had occasion to review the freezing of the rate structure caused by a unanimity rule and has condemned such freezing as "an intolerable situation." *IATA Conference Resolution, supra,* at 645.

[12] *Port Differential Investigation,* 1 U.S.S.B. 61, 72 (1925).

which desired the change and those few who blocked it.[13] For these reasons the unanimity rule must be declared unlawful under section 15.

There are, moreover, additional reasons why the unanimity rule must be disapproved. The unanimity rule has resulted in maximum level of commissions which places the booking of steamship travel at a competitive disadvantage with airline travel. The record clearly shows, contrary to respondents' contention, it is not economic factors entirely beyond their control that have caused this competitive disadvantage but the unanimity rule itself.

There are two economic factors appearing in the record: (1) The speed and seating capacity of the new jet aircraft which result in reduced travel time and added convenience, extensive advertising by airlines and certain other factors inherent in air travel, and (2) the additional time which must be spent by the travel agent to book sea passage—the record shows that it takes three to four times as long to book sea passage as it does to book air passage. The former is admittedly not the fault of the unanimity rule, but the latter is an "economic factor" which the substantial evidence of record indicates that but for the unanimity rule could have been overcome by respondents themselves. The purely superficial equilibrium between commissions for booking air and sea passage (both now stand 7 percent for point-to-point bookings and 10 percent for tours) would, the record indicates, have been replaced by the majority of conference lines by a higher "percentage level" of commissions for sea passage which, at the very least, would have reduced the disparity in the respective "effective levels" of commissions. And again, the record before us indicates that until this much is done, the economic self-interest of travel agents will serve to foster the definite tendency to sell air passage over sea passage—a situation clearly contrary to the public's interest in the Shipping Act's declared purpose of "encouraging and developing * * * a merchant marine adequate to meet the requirements of the commerce of the United States * * * " with foreign countries. Thus, our responsibility for protecting that interest requires that we not grant continued approval to anticompetitive conduct which tends to reduce the effectiveness of our merchant marine, otherwise we would fail in our duty of "strict administrative surveillance over conferences" to insure: (1) The continued prosperity of that portion of our foreign commerce placed in our charge, and (2) the maintenance of a strong and independent merchant marine. Moreover, the traveling public has

[13] The fact that the record is unclear as to whether or not the same carriers consistently blocked the desires of the majority is not important. What is important is that there existed a consistent freezing of commissions at a level which was always contrary to the wishes of some majority.

a right when selecting a mode of transportation to deal with an agent as free as possible from any motivation to influence that choice because of economic self-interest in booking air travel. Since the unanimity rule creates the situation which tends to foster airline bookings at the expense of potential steamship bookings it is detrimental to the commerce of the United States within the meaning of section 15.

Significantly, respondents do not here on remand urge a single statutory aim or purpose which is fostered or served by the unanimity rule, nor do they point to a single important public benefit which is secured by the rule.[14]

The Court noted in footnote 7 of its opinion, that the Examiner found that in view of the small minority of American-flag lines in the conference, the unanimity rule was "of substantial value to the American-flag lines" preventing "travel agents from playing one line against another." This is apparently so because "when all lines participate in the selection of rates of commission, no line is in a position to say that it is favoring agents more than another." (Initial Decision of Examiner Seaver at p. 40.) Taken at face value this statement is, at best, confusing. It would seem obvious that all lines can "participate in the selection of rates of commission" whether unanimity or a simple majority is required to set the rate. It would seem equally obvious that whether or not unanimity is required, any individual line may, if it chooses to do so, tell an agent that it voted in favor of an increase, thus, indicating that it is "favoring the agents more than another" which presumably voted against the increase. We find this reasoning somewhat less than persuasive, and far short of constituting a showing that the rule is required by some serious transportation need or necessary to secure important public benefits.

The impact of the unanimity rule is clear from the record which shows that since the 7-percent commission level finally adopted in 1956 no further increases were made, at least as of 1963, the last year of record here, and that the level of commissions in that year was lower than that actively sought by the majority of the lines 13 years earlier.

The unanimity rule has prevented a majority of the members of ASPC from raising the levels of travel agents' commission and has periodically worked to freeze commissions at levels which are effectively lower than commissions paid by airlines to travel agents when

[14] Nothing demonstrates that the unanimity rule is necessary to preserve or encourage the right of American-flag carriers to take independent action as was the case of unanimity under IATA see pp. 12–13 supra. Indeed, lack of unanimity in IATA leaves the individual carrier free to initiate its own rates (IATA Traffic Conference Resolutions, 6 C.A.B. 639, 645), while under the conference agreement here lack of unanimity serves to freeze the level of commissions and does not permit the individual carrier to initiate its own increases in commissions. Moreover, the rule places the power of potential veto in the hands of each member, six of whom do not even serve American ports.

booking air passage. This disparity in the effective level of commissions for booking air and sea passage fosters a tendency on the part of the travel agent to push the sale of air travel which in turn deprives the undecided traveler of his right to deal with an agent free of any motivation based on economic self-interest. We find this situation detrimental to the waterborne foreign commerce of the United States in that it fosters the decline in travel by sea and contrary to the public interest in the maintenance of a sound and independent merchant marine.

Moreover, from the substantial evidence of record it is reasonable to conclude that but for the unanimity rule the majority of the member lines of ASPC would have increased agents' commissions, and it is reasonable to conclude from the record before us that an increase would have enhanced the competitive position of the steamship lines. Had there been a showing that the rule was required by some serious transportation need, or necessary to secure an important public benefit, or in furtherance of some purpose or policy of the statute, we might have required more before disapproving the rule.[15] But, in view of our responsibilities under section 15, disapproval of the rule is required in order to protect the public interest against an unwarranted invasion of the prohibitions of the antitrust laws, since it has not been shown to be necessary in furtherance of any valid regulatory purpose under the Shipping Act.

Because of its effect noted above, the use of the rule must be outlawed in deliberations by any group having final or recommendatory power over levels of commissions to travel agents. Accordingly, article 6(a) of Agreement No. 7840 must be modified to remove the unanimity requirement, and article 3(d) must be modified to show that it does not apply to any deliberations by recommending or enacting bodies on levels of agents' commissions.

The Tieing Rule

Respondents insist that continued approval must be given the tieing rule since section 15 will not allow disapproval merely because it "runs counter to antitrust principles" or has not been shown "necessary" to protect respondents from outside competition—the only bases which may be advanced on the record in this proceeding, argue respondents.

The record in this proceeding shows that approximately 99 percent of all Trans-Atlantic steamship passengers are carried by conference lines. In 1960, not an unusual year, approximately 80 percent of all Trans-Atlantic passenger steamship bookings made in this country, other than on cruises, were sold by appointed agents. Both the agents

[15] *Mediterranean Pools Investigation*, supra. See also *Six Carrier Mutual Aid Pact*, supra.

and respondents treat the tieing rule as an absolute prohibition against the sale of nonconference passage. The only vessels whose operators are not members of the conference are freighters which can carry a limited number of passengers. These lines, like the conference lines, are dependent upon travel agents for the sale of ocean transportation. Thus, as a consequence of the tieing rule, the travel agents have been prevented from performing their function of selling ocean transportation, passengers have been denied the services of travel agents precluded from booking passage upon the means by which they preferred to travel, and the nonconference lines have been denied access to channels which control some 80 percent of all Trans-Atlantic passenger business. The fact that there are conference freighters capable of carrying passengers who wish to travel to Europe is unimportant here.

The important questions here are: should prospective passengers be denied the right to utilize the valuable services of agents in fulfilling their desires to travel on nonconference vessels; should agents be denied the right to book them by the means of their choice, and should nonconference lines be denied the use of agents upon whom they, like the conference lines, must depend for the sale of ocean transportation. The answer to these questions must be no.

Respondents admit that the purpose of the tieing rule is to eliminate outside competition, and that purpose has obviously been achieved.[16] Whether or not the rule resulted in reducing nonconference competition to its present minimal amount, it is plain that it keeps it there. The tieing rule imposes restraints upon three groups not parties to the conference agreement, the agents, the nonconference carriers, and the traveling public. The record here demonstrates that these restraints have operated against the best interests of all three of these groups. Once this was shown, it was incumbent upon the conferences to bring forth such facts as would demonstrate that the tieing rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.

No convincing arguments were advanced. Respondents, in the light of their almost complete monopolization of the trade, could hardly make the claim that the rule is necessary to protect the conference from outside competition, and has in fact admitted that it is not.

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[16] The Supreme Court has indicated that restraints on third parties are to be viewed with extreme distrust. It has been held that the "Freedom allowed conference members to agree upon terms of competition subject to Board approval is limited to the freedom to agree upon terms regulating competition among themselves," * * * and that "Congress struck the balance by allowing conference arrangements passing muster under 15, 16, and 17 limiting competition among the conference members while flatly outlawing conference practices designed to destroy the competition of independent carriers." *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 491 492–3 (1958).

The conference, accordingly, attempts to justify the tieing rule by stating that it is necessary to maintain conference stability. In contrast to this bold assertion, however, the Caribbean cruise trade operates efficiently without either rule or conference. While conditions in the Caribbean cruise trade may indeed be somewhat different, the absence of both conference and rule therein is enough to show that neither is self-evidently necessary for trade stability.

Respondents finally point to the services performed for the agents as cause for continued approval of the rule. Although it is true that the conference does perform services for the agents through its bonding and other selective activities, these services are paid for by the agents through annual fees. Any additional promotional services performed by lines are made on a line-by-line basis and ordinarily require matching contributions by the agents. In light of the facts that many of these services are performed on an individual-line basis, rather than as a conference activity, the services are paid for by the agents, and the agents are not the lines' employees but deal at arm's length with them, as well as the airlines, the conference, although entitled to exercise some control over agents' activities, has made no showing that it is entitled to maintain a complete foreclosure over agents' services for nonconference lines.[17]

The tying rule of the TAPSC operates to the detriment of three relevant portions of the commerce of the United States, inasmuch as it is an unjustified restraint upon the activities of travel agents which prevents them from selling ocean transportation. It is detrimental to the interest of the agents, one part of our commerce, because it denies them the right to book passengers who desire to travel by nonconference vessels by the means they desire and thus live up to their duty as agents. It is detrimental to the interests of the nonconference carriers, another part of our commerce, because it denies them the use of agents upon whom, they, like the conference lines, must depend for the sale of ocean transportation. Lastly, it is detrimental to the interests of the traveling public, still another part of our commerce, in that it denies prospective passengers the right to utilize the valuable services of agents in fulfilling their desires to travel on nonconference vessels. Nothing has been brought forward which, in spite of these detrimental consequences, could justify the rule. Therefore, it must be disapproved under section 15 as operating to the detriment of the commerce of the United States.

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[17] Of interest in this regard is the recommendation of the Antitrust Subcommittee of the House Judiciary Committee appearing at p. 388 of the "Celler report," "The Federal Maritime Commission should prohibit conferences from regulating the activities of agents. Passenger conferences should not be permitted by the Commission to regulate the business activities of their ticket agents.

Additionally, the tying rule is unjustly discriminatory as between carriers, within the meaning of section 15.

In *Pacific Coast European Conf.—Payment of Brokerage*, 5 F.M.B. 225 (1957), our predecessor, the Federal Maritime Board, declared unlawful, under section 15 of the Shipping Act as "unjustly discriminatory as between carriers" a provision which had the effect of prohibiting payment of "brokerage" by conference lines to any forwarder-broker who served nonconference lines. The nonconference lines depended upon the forwarder-brokers for the majority of their cargoes, and the conference lines carried most of the cargo in the trade. The purpose of the prohibition was admitted to be the reduction or elimination of nonconference competition. The Board concluded that the provision in question "would foreclose a nonconference line from obtaining cargoes through forwarders in this trade, and shippers who desire to ship nonconference in this trade would be deprived of the services of freight forwarders." It therefore found the provision to be prima facie unjustly discriminatory as between carriers and shippers and struck it down as it found nothing in the record which would justify it.

Here the admitted intent of the tying rule is to eliminate nonconference competition. Agents have lost prospective bookings because the tying rule prevented them from making nonconference bookings desired by the traveling public. And nonconference lines have been denied even access to channels controlling 80 percent of the business. We think the reasoning in the *Pacific Coast* case is persuasive, and we find the tying rule to be unjustly discriminatory as between carriers. It requires disapproval under section 15.

Finally, the tieing rule is contrary to the public interest because it invades the prohibitions of the antitrust laws more than is necessary to serve the purposes of the regulatory statute and there has been no showing that the rule is required by a serious transportation need or is necessary to secure important public benefits.

On the basis of the foregoing we conclude that the unanimity rule and the tieing rule are detrimental to the commerce of the United States and contrary to the public interest, that the unanimity rule is unfair as between carriers, and that the tieing rule is unjustly discriminatory as between carriers, within the meaning of section 15, and both rules should be disapproved under that section.

An appropriate order will be entered.

VICE CHAIRMAN JOHN S. PATTERSON, dissenting:

INTRODUCTION

The Commission has been directed by the U.S. Court of Appeals for the District of Columbia Circuit either to make supporting findings which adequately sustain the ultimate findings that the unanimity rule and the tieing rule in an agreement of a conference of common carriers by water operate to the detriment of the commerce of the United States, or, if no such finding can be made on the record, approve the agreement containing these two rules.

The majority's report responds to the Court's order by deciding that the direction to make supporting findings does not require supporting facts, but permits supporting rationalizations which expand and clarify a "perhaps too brief discussion" and even "disagreeing with the Court where * * * our own experience and best judgment dictate."

Two introductory comments are needed. *First*, I believe that findings have always been understood to refer to the end product of looking over, locating, or finding and then assembling in summary form particular facts thought to be most relevant from a record of miscellaneous verbal testimony and written information collected by an Examiner in an agency proceeding.[18] In a way our task is very simple once the facts are assembled. All we have to do is marshal the facts into findings and then show how the findings conform to or vary from what the statute requires by means of reasoning that will appeal to everyone, including the Courts, as convincing. I doubt if the Court of Appeals expected anything more complicated than this, and certainly not substitution of a long discussion for a "perhaps too brief" one. *Second*, my reading of Judge Washington's opinion on behalf of the Court of Appeals discloses nothing with which to agree or disagree, contrary to the majority's assumption. We are not required to argue with the Court of Appeals, but only to state our own case as reasonably as possible. The judge simply gave examples to illustrate why he had concluded that statutory requirements had not been linked with asserted facts and expressed the difficulties he was having in understanding the report, and then gave us the opportunity to remove his doubts by findings based on facts, not arguments.

The majority presents, in the name of facts, conjecture and opinion taken from the record (e.g., "the considered business judgment of nearly all the conference members"). Conjecture and opinion do not become fact by being asserted by witnesses or by attorneys and recorded in docketed papers. I might agree that fostering a tendency as shown

[18] *Morgan* v. *United States*, 298 U.S. 468, 480 (1936). Possibly informed speculations in rate cases and established rules of law or ethics are acceptable as facts, but there is no need here for this type of finding.

by the record is possible, and that preventing of changes has occurred. I do not agree there are record facts to sustain the ultimate finding there is discrimination between carriers, or the public interest suffers, or there is detriment to commerce just because selfish tendencies are fostered or water carriers have lost sales and the prevented changes are the real causes. If there are any facts in the 2,618 pages of transcript and 141 exhibits, of the type I consider needed to connect the rules with the selfishness and the losses and with discrimination or detriments to commerce or contrariety with public interest, such facts have escaped my review. I do not agree that the alleged harm to some elements of commerce, without more evidence, is a detriment to commerce, nor that such harm is automatically against the public interest.

By my dissent in our first review of this proceeding, I concluded on the record before me that approval should be given, pursuant to section 15 of the Shipping Act, 1916, as amended (Act), to the carriers' agreements containing the unanimity voting rule in connection with regulating the level of travel agents' commissions and the rule requiring agency contracts to contain an obligation to sell only passenger tickets issued by the conference carriers and prohibiting sale of passenger tickets issued by competing carriers.

The reasons for my renewed dissent are:

1. Instead of making supporting findings of factual evidence from the record, the majority has only developed supporting rationalizations based on conjecture and opinion. In my opinion, the Court's instructions have not been complied with.

2. The rationalizations do not supply the evidence and reasoning needed to relate record information to nonconformity with standards of disapproval of agreements in the second paragraph of section 15 of the act.

Discussion

1. Lack of evidentiary findings.

There is just as much lack of evidence now as when we made the decision in the same Docket No. 873, reported in 7 FMC 737 (1964). There is still no proof in the form of evidence summarized in findings that the agreements may be found—

(a) 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;

(b) to operate to the detriment of the commerce of the United States;

(c) to be contrary to the public interest; or

(d) to be in violation of the act.

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It has been conceded the reopened proceeding was limited to the filing of briefs and oral argument by the parties: i.e., no new evidence was gathered by the Examiner. As a result of examining the old papers and listening to new arguments, the majority has developed a new rationale.

2. The rationale of the majority, as I interpret it, is as follows:

a. The unanimity rule has prevented changed commission percentages and "such results are clearly detrimental to the commerce of the United States as inimical to the very nature of the conference as a voluntary association and unfair as between the majority of carriers which desired the change and those few who blocked it."

b. The unanimity rule has resulted in a level of commissions "which places the booking of steamship travel at a competitive disadvantage with airline travel" and the record shows the rule, not economic factors, cause the disadvantage.

c. Until commission levels are raised "the economic self-interest of travel agents will serve to foster the definite tendency to sell air passage over sea passage" contrary to the public's interest of encouraging and developing the merchant marine.

d. The tieing rule is detrimental to commerce and contrary to public interest because it prevents: (1) Travel agents from performing their function of selling ocean transportation; (2) passengers from obtaining services of agents if the agents are precluded from booking passage by the passengers' preferred means of travel; and (3) nonconference carriers from having access to "channels which control some 80 percent of all Trans-Atlantic passenger business." Harm to the three elements of commerce is equivalent to detriment to foreign commerce and against public interest.

The rationalizations of the majority are justified by what are thought to be the results in relation to the four section 15 tests referred to by the Court of Appeals. The resulting rules may be plausible and reasonable as stated and abstractly considered might be very good policy, but they achieve the status of an order changing respondents' rights only if they are associated with facts showing the results really will occur. If the rules prohibiting unanimity or tieing obligations are intended, section 4 of the Administrative Procedure Act must be followed. Reference is made to my dissent in this same docket for my arguments indicating the claimed results are by no means certain and may be just the opposite of what is claimed.

Summarized, my arguments were that:

1. The unanimity rule controlling commissions resulted in no proven detriment to commerce because: (a) Passenger diversion may have other causes, and (b) the percentage levels are only a transitory economic factor subject to competitive change by airlines.

2. The tieing rule resulted in no proven detriment to commerce caused by lack of competitive necessity for the rule evidenced by either: (a) Denial of competing services of nonconference carriers, or (b) harmful effects on other carriers or (c) restraint on travel agents in violation of antitrust principles.

3. I agreed that certain rules concerning prior approval of business decisions of travel agents were against public policy.

There was no doubt in my mind that the unanimity and tieing rules had prevented changes and had prevented certain ticket-selling services, but this result only showed the rules had been successful in doing what they were intended to do, not that they were unlawful by virtue of the mere fact of success. I might have been wrong. Judge Washington's speculations and examples may be wrong too. The different viewpoints must be resolved with more facts, not longer discussion. I don't want to rely on my own experience or best judgment unless supported by basic facts. I need the facts and must weigh them before I can rely on my own experience in solving a problem with which I have never before been confronted.

Certainly no one should, nor do I, expect a reviewing court to sustain my reasoning and ultimate conclusions without supporting facts just because as a presidentially appointed Commissioner, contributing competence and expertise in the carrying out of my duties, I say new standards of conduct are proper and that rules embodying those standards shall be applied to invalidate the agreement provisions, based solely on the dictates of my own experience and judgment, supported only by conjecture and opinion from a record.

I hold that record deficiencies may not be replaced by such conjecture-supported findings as the unanimity rule is a detriment to commerce because it is effective in preventing increased commissions. What is needed, but totally lacking, in this particular case is record support sufficient to make findings of fact which show how the conference's rule blocking or preventing change in commission percentages is incompatible with prohibitions against detriments to commerce as a result of specified facts rather than opinions, speculations, or conjecture substantiated by a rationalizing process. The Commission may not rely merely on "the evidence of the blocking of the desires of a

majority of the member lines to achieve their goal present in this proceeding" without intervening factual detail as sufficient reason for the flat conclusion that the unanimity rule is "detrimental to the commerce of the United States." A court has recently condemned this sort of reasoning. *U.S. Atlantic & Gulf/Australia New Zealand Conference* v. *FMC and USA*, 364 F. 2d 696 (1966).

