FEDERAL MARITIME COMMISSION

DOCKET NO. 66–17

INDEPENDENT OCEAN FREIGHT FORWARDER, LICENSE APPLICATION NO. 552, HESKEL SALEH DOING BUSINESS AS EASTERN FORWARDING SERVICE

Initial Decision Adopted February 14, 1967

Applicant found technically competent and able to engage in the business of an independent ocean freight forwarder.

Application by holder of "grandfather rights" for license as independent freight forwarder denied. However, effective date of denial postponed to allow applicant to establish his own freight forwarding office and cease use of office equipment of shipper.

Applicant ordered to cease and desist from the collection of unearned commissions from carriers.

Applicant, in person.
Donald J. Brunner and *Samuel Nemirow* as Hearing Counsel.

REPORT

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

This proceeding is before us upon Hearing Counsel's exceptions to the supplemental initial decision of Examiner Benjamin A. Theeman.[1] The Examiner, in his initial decision found the following facts of record:[2]

1. The Commission's files show that Respondent operated under FMB Registration No. 1715 since July 11, 1958; on January 17, 1962, Respondent filed an application for a forwarder's license pursuant to section 44(b) of the Act, as amended; the application was given the number contained in the title of this proceeding.[3]

[1] After the issuance of the initial decision, we remanded the proceeding to the Examiner for further findings and conclusions as to the technical competence and ability of the applicant to engage in the business of an independent ocean freight forwarder.

[2] No exceptions were taken to these findings. Quotation marks have been omitted for the sake of convenience.

[3] Official notice is taken of the facts contained in this paragraph.

2. Respondent testified that he has read and is familiar with the amendment to the Shipping Act, 1916 (Public Law 87-254) dealing with independent ocean freight forwarders, enacted on September 19, 1961, containing the above-cited sections.

3. Respondent has been carrying on two businesses at 152-08 Jamaica Avenue, New York. One business, under the name of Jamaica Nylon Center, is the operation of a ladies specialty store. The other business, under the name of Eastern Forwarding Service is the subject of this proceeding.

4. Respondent has performed freight forwarding services for only one client, P. S. Saleh, Inc. (hereinafter Saleh, Inc.). Saleh, Inc., engaged in the business of exporting cars and trucks to the Middle East, is wholly owned by Respondent's brother, Philip.

5. Respondent has been performing the limited type of freight forwarding services set forth herein for about 15 years. At an unspecified period, and for about 6 months he was an exporter.

6. Eastern operates from a back room of the specialty store. The equipment consists of a desk, a typewriter, a case (not a filing cabinet) for account books, freight forwarding forms, letterheads and other necessary papers. The telephone is also located there. There is one telephone number for both businesses, but each business is separately listed in the telephone book.

7. The front of the building occupied by Eastern has no indication of any kind that Eastern is an occupant or that freight forwarding services were being offered there. Respondent did no public advertising nor in any other way offered his freight forwarding services to the public.

8. Respondent has no employees. Because Respondent has no copying machine, his daughter does the necessary work on customs declarations, Bills of Lading and the required copies of each.[4] This work is done at the office of Saleh, Inc. and not at the office of Eastern. Up to about 7 months ago, Respondent employed a messenger, who was not fully employed but was used "most of the time."

9. Respondent "very rarely" communicates with, or receives a communication from the carrier.

10. The usual procedure by which a shipment of Saleh, Inc. is put aboard a common carrier and the organizations that take part in the movement are as follows:

a. Saleh, Inc. books the cargo with the common carrier.

b. Independent packers prepare the shipment for transportation, prepare the dock receipt, move the cargo either to the pier or the vessel and bring the dock receipt to Saleh, Inc.

[4] The record contains no information as to the daughter's employment.

c. The particulars of the shipment are transmitted to Respondent usually at the office of Saleh, Inc.

d. On behalf of Respondent, Respondent's daughter prepares customs declarations and Bills of Lading at the place of business of Saleh, Inc. Respondent does not prepare consular documents, if any are needed.

e. Customarily, the "Line Copy" [5] of the Bill of Lading is signed or initialled at the place of business of Saleh, Inc. Respondent did not know who signed or initialled the Line Copy for Eastern.[6]

f. The packers deliver the cargo to the common carrier.

g. Respondent procures the carrier's signature on the Bill of Lading. (No detail is given as to the means by which this step is accomplished.)

h. Respondent has insufficient funds to cover freight costs. Saleh, Inc. sends to Respondent a check made out to Respondent in the amount of the freight. Respondent deposits the check in its account and issues a check in the same amount to the common carrier in payment for the freight.

i. Respondent retains one copy of the Bill of Lading and gives two copies to Saleh, Inc.

11. Respondent has a "Line Copy" stamp in his office and another in the office of Saleh, Inc. Customarily, the stamp in the office of Saleh, Inc. is used. Respondent has no recollection when the stamp in his office had last been used.

12. Respondent charges and collects from the common carrier, a commssion at the rate of 2½ percent for the shipments booked by Saleh, Inc. At 6 month intervals, Respondent charges and collects from Saleh, Inc. his freight forwarding fee at the rate of $5 per shipment. There is no evidence to show that the "rate of $5.00 per shipment" is in any way unreasonable.

13. During 1965, Respondent handled between 80 and 100 shipments. The combined income from carrier commissions and forwarding fees totalled $1,800. This amount represented about 40 percent of Respondent's gross income; the other 60 percent came from his specialty shop. Respondent's income from the shop has always been greater than from the forwarding activities and for several years before had been greater than 60 percent.

14. Respondent devotes about 20 percent or less of his time to forwarding activities. Until recently he solicited no business from any shipper other than Saleh, Inc. Within the last few months he has solicited business from three other exporters friendly to him. Two of them indicated that they might give him some forwarding business later in

[5] The Line Copy of the Bill of Lading contains the certification by the freight forwarder of services rendered to the carrier in connection with the shipment as required by section 510.24(e) of General Order No. 4, as amended, and section 44(e) of the Act.

[6] There may have been occasions when Respondent was present at the preparation of the "Line Copy." Then he would personally sign or initial it. In Respondent's opinion the signing of the line copy was not important: "the main thing is preparing these two items . . . those that are checked." Respondent is referring to subitems (1) through (5) of the line copy certification.

1966, and requested that he get in touch with them again. They advised Respondent that if he were "in a regular office in [New York] city, that would help a lot", particularly if he gave up the ladies specialty business.

15. There is no evidence that Eastern at any time shared directly with Saleh, Inc. any part of the commission paid by the common carriers, or indirectly by reduced rates for the forwarding services rendered.

Discussion and Conclusions

On the basis of the foregoing, the Examiner concluded that applicant should be granted a license subject to the following conditions:

a. Respondent immediately cease from billing carriers for freight forwarding services not rendered to carriers by Respondent and cease accepting payment from them for such unperformed services.

b. Respondent shall (1) forthwith certify to the Commission that he is attempting to and will establish his own freight forwarding office and perform his freight forwarder's services independently of the use of the office facilities or employees of Saleh, Inc. or any other shipper; and (2) establish said independent office not later than September 1, 1966.[7]

Hearing Counsel excepted to the initial decision on two grounds:

a. The Initial Decision errs in granting a freight forwarder license subject to certain Examiner-imposed conditions.

b. The Initial Decision errs in granting a freight forwarder license to an unqualified applicant in terms of sections 1 and 44 of the Shipping Act, 1916, as amended.

As to the second exception, Hearing Counsel urged that "The record is pregnant with facts which demonstrate that this applicant has performed little, if any, 'actual work' concerning shipments of P.S. Saleh, Inc. . . ." and further that:

The booking of cargo is essential to the operation of a freight forwarder service. There is doubt whether this respondent has ever engaged in this activity or in fact he has the ability to book cargo. Therefore, there is considerable doubt, if called upon today to do so, he would be capable of handling this basic matter.

The order instituting this proceeding alleged but two grounds for denying applicant a license. They were:

. . . that Heskel Saleh doing business as Eastern Forwarding Service does not hold himself out to the shipping public to perform ocean freight forwarding services and that his close association with P. S. Saleh, Inc., his only shipper client, destroys his independence and thereby precludes him from licensing . . .[8]

[7] The Initial Decision was served June 22, 1966, thus the September 1 date would have provided sufficient time for applicant to comply with the conditions.

[8] Concerning the failure of applicant to "hold its services out to the public," the Examiner noted that "No source for this requirement was given," nor was any "statute regula-

Since it seemed to us that Hearing Counsel were for the first time raising the question of applicant's "technical competence" or ability to perform fundamental forwarding services, we remanded the proceeding to the Examiner "in order that applicant may have an opportunity to demonstrate on the record that he possesses sufficient technical competence and ability to qualify as a licensed freight forwarder under sections 1 and 44 of the Act."

Subsequent to the remand, on October 7, 1966, Hearing Counsel submitted a memorandum to the Examiner signed by Robert G. Drew, Chief, Division of Freight Forwarders, Federal Maritime Commission. This memorandum set forth facts brought out by Mr. Drew's interview with the applicant concerning the latter's technical competence. No hearings were had, but the Drew memorandum was received in evidence with opportunity afforded applicant to comment or request further hearing. Applicant made no response. The Examiner issued his supplemental initial decision concluding that applicant possessed sufficient technical competence and should be licensed subject, however, to the conditions set forth in his initial decision of June 22, 1966.

Hearing Counsel excepted to the Examiner's supplemental decision again on the same two grounds previously urged, i.e. (1) the granting of a license subject to certain Examiner-imposed conditions; and (2) the granting of a license to an unqualified applicant in terms of sections 1 and 44 of the Act.

As we read these latest exceptions of Hearing Counsel, they do not go to the Examiner's conclusion that applicant is technically competent and able. Rather, they restate Hearing Counsel's position that the record herein demands "a denial of the instant application and if the applicant can subsequently establish that he is qualified for a license, then and only then should he be granted a license."

We think the Examiner's discussion of the issues well founded and dispositive, and we adopt it as our own except as may be otherwise indicated.[9]

It is clear from the foregoing that Respondent for the past 15 years has been "carrying on the business of freight forwarding" in a circumscribed manner limited to a few of the services usually performed

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tion or case" either "cited or referenced" to him. The Examiner then concluded that even though such a "holding out" was not required, the applicant was in fact attempting to solicit other clients and thus could be considered as trying to comply with the demand. Hearing Counsel took no exception to the Examiner's conclusions. In view of the applicant's attempted solicitation, we see no reason to adopt or reject the Examiner's conclusion on this question.

[9] Here, again, for the sake of convenience quotation marks have been omitted, and, of course, all footnotes have been renumbered.

by freight forwarders.[10] There appears to be no question that Respondent is "fit, willing and able properly to carry on the business of forwarding" as required by the statute. Hearing Counsel does not intend to the contrary. However, there are certain circumstances under which Respondent has carried on his forwarding business that must be rectified in order that his application for a license may be properly granted.

Respondent, as to the shipments of Saleh, Inc., has not and does not perform "with respect to such shipment[s] the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for, such cargo" as required by section 44(e). Despite this nonperformance, Respondent has been billing the carrier for commission and receiving payment from the carrier. It is this type of unearned payment (the legislative history calls it "unearned brokerage" or "automatic unearned brokerage fees") that section 44(e) was enacted specifically to eliminate.[11] The receipt of such unearned payments is improper under section 44(e). Respondent will be required to refrain from requesting or receiving such payments from carriers unless he actually performs those services set forth in and otherwise complies with section 44(e) as prerequisite to such payment.[12]

The record shows that Respondent has been dependent upon Saleh, Inc. for certain office equipment and accommodations in order to complete the limited freight forwarding services that he performs. The record does not show that Saleh, Inc. has exerted any control over Respondent, or is there sufficient evidence in the record to support a finding that Respondent is shipper connected. Nevertheless, this type of operation is not consistent with the concept of an "independent ocean freight forwarder" as contemplated by the statute. Such arrangements may easily lead to control of the forwarder by the shipper. Respondent has stated that he intends to open an office in downtown Manhattan and

[10] For a listing of the divers services performed by freight forwarders, see General Order 4, 46 CFR Sec. 510.2(c)i; *United States* v. *American Union Transport Co.*, 327 437 U.S. (1945); *N.Y. Foreign Freight Bureau Assn.* v. *F.M.C.*, 337 F.2d 289, 292 (1965); Docket No. 765/831 *Freight Forwarder Investigation, etc.*, 6 FMB 327, 334/5.

[11] See particularly House Report No. 2939, 84th Cong., 2d sess., July 26, 1956, page 54, paragraph (2) *Unearned brokerage,* page 55, paragraph (8), *Is remedial action required in connection with the Shipping Act?*

[12] Section 44(e) refers to a "licensed" forwarder. It is applicable to forwarders holding "grandfather rights" by the following series of steps. Section 44(b) sets forth that the "grandfather rights" may be continued "under such regulations as the Commission shall prescribe." The Commission issued a regulation on May 1, 1963, as Amendment No. 1 to General Order 4. Section 510.21(a) of Title 46 CFR contains the following definition:

§ 510.21 Definitions.

(a) The term "licensee" means any person licensed by the Commission as an independent ocean freight forwarder, or any independent ocean freight forwarder who, on September 19, 1961, was carrying on the business of freight forwarding under a valid registration number issued by the Commission, or its predecessors, who filed an application for such a license (Form FMC–18) on or before January 17, 1962, and whose application has not been denied.

to devote full time to his forwarding business. It is assumed that Respondent will cease using the office and office equipment of Saleh, Inc. In any event, as hereinafter stated, a condition to the granting of Respondent's application is the complete severance from, and discontinuance of the use of, the office and office equipment of Saleh, Inc. or any other shipper.[13]

Respondent is not a "dummy forwarder" in the sense that that term is used in connection with freight forwarders. Under Commission decisions [14] and the legislative history [15] rebating has been inextricably connected with a "dummy forwarder". The Commission has defined a "dummy forwarder" as one "organized for the sole purpose of collecting compensation from carriers which would find its way back in whole or in part to the shipper." [16] The record is bare of any evidence to show that the payments made by the carriers to Eastern redounded in any way to the benefit of Saleh, Inc., or in any way offended the rebating provisions of the existing law.[17]

The Congress has listed 10 instances of facts and circumstances whose existence, Congress states, "raise at least an inference of the existence of [rebating] arrangements." As pointed out by Hearing Counsel, five of them exist in this case.[18] Despite the existence of these items, Hearing Counsel do not contend that any of the carrier's payments made to Eastern have found their way back to Saleh, Inc. Nor does the existence of these five items when considered in the light of the entire record constitute sufficient evidence to support a conclusion to the effect that rebating has occurred.

As already noted, the Examiner concluded that applicant should be granted a license provided he (1) immediately ceased collecting unearned brokerage, and (2) forthwith certify that he is attempting and will establish his own freight forwarder office and perform his freight forwarder services independently of the use of the office facilities or

[13] See *Application etc., Morse Shipping Co., etc.*, 8 FMC 472 (1965); *Application etc., Del Mar Shipping Corporation*, etc., 8 FMC 493 (1965).

[14] Docket No. 1192, *Application etc., Wm. V. Cady, etc.*, 8 FMC 352, 358; Docket No. 1201, *Application etc., Morse Shipping Co., etc.*, 8 FMC 472; Docket No. 1196, *Application etc., Del Mar Shipping Corporation*, 8 FMC 493, 496.

[15] Testimony of Thomas E. Stakem, page 836, Hearings before the Special Subcommittee on Freight Forwarders and Brokers, 84th Cong., 1st and 2d sess.; H.R. No. 2939, *supra*, at page 54; H.R. No. 2333, 85th Cong., 2d sess., July 31, 1958; H.R. No. 798, 86th Cong., 1st sess., August 6, 1959; S.R. No. 1682, 86th Cong., 2d sess., June 24, 1960; and H.R. No. 1096, 87th Cong., 1st sess., August 31, 1961.

[16] Docket No. 1192, *supra*, at page 358.

[17] H.R. No. 2939, *supra*, page 54 (2) *Dummy forwarders.*

[18] They are specifically: (a) the members of the family or close relatives of officials of the shipper corporation are appointed to act as forwarders or brokers . . . (c) The shipper and its forwarder share the same offices . . . without reimbursement . . . and (f) the forwarder is a one-man concern . . . (h) The forwarder is designated to collect brokerage on a single account . . . (j) The forwarder is engaged in another business for his primary occupation, which appears to be unrelated to the business of forwarding.

employees of Saleh, Inc., or any other shipper.[19] We agree with these conditions and impose them as our own. However, in application, etc., *Del Mar Shipping Corporation etc.*, 8 F.M.C. 493, we found that an incorporated forwarder which has 50 percent of its stock owned by a shipper in the foreign commerce of the United States was not an independent ocean freight forwarder, notwithstanding the intention of the shipper not to exercise any control over the forwarder. We thus denied applicant Del Mar a license. However, we postponed the effective date of the denial to allow time for divestiture by the shipper of control of the forwarder. Since the applicant does not now qualify for a license, we think this the better procedure. Accordingly, the application here under consideration is denied; however, the effective date of the denial is postponed until August 1, 1967 to enable the applicant to comply with the above conditions, in which event the denial order would not be entered.

Initial Decision of Benjamin A. Theeman, Presiding Examiner [1]

The order in this proceeding served on March 29, 1966, by the Federal Maritime Commission (Commission) on Heskel Saleh doing business as Eastern Forwarding Service (Respondent or Eastern) stated as follows:

> By letter dated February 2, 1966. Heskel Saleh doing business as Eastern Forwarding Service was notified of the Federal Maritime Commission's intent to deny his application for an independent ocean freight forwarder license. The grounds for denial are that Heskel Saleh doing business as Eastern Forwarding Service does not hold himself out to the shipping public to perfrom ocean freight forwarding services and that his close association with P. S. Saleh, Inc., his only shipper client, destroys his independence and thereby precludes him from licensing. Applicant has now requested the opportunity to show at a hearing that denial of the application would be unwarranted.

The hearing was held in New York City pursuant to Sections 22 and 44 of the Shipping Act of 1916, as amended (the Act), to determine whether Eastern qualified for a license pursuant to Sections 1 and 44 of the Act.[2] Respondent appeared and participated in person. Testimony of Respondent was placed in the record mainly through questions by Hearing Counsel. Respondent offered no substantial additional data though given the opportunity to do so.

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[19] The Examiner would have given the applicant until September 1, 1966, see footnote 7, *supra*.

[1] This decision became the decision of the Commission on February 14, 1967.

[2] These sections are contained in Public Law 87-254 enacted September 19, 1961, providing for the licensing of independent ocean freight forwarders. See portion of this decision, infra, headed, Pertinent Provisions of the Act.

From the record as a whole it is found:

1. The Commission's files show that Respondent operated under FMB Registration No. 1715 since July 11, 1958; on January 17, 1962 Respondent filed an application for a forwarder's license pursuant to Section 44(b) of the Act, as amended; the application was given the number contained in the title of this proceeding.[3]

2. Respondent testified that he has read and is familiar with the amendment to the Shipping Act, 1916 (Public Law 87–254) dealing with independent ocean freight forwarders, enacted on September 19, 1961, containing the above-cited sections.

3. Respondent has been carrying on two businesses at 152–08 Jamaica Avenue, New York. One business, under the name of Jamaica Nylon Center, is the operation of a ladies specialty store. The other business, under the name of Eastern Forwarding Service is the subject of this proceeding.

4. Respondent has performed freight forwarding services for only one client, P. S. Saleh, Inc. (hereinafter Saleh, Inc.). Saleh, Inc., engaged in the business of exporting cars and trucks to the Middle East, is wholly owned by Respondent's brother, Philip.

5. Respondent has been performing the limited type of freight forwarding services set forth herein for about 15 years. At an unspecified period, and for about 6 months he was an exporter.

6. Eastern operates from a back room of the specialty store. The equipment consists of a desk, a typewriter, a case (not a filing cabinet) for account books, freight forwarding forms, letterheads and other necessary papers. The telephone is also located there. There is one telephone number for both businesses, but each business is separately listed in the telephone book.

7. The front of the building occupied by Eastern has no indication of any kind that Eastern is an occupant or that freight forwarding services were being offered there. Respondent did no public advertising nor in any other way offered his freight forwarding services to the public.

8. Respondent has no employees. Because Respondent has no copying machine, his daughter does the necessary work on customs declarations, Bills of Lading and the required copies of each.[4] This work is done at the office of Saleh, Inc. and not at the office of Eastern. Up to about seven months ago, Respondent employed a messenger, who was not fully employed but was used "most of the time."

[3] Official notice is taken of the facts contained in this paragraph.

[4] The record contains no information as to the daughter's employment.

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9. Respondent "very rarely" communicates with, or receives a communication from the carrier.

10. The usual procedure by which a shipment of Saleh, Inc. is put aboard a common carrier and the organizations that take part in the movement is as follows:

a. Saleh, Inc. books the cargo with the common carrier.

b. Independent packers prepare the shipment for transportation, prepare the dock receipt, move the cargo either to the pier or the vessel and bring the dock receipt to Saleh, Inc.

c. The particulars of the shipment are transmitted to Respondent usually at the office of Saleh, Inc.

d. On behalf of Respondent, Respondent's daughter prepares customs declarations and Bills of Lading at the place of business of Saleh, Inc. Respondent does not prepare consular documents, if any are needed.

e. Customarily, the "Line Copy" [5] of the Bill of Lading is signed or initialled at the place of business of Saleh, Inc. Respondent did not know who signed or initialled the Line Copy for Eastern.[6]

f. The packers deliver the cargo to the common carrier.

g. Respondent procures the carrier's signature on the Bill of Lading. (No detail is given as to the means by which this step is accomplished).

h. Respondent has insufficient funds to cover freight costs. Saleh, Inc. sends to Respondent a check made out to Respondent in the amount of the freight. Respondent deposits the check in its account and issues a check in the same amount to the common carrier in payment for the freight.

i. Respondent retains one copy of the Bill of Lading and gives two copies to Saleh, Inc.