The deficiencies in using a rationalizing process to meet the requirements of the U.S. Court of Appeals for the District of Columbia on remand are the same as those pointed out to the Securities and Exchange Commission (SEC) on remand by this same Court of Appeals in *Chenery Corp.* v. *Securities and Exchange Commission*, 80 U.S. App. D.C. 365, 154 F. 2d 6 (1946); reversed, *Securities Comm'n* v. *Chenery Corp.*, 332 U.S. 194 (1947). The issues were also before the Court of Appeals for the second time. An order holding certain financial transactions unlawful and approving a plan of reorganization of a holding company had been issued by the Commission. On petition for review the Court of Appeals held the order invalid, 75 U.S. App. D.C. 374, 128 F. 2d 303 (1942). On appeal the Supreme Court subsequently held as the Court of Appeals had held "that the Commission's order on this record could not be sustained" for want of supporting facts showing public harm and directed the Court "to remand the case to the Commission for further proceedings not inconsistent with its opinion" (id., p. 8), *Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80 (1943). This action is what happened here except for the Supreme Court appeal. On rehearing before the Commission no new or additional evidence was adduced. The SEC reexamined the problem, recast its rationale, reached the same result, and likewise reaffirmed its former order. The case again was appealed and the same Court of Appeals stated, referring to its prior review, and with exact relevance here, "we had then as we have now a case in which there is not one jot or tittle of evidence tending to contradict petitioner's declared purpose * * *". If the majority's report is subjected to another review, the Court will have the same problem described by Justice Groner as follows in reversing the order a second time:

"Certainly, a reasoned conclusion must be based on evidence, and may not be pitched alone on unresolved doubts, nor upon weaknesses or selfishness which the Commission believes is inherent in human nature. The construction advanced by the Commission would permit it to exercise a power of disapproval free of judicial review, and the notice and hearing required by the statute would become an empty form. The Commission, free of the inhibitions imposed by the particular facts, would be left to roam the widest possible area of authority influenced and impelled only by its own doubts.

"Thus considered, it is apparent that the Commission has made its present order without reliance upon such evidence or findings as would warrant our affirmance.

* * * * * * *

"In laying down, as it does, a rule of fiat unassociated with the facts in this case, the Commission has strayed from the course laid out and charted by the opinion of the Supreme Court, and accordingly we must refuse to give it effect." 154 F. 2d 6 (1946) at p. 11.

The *Chenery* case was decided before the enactment of the Administrative Procedure Act on June 11, 1946, and we now have the latter act defining even more precisely our decision-making responsibilities and separating our adjudication and rulemaking procedures.

The rationalizing problems and the rulemaking effect were the same as here—

(1) no new evidence,

(2) unresolved doubts,

(3) human weakness and selfishness is relied on in the new rationale,

(4) there is no showing how the conduct would be detrimental to public interest, and

(5) There is a laying down of rules of fiat unassociated with the facts in this case.

The Supreme Court reversed the Court of Appeals, but did not invalidate these five elements of deficiency. The Supreme Court decided there were facts showing violation of fiduciary obligations through purchase of company securities by management during reorganization sufficient to sustain the order. The character of the conflicting interests, created by the program of stock purchases while plans for reorganization of a large-multistate utility system were under consideration, was thought to influence adversely accomplishment of the objectives of the Public Utility Holding Company Act of 1935, where control by management whose influence "permeated down to the lowest tier of operating companies" was present. Conflict of interest as an ethical principle was used as a basis of decision. Ethical principles are frequently based on philosophy and become accepted through changes in public attitudes. Consequently, the principles are not susceptible of proof by evidence usually gathered in agency adjudications. The SEC used such principles as findings to support its conclusions, so the Supreme Court was probably justified in not going behind the SEC reasoning and insisting on evidence in this particular instance. The Supreme Court found the deficiencies of the first SEC decision had been overcome. What we have to overcome by adverse facts is a long history of operations under the conferences' unanimity and tieing rules

without complaint of harm to carriers or disadvantage to the public. We may not rely on ethical considerations. We have to show with new facts how times have changed.

The standards of the Court of Appeals are still valid, and the majority's report does not accomplish what the SEC report accomplished when it substantiated its order using the presence of conflict of interest.

The deficiency tests apply as follows:

(1) The lack of new evidence is admitted.

(2) When we say ocean carriers are at a competitive disadvantage because of commission levels or the public has a right to deal with agents free of motivation to influence choice of air or water carriers, we have only begun the analyzing process. The propositions only point the way to further inquiry to remove doubts. Unresolved are the questions of what carriers have been harmed by airline competition caused by passenger agent activity and how badly, and whether commission levels are the real cause of harm. Reference was made to congressional "doubt" about how to proceed. The majority refers to a lack of evidence "that a specific traveler has been persuaded to air travel against his desires or to his disadvantage." What influence does changing passenger preference have on the disadvantage rather than competition? Have any travel agents disclosed a motivation to disfavor water carriers? What are the consequences of any deviation from the agents' duties to their water carrier principals by such motives? The real objection was said to be the "disparity in the effective level of commissions." This objection means the issue is neither the rule nor how the level got where it is. The rule may just as easily increase the disparity, and if the rule diminishes the disparity what proof is there the airlines won't retaliate with higher commissions? What effect do all these potential shifts have? The question is asked whether "prospective passengers should be denied the right to utilize the valuable services of agents in fulfilling their desires to travel on nonconference vessels" and is answered "no" as though the answer is so obvious as to prove all that is necessary. The question should be whether the denial of the right to utilize the valuable services of agents to fulfill desires to travel on nonconference vessels is a detriment to commerce or contrary to public interest. We need facts to find out and to resolve doubts, and not just a "yes" or "no" answer.

Offsetting the claimed denial of rights of agents to serve and the traveling public to receive is a claim by the carriers to full loyalty of

agents to the carriers as principals without conflicting interests to serve competitors. Where is the balance to be struck? Until we have more facts to show a direct relation between voting and between exclusive agency and detriments to commerce, we ought not to use speculation and personal or fictitious experience or "yes" or "no" answers to alter respondents' rights to managerial control over their business assured by the unanimity and exclusive-agency rules. Speculations and personal or fictitious experience do not resolve doubts by being asserted in the name of our own experience and best judgment.

(3) Human weakness and selfishness appear in the form of an attribution of "the economic self-interest of travel agents" to "foster the definite tendency to sell air passage over sea passage." There is no proof, but only the assumption based on personal experience about human greed and a desire to protect people from avaricious influences.

(4) An explanation of how conduct is related to detriments to commerce is not supplied by the speculative results said to have constituted detriments. In place of explanation, we have a statement that it is "clearly contrary to the public's interest" in the purpose of the act to develop the merchant marine to let anything "foster the definite tendency to sell air passage", but we are not told how this result is achieved. It has to be assumed that anything that helps airlines hurts the merchant marine, but for all I know it may be a part of the public's interest not to hurt airlines by helping the merchant marine. Neither one interest or the other is to be protected or harmed as far as the public is concerned. The same tendency to "foster" is also said to be "detrimental to the commerce", but it is equally vague as to why detriment to commerce is linked with either the airlines or the merchant marine. Other reasons for a lack of connection to public interest and detriments are discussed in items (2) and (3) above.

(5) At least four rules have been laid down unassociated with facts as a result of the majority's reasoning. Item 2c, for example, refers to the public's right to deal with an agent free from motivation to influence choices. It is to be concluded from the majority's rhetoric that the public's right to freedom from motivations influencing choices will be examined into and the "right" is a matter of general applicability and future effect. For the present proceeding, however, there are no facts proving the assumed motivation, nor its effect on travelers' rights to choose. This statement and items 2 a, b, and d, if they won't stand up as findings supported by facts, require proof and public comment if they are to become rules instead.

CONCLUSION

In conclusion, I find it extraordinarily difficult to reason from this record now after the Court's remand as I did before it was remanded, without more facts. I conclude that the record lacks the facts from which the findings could be formulated in order to determine if the findings support the conclusions advanced by the majority opinion. Lacking the needed facts, I hold the conclusions expressed by the majority to be in error.

The public, reading our respective reports and struggling to understand what we have done with this record in deciding why a conference of carriers should have adopted an agreement requiring a unanimous vote before any change is made in the commissions each carrier must allow to be taken out of the price of a passenger ticket, or requiring an agent to represent his principal only and not a competitor, might well wish we would say either a lot more or a little less. A lot more might supply facts from the record showing exactly how such agreements discriminate or harm the public or commerce. A lot less would be a relief if all that is really possible is a statement of position or of ethical principles. But no one is to be spared and the public is to get a restated rationalization of a position in the form of an unneeded justification based on personal experience rather than on a record.

Since the proceeding is before us on remand by a court and will very likely go back again, the majority might at least have been alert about abstracting some facts which bolster a position, facilitate judicial review, and improve chances of success in litigation. But when all that is done is to offer a statement of why the agreements are bad for the public because of uncontroverted principles about our general powers and responsibilities under section 15, speculations about competition between airlines and water carriers in relation to the decline in ocean travel, unproven motives and assumed rights of passengers to buy tickets of competing principals from an agent of both, the task of meeting the Court's requirements and hence obtaining court support of our reasons inducing understanding is made difficult indeed. One would expect more facts enabling a decision without the strain of complete reliance on personally perceived intangibles to tell us whether the decision is the right one or the wrong one.

If for no other reason than that section 15 of the Act authorizes the Commission to disapproved agreements only if any of the four conditions exist in fact and "shall approve all other agreements", the agreements before us should be approved.

I conclude—

1. That findings of fact supporting: (a) Discrimination and unfairness, (b) detriments to commerce, (c) contrariety with public interest, or (d) violation of law required by section 15 of the Act in relation to agreements of the respondents have not been proven and may not be made on the basis of the record in this proceeding, and

2. that the agreements authorizing unanimous approval of commissions to be paid to travel agents and obligating travel agents not to act as agents for competing carriers must be approved.

COMMISSIONER JAMES V. DAY dissenting:

Consonant with the decision of the Court of Appeals this matter has been reviewed for the purpose of making certain findings respecting the illegality of the unanimity and tieing rules or, lacking this, to approve them. I would maintain the latter course.

In my opinion the record does not support disapproval. The evidence is lacking. Conjecture is not enough.

With regard to the unanimity rule, I would note that conference agreements are not unfair as between carriers or otherwise detrimental merely because of unanimous vote procedures maintained by the conference in the absence of sufficient evidence concerning the actual results of operations under such voting rules. See *Maatschappij Zeetransport" N. V. (Oranje Line) v. Anchor Line Ltd.*, 5 FMB 713 (1959). The lawfulness of conference voting rules, whether requiring unanimous, two-thirds, three-fourths, or majority approval must be determined on the basis of evidence introduced at a hearing as to their use in practice, and not on the basis of organizational procedure, etc. See *Pacific Coast European Conference Agreement (Agreements Nos. 5200 and 5200-2)*, 3 USMC 11 (1948). The record here is lacking in support of the majority position. Indeed, there is evidence of the value of the longstanding unanimity rule to conference carriers (Examiner's decision at pp. 40 and 65).

There is also evidence that frustration of the desires of a majority of the conference carriers is not the real factor which places the lines at a competitive disadvantage. Other economic factors are the controlling cause (e.g., the speed of airline service itself). Thus, the majority opinion's claim that the agents' commission level fosters a tendency for agents to sell air over sea travel is hardly compelling. Indeed, the proof is lacking that ocean carrier business has been diverted in any real sense because of agent commission levels. Aside from this, one can hardly rest on the assumption that a rule permitting a majority of conference members to raise the sea commission as high as they might

actually decide, would make any real and lasting difference. Any such raising would hardly be expected to correct the cited competitive disadvantage and the possibility is present that air commissions could be raised in return.

With respect to the traveling public, there is likewise inadequate proof that any cognizable rights of prospective travelers were actually violated because of conference agents advocating air travel over sea travel. I am not persuaded that such advocating as may have been done actually resulted in any substantial diversion of people to air against their best interests and judgment. The majority opinion would in this instance attempt to insure the existence of only liner agents who have no proclivities; proclivities which, in this case, would also be adverse to the interests of their principals. As the Examiner noted (Examiner's decision at p. 70) correction of an advocacy of air by ship agents in this instance is better left to the managerial discretion of the ocean carriers in their dealings with their agents.

As regards the tieing rule, again, conjecture, inferences, and assumptions cannot here substitute for record proof.

There is inadequate proof that passengers have been denied the use of travel agents in obtaining passage pursuant to their choice. The record shows that 99 percent of all Trans-Atlantic steamship passengers go conference and that the only vessels whose operators are not members of the conference are freighters which can carry a limited number of passengers. The record also indicates that there are both conference and nonconference travel agents. The evidence is not persuasive that the percentage of passengers able and wishing to travel nonconference were significantly injured because of any lack of opportunity to deal with agents (where the passengers preferred not booking passage directly with a particular line).

Neither is the evidence persuasive as to any cognizably harmful effect of the tieing rule on nonconference operators. There are nonconference agents. No nonconference carrier intervened in this case to complain against the rule.

Nor is the tieing rule unduly restrictive on the agents in my opinion. The record indicates there are some services performed by the carriers for their agents—a justification for restricting agents' services in return.

Further, the carriers believe the tieing rule is necessary to protect conference stability. I am not persuaded that the conference assertion of need is invalidated merely by the majority's reference to the Caribbean cruise trade where no conference exists and conditions "may indeed be somewhat different."

The majority assert that the tieing rule is unjustly discriminatory as between carriers within the meaning of section 15; citing *Pacific Coast European Conf.—Payment of Brokerage*, 5 F.M.B. 225 (1957). In that case the Maritime Board outlawed a provision (in the absence of justification therefor) which prohibited payment of brokerage by conference lines to any forwarder-broker who served nonconference lines. Of the two nonconference carriers in the trade, one depended upon forwarder-brokers for all cargo and the other for 80 percent of its cargo. Both nonconference carriers appeared in the case. The Board concluded that all forwarder-brokers in the trade would refuse to serve the nonconference lines and these nonconference carriers would be foreclosed from obtaining their cargo through brokers or forwarders. Here, there appear distinctions (e.g., there remain nonconference agents who can serve nonconference carriers and no nonconference carrier has intervened to assert its dependent need of agents now subject to the tieing rule).

Finally, and in essence, I am not persuaded that the opinion and reasoning of the majority reveals a sufficient record basis for disapproval of the unanimity or the tieing rule as being contrary to the standards of section 15.

FEDERAL MARITIME COMMISSION

No. 873

INVESTIGATION OF PASSENGER STEAMSHIP CONFERENCES REGARDING TRAVEL AGENTS

ORDER

This proceeding having been remanded by the Court of Appeals for the District of Columbia Circuit and briefs and oral argument having been made by the parties, the Commission on this date issued a report in this proceeding which is hereby referred to and incorporated herein by reference.

Therefore, It Is Ordered That:

(1) All provisions of Conference Agreement No. 7840 requiring unanimous accord of the member lines in deliberations by any group having final or recommendatory power over levels of commissions to travel agents, including article 6(a) and article 3(d), be modified to remove the requirement of unanimity in such deliberations; and

(2) Article E(e) of Conference Agreement No. 120 and the rules adopted thereunder prohibiting the member lines' agents from selling, without prior permission, transportation on competitive nonconference lines be eliminated.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

Docket No. 66–27

THE PERSIAN GULF OUTWARD FREIGHT CONFERENCE (AGREEMENT 7700)—ESTABLISHMENT OF A RATE STRUCTURE PROVIDING FOR HIGHER RATE LEVELS FOR SERVICE VIA AMERICAN-FLAG VESSELS VERSUS FOREIGN-FLAG VESSELS

Decided July 21, 1966

Two-level rate structure based upon vessel flag not authorized by basic conference agreement (Agreement 7700). Two-level rates stricken from conference tariff and carriage under such rates forbidden prior to approval under section 15, Shipping Act, 1916, of two-level rate structure.

Elmer C. Maddy and *William Peter Kosmas* for respondents, Persian Gulf Outward Freight Conference and its member lines, Central Gulf Steamship Corp. and Isthmian Lines, Inc.

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

REPORT

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

The Commission instituted the subject proceeding by order served April 19, 1966, requiring the Persian Gulf Outward Freight Conference (Agreement 7700) (the Conference) and its member lines to show cause why their two-level rate structure based upon vessel registry should not be declared unlawful and such two-level rates ordered stricken from the Conference's tariff.

STATEMENT OF FACTS

By Agreement No. 7700, approved May 28, 1946, the basic conference agreement of the Persian Gulf Outward Freight Conference, the two members of the Conference, Isthmian Lines, Inc., and Central Gulf Lines, both American flagship lines, derive their authority to act

*Commissioners Ashton C. Barrett and James V. Day did not participate.

and function as a conference in the trade from the U.S. Atlantic and Gulf ports to ports in the Persian Gulf and adjacent waters in the range west of Karachi and northeast of Aden (but excluding Aden and Karachi).

On March 10, 1966, the Conference filed with the Commission revisions to its Freight Tariff No. 8, F.M.C. No. 1, effective March 11, 1966, affecting the rates on certain specified commodities. The revisions establish for each of the commodities concerned one rate if shipped via U.S.-flag vessel, and another lower rate if shipped via foreign-flag vessel. No commodities have been added or removed from the tariff, no rates have been increased, and there is no requirement that any shipper be signatory to any contract in order to avail itself of the revised rates. As indicated in the Commission's order, the tariff revisions are not an implementation of the Conference's approved dual-rate system.[1]

Article 1 of Agreement 7700, which the Conference alleges is the authority for establishing the two-level rate system, provides that:

This agreement covers the establishment and maintenance of agreed rates, charges and practices for or in connection with transportation of cargo by members of this Conference.[2]

The show cause order stated the legal basis for the institution of this proceeding as follows:

It appears that the above-quoted language of Agreement No. 7700 (article 1) does not encompass the authority to establish a two-level rate structure which provides for higher rates on cargo transported in American-flag vessels than for cargo transported in foreign-flag vessels and that the establishment of such rates introduces an entire new scheme of ratemaking and discrimination not embodied in the basic agreement requiring specific approval pursuant to section 15 of the Shipping Act, 1916.

The conference has not submitted to the Commission a request for the modification of its organic agreement to specifically set forth therein the authority required to establish and maintain the two-level rate structure at issue pursuant to Section 15, Shipping Act, 1916, which rate structure is being effectuated by the member lines.

Section 15 provides in part that:

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; * * *

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[1] This paragraph and the one preceding it have been taken verbatim from respondents' Reply to Order To Show Cause, 2–3, and constitute the entire section captioned Statement of Facts.

[2] See respondents' Reply to Order To Show Cause, 13–14.

It, therefore, appears that the publication and effectuation of the two-level rate structure herein at issue by the member lines of the Persian Gulf Outward Freight Conference may constitute the carrying out of an unfiled, unapproved agreement in violation of the terms of section 15.

A memorandum of law captioned "Reply to Order To Show Cause" was filed by respondents, and a reply to this "Reply" was filed by Hearing Counsel.[3] We have heard oral argument.

POSITIONS OF THE PARTIES

A. The Conference maintains that the show cause form of investigation in this proceeding is unauthorized by the Shipping Act, the Administrative Procedure Act, and the Commission's own rules of practice and procedure and that, even if authorized, it could not terminate in a determination of the unlawfulness of the two-level rate structure, because such structure is authorized by the present terms of Conference Agreement 7700. More specifically, the Conference alleges:

1. The Commission is empowered to issue cease and desist orders, but only upon findings pursuant to full evidentiary hearing. The use of the show cause order in this proceeding is an attempt to declare the system here under investigation unlawful and prohibit its use without providing the required opportunity for hearing and is an unjustified attempt to place the burden of proving the legality of the system upon respondents.

2. Even if the proceeding were properly instituted, the two-level rate system is authorized by the basic Conference agreement and cannot here be declared unlawful. The two-level rate system is a "routine" rate change which does not require Commission approval prior to its effective date. It is similar to a system of project rates which does not require separate Commission approval where the basic Conference agreement has a provision like that for rate establishment in Agreement 7700. The two-level rate system is necessitated because without it the Conference is unable to compete successfully with the 8900 Group (another conference in the same trade operating foreign-flag vessels exclusively) for the carriage of commercial cargo.

B. Hearing Counsel maintain that the show cause form of investigation is justified in this proceeding because the issues raised do not involve any disputed questions of fact, and the subject rate structure is not a routine arrangement and therefore requires additional Com-

[3] The Commerce and Industry Association of New York, Inc., intervened but did not otherwise participate in the proceeding.

mission approval before it may be instituted. More specifically, they allege:

1. The show cause proceeding has repeatedly been used by the Commission where, as here, the questions to be resolved involved only issues of law and there was no dispute as to material questions of fact. The use of a show cause order has, moreover, recently been upheld by the Court of Appeals for the Ninth Circuit in a case similar to the instant one in which the Court affirmed the Commission's determination in a show cause proceeding that a port equalization system was unauthorized by general ratemaking provisions in a basic conference agreement. Although the Commission is not empowered to issue cease and desist orders prohibiting the parties from carrying out an approved agreement prior to findings of violations, there is no authority for the proposition that the Commission may not issue such orders prohibiting the carrying out of unapproved agreements, and the Commission has been forbidden to allow dual-rate contracts to go into effect prior to approval.

2. The two-level rate system established by respondents is no more "routine" than port equalization systems, dual-rate contracts, and agreements to prohibit brokerage, all of which the Commission has required to be filed for separate approval under section 15. It may well be that trade factors are such that the system should be granted approval. However, approval of the system is not the question here. An agreement like the one in question cannot be instituted prior to approval, and such approval would require full evidentiary hearing on the merits, especially since the two-level rate system appears to be discriminatory with reference to Government cargoes which must under cargo preference laws move on American-flag vessels.

Discussion and Conclusions

The use by the Commission of an order to show cause to resolve the legal question of whether or not a certain type of arrangement is authorized by the wording of an approved conference agreement has been recognized as proper by the courts. *Pacific Coast Port Equalization Rule*, 7 F.M.C. 623 (1963), *aff'd sub nom. American Export & Isbrandtsen L.* v. *Federal Maritime Com'n*, 334 F. 2d 185 (9th Cir. 1964).[4]

[4] Respondents attempt to distinguish the order used in the instant case from that used in the *Pacific Coast* case on the ground that the order which forms the basis of this case did not provide for the submission of affidavits of fact. This is a distinction without a difference. The "order to show cause" in this proceeding recited that "[t]he issues raised

It is clear from a reading of section 1 of Agreement 7700 and a review of the applicable case law that the two-level rate system here involved is one which cannot be effectuated prior to separate section 15 approval. Separate section 15 approval has been required by the Commission and its predecessors of arrangements (1) introducing an entirely new scheme of rate combination and discrimination not embodied in the basic agreement (the dual-rate contract); [5] (2) representing a new course of conduct (prohibition of brokerage on a particular shipment); [6] (3) providing new means of regulating and controlling competition (port equalization system); [7] (4) not limited to the pure regulation of intraconference competition; [8] or (5) constituting an activity the nature and manner of effectuation of which cannot be ascertained by a mere reading of the basic agreement.[9]

The effectuation of conduct following under only one of the above criteria would require separate prior section 15 approval. The two-level rate system here involved comes within all five of them. No mention is made in the basic agreement of a system of rates based upon vessel flag; the institution of such new system of rates would, of course, represent a new course of conduct; the conference, moreover, admits that the purpose of the system is "to maximize interconference competition in the trade while at the same time, regulating and minimizing business confusion and intraconference competition"; [10] finally, it cannot be contended that a mere reading of article 1 of Agreement 7700, the sole provision under which the conference alleges it has authority to institute the system, indicates that the conference is to be

herein do not involve any disputed issues of fact requiring an evidentiary hearing * * *." Respondents have set forth the material facts on pages 2 and 3 of their reply to the order to show cause. These facts are not in dispute and have been, as noted above, incorporated verbatim into this report. Respondents' contention that the show cause order in this proceeding improperly attempts to shift to them the burden of proof is irrelevant. The doctrine of burden of proof has no application in proceedings in which there are no material facts in dispute. Respondents do request a full evidentiary hearing "to develop the facts relating to whether the two-level rate structure at issue here is employed now, or was recently employed in the foreign commerce of the United States, as well as other facts bearing on the allegedly anticompetitive nature of these tariff revisions and their effect on the foreign commerce of the United States." Such additional facts bearing on the operation or probable operation of a two-level rate system may well be important in a proceeding to determine the approvability of the system. They are, however, irrelevant in the resolution of the only issue involved in this proceeding—the legal question of whether or not the two-level rate system is authorized by approved Agreement 7700.

[5] *Isbrandtsen Co.* v. *United States,* 211 F. 2d 51, 56 (D.C. Cir. 1954).

[6] *American Union Transport* v. *River Plate & Brazil Confs.,* 5 F.M.B. 216, 221 (1957), *aff'd sub nom. American Union Transport* v. *United States,* 257 F. 2d 607, 613 (D.C. Cir. 1958).

[7] *Pacific Coast Port Equalization Rule, supra,* at 630.

[8] *Id.*

[9] *Joint Agreement-Far East Conf. and Pac. W.B. Conf.,* 8 F.M.C. 553, 558 (1965).

[10] See Respondents' Reply to Order To Show Cause, 24.

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empowered to institute any system of two levels of rates for the carriage of the same commodities, much less one based on vessel flag.[11]

We do not mean to imply that "routine operations relating to current rate charges and other day-to-day transactions between the carriers under conference agreements" need separate approval under section 15. See *Ex Parte 4, Section 15 Inquiry*, 1 U.S.S.B. 121, 125 (1927). In fact Congress, in enacting Public Law 87–346 [12] which amended section 15, specifically stated that "tariff rates, fares, and charges, and classifications, rules and regulations explanatory thereof * * * agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval * * *."

A review of the legislative history of this provision and the cases construing it, however, indicate that "it is intended absent additional approval to limit conference authority, such as that contained in section 1 of respondents' basic agreement, strictly to the ratemaking authority therein provided for." [13] As the House Merchant Marine and Fisheries Committee stated in reporting on what eventually became Public Law 87–346: "[W]e construe the purpose of this provision to be that individual rate changes by Conferences need not be approved * * *. The difficulty stems from the fact that in many instances conferences may insert rules and regulations in their tariffs which have the effect of restricting competition in a manner not reasonably to be inferred from the basic agreement." [14]

We conclude that the two-level rate system based upon vessel flag is unauthorized by Agreement 7700 and cannot be effectuated prior to Commission approval. Should the Conference wish to effectuate this system, it must submit an agreement embodying it for, and receive, our approval.

The Conference's contention that the Commission cannot issue a

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[11] Respondents' analogy of their two-level rate system to project rate systems is at best not in point. The proceeding cited by respondents for the analogy, *Fact Finding Investigation No. 8, May 24, 1965, Report of E. Robert Seaver, Investigating Officer*, does not indicate that project rate systems may lawfully be carried out without special section 15 authority. That proceeding is just what its name implies—a factfinding investigation. It is not adjudicatory in nature. It indicates that some conference agreements do not contain separate authorization for project rate systems. It also indicates that the Commission has approved in a docketed proceeding a conference agreement containing a separate provision authorizing project rates. *In the Matter of Agreement No. 6870*, 3 F.M.B. 227 (1950). Project rate systems have never been held by the Commission or its predecessors not to require specific authorization in a section 15 agreement.

[12] 75 Stat. 762, 764.

[13] *Pacific Coast Port Equalization Rule, supra*, at 632.

[14] H. Rept. 498, 87th Cong., p. 19. Because of this "difficulty," the Committee suggested striking of the words "tariffs of" preceding "rates, fares, and charges." As enacted, in accordance with this recommendation, the provision reads simply "tariff rates, fares, and charges * * *."

cease and desist order and require the two-level rates stricken from the Conference's tariff in this proceeding is without merit. *Trans-Pacific Freight Conference of Japan v. Federal Maritime Board*, 302 F. 2d 875 (D.C. Cir. 1962), relied upon by respondents for support of this position is inapposite. That case merely held that the Commission could not issue cease and desist orders against the implementation of provisions in a conference agreement which had been approved by the Commission and had not thereafter been found to be unlawful. The Court in that very case stated:

In *Pacific Coast European Conference—Payment of Brokerage*, 5 F.M.B. 65 (1956), the Board asserted the authority to issue a cease and desist order prohibiting the parties from carrying out an unapproved agreement. We need not express a view as to whether such an order is within the Board's authority. But we note that different considerations might well be involved in such a case. Cf. *Isbrandtsen Co. v. U.S.* 211 F. 2d at 57 (Board not allowed to let dual-rate contract go into effect prior to approval). At 879, footnote 8.

That the power of this Commission to issue cease and desist orders preventing the carrying out of unapproved agreements is a necessary corollary to the requirement that such agreements obtain approval before they may be carried out has been recognized by the Courts.[15]

The assertion of such power and the requirement by the Commission pursuant to its exercise that authorizing matter be stricken from a tariff have, moreover, specifically been affirmed in a proceeding instituted by an order to show cause. In *American Export & Isbrandtsen L. v. Federal Maritime Com'n, supra*, the Commission was upheld by the Court of Appeals for the Ninth Circuit in requiring the respondent conference in a proceeding instituted by order to show cause to cease and desist from effectuating a port equalization system without specific prior approval and to strike the rule implementing that system from its tariff.

Respondents will be required to cease and desist from carrying out the two-level system here at issue until such time as it may be specifically authorized by an agreement approved by the Commission.

The two-level rates contained in the Conference's tariffs are not in accordance with the presently authorized conference agreement. As only those tariff modifications "in accordance with law" may take effect upon filing, these rates cannot be given effect and must be stricken from the Conference tariff until such time as approval may be obtained for the two-level rate system based upon vessel flag.

An appropriate order will be entered.

[15] See e.g., *Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Com'n*, 314 F. 2d 928, 935–936 (9th Cir. 1963) upholding the Commission's issuance of a cease and desist order against the carrying out of modification of neutral body system without prior Commission approval.

FEDERAL MARITIME COMMISSION

Docket No. 66–27

THE PERSIAN GULF OUTWARD FREIGHT CONFERENCE (AGREEMENT 7700)—ESTABLISHMENT OF A RATE STRUCTURE PROVIDING FOR HIGHER RATE LEVELS FOR SERVICE VIA AMERICAN-FLAG VESSELS VERSUS FORIEGN-FLAG VESSELS

ORDER

This proceeding having been instituted on order to show cause, the Commission having received memoranda of law and heard oral argument on such order and having pursuant thereto issued on this date a report in this proceeding, which is hereby referred to and incorporated herein by reference,

Therefore, it is ordered, That,

(1) Respondents Persian Gulf Outward Freight Conference and its member lines, Central Gulf Steamship Corp. and Isthmian Lines, Inc., cease and desist from carrying out prior to Commission approval its two-level system of rates based upon vessel flag; and

(2) Any and all tariff rates implementing such system be stricken from the Conference tariffs.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

Docket No. 66–42

IN THE MATTER OF THE CARRIAGE OF MILITARY CARGO

Decided August 9, 1966

The Cargo Commitment Contract found not to be a dual-rate contract within the meaning of section 14b of the Shipping Act, 1916.

Item No. 1 of Local Freight Tariff No. 1–Y–FMC–1 of the Pacific Westbound Conference and Agreement 8086 construed not to prohibit certain petitioners from participation in the proposed competitive procurement program of the Military Sea Transport Service, Department of Defense in its present form and coverage.

The requirement that bidding under the proposed procurement program be under seal and "secret" does not constitute an "unjust or unfair device or means within" the first paragraph of section 16.

Warner W. Gardner, *Robert T. Basseches* and *James B. Goodbody* for petitioners American Mail Line, Ltd., American President Lines, Ltd., Pacific Far East Lines, Inc., States Steamship Co. and Waterman Steamship Corp.

George F. Galland, *Robert N. Kharasch*, *Philip F. Hudock*, and *J. K. Adams* for petitioners States Marine Lines, Inc., Isthmian Lines, Inc., Global Bulk Transport, Inc., Bloomfield Steamship Co.

Richard W. Kurrus for petitioner American Export Lines, Inc., *Wilbur L. Morse*, *William W. Parker* and *Howard A. Levy* for the Military Sea Transport Service, Department of Defense.

Donald J. Brunner, Hearing Counsel.

Mitchell W. Rabbino for intervenor Sapphire Steamship Lines, Inc., *Elmer C. Maddy* and *John Williams* for intervenor Atlantic & Gulf American Flag Berth Operators.

REPORT

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

This proceeding is before us on petitions seeking orders declaring unlawful the proposed competitive procurement program of the Mili-

*Vice Chairman John S. Patterson did not participate.

tary Sea Transportation Service Department of Defense. In all, 12 U.S.-flag steamship lines filed five petitions for declaratory order,[1] and still others intervened.[2] By order served July 19, 1966, we agreed to hear three of the issues raised in the petitions and declined to entertain the other issues urged therein because they were premature and did not present us with justiciable controversies.[3]

THE PROPOSED COMPETITIVE PROCUREMENT PROGRAM

On June 16, 1966, the Military Sea Transportation Service (MSTS) issued Request for Proposals No. 100 (RFP 100) containing the terms and conditions under which the Department of Defense proposed to extend its competitive procurement program to ocean transportation. The program is open to U.S.-flag steamship lines only.[4]

Under RFP 100, any line desiring to carry military cargo (offeror) must submit a "basic offer" which is simply a quotation of the rates at which the offeror will carry military cargoes. These rates must be guaranteed for a period of 1 year. The basic offer must be submitted under seal and the offeror certifies that he has reached his bid independently without consultation with or disclosure to any other offeror, or he must certify as to the conditions and circumstances of the consultation or disclosure, if any, has occurred.

Upon analysis of all basic offers, MSTS will enter into Shipping Agreements with the selected offerors.[5] Shipping Agreements are awarded on the basis of the lowest rates offered, but there does not appear to be any limit to the number of Shipping Agreements which may be awarded on any given trade route. The award of a Shipping

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[1] States Marine Lines, Inc., Isthmian Lines, Inc., Global Bulk Transport Inc. and Bloomfield Steamship Co., joint petition filed June 30, 1966; American Mail Line, Ltd., American President Lines, Ltd., Pacific Far East Lines, Inc., States Steamship Co. and Waterman Steamship Corp. joint petition filed June 30, 1966; American Export Isbrandtsen Lines, Inc. single petition filed July 11, 1966; Lykes Brothers Steamship Co. single petition filed July 11, 1966; United States Lines Co., single petition filed July 11, 1966.

[2] Intervenors were: Sapphire Steamship Lines, Inc. and the U.S.-flag lines parties to Atlantic & Gulf American Flag Berth Operators, Agreement No. 8186: Alcoa Steamship Co., Inc.; American Export Isbrandtsen Lines, Inc.; American President Lines, Ltd.; American Union Transport, Inc.; Bloomfield Steamship Co.; Central Gulf Steamship Corp.; Farrell Lines, Inc.; Grace Line Inc.; Great Lakes Bengal Lines, Inc.; Isthmian Lines, Inc.; Lykes Bros. Steamship Co., Inc.; Moore-McCormack Lines, Inc.; Pacific Seafarers, Inc.; Prudential Steamship Corp.; States Marine Lines—Joint Service; United States Lines Co.

[3] Our disposition of the various issues raised in the petitions is discussed *infra*.

[4] Department of Defense Cargo is reserved to U.S.-flag carriers by the Cargo Preference Act, 1904 (10 U.S.C. 2631).

[5] The Shipping Agreement is the standard contract of MSTS for ocean transportation and is in three parts: Part I, Description of Services; Part II, Standard Maritime Clauses, and Part III, Standard Government Clauses.

Agreement does not constitute the allocation to the selected offeror of any specific amount or portion of the cargo to be shipped in the trade. Actual bookings of cargo under Shipping Agreements are made first with the rate-favorable carrier, provided he offers suitable space and an acceptable schedule of delivery. Failing this, the cargo is booked with the line offering the next highest rate, and so on.

The holder of a Shipping Agreement is "protected from competition" of other common carriers on the route in question including those who hold Shipping Agreements as well as those who do not. Thus, if another holder of a Shipping Agreement reduces his rate, his competitive position vis-a-vis other holders is considered on the basis of the rate originally bid; and, while a carrier new to the trade may be awarded a Shipping Agreement, his service is used only if the original holders on that route cannot provide suitable service; and, finally, lines who either did not bid or were not awarded Shipping Agreements will be used only if the services or capabilities of the holders on the route are inadequate.

Any line which makes a basic offer may also, if it feels that "a firm commitment to ship a minimum volume of cargo on each sailing in order to enable it to offer its best rates, or to establish service on a particular route," submit an alternate offer. Offers based on minimum volume will not be considered unless the line has also submitted a "basic offer." If an alternate offer is accepted, a "Cargo Commitment" is entered into.

Under the Cargo Commitment, the line agrees to furnish space in specified amounts on each of its sailings and the Government agrees to provide a minimum volume of cargo for each sailing. Default on the part of either party results in payment of "dead freight" under the terms and conditions set forth in the contract.[6]

The Government does not contemplate, except possibly for special services that Cargo Commitments will be awarded to exceed 50 percent of the total Government requirement on any given route or that any individual Cargo Commitment will result in the use of more than 50 percent of the space of any single carrier on a given route.

[6] Article 4b provides: "Should the Government fail to ship cargo to fullfill its commitment on a particular sailing by a deficit of more than five (5) percent of the total cargo required to meet its commitment, it shall pay for the full deficit in its commitment at the rate stated for dead freight in annex A". Similarly, article 4d provides: "To the extent the carrier fails for any reason to make acceptable space available to the Government on a sailing of its ships on the route in an amount required for the Government to meet its requirement to ship cargo, the carrier shall pay the Government for its default at the rate per MT of such deficit as stated in annex A; provided, however, that the carrier shall be excused from its commitment to furnish ship capability to the extent that its default is caused by force majeure including strikes."

When awards are made, either on basic offers or under Cargo Commitments all rates must be filed with the Commission.

THE ISSUES

In the order instituting this proceeding, we declined to consider the lawfulness of the proposed procurement program under sections 14 Fourth, 16 First 17 and 18(b)(5) of the act because the issues raised under those sections were premature and did not present us with justiciable controversies. Certain petitioners view our denial improper, at least insofar as sections 14 Fourth and 16 First of the act are concerned.

The relevant portion of section 14 Fourth makes it unlawful for any common carrier by water to "make any unfair or unjustly discriminatory contract based on volume of freight offered * * *." Since no particular contract for any stated volume of cargo at a fixed rate had, as yet, been made, we declined to speculate on the validity under section 14 Fourth of contracts to be made in the future.

In a similar vein, section 16 First makes it unlawful for a common carrier by water to give any undue or unreasonable preference or advantage to any person, locality, or description of traffic or to subject any person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Here, pointing out that as yet no rates had been fixed under the proposed procurement program, we again declined to speculate as to validity of nonexistent rates under section 16 First.

It is argued, however, that what we were asked was "to determine the legality of the system, and not to measure the precise injury it inflicts." Or, as one petitioner would put it, "we are not, at the moment, complaining about rates but about a practice or device proposed by MSTS in its Request for Proposal No. 100." We are referred to the fact that neither section 14 Fourth nor section 16 First makes specific reference to rates. An analysis of their arguments will clearly reveal their legal insufficiency.

The basic premise upon which the entire argument is grounded is that the Department of Defense through MSTS proposes by the "device" of competitive bidding to reduce ocean transportation rates on military cargo by 25 percent. Thus, we are variously told:

> There is no question that the new competitive procurement device is intended to drive common carrier rates for MSTS cargoes to rock-bottom levels or perhaps below. The Department of Defense has boasted widely about the anticipated 25 percent reduction in ocean transportation costs.

* * * * * * *

The Department of Defense, recognizing the large volume of the MSTS cargoes and their importance to the carriers * * * expects a reduction in MSTS rates of at least 25 percent * * *. It will accept an use the lowest rate, whether or not it is compensatory, and recognizes that this may well result in some lines going out of business.

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* * * it must be remembered that the announced purpose of the competitive bidding system is to drive rates down as much as 25 or 30 percent in favor of the world's largest shipper. The disastrous effects of such a rate slash are evident.

The thread of the "25-percent reduction" runs throughout every argument of petitioners. This is their prime concern. It is also the key to their allegations of unlawfulness under the provisions of the Shipping Act cited to us. Thus, the "contract" is an unjust one under section 14 Fourth because the reduction in rates would not be based "upon a recognition that MSTS cargoes, by their volume and their concentrated location, presented different shipping characteristics," but would be the product solely of competitive bidding. Whatever the validity of this latter assumption, it is itself precisely the reason why there can be as yet no determination made under section 14 Fourth. The section doesn't outlaw all contracts based on volume of freight offered; it proscribes only those which are unfair or unjustly discriminatory. But how is such a contract to be unfair or unjustly discriminatory? Obviously, if the advantages offered under it are not based upon transportation factors which are altered by the "volume of freight offered." Here, the Cargo Commitment is sought if the offeror needs a fixed volume to provide his "best rate." By its very terms, the contract in question is geared to a rate. It is on the basis of rates that the contracts, if any, are to be awarded. To argue now that no specific contract, nor any specified volume, nor any fixed rate is needed to declare the Cargo Commitment unlawful is to ignore legal realities * * *. Not even the most strained reading of section 14 Fourth can render unlawful the mere pro forma solicitation by a shipper, no matter how large, of contracts based on volume of freight and this is how petitioners would have us read the section.

It should be equally clear that any consideration of the "system" under section 16 First is just as premature. Again, the "preference" to MSTS is a reduced rate. It is nothing else. And yet again, not all preferences or prejudices are outlawed by that section but only those which are undue or unreasonable. How the undueness or unreasonableness of the rate preference is to be determined until the particular rate is in existence is never made clear nor indeed can it be at this time.

Certain petitioners point out that our order of July 19, 1966, failed to deal specifically with two issues raised in their petitions, i.e. that the competitive bidding system was unlawful (1) because it "violated the policies of the merchant marine statutes," and (2) the Commission "lacked statutory authorization" necessary for the establishment of preferential rates for Government cargo.

While we did not read petitioners' references to "policy" as asserting a "violation," one is now specifically asserted. To the extent that this assertion is divorced from specific allegations of violation of particular substantive provisions of the statutes, we are charged with administering, it should only be necessary to point out that expressions of policy are nothing more than the goals sought to be achieved by Congress in the enactment of the particular substantive provisions of law which the statement accompanies. Standing alone a statement of policy grants no substantive power and prohibits no specific conduct. It is an aid in the construction of the substantive provisions of a statute, and it is not "violated" in the sense that those substantive provisions of a statute are violated. The "policies of the maritime statutes" as an aid in statutory construction, wherever relevant, are discussed in connection with the specific issues dealt with herein. However, some preliminary considerations are necessary to place the "policy" question in its proper perspective.

We are urged not to confuse our determination of the validity of RFP 100 under the Shipping Act with "such foreboding and seemingly omnipresent spectres as the Douglas Committee or a putative policy conflict with the Department of Defense." We need only say that petitioners' "trust" that we would not so confuse our deliberations and determinations was well placed. But we would that petitioners had rendered our tasks less difficult by restricting their arguments to us to particular provisions of the Shipping Act.[7] In resolving the issues before us, we are told that it is mandatory that we consider the objective of promoting the American Merchant Marine. We are cited to the preamble to the Merchant Marine Act of 1920 (46 U.S.C. 861) which states that it is:

> * * * the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of * * * a (privately owned American Merchant Marine) and insofar as it may not be inconsistent with the provisions of the Act, the United States Shipping Board (now the Federal Maritime Com-

[7] Thus, we are offered arguments such as the program proposes a practice which is "revolutionary and improper deviation from Anglo-American transportation law;" that such a practice has never been sanctioned under the "venerable Interstate Commerce Act;" and that the practice calls for a "diabolical form of Russian roulette," but it is the application of the law only that is germane in our deliberation herein.

mission) keep always in mind this purpose and object as the primary end to be obtained.