11. Respondent has a "Line Copy" stamp in his office and another in the office of Saleh, Inc. Customarily, the stamp in the office of Saleh, Inc. is used. Respondent had no recollection when the stamp in his office had last been used.

12. Respondent charges and collects from the common carrier, a commission at the rate of 2½ percent for the shipments booked by Saleh, Inc. At 6 months intervals, Respondent charges and collects from Saleh, Inc. his freight forwarding fee at the rate of $5.00 per shipment. There is no evidence to show that the "rate of $5.00 per shipment" is in any way unreasonable.

13. During 1965, Respondent handled between 80 and 100 shipments. The combined income from carrier commissions and forwarding fees totaled $1,800. This amount represented about 40 percent of Respondent's gross income; the other 60 percent came from his specialty shop.

[5] The Line Copy of the Bill of Lading contains the certification by the freight forwarder of services rendered to the carrier in connection with the shipment as required by Section 510.24(e) of General Order No. 4, as amended, and Section 44(e) of the Act.

[6] There may have been occasions when Respondent was present at the preparation of the "Line Copy". Then he would personally sign or initial it. In Respondent's opinion the signing of the line copy was not important: "the main thing is preparing these two items . . . those that are checked." Respondent is referring to sub-items (1) through (5) of the line copy certification.

Respondent's income from the shop has always been greater than from the forwarding activities and for several years before had been greater than 60 percent.

14. Respondent devotes about 20 percent or less of his time to forwarding activities. Until recently he solicited no business from any shipper other than Saleh, Inc. Within the last few months he has solicited business from three other exporters friendly to him. Two of them indicated that they might give him some forwarding business later in 1966, and requested that he get in touch with them again. They advised Respondent that if he were "in a regular office in [New York] city, that would help a lot", particularly if he gave up the ladies specialty business.

15. There is no evidence that Eastern at any time shared directly with Saleh, Inc. any part of the commission paid by the common carriers, or indirectly by reduced rates for the forwarding services rendered.

POSITIONS OF THE PARTIES

Respondent stated that he intends to devote more of his time to freight forwarding; and to approach other exporters; if he gets some more business he will dispose of his specialty store and open an office in Manhattan, New York. Respondent requests until approximately the end of 1966 to accomplish this plan. Then, if the freight forwarding business does not prosper he offers to consent to the cancellation of his license. Hearing Counsel takes no position in regard to this request.

Hearing Counsel contend that Respondent maintains a "dummy forwarder" operation such as Congress intended to eliminate when it passed Public Law 87-254.

PERTINENT PROVISIONS OF THE ACT

Sec. 1 . . . when used in this Act: . . .

The term "carrying on the business of forwarding" means the dispatching of shipments by any person on behalf of others, by oceangoing common carriers in commerce from the United States, its Territories, or possessions to foreign countries, or between the United States and its Territories or possessions, or between such Territories and possessions, and handling the formalities incident to such shipments.

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

Section 44(a) provides that a person desiring to engage in the carrying on of the business of forwarding must first secure a license from the Commission.

Section 44(b) requires the Commission to issue the license to any qualified applicant who is or will be "fit, willing and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules and regulations of the Commission issued thereunder, and that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936; otherwise such application shall be denied." Also by Section 44(b), the Congress granted so-called "grandfather rights" to those independent ocean freight forwarders who, on the effective date of the Act, were "carrying on the business of forwarding under a registration number issued by the Commission." Such forwarders were allowed to continue in business for a period of 120 days after September 19, 1961 without a license, and if the forwarder applied for a license within the 120 days he could continue to operate "under such regulations as the Commission shall prescribe" until otherwise ordered by the Commission.

Section 44(e) provides in pertinent part:

> (e) A common carrier by water may compensate a person carrying on the business of forwarding to the extent of the value rendered such carrier in connection with any shipment dispatched on behalf of others when, and only when, such person is licensed hereunder and has performed with respect to such shipment the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for, such cargo, and at least two of the following services:
>
> (1) The coordination of the movement of the cargo to shipside;
>
> (2) The preparation and processing of the ocean bill of lading;
>
> (3) The preparation and processing of dock receipts or delivery orders;
>
> (4) The preparation and processing of consular documents or export declarations;
>
> (5) The payment of the ocean freight charges on such shipments:
>
> *Provided, however,* . . . Before any such compensation is paid to or received by any person carrying on the business of forwarding, such person shall, if he is qualified under the provisions of this paragraph to receive such compensation, certify in writing to the common carrier by water by which the shipment was dispatched that he is licensed by the Federal Maritime Commission as an independent ocean freight forwarder and that he performed the above specified services with respect to such shipment. Such carrier shall be entitled to rely on such certification unless it knows that the certification is incorrect.

Discussion

It is clear from the foregoing that Respondent for the past 15 years has been "carrying on the business of freight forwarding" in a circum-

scribed manner limited to a few of the services usually performed by freight forwarders.[7] There appears to be no question that Respondent is "fit, willing, and able properly to carry on the business of forwarding" as required by the statute. Hearing Counsel does not contend to the contrary. However, there are certain circumstances under which Respondent has carried on its forwarding business that must be rectified in order that his application for a license may be properly granted.

Respondent, as to the shipments of Saleh, Inc., has not and does not perform "with respect to such shipment[s] the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for, such cargo," as required by Section 44(e). Despite this non-performance, Respondent has been billing the carrier for commission and receiving payment from the carrier. It is this type of unearned payment (the legislative history calls it "unearned brokerage" or "automatic unearned brokerage fees") that Section 44(e) was enacted specifically to eliminate.[8] The receipt of such unearned payments is improper under Section 44(e). Respondent will be required to refrain from requesting or receiving such payments from carriers unless he actually performs those services set forth in and otherwise complies with Section 44(e) as prerequisite to such payment.[9]

The record shows that Respondent has been dependent upon Saleh, Inc. for certain office equipment and accommodations in order to complete the limited freight forwarding services that it performs. The record does not show that Saleh, Inc. has exerted any control over Respondent, nor is there sufficient evidence in the record to support a finding that Respondent is shipper connected. Nevertheless, this type of operation is not consistent with the concept of an "independent

[7] For a listing of the divers services performed by freight forwarders, see General Order 4, 46 CFR Sec. 510.2(c); *United States* v. *American Union Transport Co.*, 327 U.S. 437 (1946); *N. Y. Foreign Freight Bureau Assn.* v. *F.M.C.*, 337 F. 2d 289, 292 (1965); Docket No. 765/831 *Freight Forwarder Investigation, etc.*, 6 FMB 327, 334/5.

[8] See particularly House Report No. 2939, 84th Congress, 2d sess., July 26, 1956, page 54, paragraph (2) Unearned brokerage, page 55, paragraph (8), *Is remedial action required in connection with the Shipping Act?*

[9] Section 44(e) refers to a "licensed" forwarder. It is applicable to forwarders holding "grandfather rights" by the following series of steps. Section 44(b) sets forth that the "grandfather rights" may be continued "under such regulations as the Commission shall prescribe." The Commission issued a regulation on May 1, 1963, as Amendment No. 1 to General Order 4. Section 510.21(a) of Title 46 CFR contains the following definition:

§ 510.21 Definitions.

(a) The term "licensee" means any person licensed by the Commission as an independent ocean freight forwarder, or any independent ocean freight forwarder who, on September 19, 1961, was carrying on the business of freight forwarding under a valid registration number issued by the Commission, or its predecessors, who filed an application for such a license (Form FMC–18) on or before January 17, 1962, and whose application has not been denied.

ocean freight forwarder" as contemplated by the statute. Such arrangements may easily lead to control of the forwarder by the shipper. Respondent has stated that he intends to open an office in downtown Manhattan and to devote full time to his forwarding business. It is assumed that Respondent will cease using the office and office equipment of Saleh, Inc. In any event, as hereinafter stated, a condition to the granting of Respondent's application is the complete severance from, and discontinuance of the use of, the office and office equipment of Saleh, Inc. or any other shipper.[10]

Respondent is not a "dummy forwarder" in the sense that that term is used in connection with freight forwarders. Under Commission decisions[11] and the legislative history [12] rebating has been inextricably connected with a "dummy forwarder". The Commission has defined a "dummy forwarder" as one "organized for the sole purpose of collecting compensation from carriers which would find its way back in whole or in part to the shipper".[13] The record is bare of any evidence to show that the payments made by the carriers to Eastern redounded in any way to the benefit of Saleh, Inc., or in any way offended the rebating provisions of the existing law.[14]

The Congress has listed 10 instances of facts and circumstances whose existence, Congress states, "raise at least an inference of the existence of [rebating] arrangements." As pointed out by Hearing Counsel five of them exist in this case.[15] Despite the existence of these items, Hearing Counsel does not contend that any of the carrier's payments made to Eastern have found their way back to Saleh, Inc. Nor does the existence of these five items when considered in the light of the entire record constitute sufficient evidence to support a conclusion to the effect that rebating has occurred.

The Commission's Order herein and Hearing Counsel make a point of the fact that Respondent "does not hold its services out to the pub-

[10] See *Application etc., Morse Shipping Co., etc.,* 8 FMC 472 (1965); *Application etc., Del Mar Shipping Corporation, etc.,* 8 FMC 493 (1965).

[11] Docket No. 1182, *Application etc., Wm. V. Cady, etc.,* 8 FMC 352, 358; Docket No. 1201, *Application etc., Morse Shipping Co., etc.,* 8 FMC 472; Docket No. 1196, *Application etc., Del Mar Shipping Corporation,* 8 FMC 493, 496.

[12] Testimony of Thomas E. Stakem, page 836, Hearings before the Special Subcommittee on Freight Forwarders and Brokers, 84th Cong., 1st and 2d sess.; H.R. No. 2939, *supra,* at page 54; H.R. No. 2333, 85th Cong., 2d sess., July 31, 1958; H.R. No. 798, 86th Cong., 1st sess., August 6, 1959; S.R. No. 1682, 86th Cong., 2d sess., June 24, 1960; and H.R. No. 1096, 87th Cong., 1st sess., August 31, 1961.

[13] Docket No. 1196, *supra,* at page 358.

[14] H.R. No. 2939, *supra,* page 54 (2) *Dummy forwarders.*

[15] They are specifically: (a) the members of the family or close relatives of officials of the shipper corporation are appointed to act as forwarders or brokers . . . (c) The shipper and its forwarder share the same offices . . . without reimbursement . . . and (f) the forwarder is a one-man concern . . . (h) The forwarder is designated to collect brokerage on a single account . . . (j) The forwarder is engaged in another business for his primary occupation, which appears to be unrelated to the business of forwarding.

lic." It is indicated that this lack is a cause for denial of Respondent's application. No source for this requirement is given. No statute, regulation or case is either cited [16] or referenced. Absent such basis, this requirement is not considered sufficient cause to deny the application. In any event, Respondent has stated that he intends to close his specialty shop if the forwarding business warrants, open an office for freight forwarding in a building in downtown Manhattan, and has already solicited other clients than Saleh, Inc. These actions proposed and past show that Respondent is attempting to perform services for more than one client; and may be considered an attempt to comply with the demand, even though not required, that "he hold himself out to the public."

CONCLUSION

Section 44 of the Act is a licensing statute. Like other licensing statutes it should be approached with a liberal attitude to the end that licenses may be granted to qualified applicants. *Application for Freight Forwarders License—Dixie Forwarding Co., Inc.*, 7 FMC 109, 122, 167 (1965). If the Respondent refrains from receiving payment from carriers for unearned commissions, and severs his office connections with the establishment of Saleh, Inc., the Respondent would come within the definition of an independent freight forwarder contained in Section 1 of the Act. The application will therefore be granted subject,[17] however, to the following conditions:[18]

a. Respondent immediately cease from billing carriers for freight forwarding services not rendered to carriers by Respondent and cease accepting payment from them for such unperformed services.

b. Respondent shall (1) forthwith certify to the Commission that he is attempting to and will establish his own freight forwarding office and perform his freight forwarder's services independently of the use of the office facilities or employees of Saleh, Inc. or any other shipper; and (2) establish said independent office not later than September 1, 1966.[19]

BENJAMIN A. THEEMAN,
Presiding Examiner.

WASHINGTON, D.C., *June 22, 1966.*

[16] It is noted that in Docket No. 1201, *Morse Shipping Co., supra,* the Bureau of Domestic Regulation and the freight forwarder stipulated in an agreement "(e) Morse expresses the intention to hold herself out to the shipping public as an independent ocean freight forwarder and actively solicit shipper clients in addition to Freiberg and its affiliates." No more is said.

[17] Subject also, of course, to the regulations of the Commission prescribed for freight forwarders.

[18] See *Dixie Forwarding Co., Inc., Morse Shipping Co.* and *Del Mar Shipping Corporation, supra,* for similar action by the Commission.

[19] This time is considered adequate in view of the fact that the Public Law 87–254 became effective September 19, 1961, and Respondent first considered the establishment of a Manhattan office in early 1966.

REMAND OF PROCEEDING TO EXAMINER

This proceeding is before us on exceptions of Hearing Counsel to the Initial Decision of Benjamin A. Theeman in which the Examiner granted applicant a license subject to the following conditions:

> a. Respondent (applicant) immediately cease from billing carriers for freight forwarding services not rendered to carriers by Respondent and cease accepting payment from them for such unperformed services.
>
> b. Respondent shall (1) forthwith certify to the Commission that he is attempting to and will establish his own freight forwarding office and perform his freight forwarder's services independently of the use of the office facilities or employees of Saleh Inc., or any other shipper; and (2) establish said independent office not later than September 1, 1966.

As we read their exceptions, Hearing Counsel except to granting applicant a license on the grounds that applicant is not ". . . qualified in terms of sections 1 and 44 of the Shipping Act, 1916, as amended". The order instituting this proceeding alleged but two grounds for denying applicant a license. They were:

> . . . that Heskel Saleh doing business as Eastern Forwarding Service does not hold himself out to the shipping public to perform ocean freight forwarding services and that his close association with P. S. Saleh, Inc., his only shipper client, destroys his independence and thereby precludes him from licensing . . .

While the transcript of hearing in this proceeding demonstrates that Hearing Counsel's concern with applicant's technical competence and ability to engage in the business of forwarding is not unwarranted, a denial of applicant's license on this ground would, in our view, deprive the applicant of the notice of "the matters of fact and law asserted" to which he is entitled by section 5(a) of the Administrative Procedure Act. Therefore, in order that applicant may have an opportunity to demonstrate on the record that he possesses sufficient technical competence and ability to qualify as a licensed freight forwarder under sections 1 and 44 of the Act, we will amend the order instituting this proceeding to include the issue of applicant's technical competence, and remand the proceeding to the Examiner for a further hearing on this issue.

Therefore, it is ordered, That this proceeding be and hereby is remanded to the Examiner in order that he may determine whether applicant possesses sufficient technical competence and ability to qualify as a licensed independent ocean freight forwarder.

It is further ordered, That the first ordering paragraph of the Commission's order served March 29, 1966, in Docket No. 66–17 be deleted, and the following paragraph substituted therefor:

Therefore, it is ordered, pursuant to Sections 22 and 44 of the Shipping Act, 1916 (46 U.S.C. 831, 841b), That a proceeding is hereby instituted to determine whether applicant is or will be an independent

ocean freight forwarder as defined in the Act, and whether applicant possesses sufficient technical competence and ability to qualify as a licensed independent ocean freight forwarder, or otherwise qualifies for a license pursuant to Sections 1 and 44 of the Shipping Act, 1916 (46 U.S.C. 801, 841b).

SUPPLEMENTAL INITIAL DECISION OF BENJAMIN A. THEEMAN, PRESIDING EXAMINER

On August 26, 1966, the Commission remanded this proceeding to the Examiner to determine whether applicant possesses sufficient technical competence and ability to qualify as a licensed independent ocean freight forwarder. This supplemental decision results.

On June 22, 1966, the Examiner in his Initial Decision granted applicant a license subject to the regulations of the Commission prescribed for freight forwarders and the two following conditions:

a. Respondent (applicant) immediately cease from billing carriers for freight forwarding services not rendered to carriers by Respondent and cease accepting payment from them for such unperformed services.

b. Respondent shall (1) forthwith certify to the Commission that he is attempting to and will establish his own freight forwarding office and perform his freight forwarder's service independently of the use of the office facilities or employees of Saleh Inc., or any other shipper; and (2) establish said independent office not later than September 1, 1966.

Hearing Counsel filed exceptions to the Initial Decision that gave rise to this remand. In the remand, the Commission specified that the exceptions brought into question applicant's "technical competence and ability"; pointed out that these grounds were not listed in the order initiating this proceeding; and stated that a denial of application on the ground of incompetence would deprive the applicant of notice to which he is entitled under Section 5(a) of the Administrative Procedure Act.[1]

The Examiner duly set a hearing on remand for October 10, 1966 in New York City.

On October 7, 1966, Hearing Counsel submitted to the Examiner (by covering memorandum with copy to applicant) a memorandum dated October 6, 1966 signed by Robert G. Drew, Chief, Division of Freight Forwarders, Federal Maritime Commission. The memorandum set forth facts brought out by Mr. Drew's interview with the applicant concerning the latter's technical competence. Based thereon, Mr. Drew stated in his memorandum that applicant possessed the necessary technical competence.

Hearing Counsel, in their covering memorandum, requested that the Drew memorandum be received in evidence as an exhibit in lieu of the

[1] Now Sec. 554(b) of Title 5 U.S.C.

hearing; and stated that this action was not meant to imply that Hearing Counsel had in any way receded from the positions already taken in respect to the other issues in this proceeding.

In view of Hearing Counsel's action the October 10, 1966 hearing was cancelled.

By order dated October 11, 1966 applicant was given through October 24, 1966 to comment on the receipt in evidence of the Drew memorandum, or to request a further heading. Applicant made no response. Accordingly, the Drew memorandum is received in evidence as Exhibit No. 4.

The parties were given an opportunity to file briefs with regard to the issue raised by the remand. None did so.

The Drew memorandum details the examination made into applicant's technical competence and shows that he has been and is capable of carrying on the business of ocean freight forwarding for others.[2] Therefore, on the record as a whole it is concluded that applicant possesses sufficient technical competence and ability to qualify as a licensed independent ocean foreight forwarder; subject to compliance with the various conditions of the Initial Decision set forth in the second paragraph of this Supplemental Decision.

Accordingly, the granting of the application subject to the conditions set forth in the Initial Decision of June 22, 1966 is confirmed.

BENJAMIN A. THEEMAN,
Presiding Examiner.

WASHINGTON, D.C.,
November 1, 1966.

DENIAL OF APPLICATION AND DISCONTINUANCE OF PROCEEDING

In its Report served February 15, 1967, the Commission postponed the effective date of the denial of the application herein, in order to permit applicant to establish his own office and perform forwarder services independently of Saleh, Inc., or any other shipper.

Applicant has informed the Commission that he has decided to discontinue his forwarding activities. Accordingly,

It is ordered, That the application is denied and this proceeding is discontinued.

By the Commission.

THOMAS LISI,
Secretary.

[2] See page 7 of the Initial Decision in this proceeding where the Examiner found "that the Respondent . . . 'has been carrying on the business of freight forwarding' in a circumscribed manner limited to a few of the services usually performed by freight forwarders."

FEDERAL MARITIME COMMISSION

DOCKET NO. 66-15

IN THE MATTER OF AGREEMENT 9448—JOINT AGREEMENT BETWEEN FIVE CONFERENCES IN THE NORTH ATLANTIC OUTBOUND/EUROPEAN TRADE

INITIAL DECISION ADOPTED

February 17, 1967

Agreement No. 9448, as modified herein creates a cooperative working arrangement under which five member steamship conferences share office space and services and meet together to discuss mutual problems in specified areas. As modified, said agreement is approved conditioned upon the filing of evidence of acceptance by the member conferences.

Burton H. White and *Elliott B. Nixon* for respondents.

Donald J. Brunner, *Samuel B. Nemirow*, and *Roger A. McShea III*, Hearing Counsel.

REPORT

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

This is an investigation on our own motion to determine *inter alia* whether a cooperative working arrangement (No. 9448) filed for approval under section 15 of the Shipping Act, 1916, should be approved, disapproved, or modified.

In his initial decision, Examiner E. Robert Seaver concluded that the subject agreement—even as amended in the course of the hearings—could not be approved under the criteria of section 15 and the cases thereunder because the agreement was too general and the Commission could not know with sufficient particularity the activities that might be engaged in under its terms. We agree.

The respondent conferences appealed from this initial decision and Hearing Counsel generally supported the position of the Examiner in his initial decision.[1]

[1] Hearing Counsel take the position that the agreement which was the subject matter of the investigation may not be amended during the course of the hearings without our amending the order of investigation. We reject this view. It is entirely proper for an Examiner to encourage modifications which might reasonably lead to an agreement so long as such modifications are within the scope of the original inquiry.

We have considered the exceptions of respondents and find that they are essentially a reargument of issues which were fully briefed and treated by the Examiner in his initial decision. Upon careful examination of the record, and the briefs and argument of counsel, we conclude that the Examiner's disposition of these issues was well founded and proper.

We depart from the Examiner's ultimate conclusion only to the extent that on the basis of the record in this case, we have modified Agreement No. 9448 and, as modified, given it our approval conditioned upon respondents' acceptance within 60 days. These modifications specify the particular areas in which the member conferences are authorized to meet and discuss mutual problems. These correspond to the types of matters which the Conference Chairman testified are likely to be the subject of discussion.

We note that the agreement, as modified, does not authorize the parties to agree on anything (except housekeeping arrangements). Moreover, it limits discussions to four specified areas. If the parties desire to broaden the scope of the agreement, we have incorporated simple amendatory procedures which can initiate such action.

Accordingly, except as noted herein, we adopt the Examiner's initial decision as our own and make it a part hereof.

An appropriate Order will be entered.

By the Commission.