"Thus," it is argued, "the objective of promoting and maintaining an adequate and well balanced American Merchant Marine pervades the functions of the Commission under the regulatory provisions of the Shipping Act," and "In considering whether a practice is 'unfair' or 'detrimental to commerce,' the Commission must properly be influenced in its determinations by the resulting effect that such a practice would have on the American Merchant Marine." There is very little in this latter conclusion with which we could disagree. However, a cautionary word or two is called for.

Volumes have been written in the annals of Congress concerning our national shipping policy. The topic is traditionally a favorite one for patriotic addresses throughout the country, yet the interrelationships between the dual elements of our national shipping policy, both promotional and regulatory has never at any time been clearly articulated or well defined. It can only be deduced from a careful and painstaking study of our shipping laws and administrative practices which are neither consistent nor codified.[8]

This national shipping policy which is to be ultimately deduced from a study of the shipping laws and past administrative practices, is a synthesis in which there is found "nothing inconsistent with regulatory policy in U.S. promotional policy." (Cellar Report 25 and 26.) Indeed, "[t]he development and maintenance of a sound maritime industry require that the Federal Government carry out is dual responsibilities for regulation and promotion with equal vigor."[9] The history of past organizational arrangements for carrying out these dual responsibilities had proved inadequate and the Government's experience under them culminated in Reorganization Plan No. 7. The purpose of the plan was to provide the most appropriate organizational framework for each of the functions—regulatory and promotional—thus:

Regulation would be made the exclusive responsibility of a separate commission organized along the general lines of other regulatory agencies. On the other hand, nonregulatory functions, including the determination and award of subsidies and other promotional and operating activities would be concentrated in the head of the Department of Commerce * * * (House Doc. No. 187, 87th Cong. 1st sess., 1961, p. 2).

This Commission is, of course, the result of Reorganization Plan No. 7, and its responsibilities are exclusively regulatory. We may not "promote." Neither may we "regulate" without regard to the consequences

[8] Report of the Antitrust Subcommittee of the Committee on the Judiciary, on the Ocean Freight Industry, House of Representatives, 82 Cong. 2d sess. 1962, p. 5 (Celler report).

[9] Message of the President Transmitting Reorganization Plan No. 7 of 1961, House Doc. No. 187, 87th Cong., 1st sess. 1961, p. 2.

of that regulation on our merchant marine, because the American merchant marine is itself a part of the foreign commerce of the United States and, as such, is entitled to the full protection of the Shipping Act. But the act does not stop with the merchant marine, it extends its protections to shippers and "other persons" subject to its provisions. Just as we must "scrupulously insure that all carriers, regardless of flag, are accorded equal treatment under the laws we administer;" [10] we must be equally scrupulous lest our concern for our merchant marine lead us to a construction of the act which dilutes the protection afforded by it to shippers and "other persons." For, under the act, such persons as shippers, forwarders, terminal operators, and the like, are just as much a part of national maritime industry as are the ships which carry the cargo. The act does not afford degrees of protection based upon differences of identity alone. It is based upon the assumption that adherence to the "rules of the game" will of itself aid in promoting our merchant marine and it is our sole responsibility to insure that these "rules" are observed. With this in mind, we turn to a consideration of the issues at hand.

Discussion and Conclusions

The Cargo Commitment Under Section 14b

The petitioners urge that the only type contract lawful under the Shipping Act where a shipper commits himself to "give all or a fixed portion of his patronage" to a particular carrier is one approved by the Commission under section 14b of the act.

> Indeed a dual rate contract is nothing but a cargo commitment by a shipper to a carrier or group of carriers. The heart of the definition (of a dual-rate contract) is the commitment by the shipper of a fixed portion of patronage to the carrier. This is done by MSTS form 4280/2T. (The Cargo Commitment.) It follows that the form is a dual-rate contract.

Thus, would petitioners bring the Cargo Commitment within the purview of section 14b which provides in relevant part:

> Notwithstanding any other provisions of this act, on application the Federal Maritime Commission, shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract * * * which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers * * *.

It is by a literal reading and application of this language that petitioners conclude that the Cargo Commitment is a contract covered

[10] *Northern Pan-American Line A/S* v. *Moore McCormack Lines, Inc.*, 8 FMC 213 at 229 (1964).

by section 14b. We may not, according to petitioners, resort to the legislative history because the language of the statute is clear and unequivocal on its face and the intent of Congress is relevant only to resolve ambiguities. We shall have more to say about this later, but for the moment, we shall restrict ourselves to a literal reading of the statute.

As petitoners point out, the critical language is "all or any fixed portion of his patronage." The Cargo Commitment deals with "minimum amounts." Under RFP 100, no Cargo Commitment would be for "all" of MSTS's "patronage" on a given route. Thus, we have the problem of equating "fixed portion" with "minimum amount." In our view, they are not synonymous.

The "patronage" referred to in section 14b is quite obviously the sum total of the particular merchant's foreign exports. Ideally, the dual-rate contract commits all of these exports to move on conference vessels. The very purpose of the exclusive patronage or dual rate system is to tie to the conference as much of the total export movement in a given trade as possible. In this way, the conference counters competition from the so-called independent or nonconference operator.[11] Where the contract calls for "all" of the merchant's patronage, no problem is presented. But what of the "fixed portion" referred to in 14b? How is this to be determined? Petitioners would equate "fixed portion" with "minimum amount." We don't find them synonymous, however.

A portion is "an allotted part" or "a part of the whole." [12] The whole is, of course, everything exported by the merchant in the trade and the "portion" to be "fixed" is a part of that whole. Let us see what happens if we accept petitioners' reading of "fixed portion" as "minimum amount." A merchant agrees to commit to a carrier 1,000 tons of cargo under a contract running for a year. Clearly, this is some "portion" of his patronage, but is it "fixed" within the meaning of the statute? Obviously not. If the merchant exports a total of 2,000 tons over the duration of the contract, the "portion" represented by the 1,000 tons is 50 percent or one-half of his patronage but if the merchant exports 10,000 tons, the "portion" represented by the 1,000 tons committed under the contract is only 10 perecnt or one-tenth of the whole. Clearly, the 1,000 tons cannot represent any "fixed portion" of the merchants' patronage. However, if the same merchant agrees to give the carrier 50 percent (one-half) or 10 percent (one-tenth) of his patronage, the "portion" remains "fixed" whatever his total exports may be for the

[11] See *Federal Maritime Board* v. *Isbrandtsen Co.*, 354 U.S. 481 (1958).

[12] *Webster's New Collegiate Dictionary*, p. 658.

period of the contract. Thus, it is clear that "fixed portion" does not equate with a specified or "minimum amount" stated in terms of tons, rather as used in section 14b "fixed portion" is synonymous with a percentage or an invariable part of the whole. A consideration of section 14 in its entirety buttresses this conclusion.

Section 14 Fourth makes it unlawful for a common carrier by water to "make any unfair or unjustly discriminatory contract based on volume of freight offered * * *." If every contract calling for a "minimum amount" of volume is a contract for a "fixed portion" and included within 14b, what is the contract which may be made under 14 Fourth? [13] Are we now to assume that contracts originally unlawful only if "unfair or unjustly discriminatory" must now, because of 14b, be filed for approval and contain provisons concerning such things as the prompt release of the shipper; or who has the legal right to select the carrier with whom the goods are shipped; or diversion of goods from natural routings? And all this without any reference to 14 Fourth in the newly enacted 14b. This is, of course, the way petitioners would have us read the section. If Congress had intended to alter the status of contracts based on volume of freight offered, they certainly would have made such an intention clear. Amendments to statutes are not to be implied. Wherever possible, a statute is to be construed so as to preserve intact all its provisions. If section 14b is read as petitioners urge, then section 14 Fourth would at the very least take on a meaning different than it originally had. That petitioners misread section 14b becomes even clearer when resort is had to the background and legislative history of that section.

In 1958, the Supreme Court in *Federal Maritime Board* v. *Isbrandtsen Co.*, 354 U.S. 481, struck down the so-called exclusive patronage dual-rate contract of the Japan-Atlantic and Gulf Freight Conference as unlawful under section 14 Third of the Shipping Act.[14] In *Isbrandtsen*, *supra*, the Board had argued that the contracts in question had to be lawful because the legislative history of the Shipping Act clearly demonstrated that Congress was well aware that

[13] That the Cargo Commitment is a volume contract would seem beyond dispute. Thus, the Cargo Commitment will be awarded where the contracting officer finds it to be in the best interest to commit the Government "to ship a minimum volume of cargo for a specified number of sailings on a particular route." Thus, if a carrier can offer his best rate if he is guaranteed say a minimum of 500 tons for each of his sailings, he would seek a Cargo Commitment. Here there is no difficulty in equating minimum volume and minimum amount. Thus, contracts calling for a stated volume and contracts calling for a stated amount are but different ways of stating the same thing.

[14] Section 14 Third makes it unlawful for a carrier to "Retaliate against any shipper by refusing or threatening to refuse, space accommodations when such are available or to resort to other discriminating or unfair methods because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reasons."

the use of such contracts as a tying device was widespread in the foreign commerce of the United States and it had not outlawed such contracts even though it had specifically outlawed other tying devices such as the deferred rebate prohibited in section 14 Second. In rejecting this contention, the Court pointed out that the contracts "recognized" by Congress had been described as follows:

Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers, at regular intervals and the shipper agrees to confine all shipments to conference steamers, and to announce the quantity shipped in ample time to allow for the proper supply of tonnage.

The rates are less than those specfied in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i.e. are willing to contract with all shippers on the same terms.

In distinguishing these contracts from the exclusive patronage dual rate contract then before it, the Court said:

These contracts were very similar to ordinary requirements contracts. They obligated all members of the Conference to furnish steamers at regular intervals and at rates effective for a reasonably long period sometimes a year. The shipper was thus assured of the stability of service and rates which were of paramount importance to him. Moreover, a breach of the contract subjected the shipper to ordinary damages.

By contrast, the dual-rate contracts here require the carriers to carry the shipper's cargo only "so far as their regular services are available;" rates are "subject to reasonable increase" within 2 months plus the unexpired portion of the month after notice of the increase is given;" [e]ach Member of the Conference is responsible for its own part only in this Agreement;" the agreement is terminable by either party on three months' notice; and for a breach, the shipper shall pay as liquidated damages to the Carriers fifty (50) per centum of the amount of freight which the shipper would have paid had such shipment been made in a vessel of the Carriers at the Contract rate currently in effect." Until payment of the liquidated damages the shipper is denied the reduced rate, and if he violates the agreement more than once in 12 months, he suffers cancellation of the agreement and denial of another until all liquidated damages have been paid in full.

Almost immediately after the Supreme Court's decision in *Isbrandtsen*, the Congress moved, through "moratorium" or "interim" legislation, to preserve the legality of the dual-rate system until such time as it could enact permanent legislation.[15] In 1961, Congress enacted Public Law 87–346 (75 Stat. 762) which, among other things, added section 14b to the Shipping Act. The connection between *Isbrandtsen* and Public Law 87–346 is too well known to warrant detailing here.[16] A

[15] Public Law 85–626, 85th Cong., S. 2916 (Aug. 12, 1958) amended by Public Law 86–542, 86th Cong. H.R. 10840 (June 29, 1960), further amended by Public Law 87–75, 87th Cong. 32154 (June 30, 1961).

[16] See however, House Report No. 498, 87th Cong. 1st sess., 1961, pp. 3–7 and Senate Report No. 842, 87th Cong. 1st sess., 1961, pp. 1–11.

simple reading of the provisions of 14b makes it patently clear the contract which was to be legal under the Shipping Act "notwithstanding any other provisions of (the) Act,"[17] was the dual-rate contract before the Supreme Court in *Isbrandtsen.* But what of that contract which the Supreme Court had found to be something distinct and different from the dual-rate contract—the contract of which Congress expressly stated its awareness of but did not outlaw—the contract which the Supreme Court found similar to "ordinary requirements contracts." Such contracts had, since 1916, been lawful under section 14 Fourth so long as they were not unfair or unjustly discriminatory. We will not now read section 14b as altering the longstanding status of these contracts.

Just as it is clear that section 14b deals with the dual-rate or exclusive-patronage contracts, it would seem equally clear that the Cargo Commitment is just that kind of contract which the Supreme Court found similar to an ordinary requirements contract. Thus, it obligates the carrier to furnish steamers (a specified amount of space) at regular intervals (by sailing) and at rates effective for a reasonably long period, sometimes a year (the specified period in the Cargo Commitment is 1 year). We conclude that the Cargo Commitment is not an exclusive patronage or dual rate contract the use of which is to be permitted subject to the provisions of section 14b but is a contract "based on volume of freight offered" within the meaning of section 14 Fourth. Whether a particular Cargo Commitment is unfair or unjustly discriminatory and thus unlawful under 14 Fourth is, as we have already pointed out, dependent upon such things as the particular amount of cargo committed and the specific rate fixed under it.

What we have thus far said is, of course, in no way concerned with any special status of the Government as a shipper under the act and would apply to all shippers. Petitioners, however, make much of the absence from the Shipping Act of any express provision in the act for reduced rates to the Government. Although, petitioners' contentions are made in the context of their arguments under section 14b, they entail much more as we read them. Petitioners point out that in 1961, the Comptroller General, in letters to the House Merchant Marine and Fisheries Committee and the Senate Committee on Commerce, urged inclusion in the legislation enacting 14b of a provision similar to section 6 of the Intercoastal Shipping Act, 1933.[18] At one point, the

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[17] For the full text of sec. 14b, see appendix.

[18] Actually, the requested provision would have added to the present tariff filing requirements now in section 18(b) a proviso to appear in subsection (3) thereof stating:

"Provided that nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates, for the United States, State or municipal governments, or for charitable purposes."

Senate Committee acceded to the request and added the reduced rate provision, but this was deleted without explanation from the final act as passed. (See Index to the Legislative History Senate Doc. No. 100, 87th Cong. 1st sess. p. 218.)

Petitioners' argument, reduced to its essentials, is: no exemption, no reduced rates to the Government. In his letters, the Comptroller General cited *United States* v. *Associated Air Transport*, 275 F. 2d 837 (C.A. 5, 1950); and *Slick Airways* v. *United States*, 292 F. 2d 515 (Ct. Cl. 1951), and it is upon these cases that petitioners rely.

The *Slick* and *Associated* cases both involved the proper charges to be imposed for services already performed. The issue in both cases was the applicability of the carriers' already published and filed tariff rates to the particular services rendered. In each case, the Court's decision rested upon the simple proposition that the filed tariff rate alone governed the dispute. Thus, in the *Associated* case, the Court refused to consider "contracts or agreements or understandings or promises" which had not been filed with the Civil Aeronautics Board declaring "The tariffs are both conclusive and exclusive" (275 F. 2d at 827). Again in *Slick*, the Court of Claims held that the rate specified in a contract was superseded by a new rate when the new rate was properly filed with the Civil Aeronautics Board, stating, "The tariff must control in the event of an inconsistency between it and the contract of carriage" (292 F. 2d at 519). Neither case denied the right of the Government to reduced rate transportation when the reduced rate was properly filed and a part of the published tariff of the carrier, thus:

> * * * under the Civil Aeronautics Act, the Government had the right to reduced rates only pursuant to tariffs lawfully published and filed by a carrier under section 403 of the Act. *Slick*, *supra* at 518.

Here there can be no question of a conflict between the tariff rate and actual rate paid by the Government. Under RFP 100 itself, all rates agreed upon are to be published and filed with the Commission under section 18(b) of the act. The authorities of the petitioners are not relevant to the issue here.[19]

[19] At common law, the sovereign was, of course, entitled to reduced rate transportation, and any statute which would tend to restrain or diminish the sovereign's powers, rights, or interest is not binding unless the sovereign is named therein. *Emergency Fleet Corporation* v. *Western Union*, 275 U.S. 415 (1927). Thus, it would seem that any denial of reduced rate transportation to the Government would have to be based on express statutory language. See also *Guarantee Co.* v. *Title Guaranty Co.*, 224 U.S. 152 (1912); *United States* v. *California*, 297 U.S. 175 (1936); *Guaranty Trust Co.* v. *U.S.*, 304 U.S. 126 (1938); *Public Utilities Commission of California* v. *U.S.*, 335 U.S. 543 (1958); and *Paul* v. *U.S.* 371 U.S. 245 (1963).

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Petitioners' contentions are based upon the assumption that unless the Government is some type of preferred status shipper under the act, it is a "shipper" within the meaning of section 14b and thus the Cargo Commitment is a dual-rate contract. The legislative history makes it clear to us, that shipper and consignee as used in section 14b have a distinct and somewhat limited frame of reference.

In the so-called interim or moratorium legislation by which Congress preserved the legality of the dual-rate system until the enactment of Public Law 87–346, (see note 15, *supra*), the term "merchant" is used throughout.[20] Even the most cursory examination of section 14b itself reveals the "commercial" nature of the problems dealt with therein. For example, section 14b(2) provides that a rate, insofar as it is under the control of the carrier must remain in effect for at least 90 days. This was the period uniformly urged by exporters as necessary to their doing business abroad. Section 14b(3) deals with the legal right of the contract shipper to select the vessel. Here again, sale and purchase are involved, and the provision relieves the shipper from liability under the dual rate contract when the terms of sale vest the right to select the vessel in the purchaser or consignee.

Hearing Counsel, MSTS, and intervenor Sapphire Steamship Lines, Inc., all urge that Congress could not have intended that so large a part of the total carriage of the American-flag lines [21] be the subject of section 14b without extensive hearings on the matter. These parties were able to unearth only a single reference to military cargo—a letter from the Secretary of the Navy in which he declined to comment on a predecessor bill of Public Law 87–346 because it "would have no effect on Department of Defense shipments and appears to be of primary importance to the Department of Commerce.[22]

Moreover, that the industry has long viewed the dual-rate system as a purely "commercial" tying device would appear from the historical treatment of "project rates." The Report of the Investigating Officer in Fact Finding Investigation No. 8—*Project Rates and Related*

[20] Indeed in our original rules dealing with the dual-rate system under 14b, we expressed our understanding of the intent of Congress when we termed the contract provided for a "Uniform Merchants Rate Agreement," and used the term "merchant" throughout. In addition, the uniform agreement expressly provided in article 7(b) that "goods not intended for commercial or industrial use" shipped by governments or charitable institutions could take rates "lower than contract rates" and not constitute a violation of the agreement so long as those rates were filed with the Commission.

[21] Sapphire points out MSTS cargo amounted to $282.6 million out of a total of $646.8 million of earnings for the U.S.-flag merchant marine in 1964. See the Impact of Government Generated Cargo on the U.S. Flag Foreign Trade Fleet for Calendar Year 1964, Office of Program Planning Maritime Administration, Department of Commerce, October 1965, published by the Joint Economic Committee, 89th Cong., 1st sess. p. 6.

[22] On the other hand, an appendix to the Opening Brief of Hearing Counsel lists references to the legislative history too numerous to mention here, all demonstrating the "commercial" nature of the problems and solutions under 14b.

Practices (May 24, 1965), shows that presently and over the past there have been innumerable contracts between ocean common carriers and shippers for the transportation, at discount rates, of volume movements of cargoes that are not for resale.[23] The Investigating Officer, at page 14 of his report, stated:

> One test universally applied is the requirement that the commodities shipped under project rates may not be for resale by the shipper, consignee, or anyone else. The cargoes do not enter the "stream of commerce". Shippers and carriers alike feel that this is an essential characteristic of project rates and that it prevents unfair competition and unjustly discriminatory or preferential treatment between shippers.

But if petitioners' construction of section 14b is now adopted, it would seem obvious that project rate agreements as they have existed historically would be illegal under that section.[24] Indeed, petitioners' sole reply to all arguments of past practice is that all of this was before the law was changed. Petitioners would have us conclude that Congress by preserving the legality of one traditional and historic practice, intended by implication to outlaw still another historic and, it would appear, equally venerable practice. We will not attribute such an intent to Congress nor do we feel that even petitioners really desire such a conclusion.

On the basis of the above we conclude that the Cargo Commitment proposed by MSTS is not a contract within the meaning of section 14b, approval, of which by the Commission is required before its use may be permitted in the foreign commerce of the United States. Insofar as the petitions herein seek an order declaring the Cargo Commitment a contract within the meaning of section 14b they are denied.

Competitive Bidding Under the First Paragraph of Section 16

Petitioners would also have us declare that the requirement that bids in response to RFP 100 must be submitted under seal constitutes the use by a shipper of an unjust device or means for obtaining or attempting to obtain transportation at less than the regular rates and charges which would otherwise be applicable on the lines of petitioners within the meaning of the first paragraph of section 16,[25] which provides:

> That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly

[23] As MSTS points out, the military cargoes shipped under Cargo Commitments would not be for resale by anyone.

[24] They normally contain few or none of the required provisions under section 14b and it does not appear that they could and still accomplish the desired result.

[25] Petitioners seek the same declaration under section 16 Second which makes it unlawful for a carrier to allow a shipper to use such a device. Resolution of the issue under the first paragraph of section 16 will dispose of the issue under 16 Second.

and willfully, directly or indirectly by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

Petitioners begin with the premise that this provision is designated to protect carriers from the loss of a "rightful source of revenue" through shipper "coercion." They point out that under RFP 100 "none of the lines will know the rates which its competitor is bidding." The procedure is, the petitioners argue, "essentially the same as requiring of each line that it submit a secret promise of a rebate." Thus, petitioners urge "a 'device or means' which accomplishes a rate departure through the use of concealment is automatically the 'unfair device or means' contemplated by the statute."

It is difficult to conceive of a greater misapplication of the first paragraph of section 16. Under the terms of RFP 100 the rates established must be filed with the Commission. They are then of course available to the public, both shipper and carrier alike. Admittedly, no one will know the rates before they are published, but it must be asked how else can there be competition among the bidders? It is precisely because "none of the lines will know the rates which its competitor is bidding" that the proposed program achieves its stated purpose of placing the carriage of military cargoes on a competitive basis.[26] It is easy to see that by reading section 16 first paragraph as affording carriers a right to know what their competitors are willing to offer by way of rates, petitioners have changed the provision from one designed to eliminate certain competitive practices which were deemed unfair or unjust into one that would eliminate virtually all competition.

Certainly it is true that carriers may restrict competition among themselves under the Shipping Act, but they may do so only under the terms and conditions of section 15 of the act. There is nothing in the act which requires them to restrict competition just as there is nothing in the act which gives an individual carrier the right to know what rate a competitor may be willing to negotiate with a shipper in order to get that shipper's patronage. All that the act requires is that when a carrier and a shipper have agreed on a rate it must be published in its tariff, filed with the Commission and made available to all in a way which is not unjustly discriminatory or unduly prejudicial, etc.

By the same token there is nothing in the act which requires a shipper to deal with any anticompetitive combination of carriers

[26] As petitioners themselves have pointed out we are not here concerned with whether the new program with its insistence on competition is "good or bad" but only its lawfulness under the Shipping Act.

established under section 15. The act leaves the shipper free to seek the best rate he can get subject only to the act's prohibitions against preference, prejudice, and discrimination and further provided that the means employed by the shipper is not unjust or unfair within the meaning of section 16.

The basic purpose of section 16 is to insure adherence by a carrier to his publicly announced rates, not to foreclose any change in those rates at the behest of an individual shipper. Thus, the first paragraph of section 16 makes it unlawful for a shipper to submit a false classification of the goods contained, for example, in a sealed carton in order to bring his shipment within a commodity class taking a lower rate under the tariff thereby "depriving the carrier of a rightful source of revenue." It is equally unlawful for the shipper to submit a false statement of weight. The purpose behind these prohibitions as well as those of section 16 Second is not far to seek. It was stated by Congress:

> Section 16 of the Shipping Act of 1916, as amended, among other things, provides that it shall be unlawful for any common carrier by water, or other person subject to that act, to allow the transportation of property at less than the regular rates then in force by the common carrier by means of false billing or other misclassification of freight, false claims, etc. Thus it will be seen, that while the carrier is prohibited from allowing favoritism or partiality as among competing shippers, the carrier itself is afforded no protection against the practice of an unscrupulous shipper, forwarder, broker, or other delivering goods to the carrier for transportation, in deliberately misclassifying packages of freight for the purpose of obtaining a lower transportation rate at the expense of the carrier.
>
> The Senate measure, therefore, strengthens this portion of the Shipping Act of 1916, and goes further in providing that such a practice shall neither be engaged in by a common carrier by water nor by any shipper, consignor, consignees, forwarder, broker, or other person, or any officer, agent, or employee thereof; and provides a penalty for violations of from $1,000 to $3,000, thereby effectually removing the means left open to dishonest shippers or consignees whereby they may take advantage not only of their competitors who do not indulge in the practice of false billing and misclassification in order to receive a lower transportation rate for their freight, but also of the carrier itself by depriving the carrier of a rightful source of revenue.

The section clearly contemplates, not that the tariff rate will not be changed, but rather that the tariff rate will ostensibly remain in effect while some other rate is actually paid by the shipper. Thus it is unlawful to misclassify an article to obtain a lower rate;[27] to rebate a portion of the freight rate to a particular shipper;[28] to withhold information from the carrier essential to a determination of the proper rate,[29] or

[27] *Royal Netherlands S.S. Co. v. FMB*, 304 F. 2d 928 (C.A.D.C., 1962).
[28] *U.S. v. Peninsular & Occidental S.S. Co.*, 208 F. Supp. 957 (S.D.N.Y. 1962).
[29] *Prince Line Ltd. v. American Paper Exports, Inc.*, 55 F. 2d 1053 (C.A. 2, 1932).

to seek a lower rate or rebate by false billing.[30] In all of these instances the tariff rate remained unchanged even after the unlawful practice was employed. Indeed it was essential to the particular scheme that the tariff rate not be changed. Under RFP 100 the rates will, as we have already pointed out, be filed with the Commission, it is therefore, impossible for the shipper to obtain transportation at less than the rates otherwise applicable i.e. the rates that the carrier is bound to charge under section 18(b)(3).

Moreover, no straining of the principle of *ejusdem generis* can equate the competitive bidding called for in RFP 100 with the type of "unjust or unfair device or means" contemplated in the first paragraph of section 16. On the basis of the foregoing we conclude that the competitive bidding embodied in RFP 100 is not an unjust or unfair device or means within the meaning of the first paragraph of section 16 [31] and to the extent the petitions here seek an order declaring RFP 100 unlawful thereunder they are denied.

Competitive Bidding Under the Pacific Westbound and AGAFBO Agreements

Certain petitioners [32] urge that their participation in the proposed competitive procurement program would place them in violation of their obligations under Agreement No. 57 which establishes the Pacific Westbound Conference. Article 1 of Agreement No. 57 requires that "[a]ll freight or other charges for the transportation of cargo (in the trade) shall be charged and collected (by the members) strictly in accordance with the tariff." Item No. 1 of Local Freight Tariff No. 1–Y–FMC–1, the tariff which these petitioners are bound to observe under the agreement, provides that "Member lines are permitted to negotiate special rates or charters with the Military Sea Transportation Service." Petitioners argue, however, that this provision "cannot be distorted to authorize the type of competitive dealings with the military called for in the MSTS invitation for competitive proposals."

It is difficult to determine just what petitioners seek from us under this argument for they go on to say:

> These lines recognize that this issue is necessarily subsidiary to the statutory issues. We would assume that the conference would revise the relevant tariff rule to authorize response to RFP 100 should this Commission conclude that the practice is not violative of the Shipping Act. Alternatively, if the Commission were to conclude that the practice is violative of the Shipping Act, the meaning of the tariff provision would be moot.

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[30] *Hohenberg Bros. Company* v. *FMC,* 316 F. 2d 381 (C.A.D.C. 1963).

[31] It is therefore lawful under section 16 Second as well.

[32] American Mail Line, Ltd., American President Lines, Ltd., Pacific Far East Line, Inc., States Steamship Co. and Waterman Steamship Corp.

At first blush this would appear a simple straightforward statement. Under it, should we, as we have, find RFP 100 lawful the conference at petitioners' request would simply substitute some appropriate language in the tariff rule to render clear the U.S.-flag lines freedom to respond to RFP 100. The argument, however, does not stop here. In arguing that "negotiate" could not be read to include "competitive bidding" petitioners state that the conference did not intend to sanction"the advent of a competitive innovation such as RFP 100, with its highly disruptive potential in the trade." Indeed, petitioners argue that it is highly unreasonable to conclude that the conference intended any such thing. Moreover, petitioners indicate that their assumption that the conference will amend the rule is placed on shaky ground by our "bifurcated decision" on their petition for declaratory order. Thus, their assumption is stated yet another way:

> If competitive bidding for MSTS cargo were finally held lawful we should suppose it likely that the PWC tariff rule would be amended to permit its U.S.-flag member lines to compete. We have, however, no idea what its membership would conclude if competitive bidding for MSTS cargo were held lawful with respect to three arguments with decision deferred to another proceeding upon another three.

Whatever petitioners' precise position may be the implications involved are quite clear: That the foreign-flag segment of the conference may restrict or refuse to sanction a particular method by which its "U.S.-flag member lines" may deal with the U.S. Government on the terms under which cargo reserved by law to those U.S.-flag lines is to be carried. We think it patently clear that any agreement or any rule promulgated under it which could properly be construed to achieve such a result would be contrary to the public interest within the meaning of section 15. It would seem equally clear that under such circumstances we should have to withdraw our approval of the agreement. In all fairness, however, it should be remembered that no amendment has yet been sought. We assume that these petitioners will now seek prompt amendment of Item No. 1.[33]

The Atlantic & Gulf American Flag Berth Operators [34] intervened in this proceeding apparently for the sole purpose of asserting that we may not disapprove, cancel or modify the AGAFBO agreement in this proceeding, i.e. a full evidentiary hearing would be necessary before any such action could be taken. We say this is apparently their only purpose because they do not stop here, or at least it would seem that

[33] This is of course not to be taken as a determination on our part that the construction placed upon Item No. 1 by petitioners is the proper one. Since RFP 100 does not as yet extend to the trade covered by the PWC, petitioners would have ample time to obtain an amendment.

[34] Established pursuant to Agreement FMC No. 8086.

they do not. For while they admit that article 1 of the agreement is permissive and merely provides that the member lines "may" negotiate rates with MSTS, they further point to article 2(a) which provides that all actions taken under the agreement "shall be binding on all parties" thereto. As these petitioners themselves admit the rates negotiated with MSTS are embodied in contracts between MSTS and the individual operators, the fact that these contracts have not as yet been canceled by MSTS although they provide for cancellation on 60 days' notice by either party is we think irrelevant in this proceeding. The outstanding contracts certainly do not prohibit agreement upon new contracts and we can only assume that the present contracts will be canceled before or at the time of entry into the agreements. In any event there is nothing in Agreement 8086 as we read it to prohibit the parties thereto from responding to RFP 100 nor does it appear that they themselves view it as a bar thereto. Since we find it unnecessary to take any action with respect to Agreement 8086, the issue of what type of proceeding is necessary before such action may be taken is moot.

For the above-stated reasons, the petitions before us insofar as they request that we issue an order declaring any of the petitioners herein prohibited from responding to RFP 100 because of any agreement approved under section 15 of the act, are denied.

Therefore, for the reasons stated herein we find that RFP 100 is not unlawful under section 14b or the first paragraph of section 16; and further that no agreement approved under section 15 and cited to us herein, would prohibit any of the petitioners from responding to RFP 100 in its present form and coverage.

Accordingly the petitions for declaratory order are denied.

JAMES V. DAY, concurring:

I concur that RFP 100, containing the terms and conditions under which the Department of Defense proposed to extend its competitive procurement program to ocean transportation, is not unlawful under section 14b or the first paragraph of section 16; and further that no agreement approved under section 15 and cited in this proceeding, would prohibit any of the petitioners from responding to RFP 100 in the form and coverage described in this record. I would emphasize, however, that in our concern with shippers (as well as "other persons") covered by the shipping laws which we administer we must also maintain a vigilant watch over the consequences of regulatory determinations on our carriers. As part of our commerce the carriers are entitled

to the full protection of the Shipping Act. In this regard with the establishment of competitive bidding for low cost service to the Government we should be constantly mindful of the longer run, as well as the immediate results. Further, in future determinations of the reasonableness of rates filed with us relative to the competitive bidding procedures as they may be developed, it is pertinent to weigh the effect on U.S.-flag carriers not contracting for cargo as well as to consider the effect on the financial prospects of those carriers so contracting.

(Signed) Thomas Lisi,
Secretary.

SEC. 14b. Nothwithstanding any other provisions of this Act, on application the Federal Maritime Commission (hereinafter "Commission"), shall, after notice, and hearing, by order, permit the use by any common carrier or conference of such carriers in foreign commerce of any contract, amendment, or modification thereof, which is available to all shippers and consignees on equal terms and conditions, which provides lower rates to a shipper or consignee who agrees to give all or any fixed portion of his patronage to such carrier or conference of carriers unless the Commission finds that the contract, amendment, or modification thereof 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 the contract, amendment, or modification thereof, expressly (1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice; (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than 90 days; (3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however*, That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract; (4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available; (5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided, however*, That the contract may specify that in the case of a breach by a contract shipper the damages

may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling; (6) permits the contract shipper to terminate at any time without penalty upon 90 days' notice; (7) provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates; (8) excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however*, That upon finding that economic factors so warrant, the Commission may exclude from the contract any commodity subject to the foregoing exception; and (9) contains such other provisions not inconsistent herewith as the Commission shall require or permit. The Commission shall withdraw permission which it has granted under the authority contained in this section for the use of any contract if it finds, after notice and hearing, that the use of such contract is detrimental to the commerce of the United States or contrary to the public interest, or is unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors. The carrier or conference of carriers may on ninety days' notice terminate without penalty the contract rate system herein authorized, in whole or with respect to any commodity: *Provided, however*, That after such termination the carrier or conference of carriers may not reinstitute such contract rate system or part thereof so terminated without prior permission by the Commission in accordance with the provisions of this section. Any contract, amendment, or modification of any contract not permitted by the Commission shall be unlawful, and contracts, amendments, and modifications shall be lawful only when and as long as permitted by the Commission; before permission is granted or after permission is withdrawn it shall be unlawful to carry out in whole or in part, directly or indirectly, any such contract, amendment, or modification. As used in this section, the term "contract shipper" means a person other than a carrier or conference of carriers who is a party to a contract the use of which may be permitted under this section.

FEDERAL MARITIME COMMISSION

DOCKET NO. 66–14

AGREEMENTS NO. 4188, NO. 4189, NO. 5080, NO. 7550, NO. 7650, AND NO. 7997

Decided August 17, 1966

The discontinuance of the trade involved is solely due to governmental embargo and on the facts and circumstances of this record approval of the agreements is continued.

Pooling Agreement No. 7997 disapproved and canceled because of withdrawal of members.

John R. Mahoney and *John G. McGarrahan*, for respondents.[1]
Donald J. Brunner and *Samuel B. Nemirow*, as Hearing Counsel.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* James V. Day, George H. Hearn, *Commissioners*) :[2]

This proceeding was instituted on March 10, 1966, to determine whether these conference and pooling agreements all involving the trade between the United States and Cuba remain subject to the protection of section 15 of the Shipping Act, 1916, as amended, since the circumstances warranting their continued approval have apparently ceased to exist. The conferences by affidavit and memorandum of law urge continued approval of the agreements. Hearing Counsel say the agreements should be disapproved. Neither the conferences nor Hearing Counsel sought oral argument and accordingly none was heard.

FACTS

The conference and pooling agreements in question are domiciled in the United States. All the agreements have U.S. flag carrier mem-

[1] No. 4188, Havana Steamship Conference; No. 4189, Gulf and South Atlantic Havana Steamship Conference; No. 5080, Havana Joint Agreement; No. 7550, Havana Northbound Rate Agreement; No. 7650, Santiago de Cuba Conference; and No. 7997, West Gulf-Havana Pool Agreement.

[2] Commissioner Ashton C. Barrett did not participate.

bership. The approved agreements have covered the Cuban trade for periods extending from 11 to 31 years. Trade with Cuba had been substantial prior to the ascendancy of the present *de facto* regime. Despite the fact that trade ceased between Cuba and the United States in 1962, the conferences maintain offices, current tariffs on file with the Commission, and residual funds on deposit in New York and New Orleans banks. Dual rate contracts as approved by the Commission have been printed and filed. All the general orders promulgated by the Commission have been complied with and recently amendments were filed in accordance with the latest general order. Some of the conferences have been participating in proceedings before the Commission during the embargo, the latest having been served on June 28, 1966. (Proposed Rule Covering Time Limit On The Filing Of Overcharge Claims, 10 F.M.C. 1, Docket No. 65-5.) Everything has been maintained in conformity with the Commission's directive in *The Dual Rate Cases*, 8 F.M.C. 16, (1964), and related proceedings.

Discussion and Conclusion

The conferences argue essentially that approval should be continued on a "stand-by" basis until resumption of the trade. It is averred that precedent may be found in the suspension of operations of certain conferences serving Spain during the Spanish Civil War, or in the abeyance of service under the Trans-Atlantic Passenger Conference Agreement and through stand-by arrangements maintained for other conferences affected by the outbreak of hostilities in the Second World War.

Hearing Counsels' position is that approved section 15 agreements may not be suspended or stayed, citing as authority *Pacific Coast European Conference—Payment of Brokerage*, 5 F.M.B. 65 (1956). Hence, they assert nothing can be done but to disapprove these agreements. The resolution of this primary issue will be dispositive of the proceeding.

The cessation of trade to which these conference agreements are applicable would under *Mediterranean Pools Investigation*, 9 F.M.C. 264, Docket No. 1212, and *Agreement No. 8765—Order to Show Cause*, Docket No. 65-42, 9 F.M.C. 333, certainly seem to constitute that "lack of transportation circumstances" which would warrant disapproval of the agreements. Add to this the dictum in *Pacific Coast*, *supra*, that suspension or stay of section 15 agreements would be "tantamount to disapproval," and there would appear to be no option but to disapprove these agreements on the basis of the facts presented and the ostensibly applicable law. Such is not the case, however.

While *Mediterranean Pools* is appropriate to determinations whether agreements are to be accorded continued approval, as well as initial approval, yet both it and *Agreement 8765* are not precedent with respect to the issue at hand. The situation in *Mediterranean Pools* and *Agreement 8765* arose because of voluntary action of the conference members. The situation presently being considered is due to circumstances outside the control of the conference members. *Mediterranean Pools* dealt with a proposed pooling agreement designed to curb malpractices in the trade and *Agreement 8765* concerned a defunct agreement contrived originally to suppress a rate war. Here the cessation of trade was brought about by sovereign act. It would be illogical and indeed inequitable for an agency of the very government which imposed the embargo to disapprove the agreements of the conferences involved in the trade when they were totally without responsibility for any part of the embargo. As the conference activity before the trade ceased was within the standards of the Shipping Act, there is no reason to presume that there will be anything objectionable about it when the trade begins again. Finally, the continued approval of the agreements will facilitate the rapid resumption of service when the embargo is lifted. Accordingly, and for the reasons stated herein, approval of the conference agreements is being continued.

With regard to the West Gulf-Havana Pool Agreement, Agreement No 7997, as only one carrier remains, the approval hitherto accorded it is being withdrawn, and it is herewith disapproved.

An appropriate order will be entered.

Vice Chairman JOHN S. PATTERSON, concurring separately:

I concur in the conclusion that reasons for disapproval have not been proven.

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 Agreements No. 4188, No. 4189, No. 5080, No. 7550, and No. 7650, shall continue to be approved, and

It is further ordered, That Agreement No. 7997, be disapproved and is hereby canceled.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 916

INVESTIGATION OF PRACTICES, OPERATIONS, ACTIONS AND AGREEMENTS WEST COAST OF ITALY, SICILIAN AND ADRIATIC PORTS/NORTH ATLANTIC RANGE TRADE

Decided August 19, 1966

Three carriers, by entering into and carrying out an agreement to pay a 3-percent commission to certain selected forwarders, which was unauthorized by any section 15 agreement, violated section 15 by failing to file the agreement and carrying it out prior to approval.

No other violations have been shown.

Warner W. Gardner and *Robert T. Basseches* for respondent American President Lines, Ltd.

Ralph D. Ray, *Carl S. Rowe*, *Paul M. Bernstein*, *Thomas F. Daly*, *Franklin G. Hunt*, and *Rainer N. Greeven* for respondent American Export-Isbrandtsen Lines, Inc., formerly American Export Lines, Inc.

Francis J. Greene and *George F. Roberts* for respondent Prudential Steamship Corp.

Horace M. Gray for respondent Home Lines, Inc.

Herman Goldman and *Seymour H. Kliger* for respondent Fern-Ville Mediterranean Lines.

Thomas K. Roche, *Sanford C. Miller*, and *William F. Faison* for respondents Concordia Line and Torm Lines.

Edwin Longcope and *David I. Gilchrist* for respondents Hellenic Lines, Ltd., and Zim Israel Navigation Co.

Burton H. White and *Elliott B. Nixon* for respondent Fabre Line.

Robert J. Nicol and *Joseph J. Lombardi* for respondent Fassio Line.

Leonard G. James, *Robert L. Harmon*, and *F. Conger Fawcett* for respondents Costa Line and Italian Line.

Edward Aptaker, *John E. Cograve*, *Farnk Gormley*, *Harold L. Witsaman*, *H. B. Mutter*, *Robert J. Blackwell*, *Donald J. Brunner* and *Norman D. Kline* as Hearing Counsel.

REPORT

By the Commission

The Federal Maritime Board instituted this proceeding on September 19, 1960, to investigate certain alleged violations of the Shipping Act, 1916 (46 U.S.C. 801 *et seq.*), by members or former members of the West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference (WINAC). The proceeding was specifically designed to determine (1) whether respondents violated section 14 First of the Act (46 U.S.C. 812) by paying or agreeing to pay deferred rebates, (2) whether respondents violated section 15 of the Act (46 U.S.C. 814) by entering into and carrying out agreements concerning deferred rebates, special rates, or other preferential arrangements, or (3) whether respondents violated section 16 First or Second of the Act (46 U.S.C. 815) by discriminating between persons or allowing persons to obtain transportation at less than the regular rates by an unjust or unfair device or means.

Facts

From the very beginning of the WINAC Conference in 1934, the trade has been characterized by unrest. The source of this unrest stems from rebating and continuous rumors of malpractices. Many factors aggravate the situation. The trade has not grown and yet an excess number of carriers has participated in it. The number of forwarders servicing Italian shippers is excessive. Competition among forwarders and carriers is consequently intense. Traditionally, rebating and other concessions are widely employed. Italian law specifically sanctions such practices.