INITIAL DECISION OF E. ROBERT SEAVER, PRESIDING EXAMINER [2]

Five steamship conferences,[3] covering outbound trades between American North Atlantic ports on the one hand, and various ranges of ports in Western Europe, on the other, each of which operates under an individual agreement previously approved by the Commission under section 15 of the Shipping Act, 1916, filed Agreement No. 9448 for approval under section 15. The names of the conferences, set out in the margin, reflect the respective ranges of ports they serve. The agreement would establish a cooperative working arrangement between the five conferences. As originally submitted, the proposed agreement recited simply that the members would meet, consult, and

[2] See Commission report in Docket No. 66-15, served February 24, 1967.

[3] North Atlantic Baltic Freight Conference (7670), North Atlantic Continental Freight Conference (9214), North Atlantic French Atlantic Freight Conference (7770), Chairman Barnett; North Atlantic Mediterranean Freight Conference (7980), Chairman MacNeil; North Atlantic United Kingdom Freight Conference (7100), Chairman Gage.

confer together regarding "common problems and issue joint reports and circulars relating to such problems."

The proposed agreement contained no limits on the scope of the matters that could be discussed, nor did it designate with particularity the matters that would be discussed. It contained no requirement for reporting activities under the agreement to the Commission. The Commission was concerned with the absence of any specific statement, in the agreement, of its objects and purposes so on March 24, 1966, it issued an order of investigation and hearing under the authority of sections 15 and 22 of the Shipping Act, to determine:

(1) whether the agreement should be approved, disapproved, or modified by the Commission, pursuant to section 15; (2) whether there are any unfiled agreements between the carriers which are being unlawfully implemented; and (3) whether the agreement submitted for approval is true and complete.

Section 15 requires every common carrier by water, or other person subject to the Act, to file with the Commission a true copy, or, if oral, a true and complete memorandum of every agreement with another such carrier or person which covers certain named anticompetitive activities or provides for an "exclusive, preferential, or cooperative working arrangement." The term "agreement" is defined so as to include understandings, conferences, and other arrangements.

The statute requires the Commission to disapprove, cancel or modify any agreement that it finds to be unjustly discriminatory or unfair as between the interests named in the statute, to operate to the detriment of the commerce of the United States, or to be contrary to the public interest or in violation of the Act. It requires the Commission to approve all such agreements that do not offend these statutory tests and exempts approved agreements from the antitrust laws.

A prehearing conference and hearing were held before the undersigned and, after an exchange of briefs, oral statements of counsel were heard by the Examiner, pursuant to the agreement of the parties. No shippers, carriers, or others who might have an interest in the agreement took part in the hearing or participated in any other way. Only the Chairmen of the respondent Conferences testified at the hearing. The facts, as disclosed by this testimony and the exhibits which were made part of the record, are as follows.

The five conferences share office space at No. 17 Battery Place, New York City. For some 60 years, a single chairman served all of these conferences and they were loosely connected together under F.M.C. Agreement No. 12, entered into in 1904 between the steamship lines that made up the membership of the respective conferences. That agreement was approved by a predecessor agency of the Commission

many years ago and had as its purpose "the consideration and adjustment of all non-competitive matters appertaining to their general interest, which shall simplify the conduct of the business, and the relations with shippers and their representatives, with connecting carriers, and with others." That agreement, unlike the one at hand, contemplated that the member lines would reach agreement with respect to those subjects, not merely discuss them.

In March, 1964, the respondent conferences decided that each should have greater autonomy and that the job of chairman of all of them was too burdensome for one man. A separate chairman was appointed for the North Atlantic Mediterranean Freight Conference and one for the North Atlantic United Kingdom Freight Conference. A single chairman continues to serve the other three. At the request of the members to Agreement No. 12, that agreement was cancelled by the Commission in August 1965. Agreement No. 9448 is sought as a partial substitute for Agreement No. 12.

Each of the respondent conferences has always held its own separate meetings and will continue to do so. Each adopts rates and publishes and files its own tariff. Each files its own separate minutes of its meetings with the Commission. Each has its own staff of employees, with minor exceptions such as a telephone operator who serves all of the respondents. The five member conferences serve different ranges of ports in Europe and the United Kingdom. For this reason, there is no direct competition between the members of one conference and the members of the other. A degree of competition between the groups exists insofar as a particular area in the hinterlands of Europe may be served by more than one range of European ports and, thus, is served by more than one of the conferences. Competition is also possible through transshipment, of course, but the extent of such competition was not shown. However, the discussions and activities under the agreement are not intended to have anything to do with this competition nor with competition from carriers outside the conferences. The matters to be discussed are those where the interests of the members coincide. The specific anticompetitive activities enumerated in section 15, including the discussion of rates, are explicitly excluded from the coverage of the agreement. The members do not seek authority to "agree" on anything—merely to confer. The agreement is considered by its proponents to be a cooperative working arrangement and since that is one of the types of agreement covered by section 15, they feel that some of the contemplated activities may require Commission approval in accordance with the statute. They seek exemption from the antitrust laws, through such approval, even though they feel that

there is some doubt as to the applicability of those laws to the contemplated activities.

The Conference Chairmen testified that, as far as they can visualize at present, the type of matters that will, or may, be brought up for discussion, are:

(1) Legal problems affecting all five conferences. Since all five employ the same law firm, they prefer to confer with their lawyers with respect to such common problems at one time, rather than at five separate consultations. (2) Problems arising from new or proposed legislation, regulations, court decisions. (3) Provisions of due bills, bills of lading, tariff rules, forwarder rules, container rules, shipping documents. (4) Innovations and changing conditions in ocean transport, such as containerization of cargo. (5) Issuance of joint reports and circulars and disseminating material such as speeches of Commission Members to the members of the proposed agreement.

It is conceded by the parties and found and concluded that the joint discussion of some of these matters falls within the coverage of section 15, and therefore within the jurisdiction of the Commission, because the agreement constitutes a cooperative working arrangement within the meaning of the statute. Hearing Counsel objected to approval of the agreement as initially submitted on the grounds that it was so general that the Commission would not know, with sufficient particularity, the activities that would be engaged in under the terms of the agreement. The Examiner shared this view. The difficulty of drafting an agreement that would specify every type of matter that might be discussed and every problem of mutual concern to the conferences that might be considered was recognized. The parties to the proceeding negotiated together to see if language could be found that would be agreeable to all concerned. The Examiner made an effort to assist in reaching this common ground because he believed then (and continues to believe) that the problem is not so much that the proposed activities must be prohibited, but merely that they are not described adequately. The objections to the form of the agreement resulted in revision in the agreement by the respondents so as to set forth those matters that will *not* be the subject of the interconference discussions. These exceptions cover every type of activity described in section 15 except "cooperative working agreements". The revision also attempts to describe a little more precisely the matters that will be discussed. However, the agreement is still "open-ended" because the members feel that they cannot presently anticipate and set forth every subject that may require discussion at some later date.

The revised form, as finally submitted for approval, is attached hereto as an appendix. This form is identified as Exhibit 10 in the record. Hearing Counsel continue to object to approval of the agree-

ment, in its revised form, on the ground that the agreement still does not define the conduct that will be permitted with as much particularity as is required by section 15.

Discussions and Conclusions

As originally submitted, the agreement contained no requirement for reporting activities undertaken thereunder to the Commission. Respondents were of the view that such reporting was not required, since no decisions or agreements on the subjects to be taken up were contemplated. As finally submitted, however, the agreement has been revised so as to require the keeping of minutes and submission of reports to the Commission of the meetings and the matters taken up and discussed. This provision satisfies the requirements of General Order 18 and would afford the necessary means for the Commission to maintain a continuing inspection of the activities under the agreement.

Section 15 of the Act forbids the approval of agreements between conferences unless each conference retains the right of independent action. This requirement is satisfied by the third paragraph of the agreement involved here, which provides such a reservation. Section 15 also requires that conferences adopt and maintain reasonable procedures for promptly and fairly dealing with shipper requests and complaints. The individual agreements and procedures of the member conferences establish the machinery to handle such requests and complaints. This will fulfill the statutory requirement since the dealings with shippers will be through individual conferences. Similarly, the question of self-policing, required by section 15, was not raised. This, too, can be left to the individual conferences. Since the parties to the agreement apparently will not make joint decisions, at present there is nothing to police.

It is seen, then, that the crux of the case involves the question whether the Commission can or should approve an agreement under section 15 that states, in essence, what activities the parties will not engage in but does not set out, in detail, the activities that *will* be engaged in. The question is probably not one of earthshaking importance to respondents, nor in the over-all scheme of things. However, no cases have been decided on this rather puzzling point, so considerable care has been taken not only to see that respondents' proposal receives full and fair consideration but also to see that the result of this proceeding will not establish an unworkable precedent.

Both Hearing Counsel and the Examiner held the tentative view, after the evidence was in, briefs were filed, and oral argument was

heard, that the revised agreement was about as specific as you could make it and still accomplish the desires of the respondents and that the agreement was probably approvable. However, when Hearing Counsel submitted their final position, they urged that the agreement cannot be approved. Respondents are adamant in the view that a simple agreement to discuss mutual problems has to be approved. After further deliberation, and in the light of the Commission policy reflected in the recent decision in Docket No. 66-27, *infra*, the Examiner shares the view of Hearing Counsel, although not entirely for the reason advanced by them.

Respondents argue that in Docket No. 883—*Unapproved Section 15 Agreements—West Coast South American Trade*, 7 F.M.C. 22 (1961), the Commission found that there was not a violation of section 15 where two conferences got together, with no approved section 15 agreement, and discussed mutual problems—even rates. Respondents state that they submitted this "extremely simple" agreement for approval out of an abundance of caution. They argue that agreements must be approved unless they are found to violate the specific standards of section 15. *Aktiebolaget Svenska Amerika L.* v. *Federal Maritime Commission*, 351 F.2d 756 (1965); *Alcoa S.S. Co.* v. *Cia. Anonima Venezolana*, 7 F.M.C. 345 (1962). Respondents also cite the rule that agreements should not be disapproved "on the bare possibility that they could violate the Act. At the least there ought to be substantial likelihood of such conduct." *Agreement 849%—Alaskan Trade*, 7 F.M.C. 511 (1963). They allege that there has been no showing that the proposed activities under the agreement will be discriminatory, detrimental to commerce, or contrary to the public interest, and that it therefore must be approved. They point out that the Commission can disapprove the agreement at any time in the future if the activities under the agreement go beyond those that are authorized, citing the *Agreement 849%* decision, *supra*.

Respondents urge, further, that the anticompetitive aspects (if any) of their proposed agreement do not approach the extent of those practiced in trades where all of the carriers are members of one conference serving all of the ranges of ports, such as the conference that covers the entire trade between the Pacific Coast and Europe. They say, in effect, that if the Commission's aim is to minimize the inroads on antitrust principles, it should permit this kind of "discussion" agreement, rather than risk driving the conference carriers all into one super-conference in the North Atlantic.

Hearing Counsel argue that agreements approved under section 15 must be precise in the description of the authorized activities in order

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that the Congressional policy underlying the statute may work. That policy contemplates continuous administrative supervision over those shipping activities exempted from the antitrust laws. They cite *Anglo-Canadian Shipping Co.* v. *United States*, 264 F.2d 405 (1959). They also cite cases holding that the Commission must have the means of obtaining information and data if it is to properly carry out this supervision; e.g. *Unapproved Section 15 Agreements*, *supra;* and *Mediterranean Pools Investigation*, 9 F.M.C. 264, Docket No. 1212, decided January 19, 1966. The latter point appears to be of somewhat limited relevance.

The thrust of Hearing Counsel's argument is that the standard for approval of section 15 agreements is "based on the contents of the agreement." *Joint Agreement Between Far East Conference and Pacific Westbound Conference*, 8 F.M.C. 553, 561 (1965). In that case, the Commission held that an agreement must be sufficiently precise to permit any interested party to ascertain how the agreement is to work by reading it, "without resorting to inquiries of the parties . . ." In short, Hearing Counsel say that the proposed agreement here is so general in its terms that *anything* could be taken up and considered by the conferences (except those things specifically excluded, of course). The testimony of the conference chairmen bear this out.

The arguments of respondents are, at first blush, most persuasive. Upon closer scrutiny, though, it is seen that their arguments support the legality under section 15 of the things their witnesses said respondents intended to do under the agreement. This is not the question. The question is the legality of the Commission giving section 15 approval (and antitrust immunity) to anything the respondents might decide to do under the broad wording of the agreement. The Commission simply does not know, at this time, the extent and identity of the areas of mutual concern these carriers might confer about. Yet the Commission is under a mandate, under section 15, to know what it is approving at the time it does so. It is not enough that the agreement can be thrown out later if the activities prove to be beyond the pale. For example, if the members discuss vessel utilization, free space, and the like, this could lead to the spacing of the sailings of all the carriers, either by design or simply because the minds of the members were similarly influenced by the discussions. If circulars are issued jointly, this in itself would tend to indicate that there was some agreement as to their content. In turn, the content of such circulars could influence or affect concerted action. These are examples of many subjects, presently unknown to the Commission, that might be taken up by the members with results that are either anticompetitive or which would have other

consequences, in transportation and commerce, of direct concern to the Commission and the public.

In addition to the reasons given by Hearing Counsel, approval of the agreement must be denied because it runs counter to the policy of the Commission evidenced in Docket No. 66–27—*The Persian Gulf Outward Freight Conference*, 10 F.M.C. 61, decided since this instant proceeding was submitted for decision. In that case, the Commission decided that a conference cannot establish joint freight rates on cargoes transported on foreign flag vessels that are lower than those applicable to cargoes carried on American flag ships under the terms of an approved section 15 agreement authorizing its members to establish joint rates, charges, and practices. That decision, and other court and Commission cases cited therein, evidence a growing policy to restrict activities under approved section 15 agreements closely to those specified in the agreement. This policy excludes many practices that are claimed to be "interstitial", or included in the "cover of authority" of the underlying section 15 agreement.

This line of cases provides a strong analogy to the present situation, for if conferences are to be held strictly to the activities explicitly authorized in their agreements, then great care must be taken when the agreements are approved to see that (1) the Commission knows precisely what it is approving, and (2) the agreements set forth clearly, and in sufficient detail to apprise the public, just what activities will be undertaken. It is manifest that this requirement of clarity in the agreement will inure to the benefit of the conference concerned.

Finally, the respondents correctly state that section 15 requires approval of proposed agreements unless they offend the statutory tests. The agreement proposed by respondents fails to comply with these standards, however, on several counts. It would be contrary to the public interest to approve an agreement whose coverage is so vague that the public cannot ascertain the coverage by reading the agreement. The approval of such an agreement would deprive the public of the protection, afforded by statute, of the Commission's surveillance over conference activities. The blank check that would be afforded by the approval of this agreement would simply fail to protect the public interest and the flow of commerce in the manner contemplated by Congress in the enactment of section 15.

Furthermore, the proposed agreement is not the "true and complete" agreement of the parties thereto. The conference witnesses admitted that even they do not know what subjects they might get into as time goes on. It is patently incomplete because it does not adequately describe the activities that will be pursued under its terms. Written,

as well as oral, agreements must be "complete" as well as "true", as evidenced by the Commission's Order of Investigation in this very proceeding. For this reason and those previously discussed, the agreement cannot be approved.

If, as a result of this decision, the respondent conferences decide that they will seek to join together in a "super-conference", the issues incident to the application for approval of such a proposal would be decided at that time on their own merits. Those issues are not present here.

There is no contention that there are any unfiled agreements between the respondents that are being unlawfully implemented and the record herein would not support a finding that such agreements exist.

Other contentions of the parties are either irrelevant, in view of the decision herein, or they are not supported by substantial, reliable, or probative evidence.

Ultimate Conclusion

1. Agreement No. 9448 is hereby disapproved pursuant to section 15, Shipping Act, 1916, for the reasons set forth in this decision.

2. Agreement No. 9448 is not the true and complete agreement among respondents.

3. There are no unfiled agreements between the carriers which are being unlawfully implemented.

An appropriate order will be entered.

(Signed) E. Robert Seaver,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

DOCKET No. 66–15

IN THE MATTER OF AGREEMENT 9448—JOINT AGREEMENT BETWEEN FIVE CONFERENCES IN THE NORTH ATLANTIC OUTBOUND/EUROPEAN TRADE

ORDER

The Federal Maritime Commission instituted this proceeding to determine whether Agreement No. 9448 should be approved pursuant to section 15 of the Shipping Act, 1916, and the Commission having this date made and entered its Report adopting the Examiner's Initial Decision (except as to disapproval of the subject agreement), which Report and Initial Decision are made a part hereof by reference.

Therefore it is ordered, That Agreement No. 9448 be and the same hereby is approved pursuant to section 15 of the Shipping Act, 1916, on the condition that it be modified by substituting the language contained in Appendix B hereto.

It is further ordered, That the approval herein ordered with respect to Agreement No. 9448 shall become effective at such time as the Federal Maritime Commission receives written notice that the parties have agreed to the foregoing modification except that such approval shall become null and void unless the agreement so modified is filed with the Commission not later than sixty (60) days from the date of service of this order.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

APPENDIX A

F.M.C. DOCKET No. 66–15

APPENDIX TO INITIAL DECISION

AGREEMENT No. F.M.C. 9448

The undersigned Conferences, by their respective Chairmen thereunto duly authorized, hereby enter into a cooperative working agreement in consideration of the mutual benefits resulting therefrom. It is the intention of the parties, through their respective Chairmen or other representatives, to confer and meet with one another in respect of common problems where their interests coincide and issue joint reports and circulars relating to such problems. Since it is not possible to foresee in detail all the subjects that will be discussed under the terms of this Agreement, they cannot be enumerated here.

Nothing herein shall authorize or permit the parties hereto to directly or indirectly consult, meet or confer with one another with respect to fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; or limiting or regulating in any way the volume or character of freight or passenger traffic to be carried.

Each Conference shall always retain the right of independent action, and any action taken by a member of this Agreement on matters discussed or conferred upon shall be taken solely by the individual Conferences and reported upon by them in accordance with the terms of their approved agreements.

The parties hereto shall within 30 days file with the Federal Maritime Commission a report of each meeting held pursuant to this Agreement, describing all matters that were discussed or taken up as to which one of the Chairmen shall certify as to its accuracy and completeness. Copies of all reports or circulars, in whatever form, issued under this Agreement shall be retained by the parties for at least two years.

This Agreement shall amend and supersede the Agreement between the undersigned Conferences filed with the Federal Maritime Commission on or about April 15, 1965. This Agreement shall not become effective until it is approved by the Federal Maritime Commission in accordance with section 15 of the Shipping Act, 1916.

Dated: NEW YORK, N.Y., *July 18, 1966.*

APPENDIX B

AGREEMENT No. F.M.C. 9448

The undersigned Conferences, by their respective Chairmen thereunto duly authorized, hereby enter into a cooperative working agreement in consideration of the mutual benefits resulting therefrom and agree as follows:

1. The member conferences are authorized to participate jointly in the lease of office space and in connection therewith to utilize common telephone, mailroom, receptionist, duplicating, photostat, storage, library and other similar routine office services which can better be accomplished jointly and shall apportion the expenses for the operation of such joint services and facilities as may be mutually agreed upon.

2. The member conferences through their respective Chairmen or other duly designated representatives are authorized to confer and meet with one another with respect to the following common problems where their interests coincide and issue joint reports and circulars relating to such problems.

(a) Common legal problems;

(b) Problems arising from proposed legislation and Court decisions;

(c) Standardization of terminology and provisions in bills of lading and other documents commonly used in connection with ocean shipping;

(d) Technological developments and changes affecting ocean transportation such as containerization.

3. This agreement may be amended upon a majority vote of its member conferences provided, however, that no amendment shall become effective unless and until it has been approved by the Federal Maritime Commission pursuant to section 15 of the Shipping Act, 1916.

4. Nothing herein shall authorize or permit the parties hereto to directly or indirectly consult, meet or confer with one another with respect to fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages, controlling regulating, preventing or destroying competition; pooling or apportioning earnings, losses or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; or limiting or regulating any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement, except as authorized in Paragraphs 1 and 2 of this Agreement.

5. Each conference shall always retain the right of independent action, and any action taken by a member of this Agreement on matters discussed or conferred upon shall be taken solely by the individual conferences and reported upon by them in accordance with the terms of their approved agreements.

6. The parties hereto shall within 30 days after each meeting file with the Federal Maritime Commission a report of such meeting held pursuant to this Agreement, describing all matters that were discussed or taken up as to which one of the Chairmen shall certify as to its accuracy and completeness. Copies of all reports or circulars, in whatever form, issued under this Agreement shall be retained by the parties for at least two years and copies thereof shall be filed with the Commission in the same manner as reports required by this paragraph.

This Agreement shall amend and supersede the Agreement between the undersigned Conferences filed with the Federal Maritime Commission on or about April 5, 1965.

DOCKET No. 66–15

ON PETITION FOR RECONSIDERATION

In our Report and Order in this docket served on February 24, 1967, we approved Agreement 9448 on the condition that it be modified as set forth in Appendix B to the Report.

Respondents have filed an amended agreement which differs from that specified in our Order in two respects:

1. It does not contain paragraph 1 which relates to joint participation in office services;
2. It does not contain the last two lines of paragraph 6 which relate to the filing of reports and circulars with the Commission.

In an accompanying letter respondents' attorney argued that agreements relating to joint office sharing arrangements and the pooling of secretarial services have not, in the past, been considered as subject to the requirements of section 15, even though they might literally be deemed "cooperative working arrangements." See: *Volkswagenwerk, A.G.* v. *Marine Terminals Corporation, et al.*, 9 F.M.C. 77, 82 (1965). Counsel also contends that the requirement of filing circulars and reports goes beyond the terms of General Order 18. We have treated this letter and the amended agreement as a petition for reconsideration, and so advised counsel for the respective parties. Hearing Counsel, in their reply, state that they have no objection to the proposed changes.