The Italian forwarder has played perhaps the most significant role in history of the troubled WINAC trade.[1] Because of congested facilities at Italian ports, considerable care must be exercised in scheduling cargo for loading aboard vessels. Goods are transported from inland points by rail, truck, or horse cart, and it is imperative that 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. Exporters customarily pay to forwarders a single lump sum payment or "forfait," which includes payment for the above services

[1] In Italy, the forwarder is known as a "caricatore," which, literally translated, means "loader." Although sometimes the word is translated "shipper," the actual shipper or owner of the cargo is designated as the "exporter."

as well as ocean freight. The forwarder generally assumes responsibility for the transfer of the goods from interior point of origin in Italy to ultimate destination abroad and usually selects the ocean carrier. This control over the routing of cargo places the forwarder in an advantageous bargaining position with the carrier with respect to brokerage and rebates. The forwarder's position is further strengthened by Italian law which requires the employment of a licensed broker in the exportation of goods from Italy and treats the forwarder as the owner of the merchandise for customs purposes. Italian law does not prohibit rebating which has traditionally been employed in the Italian trades.

Competition among forwarders in Italy is intense with the number of forwarders servicing the WINAC trade greatly in excess of the needs of the market. In 1952, the 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 other ports, a small minority of forwarders also handle the bulk of the business, which forces many small firms to compete intensely for the residue. Forwarders, therefore, are induced to seek reductions and concessions from carriers and have maintained that such measures are necessary in order to stay in business.

In Italian trades other than those involving the United States, deferred rebate systems are common. 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. These practices are traditional in Italy with respect to transportation generally and are not unlawful under Italian law. 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 other trades.

Each of the respondents was, at least for part of the period under investigation, a member of WINAC.[2]

Prior to World War II, conference members paid a standard 4 percent brokerage to Italian freight forwarders. In addition, the mem-

[2] The Commission approved the basic agreement on Mar. 23, 1934. Originally, there were nine member lines, but membership has fluctuated since, ranging from a low of five members before the war to 24 in 1960. Originally, the Board named over 30 carriers as respondents, but only 14 remain: 12 foreign flag lines (Torm Lines; Hellenic Lines, Ltd.; Concordia Line; Fern-Ville Mediterranean Lines; Italian Line (Italia); Costa Line; Home Lines; Achille Lauro; Zim Israel American Lines; Fabre Lines; Fassio Line; and United Arab Maritime Co.) and three U.S.-flag lines (American Export-Isbrandtsen Lines, Inc. (Export); American President Lines (APL); and Prudential Steamship Corp.).

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bers paid a special commission in varying amounts to certain forwarders. The members also operated under a deferred rebate system.[3]

In 1947, foreign flag lines again began to enter the trade and, as before, WINAC authorized payments to forwarders of 4 percent brokerage, the standard amount in Italian export trades.

Between 1948 and 1952, conference members authorized an additional commission of 3 percent to forwarders. The avowed purpose of the 3 percent commission was to tie the forwarders to the member lines or to insure their loyalty. The carriers made payments through the conference office sometime after due; for example, the commissions for 1952 were not paid until 1955. Before forwarders could be paid, the conference secretary was obliged to obtain freight reports from each line at each port, compile them, and bill and receive funds from the carriers. The system did not work smoothly and considerable time elapsed before the information could be compiled. Although the member lines were not too happy with the system and considered its termination after 1950, it was allowed to continue for the benefit of the forwarders.

The commission was to be paid only to those forwarders who generated at least $5,000 of business. However, the conference administered this rule flexibly and paid commissions to many forwarders who did not reach the minimum requirement. The conference did not pay commissions on certain low-rated tariff items and goods of Swiss origin.

In addition to the regular 3 percent commission, some forwarders received extra payments if a surplus accumulated in the carriers' commission account. Although the conference filed nothing pertaining to the 3 percent commission with the Federal Maritime Board, the staff was generally aware of it.

The smaller lines opposed the 3 percent system. One Scandinavian line believed that it was contrary to the Shipping Act, 1916. However, an official of APL believed that these lines opposed the system because it limited their ability to offer special concessions.

The last year in which the commission system operated with conference support was 1952. Although forwarders encouraged its continuation, on three occasions, the conference rejected proposals to pay the commission for the year 1953. The conference formally voted down the system at an owners' meeting on May 1, 1956, despite opposition by APL and Export who wanted commissions paid openly, not covertly.

With the termination of the 3 percent commission system, the three major lines in the trade, APL, Export, and Italia, became fearful of

[3] The U.S. Maritime Commission was apparently informed of this on at least three separate occasions.

their competitive position. The "Big Three" believed that rebating was rife among their smaller competitors. The excessive number of carriers in the trade created an atmosphere of suspicion with respect to malpractices. Because of the elimination of the 3 percent commission, the forwarders who were favorable to any arrangement which would authorize additional commissions, put additional pressure on the carriers for rate concessions. Because of these conditions, on January 20, 1954, representatives of the "Big Three" agreed to pay a commission of 3 percent to seven forwarders mutually agreed upon in lieu of the discontinued conference 3 percent commission. Although the forwarders selected were not the largest in the business, they were old and valued firms which had been loyal to these lines in the past and, it was hoped, would provide a nucleus of high-paying cargo.

As with the defunct conference commission system, commissions were to be paid on a deferred basis in the expectation that the forwarder would remain loyal to the carrier. For example, commissions that accrued to forwarders for 1954 were paid in August 1955. Although the agreement was designed to secure a tie to the carriers, forwarders who routed cargo via other carriers were not necessarily barred from receiving accrued commissions. Moreover, the list of recipient forwarders was subject to enlargement and four new beneficiaries were added in 1955. The "Big Three" also agreed to treat each forwarder on the list identically. The agreement was not filed with the Federal Maritime Board.

The "Big Three" entered into this agreement in order to combat the other carriers in the trade who were rebating and to preserve their positions in the trade. To some extent, this was accomplished. For the year ending April 30, 1956, APL and Export were first and second in tonnages loaded per sailing at Genoa and Leghorn.

Despite the beneficial effects of the initial three-line agreement in preserving their competitive positions, forwarders continued to pressure the lines for futher concessions during 1956.[4] APL's agents in Italy reported that foreign flag lines were already paying brokerage to replace the conference's terminated commissions. APL was informed that Export and Italia had offered to pay commissions even if the conference did not. Thus, APL was concerned not only with the practices of the smaller lines, but also with the conduct of the parties to the 1954 "Big Three" agreement. Furthermore, rumors, circulated concerning 10 percent rebates and other concessions offered by the smaller lines. Consequently, the "Big Three" felt compelled again to act in concert to protect themselves.

[4] The conference commission system continued only through 1952 and was formally terminated in 1956.

Representatives of Export and APL conferred in Genoa in an effort to ameliorate these aggravated competitive conditions. On October 20, 1965, these lines (and shortly thereafter, Italia) agreed to pay additional commissions not in excess of 3 percent to selected forwarders. The parties prepared schedules for payments, alterable only by agreement. Although the three lines attempted to limit the amount of payment and the number of recipient forwarders, nine of the forwarders included in the 1956 agreement were still participating in the earlier agreement so as to be eligible to receive an aggregate of 6 percent in commissions in addition to the standard 4 percent brokerage. The agreement was not filed with the Federal Maritime Board.

The "Big Three" designed this agreement to preserve their positions in the trade, and again to some extent they were successful. For the year ending April 1957, APL and Export lifted 59 percent, 83 percent, and 60 percent of the cargo at Genoa, Leghorn, and Naples, respectively.

Mr. Frazier Bailey, who was appointed Managing Director of Export in late 1957, provided stimulus for the termination of the "Big Three" agreements. Mr. Bailey felt that the "Big Three" commission system was illegal and took steps to eliminate it. Export and Italia terminated the agreements on December 31, 1957. APL agreed to terminate but preferred a later date either out of fear of business losses or consideration to forwarders who had made bookings in reliance on the commissions. APL also had misgivings since reports were circulating which indicated that carriers might continue to grant concessions. Nevertheless, APL selected January 31, 1958, for termination. It is not clear when final payments were actually made by Export and Italia. However, APL's last payment under the system occurred in August 1958.

Both APL and Export hoped that the conference would reestablish a commission system to offset the demise of the "Big Three" agreements, but the conference took no action.

Therefore, the elimination of the "Big Three" commissions not surprisingly was followed by forwarder complaints. For instance, forwarders informed APL that other carriers would resort to concessions, that the Swiss traffic would be lost, and that loss of extra commissions would jeopardize APL's operations in such a highly competitive business.

Without extra commissions, APL was convinced that it would lose cargo. From 1958 through 1960, a period during which no extra commission systems were in effect, APL's share of WINAC cargo declined from 16 percent to 14 percent to 10 percent. Export also suffered a noticeable decrease in tonnages loaded at Genoa, Leghorn, and Naples

in the summer of 1960, although carryings of other lines declined as well. APL believed that the attractiveness of its superior service was being offset by malpractices of the foreign flag lines. Other lines were also disturbed over the existence of malpractices among conference members during the period 1958–60.

In December 1960, the conference secretary advised the Federal Maritime Board that the trade was experiencing difficulty, particularly because of "the overwhelming excess of the services offered by the Member Lines in respect of the necessities of the trade." [5] Conference statistics showed an increasingly excessive number of calls by conference vessels at Italian ports of loading.

By the end of 1960, unrest among WINAC members had become intense. One foreign flag carrier representative notified the Federal Maritime Board that malpractices were continuing among the carriers and were causing instability in rates.[6] He described the situation to be so bad "that the WINAC is being looked upon in many quarters as a farce."

Even prior to 1958, when the "Big Three" agreements were still in effect, WINAC took certain steps to effect reform. For instance, the conference appointed a Controller of Cargo to verify descriptions and valuations of cargo made by shippers. The Controller, since he could but make random chceks on rare occasions, was ineffective. A "Sole Arbiter" was also considered but this plan failed to win necessary support among member lines. Cancellation of contracts with persistently dishonest forwarders was suggested but never carried out.[7] Finally, the conference placed payment of "extra loading" and "overtime" expenses by carriers to shippers under conference control.

These attempts at reform were followed by more vigorous efforts after 1957, when the "Big Three" agreements terminated. In 1958, the conference engaged the Atlantic Cargo Inspection Corp. (ACIC) to conduct spot checks on weights, measurements, and classifications. ACIC reports indicated that violations were widespread. The conference reported to the Federal Maritime Board, on July 31, 1961, that ACIC uncovered 325 misdeclarations out of 923 spot checks. ACIC further discovered instances of mismeasurement at Italian ports of loading, although the conference had supposedly engaged sworn measurers at Leghorn and Genoa.

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[5] The conference frequently notified the staff of the Federal Maritime Board of the unrest due to malpractices during 1958–60.

[6] The alleged malpractices were mismeasurement of cargo, reduction of values of cargo in the case of *ad valorem* payment of freight, improper classification, absorption of demurrage of lighters and trucks, and financing forwarders and shippers without interest.

[7] The Federal Maritime Board's staff informally indicated that this action might be unjustly discriminatory and suggested arbitration.

An owner's Police Committee was next established by the conference to investigate allegations of malpractices, determine violations, and impose fines. The only proceeding of record brought before the Police Committee, however, was dropped for lack of evidence.

On January 22, 1958, a special owner's meeting was held in which a pledge to observe all conference rules, regulations, and tariffs was unanimously adopted. Similar pledges were adopted at subsequent meetings, but were not heeded in practice. On October 20, 1960, the conference appointed the accounting firm of Price, Waterhouse & Co. as a neutral body to police and enforce WINAC regulations. The idea was suggested several years earlier at conference meetings, but some time elapsed before the conference could obtain the approval of the Federal Maritime Board, which required certain alterations in the proposed agreement. The system did not work as well as had been expected and the resignation of the accounting firm was accepted March 26, 1962. No successor was appointed.

Widespread rumors regarding continued malpractices persuaded Export and APL, among others, to tender their resignations from WINAC. On September 8, 1960, these lines and Prudential and Concordia gave the required 90 days' notice of resignation. Other lines indicated their intent to resign unless rates were opened or the existing resignations were withdrawn. A series of special meetings were held in an effort to prevent dissolution of WINAC. The establishment of a neutral body, pledges of adherence to conference regulations, and expressed intentions to seek reform persuaded the resigning members to reconsider and the resignations were withdrawn.[8] This was done although APL was advised by its agent in Italy not to remain in the conference until rebating by other lines ceased.

Early in 1961, the conference approved a plan to pay extra commissions to all forwarders in exchange for compliance by forwarders with WINAC regulations. Payment of commissions was to be deferred and forwarders were expected to remain faithful to conference regulations. Some time elapsed pending consideration of the system by the Federal Maritime Board. It was then dropped.

One of the most serious steps taken to reform the trade was the opening of rates among the conference members in 1961 which permitted each member to fix rates independently. APL believed that open rates would curtail rebating and would restore it to a position of prominence based upon its superior service. To some extent this was realized. APL's share of total WINAC traffic rose from 10 percent in 1960 to 11 percent the following year, despite a general decrease in total

[8] WINAC on Oct. 1, 1961, established a body of sworn measures at Leghorn in hopes of eliminating a large proportion of mismeasured shipments.

tonnage in the trade. However, open rates did not prove to be a satisfactory solution because of the resulting revenue losses and the fact that some rebating still continued. Because of the losses and because of the anticipation of the formation of a pool, rates were closed by the end of the year.

The final conference effort to reform was the pooling agreement of 12 lines approved by the Commission on March 6, 1962, which guaranteed a fixed percentage of revenue to each line. APL entered the pool despite the fact that its share was considerably below its historic participation in the trade.

Not all the WINAC member lines were parties to the pool; thus, there was no restraint on malpractices by nonmembers. Rebating to some extent continued even among the pool members. Since the pool could be renegotiated, it was advantageous to a line to increase its participation over its original allocation. In particular, on high-rated cargo, temptations to rebate were still present. Early studies following execution of the pooling agreement show that the pool operated more to the benefit of nonmembers than members. Nevertheless, APL, as well as many others in the trade, believed the pool to offer perhaps their only salvation.

While much of the record is devoted to competitive activities in Italy, one instance occurred in this country. National Silver Co., an importer of glassware, ceramics, and other products, maintained a warehouse in New Bedford, Mass., about 60 miles from the Port of Boston. Cargo destined from Italy to the New Bedford warehouse is booked for Boston discharge. However, if there were inadequate Boston cargo aboard to justify a Boston call, the vessel would discharge the cargo at New York and truck the cargo to New Bedford at the vessel's expense thereby in effect giving National Silver free overland transportation although when the cargo was discharged in Boston, overland transportation was for the account of the cargo. This was a common practice and occurred during the period of record. Indeed, National Silver made every effort to avail themselves of this concession. It became an important point in the solicitation. An official of Fassio Line discussed this concession with National Silver but indicated this free transportation would not be granted unless the vessel did not call at Boston.

Discussion

The foregoing facts, as well as the exceptions and replies to exceptions, present the following issues for our consideration and decision:

1. Whether the agreement among the WINAC members to pay a 3-percent deferred commission to Italian freight forwarders

from 1947 to 1952 was an unfiled and unapproved agreement in violation of section 15.

2. Whether the 1954 agreement between APL, Export, and Italia, to pay a 3-percent deferred commission to certain forwarders was an unfiled and unapproved agreement in violation of section 15.
3. Whether the 1956 agreement between APL, Export, and Italia, to pay a 3-percent deferred commission to certain forwarders was an unfiled and unapproved agreement in violation of section 15.
4. Whether pursuant to any of the above agreements, respondents entered into and effectuated deferred rebating systems in violation of section 14 First.
5. Whether any respondent violated section 16 First by the absorption of trucking charges.
6. Whether any respondent violated section 16 Second by allowing persons to obtain transportation of property at less than the regular rates by paying commissions to forwarders.

With respect to Issue No. 1, a majority of the Commission (composed of Vice Chairman Patterson and Commissioners Barrett and Day) finds that the members of WINAC were authorized by their conference agreement to pay commissions to forwarders and accordingly did not violate section 15. With respect to Issues Nos. 2 and 3, a majority (composed of Chairman Harllee, Vice Chairman Patterson, and Commissioner Hearn) finds that respondents APL, Export, and Italia violated section 15 by entering into and carrying out unfiled and unapproved agreements to pay a 3-percent commission to selected forwarders. With respect to Issues 4 and 6, a majority (composed of Vice Chairman Patterson and Commissioners Barrett and Day) finds that none of respondents violated sections 14 First or 16 Second. With respect to Issue No. 5, the Commission (Chairman Harllee, Vice Chairman Patterson, and Commissioners Barrett, Day and Hearn) finds that respondent Fassio Line did not violate section 16 First by absorbing certain trucking charges.

Examiner Charles E. Morgan issued an initial decision in which he absolved the carriers of any improper conduct. The Examiner emphasized that it was difficult to obtain documents regarding the competitive activities of foreign flag lines from abroad; indeed, in some cases, foreign flag lines were forbidden by their governments to furnish these documents to the Commission. Conversely, the Examiner points out that Export and APL had furnished detailed information during the course of the investigation, and yet they were

denied discovery against the foreign flag respondents; he, therefore, considered it unfair to prosecute the U.S.-flag lines alone.

In addition to his emphasis upon the difficulty of obtaining foreign documents, the Examiner stressed that the activities under investigation occurred on foreign soil in an environment where such activities are considered lawful. Export and APL, in order to maintain their positions in the WINAC trade, were forced to join the customary practices of granting rebates to Italian forwarders. Consequently, the Commission should not judge these activities too harshly. Furthermore, the Examiner stated that the Commission cannot as a practical matter enforce the Shipping Act against transactions which occurred in Italy.

In further exoneration of respondents, the Examiner noted generally that the statute of limitations of 5 years had run against the assessment of any fine or penalty. In particular, in mitigation and extenuation of the activities of APL and Export, the Examiner alluded to the claim of these lines that being subsidized they would be discriminated against indirectly, since a finding that either acted unlawfully might lead to a disallowance by the Maritime Administration of "commission" expenses, already suspended, in the computation of operating-differential subsidy.

Regarding the merit of the investigation, the Examiner found that the 3-percent WINAC commission was in accord with the WINAC agreement, which authorized payments to brokers if unanimously agreed upon by the members. With respect to the "Big Three" agreements, the Examiner considered them as generally reconfirming the WINAC proviso not to pay commissions not endorsed by the full WINAC membership. To the extent the "Big Three" agreements provided for optional payments to selected forwarders, the Examiner found that "technically" the agreements should have been filed under section 15. Nevertheless, since the Federal Maritime Board knew of the agreements and neither requested that they be filed nor instituted an investigation, since no data from foreign lines were available, and since the statute of limitation had expired, the only effect of a "technical" finding of violation of section 15 would be to penalize Export and APL under their subsidy contracts. Thus, the Examiner found no "substantial" violation of section 15.

The Examiner also found no violation of section 14 First by the respondents by use of deferred rebates. The holding is based upon a finding that generally commissions were paid to forwarders, not shippers. Furthermore, the Examiner finds no proof that a shipper or a forwarder booked cargo with the assurance of the payment of a deferred rebate. Next the Examiner says that the commissions were not neces-

sarily deferred rebates, since to qualify as such an illegal scheme, payment must be made "only if, during both the period for which computed and the period of deferments, the shipper has complied with the terms of the rebate agreement or arrangement." Since the 3 percent WINAC commissions and the "Big Three" commissions were computed on a yearly basis and the duration of deferments varied, and also, since forwarders were apparently paid commissions even though they routed cargo via other carriers, the Examiner found that the commissions were not violative of section 14 First.

The Examiner found no absorption of trucking charges in the United States and, accordingly, no violation of section 16 First. Regarding section 16 Second, he concluded that, since the commissions paid to Italian forwarders were in fact well-known devices, rather than unfair devices or means, plus the "lack of technical proof of specific instances of passing on the rebates from forwarders to shippers," there were no violations of section 16 Second.

In support of his findings of no violations or of no "substantial" violations, the Examiner qualifies the Commission's jurisdiction as follows:

> If the arrangements entered into overseas operate in the United States so as to affect the foreign commerce of the United States directly and materially, then jurisdiction of American law results. If there is no direct and substantial effect in the United States on our foreign commerce, then jurisdiction does not apply. There must be direct and substantial consequence within our borders resulting from the conduct overseas if our jurisdiction is to apply.

Using this test, the Examiner found that commissions paid in Italy to Italian forwarders did not affect our commerce more than remotely. Even if the activities of respondents were in violation of the literal terms of the Act, the Examiner found that the Commission was nevertheless without jurisdiction over the practices occurring in Italy because of lack of direct and material effect upon the foreign commerce of the United States.

Hearing Counsel have excepted to the Examiner's findings of no violations of sections 14 First, 15, and 16 Second. Hearing Counsel also challenge the jurisdictional standard imposed by the Examiner.

Hearing Counsel contend that the record supports a holding that respondents entered into agreements subject to section 15 which were neither filed with nor approved by the Federal Maritime Board. Specifically, Hearing Counsel except to the Examiner's finding that the WINAC commission system of 1947–52 was authorized by the conference agreement. Hearing Counsel argue that the WINAC agreement did not and could not authorize payments under a commission system, since the scheme was in reality an unlawful deferred rebating

system, not a simple decision to pay brokerage; it, therefore, could not be authorized by a section 15 agreement. Likewise, Hearing Counsel assert that the WINAC commission system was an entirely new scheme not contemplated by the basic agreement, which was discriminatory on its face, and certainly not permitted by language in the WINAC agreement which merely provides "that the parties hereto undertake not to * * * make any discount, payment or return * * * unless unanimously agreed upon by the parties * * * ."

With respect to the "Big Three" agreements, Hearing Counsel argue that there can be no question that these were agreements in violation of section 15, even the Examiner made this finding. However, Hearing Counsel attack the Examiner's description of these agreements as technical violations only. Hearing Counsel point out that in *Unapproved Section 15 Agreement—Coal to Japan/Korea*, 7 F.M.C. 295 (1962), and *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159 (1962), the Commission refused to distinguish substantial and technical offenses and gave no heed to extenuating circumstances.

Hearing Counsel also oppose the theory offered by the Examiner that, since the Federal Maritime Board knew of the use of the commission system, the Commission should find no violation here. On the contrary, it is clear, say Hearing Counsel, that the Commission is free to act as it sees fit in the public interest, regardless of what its subordinates may have done or not have done in the past.

With respect to the Examiner's finding that no violation should be found because of the possible repercussions upon APL and Export by the Maritime Administration, Hearing Counsel state that the Examiner has made an unsupported assumption as to what course of action the Maritime Administration would follow. The decision here does not control the administration of the subsidy program. Hearing Counsel concede that APL and Export were subjected to considerable pressure to rebate, in order to remain competitive, but this is something for the Maritime Administration to consider. It has no bearing on the Commission's responsibility under the Shipping Act.

Hearing Counsel except to the Examiner's failure to find that the various commission systems were unlawful under section 14 First. Hearing Counsel argue that the WINAC commission system provided for the payment of 3 percent commission sometime subsequent to the date of shipment. In addition, the admitted purpose of the system was to tie forwarders to the conference. The "Big Three" agreements likewise were deferred and were paid with the understanding that the recipient forwarder would remain loyal to the lines. According to Hearing Counsel, under these schemes, respondents by paying deferred rebates or agreeing to pay deferred rebates violated section 14 First.

The Examiner refused to find violations of section 14 First where payments were directed to forwarders, not shippers. According to Hearing Counsel, this construction would frustrate the aim of Congress by reading the section to exclude payments to forwarders particularly where, as here, forwarders have preempted the role of shipper. Furthermore, Hearing Counsel submit that it would be naive not to infer that the rebates in some significant manner redounded to the benefit of the exporter. Thus, Hearing Counsel conclude that the commission systems were indeed unlawful deferred rebate systems. Hearing Counsel also object to the Examiner's finding that the commission systems were lawful because the system was violated by the parties who created it; i.e., commissions were paid to forwarders who did not remain loyal to the carriers.

Hearing Counsel contend that respondents allowed persons to obtain transportation at less than the regular rates by an unfair device or means in violation of section 16 Second. They assert that while the system was widespread and apparently well known, the amounts of the concessions and the names of the beneficiary forwarders have been shrouded in secrecy, thus constituting unfair devices or means. Therefore, the commission system, which was designed to preserve the position of the carrier and which, in fact, treated shippers and forwarders in a discriminatory manner, was the type of practice prohibited by section 16 Second.

APL excepts to the Examiner's failure to hold that these proceedings are barred by the statute of limitations. APL also excepts on the ground that the Shipping Act is not intended to apply to the conduct of U.S.-flag lines abroad where the Act cannot also be applied with equal force to foreign flag lines. APL considers this to be unconstitutionally discriminatory. Finally, APL alleges that the Examiner erred in finding that the "Big Three" agreements were more than agreements not to pay commissions.

Section 15 Violations

As set forth above, besides the 4 percent brokerage paid to forwarders, WINAC members between 1947 and 1952 authorized an additional 3 percent commission to forwarders, with payments made through the Conference office. Under this additional commission arrangement, the Conference Secretary obtained freight reports from each line at each port, billed and received funds from the member lines, and disbursed the amounts to the forwarders. The system was cumbersome and the 3 percent commissions were not paid until long after they were due. Those for 1952 were not paid until 1955, for example. Originally, it was intended that the 3 percent commission be paid only

to those forwarders which generated at least $5,000 of business but this rule was flexible, and commissions were paid to many forwarders which did not reach the minimum. No commissions were paid on certain low-rated freight and goods originating in Switzerland and other goods on which the shipper already had received tariff benefits of some other sort.

The agreement to pay commissions to forwarders, within the WINAC machinery, was not a violation of section 15 (Issue No. 1). The terms of the WINAC agreement expressly referred to payments to brokers, in that no such payments were to be made unless unanimously agreed upon by the parties. This agreement to pay commissions was reached unanimously. Therefore, when the WINAC Conference 3 percent commission system was in effect, it was in accord with the WINAC agreement.

We have held that while an agreement fixing or regulating the amounts of brokerage was an agreement within the meaning of section 15 that had to be filed for approval, once a conference agreement had been approved, conference arrangements regarding brokerage payments to forwarders were permissible without separate section 15 approval. *Agreements and Practices Pertaining to Brokerage*, 3 U.S.M.C. 170, 177 (1949). *American Union Transport* v. *River Plate & Brazil Conferences*, 5 F.M.B. 216, 221 (1957); affirmed *American Union Tranpsort, Inc.* v. *United States*, 257 F. 2d, 607 (1958), cert. denied 353 U.S. 828 (1958). Therefore, no filing under section 15 was necessary with regard to the 3 percent Conference commissions.

Upon the demise of the WINAC commission payments in 1952, the two largest American lines, Export and APL, together with Italia, were persuaded that an additional commission arrangement was imperative in order to preserve their positions against the increased rebating of their competitors. The American lines believed that their superior service alone could not retain the patronage of forwarders who were offered concessions by other lines. In 1954 and again in 1956, the "Big Three" entered into agreements to pay additional 3 percent commissions. As with the earlier conference commission system, these commissions were paid some time after they were due in order to secure the continued patronage of forwarders. The "Big Three" agreement of 1954 called for the paymentof 3 percent deferred commission to seven, mutually agreed upon, forwarders. The agreement was not authorized by, in fact it was in derogation of, the WINAC agreement. The second "Big Three" agreement of 1956 was the same type of arrangement. Again the agreement called for an additional 3 percent commission paid to nine forwarders on a deferred basis. These agreements were not filed with the Federal Maritime Board.

The agreements between APL, Export, and Italia, were unfiled and unapproved section 15 agreements (Issues No. 2 and 3). Both the failure to file the agreements immediately and the effectuation of the agreements without approval are violations of section 15.[9] Both commission agreements were the type described in section 15 as agreements "giving or receiving special rates, accommodations, or other special privileges or advantages controlling, regulating, or destroying competition; * * * or in any manner providing for an exclusive, preferential, or cooperative working arrangement." The two "Big Three" agreements should have been filed with the Commission as required by section 15. These agreements cannot be described as merely reiterations of the WINAC requirement not to pay rebates as argued by APL. Rather these agreements affirmatively contemplated payments of commissions to selected forwarders. APL's exception in this respect is overruled.

The Examiner concedes that technically the "Big Three" agreements should have been filed; however, the Examiner concluded that there was "no substantial violation of section 15 for failure to file the agreements to pay commissions to Italian forwarders." We reverse the Examiner in this respect. The Examiner's exoneration of respondents cannot be premised upon the mere designation of the failure to file as technical or insubstantial. As we have held before, there is no room in the proper enforcement of section 15 for technical violations. Section 15 requires absolute compliance. *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159, 179 (1962); *Unapproved Section 15 Agreement—Coal to Japan/Korea*, 7 F.M.C. 295 (1962).[10] As stated in the *South African* case:

> It goes without saying that we find untenable the suggestion that respondents' arrangement constituted a "technical" violation of the law. It should be noted, furthermore, that section 15 affords little room for so-called technical violations. To us the breadth and force of its language literally implore attention and obe-

[9] See: *Unapproved Section 15 Agreements, South African Trade,* 7 F.M.C. 159, 192 (1962); *Unapproved Section 15 Agreement—Coal to Japan/Korea,* 7 F.M.C. 295, 301–302 (1962); *Unapproved Section 15 Agreements—Spanish/Portugese Trade,* 8 F.M.C. 596, 614 (1965).

[10] The Examiner supports his "technical" violation theory by stating that the Federal Maritime Board's staff knew of the agreements. This is immaterial. Section 15 requires that all agreements subject thereto be filed. These agreements were not filed. The record simply does not reflect that the Board's staff advised respondents to ignore section 15 or that the staff were actually aware of the breadth and scope of the concerted activity. Cf. *Unapproved Section 15 Agreements—South African Trade,* 7 F.M.C. 159, 196 (1962) in which the Commission stated that an allegation that certain Board personnel were cognizant of the arrangements was immaterial. The ramifications of our holding upon the subsidy program is also immaterial to the question of whether the agreement was subject to section 15 and was filed. We have stated above that APL and Export were subjected to intense pressure, in climate favorable to such commission agreements, and that APL and Export took the lead in ending the agreements and otherwise regularizing the trade.

dience, or at the very least inquiry if any doubt as to the propriety of proposed conduct. 7 F.M.C. at 197.

We have previously acknowledged the attempts of APL and Export to normalize the trade; nevertheless we must, in consonance with our responsibilities under the Shipping Act, define the law consistently. In *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159 (1962) the Commission found that respondents entered into and carried out agreements subject to section 15. In making this finding, the Commission strongly emphasized that section 15 requires government supervision of concerted activities and that consequently rigid compliance with the filing and approval provisions of section 15 is mandatory.[11] The opinion points out that a Commission investigation is an administrative proceeding looking to the regulation of present and future activity; the proceeding is not a penal or criminal trial for past violations of law and should not be conducted as such. In fact, the Commission held that matters in mitigation and extenuation were immaterial:

Respondents' argument that the arrangement "promoted stability," aided the subsidy program was "in the public interest," and not objectionable under section 15, is quite beside the point. Such matters were for the Board, the agency administering the Shipping Act, to weigh and determine before and during the time the anticompetitive activities occurred. They were not for the respondents to decide themselves. Respondents prevented any Board consideration by ignoring the eminently clear requirements of section 15 and thus frustrated it for years. We think it impossible for anyone now to state that what transpired between respondents was all well and good but even if this were not so, the impact of the statute manifestly cannot be made to depend on the *ex post facto* chance that the violation was not harmful. Section 15 may as well be scrapped as to attempt to administer it in this fashion. 7 F.M.C. at 196–97.

The Examiner was also swayed by the fact that only the U.S.-flag carriers were effectively regulated. However, in *Unapproved Section 15 Agreements—Japan, Korea, et al.*, 8 F.M.C. 503 (1965), the Commission rejected the argument of a U.S.-flag carrier that the administration of section 15 was discriminatory to it since the proceeding did not have coextensive thrust against foreign-flag carriers. The Commission held as follows:

Thus, the essence of respondent's argument is that all must "hang" or all must "go free." This is simply not the law and the adoption of any such philosophy would make effective regulation a practical impossibility. 8 F.M.C. 512.[12]

[11] Compare: *In re: Pacific Coast European Conference*, 7 F.M.C. 27 (1961); *Isbrandtsen Co. Inc.* v. *United States*, 211 F. 2d 51 (D.C. Cir. 1954), cert. den. *sub nom. Japan-Atlantic & Gulf Conf.* v. *U.S.*, 347 U.S. 990 (1954); *Calif. S. & B. Co., et al.* v. *Stockton Port Dist. et al.*, 7 F.M.C. 75 (1962).

[12] See also: *Unapproved Section 15 Agreements—Spanish Portugese Trade*, 8 F.M.C. 596, 613–14 (1965); *U.S.* v. *Wabash R. Co.*, 321 U.S. 403, 413–14 (1944).

APL's exception that it is being discriminated against is overruled for these reasons.

We turn now to the allegation that the Commission either has no jurisdiction or should not exercise jurisdiction because the subject activities occurred abroad. We believe the Examiner has ignored the clear language of section 15 and has drawn an improper analogy from the antitrust laws. While the acts under investigation occurred in Italy, they nevertheless had some effect on the commerce of the United States. There can be no doubt that the agreements to pay commissions abroad had some resulting impact on the landed costs of goods in this country. Furthermore, these practices had significant effect upon the competitive positions of the carriers in this trade who are undoubtedly subject to our jurisdiction. But more importantly, the Shipping Act itself specifically has extraterritorial application; it does not require demonstrable impact on our commerce. It simply refers to all agreements of a competitive nature between common carriers by water in the foreign commerce of the United States. Under this statute, the Commission cannot divest itself of its responsibility because it is difficult to investigate and regulate misconduct which occurred abroad. We have considered this contention before. As we said in *Unapproved Section 15 Agreements-Spanish/Portuguese Trade*, 8 F.M.C. 596 (1965): [13]

> Respondents' arguments to the contrary notwithstanding, there can at this late date be no serious question as to the so-called "extra-territorial" application of the Shipping Act. Kerr Steamship Co. v. United States, 284 F. 2d 61 (2d Cir., 1960); Montship Lines, Ltd. v. Federal Maritime Board, 295 F. 2d 147 (D.C. Cir., 1961), Hellenic Lines, Ltd. v. Federal Maritime Board, 295 F. 2d 138 (D.C. Cir., 1960); United States v. Anchor Line, Ltd., 232 Fed. Supp. 379 (S.D.N.Y. 1964).
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> Respondents are all common carriers by water in foreign commerce within the meaning of the Act, and there is no question that the agreements in issue are of the kind covered by section 15; i.e., agreements fixing or regulating transportation rates or fares and regulating, preventing, or destroying competition in our foreign commerce. These facts having been established, nothing more is needed and the failure to file such agreements results in a violation of section 15. For in requiring the filing and approval of such agreements as a condition precedent to their lawfulness, Congress itself has determined that the agreements by their very nature have an "effect" on our foreign commerce. The precise nature and degree of that effect is irrelevant to any determination as to the applicability of the filing requirements of section 15. 8 F.M.C. at 600–01.

Section 16 Violations

The record shows that Fassio discharged cargo consigned to Boston at the Port of New York and then trucked that cargo free of charge

[13] Cf. *Unapproved Agreements—Spanish Portuguese Trade,* 6 F.M.B. 103 (1960); *Unapproved Section 15 Agreements—Japan-Korea-Okinawa Trade,* 6 F.M.B. 107 (1960); *Agreements Etc. of N. Atl. W. B. Freight Assn.,* 7 F.M.C. 228 (1962).

to National Silver's warehouse at New Bedford, Mass. The record, however, does not show that National Silver was unduly or unreasonably preferred or advantaged in violation of section 16 First. This absorption of inland transportation charges was alleged as a solicitation factor, but this allegation was not established on the record. Consequently, this alleged absorption was not proven to be a violation of section 16 First. (Issue No. 5.)

Hearing Counsel urge that the payments to forwarders were unlawful under section 16 Second, because they allowed persons to obtain transportation at less than the regular rates by an unfair device or means.

The record does not disclose sufficient details of the arrangements between forwarders and carriers. We simply cannot ascertain whether the rates charged by respondents were other than the regular rates.[14] (Issue No. 6.) We, therefore, overrule Hearing Counsel's exceptions as to section 16 Second.

Section 14 First Violations

Section 14 First of the Act bans deferred rebates to shippers. The commission payments of record generally were not made to shippers (the exporters in Italy), but to the Italian forwarders. Even if the commissions had been made to shippers or if we should consider the forwarder to be the shipper, they were not necessarily "deferred rebates" prohibited by section 14 First which speaks in terms of payments made "only if, during both the period for which computed and the period of deferments, the shipper has complied with the terms of the rebate agreement or arrangement."

There must be proof that the deferred rebate payments were conditioned upon compliance by the shipper with the rebate agreement both during the period for which the payment was computed and during the period of deferment. The 3 percent conference commissions and the payments under the "Big Three" agreements were computed on a calendar year basis whereas the periods of deferment were of varied lengths. Concerning the Conference 3 percent commission, although forwarders were expected to remain loyal, commission payments to Italian forwarders were not conditioned upon continued loyalties or other arrangements. Therefore, there is no showing of unlawfully deferred rebates because there is inadequate proof that the deferred commissions met the technical requirements of the Act that the shipper be required to comply with certain conditions during both of the two periods of shipment and of deferment (Issue No. 4). It does not matter that the carriers or the forwarders designated the rebates

[14] Of course, this record predates section 18(b) which requires the filing of rates with us, thus accounting for the lack of technical proof of the regular rates.

as "deferred rebates," and it does not matter that the payments were deferred, because the Act requires that there be a particular type of deferred payment, of which there is inadequate proof herein, to make the deferred rebates unlawful. The missing ingredient in the Conference 3 percent commission system and in the "Big Three" agreements was the continued obligation of the shipper to remain loyal. Hearing Counsel's exceptions regarding section 14 First are accordingly overruled.

Miscellaneous Contentions

APL and Export argue that the proceeding is barred by the statute of limitations. However, as the Commission has consistently held, the statute of limitations pertains to actions for the collection of civil and criminal penalties, not to investigations instituted by the Commission.[15] We overrule APL's exception and hold that the proceedings here are not barred.

APL and Export continue to argue that the "Big Three" agreements were merely agreements not to pay commissions in excess of 3 percent—they did not require that commissions be paid. According to APL and Export, this simply reconfirmed the promises made in the WINAC agreement not to pay commissions, but with the qualification that none of the lines would consider itself aggrieved if one of the others paid commissions up to 3 percent. However, the argument is without merit. As we have found, the "Big Three" in order to preserve their positions in the trade, set about to insure the patronage of important forwarders by paying commissions. The agreements were not routine and not mere confirmations of the WINAC agreement; they were prohibited under WINAC.

Export contends that there is insufficient evidence against it to warrant findings of violations against it. Such is not the case, however. Our factual findings are supported by the record and indeed are, for large measure, those found by the Examiner. The record will support, with evidence properly admissible against the appropriate respondents, our holding that the "Big Three" agreements were unfiled and unapproved section 15 agreements. Export also argues that the parties made inquiry of the Board regarding the commission agreements, and the Board confirmed that no approval was necessary. We have already overruled this argument in considering Hearing Counsel's argument. We reaffirm that ruling; the argument is meritless. Suffice it to say that the record shows that the Board's staff had an inkling of the general status of the trade. There is no showing that the staff

[15] See: *Agreements, etc. of N. Atl. W. B. Freight Assn.*, 7 F.M.C. 228, 237 (1962). Indeed, the Commission has already considered and rejected the plea that this investigation is barred by the statute of limitations (Order of Oct. 20, 1961).

decided that is was unnecessary to file the "Big Three" agreements, and we know of no such decision. In addition, the argument is somewhat contrived because the demise of the agreements was the direct result of the pronouncement of an Export official that the commission agreements were illegal.

We have already ruled in considering Hearing Counsel's exceptions on Export's technical violation argument. Likewise, we overrule Export's jurisdictional contentions for the reasons previously stated. Export argues that, while we have jurisdiction to investigate the activities reflected in the record, the reach of the prohibition of the Act is another matter entirely. This is, of course, a distinction; however, our holding herein involves anticompetitive activity among carriers serving an important inbound U.S. trade. The impact of this anticompetitive activity permeates the entire trade. The carriers themselves have admitted the impact of malpractices on the trade. Competition substantially affected the relationship between carriers in U.S. foreign commerce and necessarily reflected itself in the landed price of goods here. The record also shows that competition, as well as anticompetition, had a clearly discernible effect upon the level of freight rates which were paid directly or indirectly by purchasers in this country. We, therefore, overrule the arguments that the "Big Three" agreements were too remote from our commerce to be amenable to section 15.

Italia also has contended that the Commission is without jurisdiction. In substance, the contentions are the same as those already discussed and rejected.[16] Italia contended at oral argument that an agreement to pay commissions to forwarders does not require section 15 approval. This is so because an agreement to pay deferred rebates could not be approved under section 15; therefore, it need not be filed. This is fatuous. If an agreement falls within the scope of section 15, it must be filed, whether approvable or not.

Because of our decision in this proceeding, it is unnecessary to consider in detail the arguments of other respondents, Fabre Line, Concordia Line, Torm Line, and Costa Line. While no violations were found against these respondents, we have in ruling upon Hearing Counsel's exceptions also considered and ruled upon these arguments. We will not repeat them here.

Ultimate Conclusions

For the aforementioned reasons, we find that APL, Export, and Italia in 1954 and 1956 entered into and carried out unfiled and un-

[16] Italia filed no exceptions or replies to exceptions. Accordingly, they have waived their arguments on brief to the Examiner in favor of the Initial Decision.

approved agreements to pay a 3-percent commission to selected forwarders in violation of section 15.

We find that these unlawful activities have been voluntarily terminated by the appropriate respondents. Consequently, no order will be entered. This proceeding is discontinued.

Chairman HARLLEE and *Commissioner* HEARN, concurring and dissenting:

It is our view that the Commission's decision here is correct in finding that the "Big Three" agreements were unfiled and unapproved section 15 agreements. The "Big Three" agreement of 1954 between APL, Export, and Italia called for the payment of a 3-percent commission to seven mutually agreed upon forwarders. The "Big Three" agreement of 1956 was the same type of agreement, between the same carriers, and called for the payment of a 3-percent commission on a deferred basis to nine selected forwarders. It is our opinion that each agreement was the type contemplated by section 15; that none was authorized by the WINAC agreement; that the agreements called for affirmative anticompetitive action by the parties; and that the agreements were unlawfully carried out. These agreements cannot be characterized as technical.