Upon consideration of respondents' petition for reconsideration and Hearing Counsel's reply thereto, we conclude that the points raised in said petition are well founded.

Accordingly, IT IS ORDERED:

1. That respondents' petition be and the same hereby is granted; and

2. That the amended Agreement No. F.M.C. 9448 (a copy of which is annexed hereto and made a part hereof by reference) be and the same hereby is approved pursuant to our authority under section 15 of the Shipping Act, 1916.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

AGREEMENT NO. F.M.C. 9448

The undersigned Conferences, by their respective Chairmen thereunto duly authorized, hereby enter into a cooperative working agree-

ment in consideration of the mutual benefits resulting therefrom and agree as follows:

1. The member Conferences through their respective Chairmen or other duly designated representatives are authorized to confer and meet with one another with respect to the following common problems where their interests coincide and issue joint reports and circulars relating to such problems:

(a) Common legal problems;

(b) Problems arising from proposed legislation and Court decisions;

(c) Standardization of terminology and provisions in bills of lading and other documents commonly used in connection with ocean shipping;

(d) Technological developments and changes affecting ocean transportation such as containerization.

2. This agreement may be amended upon a majority vote of its member Conferences provided, however, that no amendment shall become effective unless and until it has been approved by the Federal Maritime Commission pursuant to section 15 of the Shipping Act, 1916.

3. Nothing herein shall authorize or permit the parties hereto to directly or indirectly consult, meet or confer with one another with respect to fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing or destroying competition; pooling or apportioning earnings, losses or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; or limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement, except as authorized in Paragraph 1 of this Agreement.

4. Each Conference shall always retain the right of independent action, and any action taken by a member of this Agreement on matters discussed or conferred upon shall be taken solely by the individual Conferences and reported upon by them in accordance with the terms of their approved agreements.

5. The parties hereto shall within 30 days after each meeting file with the Federal Maritime Commission a report of such meeting held pursuant to this Agreement, describing all matters that were discussed or taken up as to which one of the Chairmen shall certify as to its accuracy and completeness. Copies of all reports or circulars, in whatever form, issued under this Agreement shall be retained by the parties for at least 2 years.

This Agreement shall amend and supersede the Agreement between the undersigned Conferences filed with the Federal Maritime Commission on or about April 5, 1965. ●

FEDERAL MARITIME COMMISSION

DOCKET NO. 66-33

AGREEMENT NO. 8005-4: MODIFICATION OF NEW YORK TERMINAL CONFERENCE AGREEMENT

ADOPTION OF INITIAL DECISION AND ORDER OF APPROVAL

Adopted February 28, 1967

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

This proceeding is before us for review on our own motion. No exceptions were filed to the Initial Decision and we decided to review that decision, because we disagree with the Examiner's ultimate conclusions numbered 2 and 3:

In his decision, the Examiner quite correctly states that the rules and regulations by which the authority to charge demurrage on export cargo is to be implemented are not an issue in this proceeding. Therefore, we would substitute the following for said ultimate conclusions:

2. The said Agreement will not make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic, or subject any of these to any undue or unreasonable prejudice or disadvantage in violation of section 16 First of the Act.

3. Neither will the said Agreement constitute an unjust or unreasonable practice as contemplated by section 17 of the Act.

In all other respects we find the Examiner's decision, which is attached hereto and made a part hereof, well founded and proper and, with the deletion of the words "when implemented" from ultimate conclusions numbered 2 and 3, we hereby adopt it as our own. Therefore,

It is ordered, That Agreement No. 8005-4, as it appears in Appendix A, is hereby approved, and this proceeding is hereby discontinued.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
Secretary.

DOCKET NO. 66–33

AGREEMENT NO. 8005–4; MODIFICATION OF NEW YORK TERMINAL CONFERENCE AGREEMENT

Agreement No. 8005–4, which modifies the New York Terminal Conference Agreement so as to permit the charging of demurrage and the establishment of free time on export cargoes, will not violate sections 15, 16, or 17 of the Shipping Act, 1916, and it is approved.

Joseph A. Byrne for New York Terminal Conference, respondent.

James M. Henderson and *Douglas W. Binns* for Port of New York Authority, petitioner.

Elkan Turk, Jr., for New York Committee of Far East Lines, petitioner.

Philip G. Kraemer for Maryland Port Authority.

Blair P. Wakefield for Virginia State Port Authority.

Roger A. McShea, III, appeared as Hearing Counsel; *Donald J. Brunner*, Chief, Office of Hearing Counsel, F.M.C., on the brief.

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

The purpose of this investigation is to determine whether Agreement No. 8005–4 between the members of the New York Terminal Conference, which has been submitted to the Commission for approval under section 15 of the Shipping Act, 1916 (the Act) would violate the provisions of sections 15, 16, or 17 of the Act and whether the agreement should be approved under section 15. The Commission has jurisdiction to conduct the investigation under sections 15 and 22 of the Act.

The New York Terminal Conference operates pursuant to Agreement No. 8005, as amended, which authorizes its members to establish and maintain joint rates, rules, and regulations applicable to truck loading and unloading at piers in New York harbor and vicinity and to fix free-time and demurrage rates and practices on import cargoes in trades not otherwise covered by an approved section 15 carrier agreement.[2] The Conference consists of marine terminal operators, contract stevedores, and common carriers by water who furnish marine terminal facilities and services in the Port of New York and vicinity.

As originally submitted for approval, Agreement No. 8005–4 would have modified the basic agreement by providing for the following:

1. Clarification of the Conference's ratemaking authority for loading and unloading lighters;

2. Ratemaking authority covering free time and demurrage on export cargo;

[1] See Commission Order in Docket 66–33, supra, initial decision adopted Feb. 28, 1967.

[2] The Conference has not yet established free-time rules nor fixed demurrage rates because, in New York, this has been done by the carriers. It is anticipated that as to the export cargoes the terminals *will* take this action, rather than the carriers.

3. A change in language with respect to free time and demurrage on import cargo;

4. Ratemaking authority for sorting import cargo; and

5. Preservation of the right of any member to charge rates different than those in the Conference tariffs (except the truck loading and unloading tariff).

Protests against approval of the proposed agreement were filed by the Port of New York Authority and by the New York Committee of Inward Far East Lines.[3] The Authority and the Committee were named as petitioners in the order of investigation in accordance with Rule 3(a) of the Commission's Rules of Practice and Procedure. The Maryland Port Authority and the Virgina State Port Authority intervened in the proceeding. Their interest in the proceeding was largely based on a desire to be sure that the approval of the proposed agreement would not place the Port of New York in a competitive advantage.

The subject matter involved in the first modification mentioned above was considered by the Commission in Docket No. 1153—*Truck and Lighter Loading and Unloading Practices in New York Harbor*, decision served May 16, 1966. The Conference therefore dropped that proposal from Agreement No. 8005–4 in the course of this proceeding. In addition, the Conference abandoned its request for approval of the fourth and fifth modifications set out above because these modifications met with considerable objection from other parties in the proceeding and apparently were not of as great importance to the Conference as the remaining two items.

This left as practically the sole issue in the proceeding the question whether the modification which would grant to the Conference rule- and rate-making authority over free time and demurrage on export cargo is lawful under the Act and whether it should be approved by the Commission under section 15. The remaining modification, being the third one set out above, is incidental to the requested authority to establish joint tariff provisions covering free time and demurrage on export cargo.

So many of the issues having been eliminated by the respondents, counsel for the petitioners and the interveners expressed the view at a prehearing conference that if the Conference could amend the remaining two proposals to clarify certain provisions the protests might be withdrawn. Hearing Counsel also expressed the view that the remaining issues might be disposed of amicably but he desired to complete a canvass of shippers and associations of shippers in the New

[3] The Committee is a group of carriers serving various inbound trades from the Orient naming free time and demurrage on inbound cargo at New York harbor operating under the authority of FMC Agreement No. 6015.

York area to be sure that the ratemaking authority covering free time and demurrage on exports would not raise protests among and problems for the shippers. Counsel for all of the parties felt that it would be possible and desirable to avoid an evidentiary hearing and the Examiner agreed. It was therefore decided that efforts to dispose of the proceeding in this way would be pursued and that a second prehearing conference would be held.

At the second prehearing conference Hearing Counsel reported that the associations of shippers and the individual shippers with whom he had communicated had not raised protests to the proposed modification, as amended in the course of the proceeding, and that Hearing Counsel did not object to approval of the proposed modifications. In the meantime, counsel for the parties had agreed upon revisions of the language of the proposed modifications and counsel for all of the remaining parties withdrew their objection to approval of the agreement.[4] It remained incumbent upon the Examiner to review the proposed modification, as amended, and make recommendations to the Commission regarding its approvability. Hearing Counsel suggested that in view of the circumstances the most expeditious way of accomplishing this would be through the issuance of an initial decision after briefs were filed by the parties expressing their position and their views. The other parties and the Examiners agreed to this course.

Discussion and Conclusions

The facts incident to this initial decision are not extensive. They were brought out by counsel for the parties in the course of the prehearing conferences and in their memoranda submitted to the Examiner. No issue has been raised as to these facts by any of the parties. The statutory requirements and prohibitions involved in this proceeding are as follows:

1. Section 15 of the Act requires that the Commission disapprove, cancel, or modify the proposed modifications if they are found to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of the Shipping Act. Agreement No. 8005–4 will not violate these standards.

2. Section 16 First of the Act makes it unlawful for any common carrier by water, or other person subject to the Act, either alone or in conjunction with any other person to make or give any undue or unreasonable preference or advantage to any particular person, local-

[4] The modifications, in their final form, are set out in Appendix A, attached.

ity, or description of traffic, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage. The Agreement will not bring about such a preference, advantage, prejudice or disadvantage.

3. Section 17 requires that every such carrier and every other person subject to the Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property and authorizes the Commission to determine, prescribe, and order enforced a just and reasonable regulation or practice whenever it finds that any such regulation or practice adopted by a carrier or other person subject to the Act is unjust or unreasonable. The modifications under consideration will not, ipso facto, constitute unreasonable regulations or practices.

It has long been an approved practice for marine terminals or ocean carriers to assess a charge for demurrage against a shipper who leaves his cargo at the terminal for a period beyond the "free time" established by the terminal.[5] In New York Harbor, such charges are assessed by the carriers in connection with the transportation of import cargo. However, no such charges are assessed in New York by anyone in connection with the storage at the terminal of export cargo. However, such cargoes are frequently allowed to remain on the piers for extended periods of time, for the benefit of the shipper, prior to export shipment. This occurs, for example, when a shipper desires to assemble several parcels at the pier for shipment under a single bill of lading. This is referred to as the "hold-on-dock" practice.

It is apparent that these practices inevitably bring about a disparate treatment as between import and export cargo and that it very likely could lead to discriminatory treatment as to different shippers of export cargo. That is, in the absence of an expressed period of free time in the tariffs of the terminal conference or the carriers, the cargo of one shipper will remain in the terminal for a greater length of time, without charge, than the cargo of other shippers. This is a valuable right to the shipper, of course, and results in an expense to the terminal operator.

Piers and terminals are constructed for use as the transient repository of goods rather than a longtime storage shed. The valuable working space on the piers is restricted if the owners of cargo, either inbound or outbound, are allowed to leave the cargo on the pier indefinitely. In addition to its paying the terminal operator for a valu-

[5] See *Storage of Import Property*, 1 U.S.M.C. 676 (Docket No. 221; 1937); *Free Time and Demurrage Charges at New York*, 3 U.S.M.C. 89 (Docket No. 659; 1948); *Practices at San Francisco Terminals*, 2 U.S.M.C. 588 (Docket No. 555; 1941); and General Order 8, Part I, 46 C.F.R. 526.1.

able service, demurrage is permitted, indeed required, by the Commission in order to discourage the owners from leaving their cargoes on the pier for excessive periods of time. Export cargo congests the piers just as much as import and there is an equal need to discourage shippers leaving their export cargo on the piers for extended periods of time.

The Port of New York is unique in that the carrier, rather than the terminal operator, designates the free time and assesses the demurrage charges on import cargo. New York is also the only major port, except Philadelphia, where there is no free-time rule and no charge for demurrage or storage on export cargoes. Official notice is taken of the facts stated in this paragraph, which are based, in part, on a sampling of the tariffs on file with the Commission.

It cannot be concluded that the proposed authority to charge demurrage on export cargo would result in any undue or unreasonable preference, advantage, prejudice, or disadvantage in violation of section 16 First. On the contrary, it is designed to eliminate such results and can be expected to do so if properly administered. Similarly, the regulations and practices contemplated by the proposed modifications are more just and reasonable, within the meaning of section 17, than the present system which allows unlimited free time to certain export shippers. The detailed method of implementing this authority is not in issue in this proceeding, of course. These methods, including the extent of free time and the level of demurrage that will be set forth in respondents' tariffs on file with the Commission, will be subject to continuing Commission surveillance under the provisions of the Act. They will have to meet the standards and will be subject continuously to the requirements and prohibitions of sections 15, 16, and 17.

Neither the petitioners, the interveners nor Hearing Counsel suggest that the proposed modifications would be unjustly discriminatory or unfair as between the interests named in section 15 or that they would operate to the detriment of our foreign commerce or be contrary to the public interest or in violation of the Act. The Examiner knows of no reason to suspect that the modifications would violate these standards of section 15 of the Act. As stated earlier, the practices contemplated in the proposed modifications will be more likely to eliminate discrimination.

The Maryland Port Authority stated on the record that it had no objection to approval of the Agreement. However, in the memorandum which it filed with the Examiner the Authority advanced certain observations that deserve comment here even though, as the Authority states, "* * * it can be argued that this goes far beyond the scope of this proceeding, * * *."

The Authority states, in effect, that rules of general applicability are needed in this area of demurrage on export cargoes. It points out that, unlike the importer, the exporter does not always have control over the length of time his cargo reposes on the pier before it is loaded on the vessel and suggests that perhaps the ship should pay the bill if it causes the delay. Clarification of the status of terminal operators generally, in relation to ship operators, is needed, the Authority suggests, in order to prevent competitive advantages to particular carriers who allow or require the shipper to bring his cargo to the pier far in advance of the actual sailing. It also suggests that the fact that carriers operate many of the terminals aggravates the competitive situation arising out of free storage of export cargo. The Authority suggests that this raises a need for rules requiring separate tariffs covering terminal charges.

These are real problems that deserve careful attention. An evidentiary rulemaking proceeding in this area might be advisable, as suggested, when the Commission's schedule and its facilities permit.[6] In the meantime, however, these considerations do not require or even permit the disapproval of Agreement No. 8005–4. It must be assumed that by ordering this investigation the Commission decided that, at least for the present, the proposed agreement involved here is to be considered, ad hoc, on its own merits, rather than awaiting the adoption of rules of general applicability in this area. As stated earlier, there has been no showing nor even a suggestion that 8005–4 will violate the standards of section 15.

It is evident, however, that until general rules are established considerable caution will have to be exercised by respondent in adopting fair standards for assessing demurrage charges and establishing free time on export cargo, within the framework of the guidelines announced in the cases cited in footnote 5, above, and General Order 8, Part I. The Commission staff will use diligence, of course, in reviewing the tariffs to see that the particular standards adopted by respondents are fair and that they are clearly set forth in respondents' tariffs. Their review will also insure that the general guidelines heretofore adopted by the Commission and its predecessors are complied with. In this way, the dangers feared by the Maryland Port Authority will be minimized.

Modification No. 3, described above, merely makes it clear that the Conference's tariff filing authority will not conflict with such authority possessed by the steamship conferences. It is incidental to the principal modification which grants the authority to adopt tariff charges and rules incident to demurrage and free time on export cargoes. It has

[6] Docket No. 965 is a nonevidentiary rulemaking proceeding in this general area. When completed, that proceeding may help settle some of the questions raised by the Maryland Port Authority even though it is concerned directly with only the Pacific coast ports.

not been questioned by the parties and no reason is perceived as to why it should be disapproved. The portion enclosed in brackets (see Appendix A) has been added by the Examiner in order that the provision will accurately express the intention of the parties. Also, without the change no demurrage could be charged by the terminals if a carrier had on file a tariff of rates that did not include demurrage. This would result in unjust discrimination between shippers, and was simply not intended by the parties.

Ultimate Conclusion

1. Agreement No. 8005–4, as set forth in Appendix A, will not violate the standards of section 15 of the Act.

2. The said Agreement, when implemented, will not make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic, or subject any of these to any undue or unreasonable prejudice or disadvantage in violation of section 16 First of the Act.

3. Neither will the said Agreement, when implemented, constitute an unjust or unreasonable practice as contemplated by section 17 of the Act.

4. An appropriate order will be entered approving Agreement No. 8005–4 and discontinuing this proceeding.

E. Robert Seaver,
Presiding Examiner.

APPENDIX A

REVISED COPY OF FEDERAL MARITIME COMMISSION AGREEMENT No. 8005–4

Agreement entered into at the City of New York, New York, on the 31st day of January, 1964, and modified on the 30th day of June, 1966, by and between the undersigned, parties to Federal Maritime Commission Agreement No. 8005.

WITNESSETH:

Whereas, at meetings duly held on the 31st day of January, 1964 and the 30th day of June, 1966, at the office of the New York Terminal Conference in the City of New York, the parties hereto considered and voted in favor of certain amendments to said Agreement No. 8005, as hereinafter set forth.

NOW, THEREFORE, the parties do hereby mutually agree as follows:

First: Clause One, as amended, is hereby further amended to read as follows:

1. The parties shall establish, publish and maintain *a tariff and/or** tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices with respect to the services of

Loading and unloading of waterborne freight on to and from trucks, lighters and barges:

Storage of waterborne import *and export* freight *on pier facilities, including the fixing of free time and demurrage thereon, provided, however, that no tariff or tariffs so issued shall include trades covered by tariffs now or hereafter published and filed by, or pursuant to agreements among, common carriers by water, [insofar as the latter tariffs cover free time and demurrage;]**

Second: Except to the extent as amended hereby, said Agreement No. 8005 shall remain in full force and effect as heretofore approved pursuant to Section 15 of the Shipping Act, 1916.

Third: This Agreement shall become effective at such time as it shall be approved by the Federal Maritime Commission pursuant to Section 15 of the Shipping Act, 1916.

Filed on behalf of the following parties comprising the membership of the New York Terminal Conference:

American Export-Isbrandtsen Lines, Inc.
American Stevedores, Inc.
Bay Ridge Operating Co., Inc.
Chilean Line Inc.
Grace Line Inc.
International Terminal Operating Co., Inc.
Maher Stevedoring Co., Inc.
Marra Bros., Inc.
Maude/James, Inc.
John W. McGrath Corporation.
Nacirema Operating Co., Inc.
Northeast Marine Terminal Co., Inc.
Norwegian America Line.
Pioneer Terminal Corporation.
Pittston Stevedoring Corporation.
Reliable Marine Service Co., Inc.
Universal Terminal & Stevedoring Corporation.

*NOTE.—*Underlined* portions designate amended provisions of Agreement 8005.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65-52

JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE AND TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN—MODIFICATION OF DUAL RATE CONTRACT

Decided March 23, 1967

Permission is granted Conferences to (a) modify the prompt release clause; (b) add a false declaration clause; and (c) delete certain references to the Federal Maritime Commission, in their approved dual rate contract form.

Petition to make further modifications, deletions and additions denied.

Elkan Turk, Jr. for respondents.

Donald J. Brunner, Howard A. Levy, and *E. Duncan Hamner, Jr.,* Hearing Counsel.

REPORT

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

This proceeding arises out of a petition filed by the Japan-Atlantic and Gulf Freight Conference and the Trans-Pacific Freight Conference of Japan (Conferences), pursuant to section 14b of the Shipping Act, 1916, requesting permission to modify certain provisions of their Commission-approved dual rate contracts. We instituted this investigation to determine (1) whether departures from the contract language approved for use by respondent Conferences in *Exclusive Patronage Contracts*, 8 F.M.C. 337 (1964), are necessitated by conditions in the trade and, if so, (2) whether the changes proposed meet the standards of section 14b of the act and can be permitted pursuant to that section.

In his Initial Decision, Examiner Herbert K. Greer approved certain changes to respondents' approved contract form, namely (1) use of an "all-affiliates" clause, (2) modification of the present prompt release

clause, and (3) addition of a false declaration clause. All other requested changes, modifications and deletions were denied by the Examiner. This proceeding is now before us on exceptions to the Initial Decision.

Respondent Conferences are engaged in the inbound trade to the United States from the Far East, principally from Japan.

On October 30, 1964, the Commission issued its Report and Order in Dockets No. 1078 and 1080—*Exclusive Patronage Contracts*, *supra*—granting permission to the respondent Conferences to institute a dual rate contract system in their respective trades and approving for use by them a form of dual rate contract. Since the form of contract, which was approved, was different from that which had been submitted by them, the Conferences submitted the approved form to committees for study. After several months of study, these committees concluded that the dual rate contract form approved by the Commission would not be adaptable to conditions existing in the trade and recommended that these contract forms not be utilized. On the basis of these findings and recommendations, respondents' approved contract form has never been put into effect. The Conferences now seek permission allowing them to make the modifications to the approved form which they deem necessary to create contract systems which in their view would be effective in their trades. These proposed changes will now be considered.

A. *The Chartered-Vessel Exclusion Clause*

Respondents propose by their present application to delete that provision in their approved contract form which excludes from contract coverage:

> * * * shipments on vessels owned by the Merchant or chartered solely by the Merchant where the term of the charter is for six months or longer, and the chartered vessels are used exclusively for the carriage of the Merchant's commodities.

They contend that there is no need for a charter-exclusion clause in their dual rate contracts in view of the fact that there are no merchant shippers in Japan who own vessels capable of use in trans-Pacific voyages to the United States and no movement of bulk cargo in the trades. They take the position that the principal reason the Commission initially adopted a charter-exclusion clause in *The Dual Rate Cases*, 8 F.M.C. 16, 42 (1964), was to protect the "vested interests" of American shippers who had invested in the construction of vessels or long term charters for the carriage of their products. They maintain that, since there are "no such vested interests in trades here involved to be protected," as there were in *The Dual Rate Cases*, *supra*, "the

economic need for charters of six months' or longer duration is absent."

Respondents explain that, although there is no evidece that any merchants trading from Japan to the United States presently own vessels or are chartering vessels, they fear the inclusion of the charter exclusion in their contracts will be to suggest to the signatory merchants ways to avoid their dual rate contracts. They contend:

> There are a substantial number of vessels arriving in Japan to complete chartered voyages for bulk cargo, and which seek employment from Japan to another point where further tramp cargoes are available. At present, a number of these vessels obtain one-way trip charters to the United States with iron and steel items as their nucleus cargo. There is no need now for merchants to commit themselves any further than to a one-way trip charter. However, the inclusion in the JAGFC and TPFCJ contracts of an exception for cargoes moving on vessels chartered for six months or more would be an invitation to merchants to do what they are not now doing. Although a merchant might lose some flexibility, he could always find other employment for the chartered vessel when a voyage in these trades is not needed.

On the basis of the foregoing, the Conferences conclude that the putting into effect of the contract system will create a "motive for large merchants, whose volume of activities makes it economically feasible for them to indulge in chartering, to seek to obtain an advantage over their less fortunate competitors." In this regard, respondents also allege that Conference representatives have been advised by small shippers that they consider the chartering privilege discriminatory and object to its inclusion in their contracts.

In his Initial Decision, the Examiner found that the respondents had failed to justify the deletion of the charter-exclusion clause prescribed by the Commission in *The Dual Rate Cases*, *supra*. Respondents except to the Examiner's rulings and reargue the same contentions made before the Examiner. We agree with the Examiner's disposition of respondents' contentions. Indeed, we find that the arguments advanced by the Conferences are either grounded on completely erroneous assumptions or totally unsupported on the basis of the record before us.

Although the charter-exclusion clause was not created by statute, but rather arose from an exercise of our authority under section 14b(9) of the Shipping Act, 1916,[1] the legislative history of section 14b makes it abundantly clear that a limited exemption for merchant-owned or chartered vessels was one of the matters which Congress intended that the Commission should deal with in its approval of dual rate systems. In its report on the bill which ultimately became Public Law 87-346, the Senate Committee on Commerce stated:

[1] Section 14b(9) gives us authority to require or permit such other provisions in dual rate contracts as are not inconsistent with section 14b.

A second matter which the Commission should resolve by rule or regulation involves the extent to which, if at all, dual rate contracts should exclude full cargoes which move in shippers' private or chartered vessels. Obviously, unless this question is carefully considered, it is quite possible that one of two things might result: First, large shippers would be able to gain substantial competitive advantage over their smaller competitors; or second, contract shippers could not make fair and legitimate use under certain circumstances of their own or chartered vessels. S. Rept. No. 860, 87th Cong., 1st Sess. (1961), p. 15.

The charter-exclusion clause as finally formulated by the Commission strikes what we believe to be a fair balance between carrier and merchant interests and to be in the best interest of the parties concerned, the public, and the commerce of the United States. *Pacific Westbound Conference—Amendment to Dual Rate Contract*, 9 F.M.C. 403, 409 (1966).

Although the present clause did permit shippers, who already owned or chartered vessels to continue doing so, its "principal justification" was not, as respondents suggest, to protect the "vested interests" of a few American companies who had invested in the construction of their own vessels or had committed themselves to long-term charters of vessels for the carriage of their products. Rather it was the Commission's recognition of the overall philosophy of the Shipping Act, 1916, which prompted it to include into dual rate contracts a clause which accords to merchants the right to engage in bona fide proprietary carriage under reasonable conditions. The philosophy of permitting dual rate contracts under the statute was not to create a complete monopoly for conferences, but rather to assure them a "nucleus" of cargo. Or, as we elaborated in *The Dual Rate Cases*, *supra*, at page 43:

An important purpose of the Shipping Act is to facilitate the flow of commerce, and while it recognizes that a proper conference system can contribute to this end, it does not undertake to give the conference prior claim on all cargoes nor afford the conferences protection from all possible competition. 8 F.M.C. 16, 43 (1964).

It was not then, nor is now our intention, to deny contract-signatories the privilege of chartering vessels merely on the basis of the fact that they are "large merchants, whose volume of activities makes it economically feasible for them to indulge in chartering." [2] This Commission was quite well aware that exclusion from contract coverage of a merchant's goods moving on the merchant's owned or chartered vessels would primarily benefit larger shippers. We also realized, however, that neither the economic philosophy of the United States nor section 14b of the Shipping Act requires that merchants be de-

[2] We advise respondents, as the Examiner did below, to "take note of the possibility that certain shippers could be deterred in entering into dual rate contracts if this privilege was withdrawn."

prived of all normal economies which go along with largeness. *The Dual Rate Cases*, *supra*, at page 42. Indeed, the foreign commerce of the United States benefits by virtue of the economies made available to American merchants.

Respondents' alternate argument that the inclusion of a charter-exclusion clause in their contracts will create a motive for large merchants to engage in either the ownership or the long-term chartering of vessels to the detriment of the stability of the Conferences' rate structure is likewise without merit.[3] Their claim is based exclusively on the fact that vessels now arriving in Japan to complete chartered voyages for bulk cargoes, and seeking some employment from Japan as an alternative to a voyage in ballast, are obtaining *one-way trip* charter to the United States with iron and steel as a nucleus. To conclude therefrom that "conditions exist which would make it easy for merchants to engage in chartering for *six months or longer*" is *non sequitur*. Indeed, it is quite improbable from an economic standpoint that a shipper would, in effect, enter the shipping business. Testimony shows that Japanese shippers operate on a small margin of profit and that it is extremely doubtful that they would want to assume the additional risk of voyage operation. In any event, the Conferences have not produced one iota of substantial evidence to demonstrate that, even if signatory-shippers were to take advantage of the charter-exclusion privilege, they would be adversely affected thereby. See *Pacific Westbound Conference—Amendment to Dual Rate Contract*, 9 F.M.C. 403 (1966).

In light of the foregoing, we find that respondents have failed to sustain their burden of proof. They have failed to show that a deviation from the uniform charter-exclusion clause is necessitated by conditions particular to their trade.

B. *The Affiliates Clause*

By the present application, respondents also propose to delete the affiliates clause approved by the Commission in *Exclusive Patronage*

[3] In this regard, consider what we state in *Pacific Westbound Conference—Amendment to Dual Rate Contract*, 9 F.M.C. 403, 410 (1966), where we had occasion to rule on a contention quite similar to that advanced by respondents above. There, Conference representatives had also voiced fears that, although certain commodities had not yet moved on chartered vessels, it was very likely that they would unless the Conference was allowed to amend the approved charter-exclusion clause. In dismissing this contention, we explained that:

> • • • whether or not there will be further charter movements in the Conference trade cannot be determined from the record and a finding one way or the other would be the product of unalloyed speculation. This Commission has said that the mere possibility that a conference agreement may result in a violation of the Act is insufficient reason to disapprove the agreement [citations omitted]. Likewise, the mere possibility that large traders may utilize the charter-exclusion clause would not justify the granting of the present petition.

Contracts,[4] *supra*, and substitute therefor an "all-affiliates" provision, which would bind *all* affiliates, as well as agents, regardless of whether the contract signatory regularly exercises working control in relation to shipper matters.[5]

Respondents' position is that the present affiliates clause was approved by the Commission with United States business and trading conditions in mind and that there is justification for the proposed modification because substantially different economic and legal relationships are found among enterprises in Japan which sell for export to the United States. These differences were explained in detail by witnesses for respondents.

The Japanese corporate structures were described as "spherical," rather than "pyramidal," as we know them in the United States. Individual companies, much like U.S. corporations, are interrelated into large industrial, financial and commercial groups, not only by stock ownership, but also by interlocking directors and by "management councils." The latter consists of the top management of all the entities of a corporate complex who confer from time to time for the purpose of maintaining overall control and establishing general group policy. One large corporate complex might include various corporations involved in the manufacture of automobiles, chemicals, and electronic products, as well as various real estate, warehousing and banking enterprises.

As a result of these "flexible and fluid" interrelationships, respondents maintain that, in Japan, it would be very difficult to prove the

[4] The affiliate clause approved by us for use by the Conferences reads in pertinent part, as follows:

2. (a) The Merchant shall ship or cause to be shipped all of its ocean shipments moving in the Trade on vessels of the Carriers unless otherwise provided in this agreement.

(b) The term "Merchant" shall include the party signing this Agreement as shipper and any of his parent, subsidiary, or other related companies or entities who may engage in the shipment of commodities in the trade covered by this Agreement and over whom he regularly exercises direction and working control (as distinguished from the possession of the power to exercise such direction and control) in relation to shipping matters, whether the shipments are made by or in the name of the "Merchant," any such related company or entity, or an agent or shipping repesentative acting on their behalf. The names of such related companies and entities, all of whom shall have the unrestricted benefits of this Agreement and be fully bound thereby, are listed at the end of this Agreement. The party signing this Agreement as "Merchant" warrants and represents that the list is true and complete, that he will promptly notify the Carriers in writing of any future changes in the list, and that he has authority to enter into this Agreement on behalf of the said related companies and entities so listed. (Article 2(b) optional.)

This is the same uniform affiliates clause adopted by us in *The Dual Rate Cases*, 8 F.M.C. 16 (1964).

[5] The provision proposed by respondents would provide that:

2. (a) The Merchant shall ship or cause to be shipped exclusively by vessels of the Carriers all goods shipped in the Trade directly or indirectly by the Merchant, and any of its agents, parent, subsidiary, associated or affiliated companies (all of which are hereinafter included in the term, "Merchant").

regular exercise of working control by the contract signatory in relation to shipping matters; that this working control is not regularly exercised by one related company over another but exercised only when deemed necessary by the management counselors who determine group policy.

In his Initial Decision, the Examiner concluded that the present record disclosed circumstances peculiar to respondents' trades which justified a departure from the standard form of affiliates clause adopted by the Commission in *The Dual Rate Cases*, *supra*. Accordingly, he granted respondents permission to use an all-affiliates clause. Hearing Counsel except on the grounds that respondents have failed to demonstrate a necessity for deviation from the standard affiliates clause. We agree.

Respondents' request for an all-affiliates clause has previously been considered by this Commission and denied in *Exclusive Patronage Contracts*, *supra*. In specifically rejecting the very clause which the Conferences again seek to institute, we stated:

> It was abundantly clear * * * that respondents desire the all inclusive affiliates clause as an aid to their policing of the contract. As we pointed out in *The Dual Rate Cases*, "no words in any agreement can assure that the parties will not breach their contract" and that the affiliates clause there—and here—approved "includes a specific provision regarding various subterfuges." In short, the easing of carrier sales effort and the aiding in strict observance of the contract offered by an all inclusive clause, is far outweighed by the legitimate business interests of autonomous subsidiaries or affiliates. 8 F.M.C. 340 (1964).

The Examiner, while cognizant of all the above concluded that:

> * * * findings of fact in such [earlier] proceeding relating to the Japanese "corporate jungle" and the unworkability of the presently approved affiliates clause were not made in the detail permissible on the record in this proceeding.

Hearing Counsel maintain that it is not enough to merely say that that record in the proceding is different or more detailed than the record in Docket Nos. 1078 and 1080, but that it is incumbent on respondents to demonstrate that conditions in the trades have changed since the making of the record in Docket Nos. 1078 and 1080; otherwise this proceeding is in essence a reopening of those dockets. We find considerable merit in Hearing Counsel's objections.

In *Pacific Westbound Conference-Amendment to Dual Rate Contract*, *supra*, at page 409, we emphasized that:

> * * * departures from the clauses prescribed [in *The Dual Rate Cases*] * * * will be allowed to suit "the reasonable commercial needs of a particular trade" *upon a showing by substantial evidence that such a change is needed or warranted.* (Emphasis added).

And we pointed out there that it was "incumbent upon the Conference to come forward with such facts and circumstances peculiar to its trade as would warrant a departure from the uniform clause." While the instant record does admittedly provide more details concerning the nature of corporate relationships in Japan than did the record in the earlier proceeding in Docket Nos. 1078 and 1080, nevertheless, the record in those dockets does sufficiently describe the conditions existing. In sum, there has been no showing that conditions and circumstances in the trades have changed since the making of the record in the earlier proceedings. Any determination that the approved form of contract is "unworkable" and that the "all-affiliates" clause would be easier to enforce is at best a calculated guess.

Hearing Counsel, citing *Pacific Coast European Conference—Exclusive Patronage Contract*, Order on Reconsideration, Docket 1007 (served September 22, 1966), would have us deny the proposed modification for the additional reason that respondents have had no actual operating experience upon which to base the requested relief. Respondents, however, suggest that our decision in *North Atlantic Westbound Freight Association—Dual Rate Contract*, 8 F.M.C. 387, makes it clear that actual experience or operation is not a prerequisite to deviation from the approved form of contract. While our decision here is based on other grounds, actual operating experience, or the lack of it, may or may not be determinative of the disposition of a particular clause in a contract. In the *NAWFA case*, 12 years of operation without a charter-exclusion clause, when coupled with substantial shipper support, justified deviation from the standard contract. In the instant case respondents have had no operating experience under any form of contract and, aside from an unsupported allegation that unspecified small shippers consider the charter-exclusion clause discriminatory, there is nothing in the record which would warrant the proposed deletion. Had they shown by evidence of record that the proposed modification of the all-affiliates clause was in fact warranted, the absence of actual operating experience would not preclude the granting of the requested relief.

Accordingly, we find that the respondents have failed to show that a deviation from the standard affiliates clause in these trades is warranted. Consequently, respondents' request to delete the affiliates clause of their presently approved form of dual rate contract is denied.[6]

[6] Respondents' basic objection to the presently approved affiliates clause, and their justification for the clause they propose, is their conviction that under the former it would be difficult or impossible to prove that a signatory merchant "regularly exercised working control" over the related company. It is clear on the record, however, that respondents' proposed clause would be far less than a panacea to their enforcement problems. In fact, the Conferences are quite obviously aware of the difficulties which would be encountered in determining, under their proposed clause, which affiliates are bound, and

C. *The Suspension Provisions*

Article 10(b) of the Conferences' approved contract presently provides that:

(b) Upon the failure of the Merchant to pay or dispute his liability to pay liquidated damages as herein specified for breach of the contract within thirty (30) days after receipt of notice by registered mail from the Conference that they are due and payable, the Carriers shall suspend the Merchant's rights and obligations under the contract until he pays such damages. *If within thirty (30) days after receipt of such notice the Merchant notifies the Conference by registered mail that he disputes the claim, the Conference shall within thirty (30) days thereafter proceed in accordance with Article 14, to adjudicate its claim for damages, and if it does not do so, said claim shall be forever barred. If the adjudication is in the Conference's favor, and the damages are not paid within thirty (30) days after the adjudication becomes final, the Conference shall suspend the Merchant's rights and obligations under the contract until he pays the damages. No suspension shall abrogate any cause of action which shall have arisen prior to the suspension. Payment of damages shall automatically terminate suspension. The Conference shall notify the Federal Maritime Commission of each suspension and of each termination of suspension, within ten (10) days after the event.*

Respondents now proposed to delete the italicized portion of this article. Respondents' objection to this part of the clause is the provision forever barring damage claims where the Conference does not proceed to adjudication within 30 days after receipt of notice from the merchant that he disputes the claim, and the requirement of notification to the Commission of each suspension and termination of suspension.

The "forever barred" provision is deemed objectionable on two counts. First, respondents complain that it leaves insufficient time to resolve the dispute without recourse to adjudication. The Conferences make much of the fact that recourse to litigation is not as common in Japan as it is in the United States and that more time to settle disputes would serve to avoid legal proceedings and the expense involved.[7]

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the difficulties of enforcing the contract. Witnesses for respondents testified that the practice of other conferences in Japan is to require a signatory merchant's affiliate to also execute a contract in order to obtain the contract rate. They anticipate that respondent Conferences would also follow this practice. As Hearing Counsel have stated:

> One may logically ask why have such a clause at all if it is still necessary to require each affiliate to execute the contract before he is allowed the contract rate?

The Examiner also conceded that:

> There are inconsistencies in respondents' position. It is difficult to understand how any affiliates clause could be workable in an industrial system where it is very difficult for a signatory to list all affiliates. If a parent company has no control over a subsidiary in relation to shipping matters, it is questionable whether they would be bound by the parent's entering into a shipping contract. The Commission has often commented on the fact that no contract language will prevent avoidance of a contract obligation. (I.D. 9).

[7] Witnesses testified that in Japan the objective is to settle disputes without the necessity of direct confrontation between the parties, for Japanese businessmen do not like to be in the position of having been declared publicly to be wrong.

Secondly, respondents question the Commission's right to establish periods of limitations other than those established by the Federal Government or the legislatures of the several states, even with respect to contracts which are entered into principally in the United States. They urge that, in any event, the Commission is without authority to impose a period of limitations with respect to contracts to be entered into predominantly in a "friendly foreign nation."

Moreover, the Conferences take the position that notifications to the Commission in cases of suspensions and terminations of suspensions "serve no practical purpose" since the likelihood that Japanese merchants will be counting on the vigilance of the Commission for protection of their interests is rather small.[8]

The Examiner concluded that no valid reason appeared on this record for deletion of all but the first sentence of Article 10(b) of respondents' approved contract form and, accordingly denied the request. Respondents except to a majority of the Examiner's findings and conclusions and reargue many of the points advanced below. They request, however, that in the event their contentions be again rejected that the period of time in Article 10(b) (line 10) allowed the Conference to proceed to arbitration once the merchant notifies the Conferences that he disputes the claim, be enlarged from thirty (30) to ninety (90) days. We find that the Examiner's denial of respondents' request to delete all but the first sentence of their approved suspension clause was proper and well founded. Respondents' alternative request for an enlargement of time from 30 to 90 days in which to proceed to arbitration is granted.

Respondents have offered no evidence of anything unusual about these trades which would necessitate a departure from the standard suspension clause. Their objection to the "forever barred" provision on the grounds that it leaves insufficient time to resolve the dispute without recourse to adjudication falls of its own weight since it is the Conferences themselves which set things in motion and control the time periods. They can negotiate for as much time as they want before they send the *initial* notice to the merchant that damages are due. Thus, as Hearing Counsel has pointed out, they can "be prepared to expect a notice of dispute, more or less at their convenience."

Respondents' second objection to the forever barred provision on the grounds that we are without authority to set "periods" of limitations is equally untenable. As Hearing Counsel have pointed out, the Commission is not compelling anyone to abide by a "period" of

[8] The Conferences believe that any disputes regarding the propriety of a suspension will most likely arise in Japan between one of the Conferences and a Japanese merchant.

limitation other than that established by the law of the jurisdiction. Since the suspension provisions were made optional by the Commission in *The Dual Rate Cases*, *supra*, no conference is compelled to adopt it. If a conference does, however, choose to have its form of contract contain an express provision giving it the right to suspend a merchant's rights and obligations under the contract for failure to pay adjudged damages, that conference must use the provision prescribed by the Commission unless it can show that circumstances particular to the conference trade necessitate another clause, or none at all.

Section 14b of the Shipping Act, 1916, permits the use of dual rate contracts but only if the Commission finds that certain safeguards have been met. In adopting this course, Congress, in a sense, reaffirmed the earlier philosophy of section 15 of the Shipping Act which, by authorizing supervised competition—restricting agreements among carriers—recognizes that there is some justification in the waterborne commerce for making exception to our normal policies. *The Dual Rate Cases*, 8 F.M.C. 16 at 24 (1964). A uniform suspension provision was one of the safeguards which Congress advocated and which the Commission adopted to insure against punitive suspensions or terminations by the conferences of merchants' contracts.

In *The Dual Rate Cases*, the Commission was mindful of the desire of Congress that "insofar as was possible, dual rate contracts should be standard or uniform." Therefore, we required that those conferences desiring suspension provisions employ the clause prescribed by us. This, it is felt would greatly simplify the problem of shippers regarding the meaning and application of contract provisions. Public interest also dictated that there be an end to adjudication. Therefore, in prescribing a period of time within which a conference must proceed to arbitration, the Commission insured that submission of the claim to legal process would not be delayed an inordinate amount of time. Respondent has failed to demonstrate that our reasoning in *The Dual Rate Cases* is inapplicable here.

We also reject respondents' contention that notification of suspensions to the Commission serves no useful purpose and should not be required. As we pointed out earlier, section 14b, like section 15 of the Shipping Act, is a limited legislative grant of an antitrust exemption. In granting carriers permission to engage in certain forms of activity which would otherwise be unlawful under the antitrust laws, Congress, however, made it clear that these exemptions must be accompanied by effective governmental supervision and control. Thus, this Commission must:

> * * * 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. Inc.* v. *United States*, 211 F. 2d 51 at 57 (D.C. Cir. 1954).

The requirement that notification of suspensions be given to the Commission serves the very useful and necessary function of providing us with information vital to our duty of administering the Shipping Act effectively. It enables us to determine whether conferences are abiding by the terms of their contracts or whether they are engaging in any activities that might be detrimental to the commerce of the United States or contrary to the public interest.

On the basis of all the foregoing, we find that respondents have failed to support their claim that deletion of all but the first sentence of their presently approved suspension clause is necessitated by the conditions in their trades. Respondents, however, are free to enlarge from 30 to 90 days the period of time within which they must proceed to arbitration. The Uniform Merchant's Contract appended to our General Order 19, 31 F.R. 12523, 12526, allows a conference to use anywhere between a minimum period of 30 days and a maximum period of 90 days "without further permission from the Commission." Accordingly, no further discussion is required.