We also concur in the majority decision to the extent that there is insufficient evidence to find unlawful absorptions of trucking charges on the shipments by National Silver.

With respect to the other issues, we must dissent from the position taken by the majority. We would find that the members of WINAC violated section 15. The record shows, and there seems to be no disagreement, that during the period 1948-1952 the WINAC members agreed to pay, and did pay, a commission of 3 percent to forwarders in addition to the regular 4 percent brokerage. The carriers paid these commissions through the conference office on a deferred basis to forwarders who booked cargo amounting to $5,000 in freight charges within a year. The purpose of the agreement was to insure the loyalty of forwarders to the conference carriers as a means of fighting the encroachment of nonconference carriers. The agreement was anticompetitive and subject to section 15. We do not consider this or any other discriminatory commission system to be authorized by the WINAC agreement which provides merely "that the parties hereto undertake not to * * * make any discount, payment or rate * * * unless unanimously agreed upon by the parties * * *." This language prohibits individual rebating. It does not authorize any commission system not properly set forth in a conference tariff and, more importantly, the language does not permit a commission system paid on a deferred basis

to selected forwarders. Although the Commission does not require the filing and approval of routine conference action, the agreement is far more than a routine or simple decision to pay brokerage. Indeed, for the reasons set forth below, the agreement was not and could not be authorized by the WINAC agreement, because it was also unlawful under section 14 First and section 16 Second.

We believe that the commission system set up by the WINAC members during the 1948–52 period, as well as the systems under the "Big Three" agreements, were illegal arrangements to pay deferred rebates. In each instance, the commissions were paid to selected forwarders on a deferred basis. This much is clear. It is likewise clear to us that the motivation of the carriers in paying the forwarders on a deferred basis was to secure as much cargo from the favored forwarder as possible. As we see it, the only questionable ingredient of the scheme was exactly what the forwarder promised in return for the commission, or what the forwarder was supposed to do during the period the commission was deferred. The record does not reveal an unequivocal promise of the recipient forwarders to give all or a fixed portion of the cargo to the carrier. We do not even know if there was a written contract between carrier and forwarder. Nevertheless, we do know that there was intense competition among forwarders and that this competition forced forwarders to reduce the price of the transportation package in order to retain their customers. This in turn makes any reduction in ocean freight, which is paid by the forwarder, a critical element in the forwarder's profit margin. Thus, we find an overtonnaged trade in need of high paying cargo and forwarders anxious to maintain their accounts by reducing the overall price to their customers. In this context, the commission arrangements take on their true significance. The carriers agree to rebate to favored forwarders on a deferred basis in order to guarantee to themselves cargo from these important forwarders. It is reasonable to infer, because of the cutthroat competition among forwarders, that the opportunity to obtain the revenue of the 3 percent deferred rebates would not be readily jeopardized. It is thus reasonable to believe that a deferred rebate was a consideration for future patronage. In fact, no other explanation is plausible.

With respect to the contention that the commissions could not be deferred rebates because the statute speaks in terms of shippers and the commissions were paid to forwarders, we disagree. First, the record reflects the extreme competition between forwarders for the available accounts. This competition resulted in reduction of the forwarder's price. Thus, some of the benefit of the commission found

its way to the "shipper." Second, and more important, the forwarder was, as a practical matter, the actual shipper. He selected the carrier, booked the cargo, paid the freight, was considered the shipper by Italian customs, etc. Under these circumstances, we believe it appropriate to consider the forwarders to be the shippers, particularly where it is clear that section 14 First is speaking of an arrangement between a carrier and a person with control over the booking of cargo where a deferred rebate is paid in exchange for patronage. Accordingly, we would find that the carriers violated section 14 First by paying, and by entering into a combination to pay, deferred rebates.

We also would find that the same commission system and payments to forwarders pursuant to these systems resulted in violations of section 16 Second, which makes it unlawful for a common carrier to allow any person to obtain transportation at less than regular rates by means of an unjust or unfair device or means. Our view is based upon the fact that the commissions were paid on a selective basis and resulted in a cheaper net freight rate to the recipients of the commission. The central fact is that the carriers had tariffs setting forth the purported cost of transportation, yet these rates were discounted by various and varying percentages. In *U.S. Lines and Gondrand Bros. Sect. 16 Violation*, 7 F.M.C. 464 (1962), the Commission found a carrier to be in violation of section 16 Second by rebating a portion of the freight charges in order to meet nonconference freight levels.

The Commission held:

> United States Lines was bound by its conference agreement to observe the rates in the conference tariff These were the only rates filed and published by it or on its behalf. The rates so reported and published were its regular or established rates which it was bound to charge and shippers were bound to pay. *Prince Line, Ltd. v. American Paper Exports, Inc.*, 45 F. 2d 242, aff'd 55 F. 2d 1053 (C.A. 2, 1932); *Compania Anonima Venezolana de Navegacion* v. *A J. Perez Export Co., et al.*, 303 F. 2d 692 (C.A. 5, 1962), 7 F.M.C. at 469–70.

Therefore, the command of section 16 Second is absolute that a carrier shall not by false means allow any person, including a forwarder, to obtain transportation at less than the regular rates. The policy underlying this command prohibits the carrier from deviating from its tariff.

The record here shows that commissions were paid and that the commissions were not contained in any tariff provision. The exact amounts of the commissions were undisclosed to competing carriers and to all shippers and forwarders. This is demonstrated by the evidence of continuous rumors of malpractices and pressures from forwarders who were frequently able to play one carrier against another because the carriers themselves were not cognizant of the actual discounted

rates charged by their fellow carriers. While everyone knew there was rebating, the details of the various payments were definitely clandestine. Consequently, we hold that the payment of commissions as set forth in the record were "unfair devices or means" prohibited by section 16 Second.

Admittedly, the record here does not include every detail of every rebate paid in this trade. However, it does disclose that the practice of rebating was widespread. We would, therefore, condemn the practice of paying certain commissions to selected forwarders as the type of unfair activity prohibited by section 16 Second.

Commissioner BARRETT, concurring and dissenting:

I must disagree in part from the decision of the majority and find that no violation of the Shipping Act has occurred. In regard to the alleged unfiled and unapproved agreements in 1954 and 1956 of APL, Export, and Italia, I share the views expressed by the Hearing Examiner. I can find no substantial violation of section 15. Furthermore, I can find no support from the record that the criteria for violation have been met or that the arrangements entered into overseas materially affected the foreign commerce of the United States.

Commissioner JAMES V. DAY, concurring and dissenting:

I concur with the majority opinion except in the following respects:

The majority interprets our past decisions as holding that Section 15 requires absolute and rigid application and that "there is *no room*—for technical violations." I do not quite read the cases that way. In the *South African*[17] case we held, rather, that Section 15 affords "*little room* for so-called technical violations. To us the breadth and force of its language literally implore *attention* and obedience, or at the very least *inquiry* if in any doubt as to the propriety of proposed conduct."

Here, the Board apparently was aware not only of the Commission system but also of the "Big-Three" agreements and did not request the agreements be filed. (Exhibit 181 Annex 15.) Aside from the contention that respondents could reasonably construe their contact with the Board as producing recognition on its part that no filing and approving of the "Big-Three" agreements were necessary, the minimum standards relative to recognition of technical violations set forth in the *South African* case, *supra*, would nonetheless appear to be met (i.e., "attention" and "inquiry"). The technical aspects of the "Big-Three" violations should thus be recognized in these circumstances.

In the past there have been distinctions in the treatment of Section

[17] *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159, 197, (1962). See also *Unapproved Section 15 Agreement—Coal to Japan/Korea*, 7 F.M.C. 295, 304 (1962).

15 violations. In the two cases cited by the majority (at page 21) the violations there involved agreements fixing rates—somewhat more substantial than the violations here present. In those cases the violations were not excused as technical. On the other hand, the Commission or its prodecessors has merely, in other cases, noted a failure to file an agreement or declared that no further action was required because the agreement had expired. *Massachusetts v. Columbia S. S. Co., Inc.*, 1 U.S.M.C. 711 (1938), and *Associated Banning Co. v. Matson Nav. Co.*, 5 F.M.B. 336 (1957). In this case the violations as to the "Big-Three" agreements, now no longer in effect, should be recognized as not substantial. The Examiner so held. I agree with his conclusion on this point.

(signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 66-4

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION, JAMES J. BOYLE & CO., 507 WASHINGTON STREET, SAN FRANCISCO, CALIF.

Decided August 24, 1966

Applicant for freight forwarder license held unfit for licensing in view of fact the record shows that applicant knowingly and willfully operated as a forwarder without lawful authorization.

Clarence Morse for James J. Boyle & Co., applicant.

Robert Reed Gray for World-Wide Services, Inc., respondent.

Donald J. Brunner and *Thomas Christensen*, Hearing Counsel.

REPORT

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

This proceeding was instituted by Commission order to determine whether James J. Boyle & Co. (applicant) qualifies for an independent freight forwarder license, and whether the freight forwarding license of World-Wide Services, Inc. (World-Wide), should be revoked pursuant to the provisions of section 44 of the Shipping Act, 1916 (Act).

Upon completion of hearings, World-Wide filed a motion to dismiss the proceedings as to it upon the ground, *inter alia*, of failure of proof. Hearing Counsel agreed that the motion should be granted. Accordingly, the Examiner dismissed the proceeding as to World-Wide.

All interested parties have been heard and the proceeding is now before us upon exceptions to the Initial Decision of Examiner Paul D. Page, Jr., holding applicant Boyle fit for licensing as an independent ocean freight forwarder.

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*Vice Chairman John S. Patterson and Commissioner George H. Hearn did not participate.

Facts

Applicant, James J. Boyle & Co. was established as a partnership on July 29, 1964, to act as a customhouse broker, foreign freight forwarder, air freight forwarder, and consolidator. Three of the partners, James J. Boyle, Dale Zerda, and Terry Hatada, were formerly employed by James Loudon & Co., a licensed forwarder. Boyle had been employed as the Vice President and Manager of Loudon's San Francisco office. The fourth partner, Howard Cheung, was employed by World-Wide as its District Manager in San Francisco and handled the freight forwarding business for World-Wide there. When Loudon & Co. encountered financial difficulties, Boyle, Cheung, Zerda, and Hatada offered to assume the management of Loudon's San Francisco office and when this offer was declined, the partnership of James J. Boyle & Co. was formed.

The partners, in July 1964, entered into an oral agreement whereby Cheung, purporting to act with the consent of his employer, World-Wide, authorized the partnership to perform freight forwarding activities in San Francisco under the firm name of World-Wide and using the license number of World-Wide. Pursuant to this agreement, all freight brokerage and forwarding fees were to be billed in the name and for the account of World-Wide. Applicant was to be compensated on the basis of 25 percent of the total forwarding fees, excluding all ocean freight brokerage revenue.

Although this agreement was entered into orally in July 1964, the terms of the agreement, which are embodied in Exhibit I, dated July 29, 1964, were only reduced to writing in September of 1964. The agreement was reduced to writing at that time because:

> * * * Mr. Cheung and I [Boyle] agreed we should get something in our files of a working agreement such as this [Exhibit I] in order to satisfy the Maritime Commission agents should they come in the office to investigate our activities. (Tr. 59.)

Mr. Boyle further testified that it was reduced to writing "about the time Mr. Kerttu [FMC investigator] called on us."

Exhibit 1 was drafted by Boyle and executed by him on behalf of the partnership. Cheung supplied the World-Wide letterhead.

Neither Boyle nor Cheung advised World-Wide of the existence of the agreement represented by Exhibit 1, and World-Wide was unaware of its existence until March 29, 1966, the day before the hearing in this proceeding. Cheung in fact did not have the authority to sign the letter of July 29, 1964.

By an oral agreement not reduced to writing, Boyle and Cheung

amended Exhibit 1 to allow Boyle to retain approximately 75 to 80 percent of the forwarding fees billed in World-Wide's name.

Applicant began its forwarding business on August 1, 1964, using the name and number of World-Wide. Applicant applied to the Commission for an ocean freight forwarder's license on August 6, 1964.

A notice to prospective clients (import-export firms) announced that Boyle & Co. would open its offices on August 3, 1964.

The announcement stated:

James J. Boyle & Co.
is pleased to announce the
opening of its offices on
August 3, 1964, providing customs
brokerage, foreign freight for-
warding and air freight
forwarding services
Associated with James J. Boyle & Co.
are:
Mr. Terry Hatada Mr. Dale Zerda
Miss Alice Young
Mrs. Elizabeth De Maree
507 Washington St., San Francisco
Yukon 6–5516

The announcement omitted any reference to its alleged connection with World-Wide.

Applicant, using World-Wide's name and license number, billed shippers for forwarding fees and steamship lines for brokerage. All such moneys collected by applicant were retained by it and no money was remitted by the partnership to World-Wide.

Applicant continued to operate pursuant to this agreement and on December 31, 1964, Cheung withdrew from the partnership, purporting, however, to authorize the continued usage by applicant of the name and license of World-Wide until such time as applicant received its own license, but for a period not to exceed 4 months. By this agreement, applicant bound itself to cease using World-Wide's name and license as of May 4, 1965; nevertheless, applicant continued to use World-Wide shipping forms until July 31, 1965, in known disregard of the agreement.

Although Cheung withdrew from the partnership on December 31, 1964, he retained office space on the partnership premises until July 31, 1965. When, on the latter date he moved out, Cheung notified the partners that applicant could no longer use the name and license of World-Wide. Applicant ceased performing forwarding services under World-Wide's name and number as of July 31, 1965; it did use

the World-Wide name and number, however, through August 1965, to bill shippers and steamship lines for services performed in July 1965.

Boyle's application for a forwarder license (Form FMC-18) (Exh. 2) discloses he had 7 years of experience as Export Traffic Manager of an industrial company and 2 years of experience as Assistant Traffic Manager, Export Department, of a Customs Brokers and Foreign Freight Forwarding firm and 8 years of experience as Vice President and Manager of another Customs Broker and Foreign Freight Forwarding firm directly supervising as many as 23 employees in all phases of customs brokerage and freight forwarding activities. Boyle formerly held a forwarder registration number issued by predecessor agencies.

Boyle was aware in July 1964 when the partnership was formed that he and the partnership required a license to engage in ocean freight forwarding.

Applicant maintains that it informed the Commission of all the facts involving its relationship with World-Wide and that the Commission never indicated to applicant that such relationship was improper. In its application for license, applicant stated that Cheung was presently the San Francisco representative on an agency basis of World-Wide. The partnership agreement which was attached to the application states in Article 9 thereof that if the partnership were to be dissolved, Howard Cheung "will be allowed to withdraw from the assets of the partnership, the business account and franchise of World-Wide Services, Inc."

Applicant further states that it disclosed all the facts to Mr. Kerttu, a Commission investigator, in September of 1964, and received no indication that its operations might be illegal.

By letter of August 6, 1965, a few days after applicant ceased its forwarding activities, this Commission notified applicant of its intent to deny the application for license; the grounds for denial being that applicant appeared to have been operating as a forwarder without a license or other proper authorization. Applicant requested a hearing.

Discussion

Hearing Counsel except to the Examiner's failure to hold that applicant's operation renders it unfit for licensing. Hearing Counsel do not challenge applicant's "willingness" or "ability" to act as an

ocean freight forwarder, but they do contend, however, that applicant is not "fit" to so act.[1]

Hearing Counsel seek to show that applicant knowingly and willfully operated without a license or other lawful authorization, and contend that such a showing will furnish sufficient grounds for denying applicant's license for lack of fitness to carry on the business of forwarding.

Hearing Counsel view the resolution of the question of whether applicant knowingly and willfully operated without lawful authorization as being dependent upon a determination of the force and effect to be given the agreement between applicant and Cheung; which agreement purports to authorize applicant to operate under the name of World-Wide. Hearing Counsel feel that said agreement, by its terms alone, may have created an acceptable employment relationship,[2] but that applicant's conduct thereunder demonstrates that such relationship was neither created in fact nor intended to be created.

In support of their contention that no meaningful employment relationship was meant to be created, Hearing Counsel offer the following:

1. By terms of the agreement, applicant was to perform a complete forwarding service and was to receive only 25 percent of the forwarding fees as compensation therefor. Seventy-five percent of forwarding fees and all brokerage were to be remitted to World-Wide. Such a low level of compensation indicates that no meaningful employment relationship existed.

2. Applicant billed forwarding fees and brokerage on all services performed by it, using World-Wide's name and license number. Contrary to the terms of the agreement, applicant retained all monies received from shippers and steamship lines. Even when the agreement was subsequently orally amended to allow applicant to retain 75–80 percent of forwarding fees, applicant in fact retained *all* forwarding fees and brokerage. This is strong circumstantial evidence that applicant intended to disregard its obligations under the agreement with World-Wide and that no employment relationship ever existed.

3. By written agreement upon Cheung's withdrawal from the partnership, applicant bound itself to cease using World-Wide's name

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[1] The pertinent language of section 44 of the Act provides: "A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant is, or will be an independent ocean freight forwarder as defined in this Act and is *fit, willing,* and *able* properly to carry on the business of forwarding * * *." (Emphasis supplied.)

[2] Section 510.4(b) of General Order 4 (46 CFR 510.4(b)) provides: "An employee of a licensed independent ocean freight forwarder is not required to be licensed in order to act solely for his employer * * *."

and license as of May 4, 1965. Despite this agreement, applicant continued to act as a forwarder, using World-Wide's name and license, until July 31, 1965. No good faith intention to operate lawfully can be inferred from applicant's knowing disregard for an agreement of its own making.

Hearing Counsel contend that this evidence compels a conclusion that applicant never entered into an employment relationship with World-Wide; that applicant never intended to enter into such a relationship; and that applicant's arrangements with Cheung amounted to nothing more than a scheme whereby applicant attempted to begin forwarding operations before obtaining a license and without other lawful authorization.

Hearing Counsel contend further that a finding that applicant operated without authority warrants a conclusion that applicant is unfit for licensing, citing *Johnson & Son, Inc., Common Carrier Application*, 79 MCC 362 (1959).

Findings

The facts permit findings that:

1. Applicant, engaged in carrying on the business of forwarding between July 1964 and July 31, 1965, without a license issued by the Federal Maritime Commission and during such period operated through the use of guile and deception.

2. Applicant was not authorized to use the license of a licensed independent ocean freight forwarder.

3. Applicant is not qualified as an independent ocean freight forwarder because the applicant is not fit properly to carry on the business of forwarding and to conform to the provisions of the Act and rules of the Commission issued thereunder.

Conclusion

In our opinion, the record of facts before us and our interpretation of them in findings support beyond a reasonable doubt that the applicant knowingly and willfully operated as an ocean freight forwarder without lawful authorization; hence, in violation of the law; and therefore the applicant is not fit to be licensed as a forwarder by this Commission.

It is not disputed that the respondent was engaged in dispatching of shipments on behalf of others by oceangoing common carriers in commerce from the United States and handling the formalities incident

to such shipments and was therefore carrying on the business of forwarding as defined in the first section of the Shipping Act, 1916.

Boyle is a trained, knowledgeable person, who knew the requirements of law and ethics pertaining to his profession.

The fact that World-Wide did not employ the applicant nor appoint it as its agent and the conduct of the applicant show there was no true operation pursuant to World-Wide's freight forwarder license.

The initial decision bypassed a central issue in this case, i.e. whether applicant held itself out as an employee as opposed to an agent of World-Wide. This issue is one of primary importance to be decided at this time. Section 44(a) specifies that "No person shall engage in carrying on the business of forwarding * * * unless such person holds a license issued by the FMC * * *." Sections 510.4(b) and 510.23(a) provide that an employee of a licensed forwarder need not himself be licensed. Certainly nothing in this record indicates Boyle was an "employee" of World-Wide. The facts in this case indicate that Boyle had a very loose arrangement with Cheung to act as *Cheung's agent* rather than the agent of World-Wide Services, Inc.

The pertinent statutory provision and our rules clearly state that only a bona fide employee of a licensee need not himself be licensed. There appears nowhere any provision in the statute or our rules imputing the authorization of a license to carry over to any or all "agents."

The facts showing applicant agreed to take only 25 percent of forwarding fees and later 75 to 80 percent, but in all cases retained all money received, without objection or claim by others, and showing a partnership with a person purporting to confer right to use another's license, proves the arrangement was a sham to make the public believe applicant was operating with a license when he was not. The actions of devising such a plan and carrying it out and operating beyond the time applicant agreed to stop show guile and deceit, and such a person is not a fit licensee.

The profession of ocean freight forwarding is a highly responsible one requiring honorable conduct by all of its practitioners. Past malpractices disclosed by our predecessor agencies induced Congress to enact licensing requirements imposing on us responsibility for reviewing and limiting access to the profession to those fit, willing, and able, and of sufficient financial standing to be able to provide a fidelity bond. Existing licensed professionals are entitled to protection as part of the public just as much as shippers, but we can make our influence felt only by establishing and maintaining high quality standards of access to licenses. To grant the license would ignore significant aspects

of applicant's past conduct and permit a lowering of standards of access to this distinguished and honorable profession and in fact diminish forwarder's own ability to protect and serve the public in line with their professed high and worthy ideals.

Our ultimate conclusion is that respondent's application for a license as an independent ocean freight forwarder should be denied.

ORDER

DOCKET No. 66-4

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION, JAMES J. BOYLE & CO., 507 WASHINGTON STREET, SAN FRANCISCO, CALIF.

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

It is ordered, That the application for license of James J. Boyle & Co. is hereby denied pursuant to section 44(b), Shipping Act, 1916.

By the Commission.

(Signed) THOMAS LISI,
Secretary.