D. *The Prompt Release Clause*

Respondents propose to delete the "prompt release clause" of their presently approved contract [9] and substitute therefore, the following language:

5. The Merchant has the option of selecting any of the vessels operated by the Carriers, subject to agreement with the particular Carrier as to quantity, and agrees to make application for space as early as possible before the selected vessel's advertised sailing date. In the event that the Merchant is unable to secure space on the selected vessel, he may request the assistance of the Conference in securing space on the selected vessel or on a vessel sailing from the chosen port at or about the same time as the selected vessel. If within three (3) business days of such request, the Conference fails to secure space on a vessel scheduled to sail within fifteen (15) days of the date of the request from the Merchant as

[9] Article 5 of the presently approved dual rate contract provides:

5. The Merchant shall have the option of selecting any of the vessels operated by any of the Carriers. The Merchant agrees to request space with the carrier he desires as early as practicable and not less than five (5) days before the earliest date he wishes to have the cargo loaded aboard the vessel. The Merchant shall not be obligated to select a Conference carrier or carriers for any shipment which the Carrier cannot suitably accommodate within a ten (10) calendar day period requested by the Merchant for loading; provided, however, that the Merchant shall first promptly notify the Conference of such unavailability of space and if within two (2) business days after receipt of such notice, the Conference shall not have advised the Merchant that his entire shipment can be suitably accommodated by a vessel or vessels (if the merchant by contract is obligated to make the shipment on a single vessel, suitable space shall be provided on a single vessel) of the Carriers within said ten (10) calendar day period, the Merchant shall be free with respect to such shipment to secure space elsewhere within a reasonable time.

aforesaid, the Merchant shall be at liberty to secure such space on any vessel whatsoever.

The Conferences' position is that the 2-day period presently allowed the Conferences to advise a shipper that a Conference vessel can accommodate the shipment, when the one selected by him is unavailable, is unreasonably short because of time differences between Japan and the cities in Europe and the United States. Since the executives of various member lines are located in the United States or Europe, respondents fear that it would experience difficulty, particularly on weekends, in contacting the home office of the European and U.S. member lines on such short notice. Respondents also point out that Japanese holidays are different than holidays elsewhere; Saturday is a working day in Japan but not customarily in the United States.

The Examiner pointed out the *The Dual Rate Cases* did not prescribe a definite form for the prompt release clause and that contract forms approved by the Commission show prompt release clauses which vary in many respects other than in stating time periods and concluded therefore that permission should be granted respondents to modify the "prompt release clause" of their contract, in accordance with their request. In this regard the Examiner found that:

> In this proceeding, the evidence of time differences, differences in holidays and working days in the various countries wherein contact may be required to determine the availability of a vessel warrants increasing the time in which the conference may advise the merchant that his shipment can be accommodated on a vessel other than the one he has selected. With regard to the increase from 10 to 15 days in which the conference must furnish space, no shipper has appeared to object to the increase and in view of the wide range of ports served by respondents, this period appears to be reasonable.
>
> While uniformity in contract clauses is to be attained whenever possible, the question of uniformity is not present as to the prompt release clause. Contract forms approved by the Commission show prompt release clauses which vary in many respects other than in stating time periods. Thus, it cannot be said that the present clause is uniform or that the advantages of uniformity require adhering to the language now found in that clause. The proposed clause meets the requirements of the first numbered paragraph of Section 14b of the Act * * *

No exceptions have been taken.

We agree with the Examiner that respondents proposal be granted. In view of the fact that Commission General Order 19, published in the Federal Register, 31 F.R. 12525 on September 22, 1966 (21 days after the initial decision in this proceeding was served) adopts as standard for all future applications for dual rate contracts a "prompt release clause" identical to that proposed by respondents, no further discussion is required.

E. *The Natural Routings Clause*

The Conferences sought permission to delete the "natural routings clause" prescribed by the Commission in *The Dual Rate Cases* and substitute therefor the following provisions:

6. The Merchant is not required to divert shipment from a natural route not served by the Carriers where direct carriage is available; provided, however, that where shipment is to be made via any port within the range of ports served by the Carriers and more than one port is available to the Merchant as a natural route, the Merchant shall route his cargo to such of those ports as the Carriers may serve. If, for any particular shipments, the Merchant shall contend that the service provided by the Carriers is not the natural route, the Merchant shall, by written notice, advise the Conference of the service which the Merchant contends is the natural route and the name of the carrier or carriers not a party to this Agreement who are providing or will provide such service. If within three (3) business days after receipt of such notice, the Conference advises the Merchant that a vessel operated by the Carriers will provide such service within fifteen (15) days after receipt by the Conference of such notice as aforesaid, the Merchant shall be obligated to select the Carrier's service. Service so provided shall not constitute a precedent or otherwise be construed as a concession that it is a natural route.

Respondents' major objection to the present clause before the Examiner related to the definition of factors to be considered in determining what is a natural route. They stated that the Conference members have the impression that the Commission's definition would be interpreted as requiring consideration of economic criteria entirely from the Merchant's point of view; that under such an interpretation, ports which are not considered "natural" might be so considered solely because a non-conference vessel might go there to try to get cargo which would be otherwise subject to the contract.

The Examiner found that the Conferences had failed to support their position that the "natural routings clause" proposed in the present application is more suitable for administration in the light of conditions in Japan than is the presently approved clause. In denying the proposed changes, he further determined that the Conferences' impression that the presently approved clause could be interpreted as relating economic conditions solely to the merchants' interest was erroneous in view of the Commission's comments in *The Dual Rate Cases*, at page 35:

There is no justifiable need served by relieving the merchant of his obligation to use conference vessels merely because a nonconference carrier is calling at one of the several ports through which a particular shipment could "naturally" move, and the conference calls at another port of equal natural routing but not the port served by the nonconference line.

* * * * * * *

As we have construed the "natural routing" provision of section 14b the merchant will be free under his contract to use nonconference vessels if in fact the use of conference vessels would require him to divert his cargo to unnatural routes. The merchant will not be permitted to escape his contract obligations, however, when the nonconference service is no more natural, as it were, than that of the conference.

The Examiner concluded:

In *Exclusive Patronage Contracts, supra*, the Commission found that the facts disclosed did not make inappropriate the conclusions and reasoning followed in *The Dual Rate Cases*, and denied permission to deviate from the standard clause. Nor can circumstances be found in this record which would render former reasoning inapplicable. The definition of "natural routing" was included in the approved clause to simplify shipper problems. Respondents desire to eliminate a definition and permit arbitrators to decide, in case of dispute, what the term means. If respondents consider their proposed clause would simplify the "natural route" determination in case of dispute, they overlook the practical aspect of the problem. The guidelines provided by the approved clause eliminate at least some of the indefiniteness rather than leave it entirely open to one interpretation by the carrier, another by the shipper, and possibly a third by arbitrators. Their concern that interpretation of the clause would relate economic conditions solely to the merchant's interests cannot be accepted as a proper interpretation in view of the Commission's comments in *The Dual Rate Cases*.

Respondents' reference to the similarity between their proposed clause and the clause approved by the Commission for the North Atlantic Westbound Freight Association (Association) has been considered. If there is a similarity in circumstances in these trades and the trade in which the Association operates, it has not been disclosed.

No exceptions were taken to this aspect of the Examiner's decision.[10] Since no exceptions have been filed to the Examiner's findings and conclusions and since we fully agree with these rulings, it is not necessary to discuss them in any further detail. We conclude, therefore, that respondents' request to substitute their own natural routings clause for the one presently approved for use by the Conferences be denied.

F. *False Declarations*

Respondents propose to modify Article 11 of their approved contract by adding the following clause:

It shall be a breach of this Agreement for the Merchant or any person, firm, or company acting or purporting to act on behalf thereof, to make a false declaration or representation in respect of the kind, quantity, weight, measurement, or value of the cargo covered by this Agreement, unless the Merchant shows that such false declaration or representation was made accidentally and without the intent to avoid the payment of the proper amount of freight on such

[10] Respondents explained that they were "motivated" in not taking exception to the Examiner's denial of their proposed clause by his observation regarding the proper interpretation of the natural routings clause approved in *The Dual Rate Cases* and in *Exclusive Patronage Contracts*.

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cargo and that, immediately upon learning of such false declaration or representation, the Merchant tendered the balance (if any) of the amount of freight properly due to the Carrier concerned.

There is testimony in the record to the effect that the Conferences have experienced difficulty in dealing with shippers engaged in the Japan-United States trades due to false declarations. Respondents state that the additional wording proposed is not with the end purpose of winning law suits but is intended as a supplement to the existing program of policing false declarations and to act as a deterrent against forbidden conduct.

The Examiner after considering all the evidence, found as follows:

> The fact that the conferences experience unusual difficulty in their trades in dealing with the problem of false declarations warrants a contract article specifically relating to the problem. Hearing Counsels' proposal that damages in event of breach shall be determined by the principles of contract law is only a repetition of language used in Article 10(a) of the approved agreement. Their concern that a false declaration might be considered grounds for suspension of the shippers rights and obligations under the contract relates to Article 10(b) under which the conferences may suspend if a shipper fails to pay adjudicated damages. Other suspension provisions are Article 15(a) relating to war, hostilities, warlike operations, embargoes, or other interferences with commercial intercourse and Articles 15(b) and 15(c) relating to increased rates made under special circumstances. The contract does not provide for suspension in event of breach. Inasmuch as damage in event of breach of contract is covered under existing clauses and there is no provision which would permit suspension because of breach of contract, it would appear unnecessary to add the language proposed by Hearing Counsel.[11]
>
> It is concluded that the record supports respondents' request to add paragraph 11(b).

No exceptions to any of the Examiner's rulings have been taken.

We find that the Examiner's findings and conclusions with regards to the addition of a "false declaration" clause are proper and well-founded, and we adopt the same as our own. Accordingly, permission is granted respondents to add a false declaration provision to their presently approved form of contract.

G. *References to the Federal Maritime Commission*

Respondents also seek to delete from Article 7 (contract rates and rate spread) and Article 11(a) (contracts of carriage) references to the fact that tariffs are on file with the Federal Maritime Commission. The Conferences recognize that the omission of these expressions

[11] Hearing Counsel had proposed that the following language be added at the end of Article 11.(b) of the Conferences' contract:

> In the event of such breach, damages resulting therefrom shall be determined in accordance with principles of contract law, and nothing contained in this contract shall be construed to permit the suspension of the merchant's rights and obligations under this contract.

would in no way relieve them of the obligation to file the tariffs pursuant to section 18(b) of the Shipping Act.

The Examiner concluded that the record did not support respondents' request and denied the proposed deletions. The Conferences have excepted on the grounds that General Order 19, 31 F.R. 12525, appears to give them blanket permission to omit these references. This exception is well taken.

General Order 19, referred to earlier in this Report, provides that certain "specific references in the contract provisions to Federal Maritime Commission * * * [are] optional and may be deleted without further permission from the Commission."

In view of the above, respondents are free to omit the references to the Federal Maritime Commission and no further discussion on our part is needed.

Ultimate Conclusions

On the basis of all the foregoing, we find and conclude that:

1. Respondents' request to substitute an "all-affiliates" clause for the affiliates clause presently approved for use by the Conferences is denied.

2. Respondents' request to delete the presently approved charter-exclusion clause is denied.

3. Respondents' request to modify the suspension provision of their approved contract form is denied.

4. Respondents' request to modify the natural routings clause of their contract is denied.

5. Permission is granted respondents to (a) modify the prompt release clause, (b) add a false declaration clause, and (c) delete certain references to the Federal Maritime Commission, in their approved contract form.

The Conferences' dual rate contract form as modified will not be contrary to the public interest, unjustly discriminatory or unfair as between shippers or exporters from the United States and their foreign competitors, and will comply with section 14b of the Shipping Act, 1916.

An appropriate order will be entered.

FEDERAL MARITIME COMMISSION

ORDER

This proceeding having been initiated by the Federal Maritime Commission, and the Commission having fully considered the matter and having this date made and entered of record a Report containing its findings and conclusions thereon, which Report is hereby referred to and made a part hereof:

It is ordered, That the Conferences' requests to (1) substitute an "all-affiliates" clause for the affiliates clause presently approved for use by the Conferences; (2) delete the presently approved owned, chartered-vessel exclusion clause; (3) modify the suspension clause of their approved contract form; and (4) modify the natural routings clause of their contract, be and hereby are, denied.

It is further ordered, however, That permission be, and hereby is granted to the Conferences to (1) modify the prompt release clause of their approved contract form to read as follows:

5. The Merchant has the option of selecting any of the vessels operated by the Carriers, subject to agreement with the particular Carrier as to quantity, and agrees to make application for space as early as possible before the selected vessel's advertised sailing date. In the event that the Merchant is unable to secure space on the selected vessel, he may request the assistance of the Conference in securing space on the selected vessel or on a vessel sailing from the chosen port at or about the same time as the selected vessel. If within three (3) business days of such request, the Conference fails to secure space on a vessel scheduled to sail within fifteen (15) days of the date of the request from the Merchant as aforesaid, the Merchant shall be at liberty to secure such space on any vessel whatsoever.

(2) add the following false declaration clause to their approved form of contract:

It shall be a breach of this Agreement for the Merchant or any person, firm, or company acting or purporting to act on behalf thereof, to make a false declaration or representation in respect of the kind, quantity, weight, measurement, or value of the cargo covered by this Agreement, unless the Merchant shows that such false declaration or representation was made accidentally and without the intent to avoid the payment of the proper amount of freight on such cargo and that, immediately upon learning of such false declaration or representation, the

Merchant tendered the balance (if any) of the amount of freight properly due to the Carrier concerned.

and (3) delete the references to the Federal Martime Commission found in Articles 7 and 11(a) of their approved contract form.

It is further ordered, That the terms and conditions of the form of the dual rate contract attached hereto shall be used by the Japan-Atlantic and Gulf Freight Conference and the Trans-Pacific Freight Conference of Japan to the exclusion of any other terms and provisions for the purpose of according merchants, shippers, and consignees contract rates.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

APPENDIX
APPROVED AGREEMENT FROM—DOCKET NO. 65-52

Agreement No._____

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN AND THE JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE

Merchant's Agreement

Memorandum of Agreement entered into at_____ this_____day of_____19__, by and between_____, having (its) (his) principal place of business at_____, (hereinafter called the "Merchant") and the carriers who are parties to the United States Federal Maritime Commission Agreement No._____, as amended, providing for the (Name of Conference) (hereinafter called the "Conference" or the "Carriers"), and which Agreement has been duly filed with the Ministry of Transportation of the Japanese Government.

For their mutual benefit in the stabilization or rates, services, and practices and for the development of international maritime commerce in the trade defined in Article 1 of this Agreement, the parties hereby agree as follows:

1. The Conference undertakes, throughout the period of this Agreement, to maintain common carrier service which shall, so far as concerns the frequency of sailing and the carrying capacity of the vessels of the Carriers, be adequate to meet all the reasonable requirements of the Merchant for the movement of goods in the trade from Japan, Korea and Okinawa to (Pacific Coast ports of California, Oregon, Washington, Canada and the ports of Hawaii and Alaska) or (United States Atlantic and Gulf Coast ports) (hereinafter called the "Trade"); and the Conference further agress that, subject to the availability of suitable space in the vessels of the Carriers at the time when the Merchant appiles therefor, said vessels shall transport the goods of the Merchant in the Trade upon the terms and conditions herein set forth. Ports from and to which service is offered by the Carriers shall be set forth in the Conference tariff.

2. (a) The Merchant shall ship or cause to be shipped all of his ocean shipments moving in the Trade on vessels of the Carriers unless otherwise provided in this Agreement.

(b) The term "Merchant" shall include the party signing this Agreement as shipper and any of his parent, subsidiary, or other related companies or entities who may engage in the shipment of commodities in the trade covered by this Agreement and over whom he regularly exercises direction and working control (as distinguished from the possession of the power to exercise such direction and control) in relation to shipping matters, whether the shipments are made by or in the name of the "Merchant," any such related company or entity, or an agent or shipping representative acting on their behalf. The names of such related

companies and entities, all of whom shall have the unrestricted benefits of this Agreement and be fully bound thereby, are listed at the end of this Agreement. The party signing this Agreement as "Merchant" warrants and represents that the list is true and complete, that he will promptly notify the Carriers in writing of any future changes in the list, and that he has authority to enter into this Agreement on behalf of the said related companies and entities so listed. (Article 2(b) optional.)

(c) In agreeing to confine the carriage of its shipments to the vessels of the Carriers the Merchant promises and declares that it is his intent to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or persons, firms or entities affiliated with or related to the Merchant.

(d) The Carriers agree that they will not provide contract rates to anyone not bound by a Merchant's Rate Agreement with the Carriers. The Merchant agrees that he will not obtain contract rates for any person not entitled to them, including related companies not bound by this Agreement, by making shipments under this Agreement on behalf of any such person.

3. (a) If the Merchant has the legal right at the time of shipment to select a carrier for the shipment of any goods subject to this Agreement, whether by the expressed or implied terms of an agreement for the purchase, sale or transfer of such goods, shipment for his own account, operation of law, or otherwise, the Merchant shall select one or more of the Carriers.

(b) If Merchant's vendor or vendee has the legal right to select the carrier and fails to exercise that right or otherwise permits Merchant to select the carrier, Merchant shall be deemed to have the legal right to select the carrier.

(c) It shall be deemed a breach of this Agreement, if before the time of shipment, the Merchant, with the intent of avoiding his obligation hereunder, divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier not a party hereto.

(d) For the purposes of this Article, the Merchant shall be deemed prima facie to have the legal right at the time of shipment to select the carrier for any shipment:

(1) with respect to which the Merchant arranged or participated in the arrangements for ocean shipment, or selected or participated in the selection of the ocean carrier, or

(2) with respect to which the Merchant's name appears on the bill of lading or export declaration as shipper or consignee.

(e) Nothing contained in this Agreement shall require the Merchant to refuse to purchase, sell or transfer any goods on terms which vest the legal right to select the carrier in any other person.

(f) In order that the conference may investigate the facts as to any shipment of the Merchant that has moved, or that the Merchant or the conference believes has moved, via a nonconference carrier, and upon written request clearly so specifying, the Merchant, at his option, (1) will furnish to the conference chairman, secretary, or other duly authorized conference representative or attorney, such information or copies of such documents which relate thereto and are in his possession or reasonably available to him, or (2) allow the foregoing persons to examine such documents on the premises of the Merchant where they are regularly kept. Pricing data and similar information may be deleted from the documents at the option of the Merchant, and there shall be no disclosure of such information without the consent of the merchant except that nothing

herein shall be construed to prevent the giving of such information (1) in response to any legal process issued under the authority of any court, or (2) to any officer or agent of any government in the exercise of his powers, or (3) to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime, or (4) to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers, or (5) to arbitrators appointed pursuant to this agreement.

(g) Within ten (10) days after the event in any transaction in which the Merchant is a party and the legal right to select the carrier is vested in a person other than the Merchant, and if he has knowledge that the shipment has been made via a nonconference carrier, the Merchant shall notify the conference in writing of this fact, giving the names of the merchant and his customer, the commodity involved and the quantity thereof, and the name of the nonconference carrier; *Provided, however*, That where the activities of Merchants are so extensive in area or the nature or volume of his sales makes it impracticable to give notice within ten (10) days, the Merchant shall give notice as promptly as possible after the event.

4. This Agreement excludes: (1) cargo of the Merchant which is loaded and carried in bulk without mark or count except liquid bulk cargoes (other than chemicals and petroleum products) in less than full ship load lots; (2) shipments on vessels owned by the Merchant or chartered solely by the Merchant where the term of the charter is for six months or longer, and the chartered vessels are used exclusively for the carriage of the merchant's commodties; and (3) shipments of cargoes for which no contract rate is provided.

5. The Merchant has the option of selecting any of the vessels operated by the Carriers, subject to agreement with the particular Carrier as to quantity, and agrees to make application for space as early as possible before the selected vessel's advertised sailing date. In the event that the Merchant is unable to secure space on the selected vessel, he may request the assistance of the Conference in securing space on the selected vessel or on a vessel sailing from the chosen port at or about the same time as the selected vessel. If within three (3) business days of such request, the Conference fails to secure space on a vessel scheduled to sail within fifteen (15) days of the date of the request from the Merchant as aforesaid, the Merchant shall be at liberty to secure such space on any vessel whatsoever.

6. This agreement does not require the Merchant to divert shipments of goods from natural transportation routes not served by conference vessels where direct carriage is available. *Provided, however*, that where the Carriers provide service between any two ports within the scope of this contract which constitute a natural transportation route between the origin and destination of such shipment, the Merchant shall be obligated to select the Carrier's service. A natural transportation route is a traffic path reasonably warranted by economic criteria such as costs, time, available facilities, the nature of the shipment and any other economic criteria appropriate in the circumstances. Whenever Merchant intends to assert his rights under this article, to use a carrier who is not a party hereto, and the port through which Merchant intends to ship or receive his goods is within the scope of this agreement, Merchant shall first so notify the conference in accordance with the provisions of Article 5 hereof.

7. The rates applicable to shipments made under this Agreement shall be the contract rates lawfully in effect at the time of shipment as set forth in the tariff

or tariffs of the Conference. Contract rates on every commodity or class of commodities shall be lower than the ordinary rates set forth in the Carriers' tariff by a fixed percentage of fifteen (15) per centum of the noncontract or ordinary rates. The rates may be rounded out to the nearest multiple of five (5) cents (not including additional handling or accessorial charges) which will not result in the difference between the rates exceeding fifteen (15) per centum of the ordinary rates.

8. (a) The rates of the freight under this agreement are subject to increase from time to time and the Carriers, insofar as such increases are under the control of the Carriers, will give notice thereof not less than ninety (90) calendar days in advance in the Conference tariff. Should circumstances necessitate increasing the rates by notice as aforesaid and should such increased rates be not acceptable to the Merchant, the Merchant may tender notice of termination of this Agreement to become effective as of the effective date of the proposed increase by giving written notice of such intention to the Conference within thirty (30) calendar days after the date of notice, as aforesaid of the proposed increase: *Further provided, however,* that the Carriers may, within thirty (30) calendar days subsequent to the expiration of the aforesaid thirty (30) calendar day period, notify the Merchant in writing that they elect to continue this Agreement under the existing effective rates, and, in the event the Carriers give such notice, this Agreement shall remain in full force and effect as if the proposed increase had never been made and the Merchant's notice of termination had never been given.

(b) The Conference shall offer to the Merchant a subscription to its tariffs at a reasonably compensatory price; however, the Merchant shall be bound by all notices accomplished as aforesaid without regard to whether he subscribes to the Conference tariff. Tariffs shall be open to the Merchant's inspection at the Conference offices and at each of the offices of the Carriers during regular business hours.

(c) The rates initially applicable under this Agreement shall be deemed to have become effective with their original effective date rather than to have become effective with the signing of this Agreement and notices of proposed rate increases which are outstanding at the time this contract becomes effective shall run from the date of publication in the tariff rather than from the date of this Agreement.

(d) The Merchant and the Carriers recognize that mutual benefits are derived from freedom on the part of the Carriers to open rates, where conditions in the Trade require such action, without thereby terminating the dual-rate system as applicable to the commodity involved; therefore, it is agreed that the Conference, to meet the demands of the Merchants and of the Trade may suspend the application of the contract as to any commodity through the opening of the rate on such commodity (including opening subject to maximum or minimum rates) provided that none of the Carriers during a period of ninety (90) days after the date when the opening of such rate becomes effective shall quote a rate in excess of the Conference contract rate applicable to such commodity on the effective date of the opening of the rate, and provided further that the rate shall not thereafter be closed and the commodity returned to the application of the contract system on less than ninety (90) days' notice by the Carriers through the filing of contract-noncontract rates in their tariff.

9. (a) The Merchant may terminate this Agreement at any time without penalty upon the expiration of ninety (90) calendar days following written

notice to the Conference of intent to so terminate. *Provided, however*, that the Merchant may terminate this agreement upon less than said ninety (90) days' notice pursuant to Article 8(a) hereof.

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

(c) Termination as provided in this Article shall not abrogate any obligation of any party or parties to any other party or parties hereto which shall have accrued prior to termination.

10. (a) In the event of breach of this Agreement by either party, the damages recoverable shall be the actual damages determined after breach in accordance with the principles of contract law: *Provided, however*, that where the Merchant has made or has permitted a shipment on a vesseel of a carrier not a party hereto in violation of this Agreement, and whereas actual damages resulting from such a violation would be uncertain in amount and not readily calculable, the parties hereby agree that a fair measure of damages in such circumstances shall be an amount equal to the freight charges of such shipment computed at the Carriers' contract rates in effect at the time of shipment, less the estimated cost of loading and unloading which would have been incurred had the shipment been made on a vessel of a Carrier party hereto. Such amount, and no more, shall be recoverable as liquidated damages.

(b) Upon the failure of the Merchant to pay or dispute his liability to pay liquidated damages as herein specified for breach of the contract within thirty (30) days after receipt of notice by registered mail from the Conference that they are due and payable, the Carriers shall suspend the Merchant's rights and obligations under the contract until he pays such damages. If within thirty (30) days after receipt of such notice the Merchant notifies the Conference by registered mail that he disputes the claim, the Conference shall within thirty (30) days thereafter proceed in accordance with Article 14, to adjudicate its claim for damages, and if it does not do so, said claim shall be forever barred. If the adjudication is in the Conference's favor, and the damages are not paid within thirty (30) days after the adjudication becomes final, the Conference shall suspend the Merchant's rights and obligations under the contract until he pays the damages. No suspension shall abrogate any cause of action which shall have arisen prior to the suspension. Payment of damages shall automatically terminate suspension. The Conference shall notify the Federal Maritime Commission of each suspension and of each termination of suspension, within ten (10) days after the event.

11. (a) This Agreement is not and shall not be construed to be a contract of carriage with the Carriers or any one of them. Shipments under this Agreement are subject to all the terms and conditions and exceptions of the then current Conference tariff, and of the permits, dock receipts, bills of lading and other shipping documents regularly in use by the individual Carriers and to all laws and regulations of the appropriate authorities.

(b) It shall be a breach of this agreement for the Merchant or any person, firm, or company acting or purporting to act on behalf thereof, to make a false declaration or representation in respect of the kind, quantity, weight, measurement, or value of the cargo covered by this Agreement, unless the Merchant shows that such false declaration or representation was made accidentally and

without the intent to avoid the payment of the proper amount of freight on such cargo and that, immediately upon learning of such false declaration or representation, the Merchant tendered the balance (if any) of the amount of freight properly due to the Carrier concerned.

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

13. The Conference shall promptly notify Merchant of changes in the Conference membership, and any additional carriers which become members of said Conference shall thereupon become parties to this Agreement, and the Merchant shall thereupon have the right to avail himself of their services under the terms of this Agreement. Any Carrier, party to this Agreement, which for any reason ceases to be a member of the Conference shall thereupon cease to be a party to or participate in this Agreement and the Merchant shall not be entitled to ship over said Carrier under this Agreement after such Carrier ceases to be a member of the Conference or after having fifteen (15) calendar days' written notice of the termination of such Carrier's membership, whichever is later. The Merchant may, at any time after notice that a carrier has ceased to be a member of the Conference, cancel without penalty or liability for damages any outstanding forward booking with such withdrawing Carrier.

14. All disputes arising in connection with this Agreement shall be submitted to arbitration by any party and any dispute so submitted to arbitration shall be finally settled under the Commercial Arbitration Rules of the Japan Commercial Arbitration Association. At the time a party makes a demand for arbitration to the Japan Commercial Arbitration Association it shall also submit the name of its arbitrator, and the other party shall have fourteen (14) calendar days thereafter to name its arbitrator and file same with the Japan Commercial Arbitration Association. The Japan Commercial Arbitration Association shall, within fourteen (14) calendar days thereafter, or within such other period as the parties may agree, name the third arbitrator, who shall act as chairman. Any sum required to be paid by an award of the arbitrators shall be paid within thirty (30) calendar days after a copy of the award has been mailed by the arbitrators to the parties. Judgment upon the arbitration award may be rendered in any court having jurisdiction thereof or application may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be. In the event an action for judgment of execution is brought in a court of competent jurisdiction on the arbitration award or on the judgment rendered thereon, the parties waive all rights to object thereto insofar as permissible under the laws of the place where the enforcement action is instituted. The place of arbitration referred to in this paragraph shall be Tokyo, Japan, unless otherwise mutually agreed upon by parties concerned. The foregoing provisions regarding arbitrations shall apply unless the parties mutually agree to have any dispute settled pursuant to the rules of any other arbitration society and at any other place, or in any other manner.

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

that the information, documents or data contain facts adverse to the position of the party who so failed, refused or omitted.

15. (a) In the event of war, hostilities, warlike operations, embargoes, blockades, regulations of any governmental authority pertaining thereto, or any other official interferences with commercial intercourse arising from the above conditions, which affect the operations of any of the Carriers in the trade covered by this Agreement, the Carriers may suspend the effectiveness of this Agreement with respect to the operations affected, and shall notify the Merchant of such suspension. Upon cessation of any cause or causes of suspension set forth in this article and invoked by the Carriers, said Carriers shall forthwith reassume their rights and obligations hereunder and notify the Merchant on fifteen (15) days' written notice that the suspension is terminated.

(b) In the event of any of the conditions enumerated in Article 15(a), the Carriers may increase any rate or rates affected thereby, in order to meet such conditions, in lieu of suspension. Such increase or increases shall be on not less than fifteen (15) days' written notice to the Merchant, who may notify the Carriers in writing not less than ten (10) days before increases are to become effective of its intention to suspend this Agreement insofar as such increases is or are concerned, and in such event the Agreement shall be suspended as of the effective date of such increase or increases, unless the Carriers shall give written notice that such increase or increases have been rescinded and cancelled.

(c) In the event of any extraordinary conditions not enumerated in Article 15(a), which conditions may unduly impede, obstruct, or delay the obligations of the Carriers, the Carriers may increase any rate or rates affected thereby, in order to meet such conditions; *provided, however*, that nothing in this article shall be construed to limit the provisions of Section 18(b) of the Shipping Act, 1916, in regard to the notice provisions of rate changes. The Merchant may, not less than 10 days before increases are to become effective, notify the Carriers that this agreement shall be suspended insofar as the increases are concerned, as of the effective date of the increases, unless the Carriers shall give notice that such increase or increases have been rescinded and cancelled.

For and on behalf of the Members of
the Conference

By_____
Chairman or Secretary pro-tem
(List of Carriers)

Merchant
(Full Corporate, Company or
Individual Name)

By ---

(Title)

(Address of Merchant)

FEDERAL MARITIME COMMISSION

DOCKET NO. 66–36

ADMISSION, WITHDRAWAL AND EXPULSION. SELF-POLICING REPORTS. SHIPPERS' REQUESTS AND COMPLAINTS. OUTWARD CONTINENTAL NORTH PACIFIC FREIGHT CONFERENCE

Decided March 23, 1967

Agreement No. 93 found not to comply with requirements of section 15 of the Shipping Act, 1916, and General Orders 7, 9, and 14.

Outward Continental North Pacific Freight Conference ordered to amend Agreement No. 93 to comply with General Orders 7, 9, and 14, and section 15 of the Shipping Act, 1916; otherwise the Commission will withdraw approval of its basic conference agreement.

General Orders 7, 9, and 14 are reasonable and valid promulgations of rules pursuant to sections 15 and 43 of the Shipping Act, 1916, and the Commission is authorized to disapprove Agreement No. 93 for noncompliance therewith.

Leonard G. James for Outward Continental North Pacific Freight Conference, respondent.

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

REPORT

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

PROCEEDINGS

By order served June 6, 1966, we directed the Outward Continental North Pacific Freight Conference (Conference) and the member lines thereof to show cause why Agreement No. 93, as amended, should not be disapproved pursuant to section 15 of the Shipping Act, 1916 (Act) because of the Conference's failure to comply with the requirements of that section and our General Orders 7, 9, and 14. The Conference filed its opening memorandum and Hearing Counsel replied. We heard oral argument.

FACTS

The Outward Continental North Pacific Freight Conference is an association of common carriers by water serving the trade from Scandinavian, Baltic, German, Dutch, Belgian, and French Atlantic ports to all Pacific Coast ports north of the United States-Mexican border, and to the Hawaiian Islands with transshipment at Los Angeles Harbor and/or San Francisco. The Conference operates pursuant to its basic agreement No. 93 which was originally approved under section 15 of the Act in 1927. Subsequent to this approval, section 15 of the Act was amended by Public Law 87-346 [1] to provide that continued approval shall not be permitted for any conference agreement:

> which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

Public Law 87-346 further amended section 15 to provide that:

> The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

The Commission's General Orders 7, 9, and 14 were subsequently adopted to implement the above-mentioned requirements of section 15.[2] These General Orders contain rules and regulations which specifically delineate minimum requirements imposed on a conference by the above-quoted provisions of section 15. The rules were duly adopted by the Commission pursuant to its rulemaking authority contained in section 43 of the Act.[3] Each General Order allowed conferences subject to the Commission's jurisdiction a fair amount of time to file any amendments to their agreements or whatever was required by General Orders 7, 9, and 14.

Respondent subsequently was advised by the Commission that its agreement did not conform with the self-policing and admission and withdrawal requirements of General Orders 7 and 9.

Respondent was advised by letter of April 29, 1965, that its agreement was not in accord with the requirements of section 528.2 of General Order 7, which provides that conference agreements between

[1] 87th Cong., H.R. 6775, Oct. 3, 1961.

[2] General Orders 7, 9, and 14 pertain respectively to self-policing, admission and withdrawal requirements, and shippers' requests and complaint procedures.

[3] Section 43 was also enacted by Public Law 87-346 and reads as follows: "The Commission shall make such rules and regulations as may be necessary to carry out the provisions of the Act."

common carriers by water in the foreign commerce of the United States, whether or not previously approved, shall contain a provision describing the method or system used by the parties in policing their obligations under the agreement, including the procedure for handling complaints and the functions and authority of every person having responsibility for administering the system. Respondent did not reply to this notice or take any action on this matter.

Respondent was twice reminded by letter (November 24, 1964 and February 16, 1965) that it had not submitted the required self-policing reports, the first of which was due in July 1964 (Sec. 528.3). No reports were filed in response to these letters.

Upon notification of the requirements of General Order 9 (November 5, 1964), respondent replied that it felt its agreement complied in all respects. Respondent was subsequently advised by letter of April 29, 1965, of the specific areas in which it was believed its agreement did not comply:

(a) "Just and reasonable cause" is not adequate criteria for denial of admission to membership (Sec. 523.2(c)).
(b) There is no provision for expulsion for failure to abide by all the terms and conditions of the agreement (Sec. 523.2(h)).
(c) The agreement fails to provide that no expulsion shall become effective until a detailed statement setting forth the reason or reasons therefor has been furnished the expelled member and a copy of notification submitted to the Commission (Sec. 523.2(i)).

No response was received to this notice, and no action was taken thereon by respondent.

Respondent was also advised by letter of January 7, 1966, that it had not complied with the requirements of General Order 14. The requirements with which respondent had not complied were specified:

(a) The conference has not filed a statement with the Commission outlining in detail procedures for the disposition of shippers' requests and complaints as provided in Sec. 527.3.
(b) The conference has not filed a report on or before October 31, 1965, covering all shippers' requests and complaints (and the information requested with respect thereto), which were received during the preceding calendar quarter or pending at the beginning of such calendar quarter as provided in Sec. 527.4.
(c) The conference has not advised us of the appointment of a resident representative in the United States on or before September 9, 1965, as provided in Sec. 527.5.

No response was received to this letter.

The Commission thereupon on June 6, 1966, issued to respondent an order to show cause why Agreement No. 93 as amended should not be disapproved by the Commission pursuant to section 15 of the Act

because of respondent's failure to comply with section 15 and because of its failure to comply with General Orders 7, 9, and 14.

Discussion

Respondent in its memorandum of law states: "It may be, as the Commission alleges * * * that they have not complied with General Orders 7, 9 and 14." Nevertheless, respondent seeks to establish that we can not disapprove its conference agreement as a result of such failure to comply. Its argument consists of the following five points, which we will discuss in order:

1. Section 15 does not give the Commission authority to disapprove a conference agreement without a specific finding as a fact that the agreement operates in one of the four ways set out in the section.

2. The Commission's attempt to enforce its General Orders by threat of disapproval of the conference agreement is an illegal sanction in violation of section 9 of the Administrative Procedure Act (APA).

3. The Commission's show cause procedure precludes the admission of any facts relating to the reasonableness of respondent's procedures or operations in these three areas, and accordingly no adverse conclusion can be reached.

4. General Orders 7, 9, and 14 are invalid in any event and unenforceable.

5. General Orders 7, 9, and 14 cannot be applied extraterritorially.

Respondent cites *Aktiebologet Svenska* v. *F.M.C.* 351 F. 2d 756 (D.C. Cir. 1965) and *U.S. Atlantic and Gulf/Australia-New Zealand Conference* v. *F.M.C.* 364 F. 2d 696 (D.C. Cir Nos. 19637, 19704, decided June 30, 1966) as the basis for its contention that we cannot disapprove its agreement without a specific finding as a fact that the agreement operates in one of the four ways set out in section 15.[4]

The above-cited cases, however, in no way concerned either the self-policing requirements, conference admission requirements, or shippers' requests and complaints procedures which are involved here. In addition to the four general grounds for disapproval of a conference agreement which governed in the *Svenska* case, section 15 specifically provides for disapproval of conference agreement for failure of a conference to maintain adequate policing, reasonable procedures for

[4] Section 15 reads in pertinent part:

> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act . . .

hearing shippers' complaints, and reasonable and equal provisions governing conference membership.[5] When examining a conference agreement, we must first determine if these three standards are met. If so, we then proceed to see if the effect of the agreement will be such that it "as a fact * * * operates in one of the four ways set out in that section by Congress." *Svenska*, 351 F. 2d at 766. If, however, our first analysis of the agreement shows that any or all of the three requirements of policing, admission procedures, and shippers' complaints are not met, disapproval is warranted on that basis alone and no further inquiry as to general effect of the agreement is necessary.

We reached the same conclusion in *Admission to Conference Membership—Pacific Coast European Conference*, 9 F.M.C. 241 (1966), and most emphatically stressed it later in our Denial of Petition for for Rehearing in the same docket, served March 22, 1966. We stated:

> In our report and order on this proceeding we found that respondents' agreement failed to meet the requirements of General Order No. 9. Therefore, since General Order No. 9 was, as we took care to point out, in explanation and effectuation of the "reasonable and equal" provision of section 15, we found that the agreement failed to meet the requirements of section 15. Nothing more was required, certainly not a further finding of detriment to commerce or one of the other alternative grounds for disapproval of a conference agreement. Section 15 could not be more specific when it states "*nor shall continued approval be permitted for any agreement* . . . which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership . . .[6]

Respondent also seeks to establish that the Commission's attempt to enforce its general orders by threat of disapproval of the conference agreement is an illegal sanction in violation of section 9 of the APA.

Section 9 reads that "no sanction shall be imposed or substantive rule or order issued except * * * as authorized by law." Respondent argues that we have no statutory penalty for enforcement of our general orders.

In *Admission to Conference Membership—Pacific Coast European Conference*, *supra*, the respondent conference there argued that it was unlawful to withdraw approval of the conference agreement for failure to comply with General Order 9. We rejected that argument and ordered the disapproval of the agreement, upon the failure to amend, for noncompliance with the requirements of section 15. We further held that, inasmuch as General Order 9 is a valid promulgation of rules interpreting and explaining the statutory terms contained in section 15, noncompliance with that General Order constitutes noncompliance

[5] See p. 350, *supra*, for section 15 language.

[6] Emphasis supplied.

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with the statute and accordingly is a proper ground for disapproval of a conference agreement.

What we said in *Admission to Conference Membership—Pacific Coast European Conference*, *supra*, about General Order 9 has equal applicability to General Orders 7 and 14. These rules are also issued to explain, interpret, and give substance to section 15.

Failure to meet the minimum requirements of the rules results in failure to abide by section 15. The sanction authorized for violation of section 15 is also applicable to a violation of the rules which are validly issued pursuant to that section. Accordingly, disapproval of respondent's agreement for failure to comply with General Orders 7, 9, and 14 will not result in a sanction unauthorized by law.

Respondent cites *Unapproved Section 15 Agreements—Gulf/United Kingdom Conference*, 7 F.M.C. 536 (1963), for the proposition that the Commission has previously stated that violation of a general order is not the equivalent of violating section 15. We need only point out that the general order involved in that case was not one issued to explain, interpret, or implement section 15. It is not inconsistent to say that violation of such a general order need not be a violation of section 15. We are dealing here, however, with general orders adopted to explain, interpret, and implement section 15, and violation thereof results in violation of section 15.

Respondent maintains that the show cause procedure has precluded it from establishing any facts which might prove that its operations in these three areas meet the requirements of the statute. It is respondent's contention that, although it does not comply with the general orders, it has nevertheless not operated in a manner inconsistent with the statute. It maintains that its policing has been "adequate," that it has adopted "reasonable and equal" conditions for conference admission, and that its shippers' complaint procedures have been "reasonable." It claims to have been precluded from showing the same, however, by the Commission's use of the show cause procedure which forecloses a hearing on the subject.

Respondent's contention would be valid were we attempting to show that its actual operations did not meet the statutory requirements. Such is not the purpose of this proceeding, however. As a result of the promulgation of General Orders 7, 9, and 14, conferences are obliged to inform the Commission of the procedures they have adopted in the areas of policing, conference admission, and shippers' complaints. Conferences are also required to submit periodic reports on actions taken by them pursuant to their established procedure. Although we realize that compliance with these general orders does not guarantee

that a conference is operating in a fair manner, consistent with the statute, it does nevertheless guarantee that each conference has established a general framework under which the mandates of the statute can be carried out. We have determined that, if a conference has not satisfied us that it has established such a suitable framework, it has not taken the necessary first step toward assuring the protections outlined in the statute.

In view of the fact that we conclude that respondent has not properly met this initial requirement, there is no need to have a full evidentiary hearing to determine whether respondent's actual operations meet the statutory requirement. No genuine issue of fact is presented and, accordingly, there is no need for an evidentiary hearing. We recognized this same point very recently in Docket No. 66–52, *In the matter of the Modification of Agreement 5700–5*, in which case we noted language from *Producers Livestock Marketing Assoc.* v. *U.S.*, 241 F. 2d 192 (10th Cir. 1957), Aff'd. 346 U.S. 282 (1958):

> * * * the Supreme Court has defined full hearing as one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law of the step asked to be taken * * *. Where no genuine or material issue of facts is presented, the court or administrative body may pass upon the issues of law after affording the parties the right of argument * * *.

Respondent was given an opportunity to submit affidavits of fact, memoranda of law, and to present oral argument. Nothing further is required in this proceeding.

Respondent has also challenged the validity of General Orders 7, 9, and 14.

There can be no dispute that the rules were issued pursuant to proper procedure. When the Commission proceeded to adopt its rules implementing the statutory requirements with respect to self-policing, admission of conference members, and shippers' complaints, a separate rulemaking proceeding was instituted for each of the three areas. In each instance lengthy proceedings were held with opportunity given to interested parties to participate. These proceedings resulted in the adoption of General Orders 7, 9, and 14.

The gist of respondent"s challenge to the validity of the rules is that the Commission cannot by use of such a rule prescribe the system to be used by a conference in fulfilling the statutory requirements in these three areas. Respondent feels that each conference should be allowed to choose its own form of meeting the requirements and the Commission should only be concerned with the fairness of actual operations under whatever form of compliance is chosen.

An analysis of the three general orders will show that respondent's fears on this matter are without basis, inasmuch as the general orders do not dictate any single form of compliance.

General Order 7 pertains to self-policing and requires that a provision for self-policing be contained in the Conference Agreement. It requires a provision describing the method or system used by the parties in policing the obligations under the agreement; a description of the procedures for handling complaints; and a description of the functions and authority of every person having responsibility for administering the system. Conferences are required to file reports twice a year showing nature of complaints, action taken, notice of violations found, and penalties imposed. General Order 7 in no way dictates what method or system of self-policing is to be used. It merely requires a description of the system and a minimum of reporting concerning the operation of the system to aid the Commission in discharging its responsibility to insure adequate policing.

As we noted in the prefatory language of General Order 7, in response to objections voiced to the possibility of requiring specific types of provisions: "Nothing in the rules specifies the particular method or procedure which must be used for self-policing." [7]

General Order 9 pertains to admission, withdrawal and expulsion provisions of conference agreements. It requires that conference agreements contain provisions in *substantially* the form of the nine provisions enumerated therein. These nine provisions contain standards designed to guarantee that the essential elements of qualification for admission and safety from expulsion are met. Such provisions are designed to prevent arbitrary conference action which would be possible under respondent's suggested provisions which allow, for example, denial of admission for "just and reasonable cause." General Order 9 does not require that the enumerated provisions be incorporated verbatim. It does require, however, that all the protections contained therein be present in some form in that which the conference adopts. Only if these protections are included is it possible that the terms and conditions for admission, etc., of a particular conference are reasonable and equal within the meaning of section 15. These are the minimum safeguards. The mere statement of these procedures in the agreement will not, however, guarantee reasonableness and equality of treatment. General Order 9, therefore, also contains reporting requirements as to actions taken under the agreement to enable us to determine the extent of compliance.

[7] See General Order 7, 28 F.R. 9257 : Aug 22, 1963.

In drafting this rule we were faced with objections on both ends calling for either greater generality or more specificity in spelling out the criteria for admission. We stated in the final order:

> The rule as drafted is neither extremely general nor overly specific, but rather it attempts to strike a balance giving the conferences some discretion in submitting for approval other conditions on admission to membership.[8]

General Order 14 pertains to conference procedures for hearing and considering shippers' requests and complaints. It requires that procedures adopted by a conference be reasonable. It defines shippers' requests and complaints. It requires that conferences file with the Commission a statement outlining in complete detail their procedures for handling shippers' requests and complaints. Conferences must also file a quarterly report describing all requests and complaints received and the nature of action taken. Conferences domiciled outside the United States are required to designate a resident representative in the United States with whom shippers situated in the United States may lodge their requests and complaints. General Order 14 does not specifically dictate the type of procedures to be adopted. It only requires that the Commission be informed of the type procedure used. The requirements of General Order 14 are designed to enable the Commission to determine whether such procedures are reasonable as required by the statute.

As in General Orders 7 and 9, objection was made to adoption of rigid requirements in formulating General Order 14, and once again we noted that we were not attempting to adopt any such rigid requirements. We said in the prefatory language to General Order 14:

> Because of the many ramifications which may arise in dealing with these matters, we agree that set and rigid procedures cannot be applied in all cases.[9]

It is obvious from the preceding discussion of the three general orders that respondent has completely distorted the picture when it claims that these general orders limit a conference to a single method of compliance with the statute.

A further aspect of respondent's attack on the validity of the general orders is that conference compliance with the general orders is no guarantee that the fairness required by the statute is being upheld. We are well aware that we have no guarantee that conferences which inform us of their procedures and report on actions taken thereunder have necessarily operated fairly. Compliance with the general orders does guarantee, however, that conferences have established a general framework under which the mandates of the statute can be carried out.

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[8] See General Order 9, 29 F.R. 5797; May 1, 1964.

[9] See General Order 14, 30 F.R. 7490, June 8, 1965.

Also, by use of the reporting requirements we can easier look at the actual operations of a particular conference. One of respondent's objections here is that we cannot condemn its actions, since we have not observed or have not taken evidence concerning respondent's actual operation in these three areas. Such, however, is not necessary since respondent has not satisfied our initial requirements of reporting its actions to us. Once we receive such reports, we can decide whether to make further investigation to determine if a conference's operations are proper.

In *Admission to Conference Membership—Pacific Coast European Conference*, *supra*, we reviewed the history of the Commission's policy toward conference admissions in view of the "reasonable and equal" provisions of the statute and concluded that General Order 9 is in complete harmony with section 15; merely seeks to realize the Congressional intent behind that section; and is necessary to carry out the provisions of the Shipping Act. The same is true of General Orders 7 and 14.

Respondent has expounded at length on the proposition that we cannot enforce our general orders abroad. In so doing, respondent attacks our decision in Docket No. 916, *Investigation of WINAC*, decided August 22, 1966,[10] in which we determined the provisions of the Act extend to conduct abroad performed by persons engaged in the foreign commerce of the United States. Respondent cites several cases which it says are *contra* our decision in Docket No. 916, and which should preclude us from attempting to enforce these general orders against respondent.

Among the cases cited by respondent are: *Empresa Hondurena De Vapores* v. *McLeod*, 300 F. 2d 222 (2d. Cir. 1962), 372 U.S. 10, and *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953). These two cases, however, involved a question of whether a statute of the United States may be applied to regulate the internal activities of a foreign nation. In neither instance would the activities sought to be regulated have affected U.S. interests or U.S. commerce. The U.S. district court of New York recognized this distinction in *U.S.* v. *Anchor Line Ltd.*, 232 F. Supp. 379 (1964) at p. 384.

Respondent, however, would have us believe that our attempts to enforce these general orders upon it is an attempt to regulate activities which have no effect on our foreign commerce or on U.S. interests. This simply is not true.

Respondent does not deny that it serves the foreign commerce of the United States. Respondent has operated under an approved basic con-

[10] 10 F.M.C. 95.

ference agreement since 1927. The mere fact that its conference agreement is subject to our jurisdiction should preclude it from questioning the applicability of these general orders to its activities. These general orders are designed to assist this Commission in carrying out its statutory duty to insure that the basic protections sought to be achieved by requiring section 15 approval are retained. We cannot see how the activities of a conference serving the U.S. foreign commerce can have no effect on U.S. shippers, or U.S. carriers which might seek to join the conference.

On the basis of the foregoing, and after analysis of respondent's agreements, we find and conclude that respondent has failed, on the specific respects enumerated above, to meet the requirements of General Orders 7, 9 and 14, and further that respondent has failed to show why Agreement No. 93, as amended, should not be disapproved. An appropriate order will be entered.

FEDERAL MARITIME COMMISSION

ORDER

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

It is ordered, That pursuant to section 15 of the Shipping Act, 1916, Agreement No. 93 be disapproved, effective 60 days from the date of this Order, unless within that time the Outward Continental North Pacific Freight Conference and its member lines shall have:

(a) amended the conference agreement to comply with the requirements of section 15 of the Shipping Act, 1916, and the requirements of the Commission's General Order 7 by inserting a provision describing the method or system used by the parties in policing their obligations under the agreement, including the procedure for handling complaints and the functions and authority of every person having responsibility for administering the system;

(b) submitted to this Commission a report satisfying the requirements of Section 528.3 of General Order 7 covering the period from January 1, 1964, to January 1, 1967.

It is further ordered, That pursuant to section 15 of the Shipping Act, 1916, Agreement No. 93 be disapproved, effective 60 days from the date of this Order, unless within that time the Outward Continental North Pacific Freight Conference and its member lines shall have amended the conference agreement to comply with the requirements of section 15 of the Shipping Act, 1916, and the requirements of the Commission's General Order 9 in the following respects:

(a) by deleting the phrase "just and reasonable cause" from Article 3 and substituting the phrase "to carriers meeting the above requirements" therefor (Sec. 523.2(c));

(b) to provide that no party may be expelled against its will except for failure to maintain a common carrier service between the ports

within the scope of the agreement or for failure to abide by all the terms and conditions of the agreement (Sec. 523.2(h));

(c) to provide for furnishing a detailed statement of the reasons for expulsion to the party expelled (Sec. 523.2(i)).

It is further ordered, That pursuant to section 15 of the Shipping Act, 1916, Agreement No. 93 be disapproved, effective 60 days from the date of this Order, unless within that time the Outward Continental North Pacific Freight Conference and its member lines shall have complied with the requirements of section 15 of the Shipping Act, 1916, and the requirements of the Commission's General Order 14 in the following respects:

(a) by filing a statement with the Commission outlining in detail procedures for the disposition of shippers' request and complaints as provided in Sec. 527.3;

(b) by publishing in the tariff full instructions as to where and by what method shippers may file their requests and complaints as provided in Sec. 527.6;

(c) by designating a resident representative in the United States with whom shippers situated in the United States may lodge their requests and complaints as required by Sec. 527.5;

(d) by submitting to this Commission a report satisfying the requirements of Sec. 527.4 of General Order 14 covering the period from July 1, 1965, to January 1, 1967.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 66–16

PORTALATIN VELAZQUEZ MALDONADO, ET AL.

v.

SEA-LAND SERVICE, INC., ET AL.

Truckers performing the pickup and delivery portion of a door-to-door contract of ocean transportation on behalf of a common carrier by water found not subject to the Shipping Act, 1916.

Complainants having failed to establish that a respondent has violated any provision of the Shipping Act, 1916, found not entitled to reparation.

Complaint dismissed.

Samuel M. Cole and *John Glynn* for complainants.

Warren Price, Jr. and *Hugh H. Shull* for respondent Sea-Land Service, Inc.

Herbert Burstein for respondent truckers.

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

REPORT *

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

This proceeding is before us on exceptions of Hearing Counsel to the initial decision of Examiner Herbert K. Greer. Hearing Counsel's exceptions merely constitute a reargument of the same issues, allegations and contentions considered by the Examiner in his initial decision. Hearing Counsel cite one additional case not mentioned in their prior briefs, *Tariffs Embracing Motor-Truck or Wagon Transfer Service*, 91 I.C.C. 539 (1924), but this case does not support the conclusion that the trucker complainants and respondents in this proceeding are "other persons" subject to the Shipping Act, 1916, any more than the cases previously cited to the Examiner to support this conclusion and rejected by him.

After a careful review and consideration of the record in this proceeding, we conclude that the Examiner's disposition of the issues

* Note.—This decision became the decision of the Commission on Apr. 13, 1967.

herein was well founded and proper. Accordingly, we hereby adopt the Examiner's decision which is set forth below.

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

Complainants [2] are Puerto Rican truckers engaged in the business of hauling goods between ocean terminals and inland points. They seek reparation in the amount of $900,000.00 from four trucking corporations operating in competitions with them and from Sea-Land Service, Inc., a common carrier by water. The claim for reparation is founded on alleged violations of sections 14, 15, 16, 17 and 18 of the Shipping Act, 1916. Complainants further ask for the issuance of an order requiring respondents to cease and desist from continuing violations of the Act and for such further relief as may appear proper.

THE FACTS

1. Respondent Sea-Land Service, Inc. (Sea-Land) is a common carrier by water and in 1958 began providing service between U.S. ports and ports in the Commonwealth of Puerto Rico. At all material times, this respondent offered a door-to-door service which included ocean transportation and the pickup and delivery of cargo to and from its terminals and shippers' and consignees' places of business. It also offered a port-to-port service under which the shipper or consignee picked up or delivered its own goods at Sea-Land's terminals.

2. Respondents Valencia Service Co., Inc., Valencia Baxt Express, Inc., Maritime Trucking Co., Inc., and Francisco Vega Otero, Inc. (herein collectively referred to as respondent truckers or Big Four), operate a trucking business in the Commonwealth of Puerto Rico and engage in hauling goods between Sea-Land's terminals and inland points.

3. Truckers operating commercially within the Commonwealth are subject to regulation by the Public Service Commission of Puerto Rico.[3]

4. From 1958 to June 1962, Sea-Land carried out the Puerto Rican portion of its pickup and delivery service under individual agreements with Puerto Rican truckers, including but not limited to, complainants and respondent truckers. Three pickup and delivery zones were established with different rates for each zone.

[1] This decision was adopted by the Commission on Apr. 13, 1967.

[2] Portalatin Velazquez Maldonado, Ramon Gonzalez Diaz, Santos Soto Rivera, Ismael Almodovar, Angel L. Rios, Torbec Trucking, Inc., Metropolitan Confidential Corporation, Justo Torres Gutierrez, Carlos Crespo, Carlos Lopez, Ramon Narvaez, Adolfo Villalobos.

[3] The record does not disclose whether the Public Service Commission acted on the rates agreed upon between the truckers and Sea-Land for performance of a pickup and delivery service. However, the truckers were licensed to operate by that Commission.

5. During April of 1962, a new manager took over Sea-Land's Puerto Rican operation. He met with a delegation of truckers to assist them in the formation of an association which would be operated and controlled by the truckers and have for its purpose the establishment of a common understanding and cooperative working agreement. Subsequently, the United Freight Haulers Association, Inc. (the association) was formed. Complainants and respondent truckers were, together with other truckers, members of the association.

6. On October 16, 1962, the association entered into a so-called Trailer Interchange Agreement with Sea-Land which was designed to govern the relations between individual members of the association and Sea-Land with respect to the pickup and delivery service incidental to Sea-Land's door-to-door full trailerload contracts of transportation. Eight pickup and delivery zones were established in lieu of the existing three zones, it being agreed that truckers would be compensated at the same rate Sea-Land charged shippers or consignees, which rate was set forth in the tariff filed by Sea-Land with the Federal Maritime Commission. These zones and the rates applicable to each zone were established by Sea-Land after negotiations with association members and the Puerto Rican Port Authority and were based on distance, condition of the roads, traffic congestion, and truckers' maximum costs. Under the terms of the agreement, the trucker provides the tractor and Sea-Land leases to him an individual trailer (sometimes referred to as a van), the lease to be effective during the time the trailer is away from Sea-Land's premises. The trucker lessee, among other things, agrees to retain possession of the trailer, to promptly make delivery to a shipper or consignee and return to Sea-Land's terminal. The lessee assumes complete control and supervision of the trailer during the lease period and the lessor relinquishes any right to control the work of any lessee employee or agent operating or using the trailer or in possession of it, the agreement providing that such persons are not "the agent or employee of the lessor for any purpose whatsoever." The trucker lessee agrees to hold the lessor harmless for damage to the Sea-Land trailer, from all liability for damages to persons or property arising out of the operation, to assume all legal responsibility for cargo loss or damage, and to maintain insurance covering the cargo, all owned, hired and nonowned vehicles involved, personal or property damage to third persons. Sea-Land is to be named in the policies as an additional insured.

7. Subsequent to its execution, the agreement was modified to relieve association members from responsibility for damage to cargo in excess of the limits described in the insurance policies; to obligate

Sea-Land not to sign agreements with nonmembers except when shippers or consignees transported trailers with their own equipment and provided the same insurance coverage required of association members; and obligating individual association members to be personally responsible for full compliance with the agreement. An additional modification provided that the insurance requirements would be satisfied by Sea-Land under policies held by McLean Industries, Inc., in consideration of a premium which "shall be charged at a combined rate of 3 percent that will be applied against the cost of hire for all operators hauling Sea-Land container and chassis units." This latter modification followed Sea-Land's offer to help truckers in obtaining better insurance coverage at less cost.

8. Individual association members may solicit shippers and consignees in Puerto Rico to obtain the privilege of hauling their shipments to and from Sea-Land's terminal. In connection with this full trailerload door-to-door service, Sea-Land honors a request from the shipper or consignee to permit a designated trucker to perform the pickup or delivery service. There are shipments as to which the shipper or consignee has not designated a trucker (herein referred to as unassigned or unrouted shipments). Originally, Sea-Land agreed to rotate such shipments among association members but this arrangement did not materialize.

9. Sea-Land was experiencing difficulty in connection with the pickup and delivery of less than trailerload (LTL) cargo. The agreement between Sea-Land and the association did not cover such cargo and individual members would accept for hauling only such LTL cargo as they elected to carry. Many association members did not own the type of equipment designed to handle LTL cargo and did not desire to purchase additional equipment in view of a possible loss which might develop because of the high cost involved in hauling LTL cargo. To solve this problem, Sea-Land approached the association to determine which members would be willing to make available equipment for handling LTL cargo in return for the privilege of hauling unassigned or unrouted full trailerload cargo. Only respondent truckers, the Big Four, accepted and thereafter Sea-Land gave them the privilege of hauling full trailerloads except for those trailers as to which a shipper or consignee had stated a preference for another trucker. When the volume of full trailerload cargo exceeded the ability of the Big Four to handle, Sea-Land would designate another association member as the hauler.

10. Sea-Land will enter into a Trailer Interchange Agreement with any Puerto Rican trucker provided he has a license to operate from

the Public Service Commission, presents evidence of proper insurance coverage, and has customers specifying the use of his services. Presently, approximately one hundred truckers have signed agreements with Sea-Land. (See finding No. 16 as to complainant Villalobos.)

11. Any trucker may bring his equipment to Sea-Land's terminal to pick up or drop a trailer he has been selected to transport. At other times, truckers are required to keep their tractors outside the terminal because of space limitations. Truckers handling LTL cargo are permitted to keep equipment involved in such transport inside the terminal area for convenience in loading and for the protection of the cargo. The Big Four are accorded telephone, office and yard privileges not available to other truckers.

12. Truckers do not own or control facilities located on Sea-Land's terminal. They enter the terminal with their tractors to pick up or deliver Sea-Land trailers. In connection with the handling of LTL cargo, they furnish the trucks necessary to haul the cargo and the labor to load or unload their trucks. The cargo is either "delivery service cargo" which it is Sea-Land's responsibility to deliver to a consignee's premises or pick up at a shipper's premises, or, "nondelivery cargo" as to which the shipper or consignee has the responsibility to pick up or deliver.

13. The arrangement between Sea-Land and the association remained in effect for approximately 2 years. Complainant Maldonado (sometimes referred to on the record as Velazquez) became president of the association. He and other association members met with Sea-Land representatives for the purpose of discussing changes in their agreement to include increased rates and a different method of distributing among truckers the privilege of hauling unassigned or unrouted cargo. Sea-Land refused to modify the existing arrangements and advised association members to "take or leave" the existing contract.

14. By letter dated June 2, 1964, and signed by complainant Maldonado as president of the association, Sea-Land was advised that the agreement would be cancelled effective midnight, June 12, 1964. Sea-Land then reverted to the system used between 1958 and October, 1962, and entered into Trailer Interchange Agreements with individual truckers.

15. On June 13, 1964, association members formed a picket line at Sea-Land's terminal. A truck driven by an employee of respondent Valencia Baxt attempted to run down Maldonado, who was in the picket line, and forced him to seek safety by getting out of the street. After several of such occurrences, Maldonado went to his home and re-

turned armed. He recognized the driver of the truck, fired at him, missed, but the bullet struck a Sea-Land employee. Maldonado was tried for the offense and convicted. He did not apply to Sea-Land for an individual Trailer Interchange Agreement and has been unable to transport Sea-Land trailers for that reason. Maldonado has lost his equipment and no longer operates as a trucker.

16. Complainant Villalobos executed an individual agreement with Sea-Land on June 13, 1964 and continued to haul trailers destined for his customer Pueblo Supermarket. Subsequently, a strike by the Teamsters Union involved a picket line at Sea-Land's terminal and Villalobos could not get into the terminal to receive trailers containing Pueblo Supermarket cargo. A Sea-Land employee dispatched a trailer to Pueblo Supermarket by another trucker and Villalobos complained. A fight ensued and the Sea-Land employee was severely beaten. Villalobos was convicted of simple assault. One week after the altercation, Villalobos presented himself at the Sea-Land terminal to pick up a trailer destined for one of his customers (not Pueblo Supermarket). After an argument which involved calling the police, Sea-Land gave Villalobos a letter terminating his contract with them and they have not permitted him to enter the terminal from that time on. His business has substantially decreased.

17. At all material times, complainant Ramon Gonzales Diaz has hauled Sea-Land trailers under a Trailer Interchange Agreement, as an individual or as an association member. He has been charged and has paid 3 percent of the revenue received for hauling a trailer as insurance premium and has been required to pay for damage to a Sea-Land trailer. He has at times been delayed at least an hour in picking up a trailer because other trailers in the line ahead of him were being subjected to inspection by Sea-Land personnel to determine whether they were in condition to be moved.

18. Sea-Land Sales of Puerto Rico is a sales agency owned by Alfonso Valencia who owns part interest in respondents Valencia Service Co., Inc., and Valencia Baxt Express, Inc. Sea-Land does not own or control the sales agency but pays the agency a fee on business produced.

19. Sea-Land does not retain any portion of the 3 percent insurance charge paid by truckers but passes the entire amount on to the insurance carrier. No charge is made by Sea-Land for administrative service involved in handling the insurance.

Discussion

The primary issue is the Commission's jurisdiction over the respondent truckers. Sea-Land is a common carrier by water and does not contest the Commission's jurisdiction.[4] Respondent truckers are not common carriers by water. They do not carry on the business of forwarding nor do they furnish wharfage, dock, or warehouse facilities If jurisdiction attaches, they must be found to be "other persons" who furnish "other terminal facilities in connection with a common carrier by water." [5]

Complainants take the position that respondent truckers furnish terminal facilities in connection with a common carrier by water because their "work was totally intertwined with the shipping operation in the light of the door-to-door service offered by Sea-Land" and that the service "involved a single inseparable transaction, conducted, maintained and exclusively controlled through Sea-Land and its agents."

Hearing Counsel argue that all truckers involved, both complainants and respondents, furnish labor and equipment in the performance of the pickup and delivery service which, regardless of their contractual relationship with the ocean carrier, amounts to the performance of a "link" in the interstate commerce intended to be covered by the Shipping Act. They cite *U.S.* v. *American Union Transport*, 327 U.S. 437 (1946) to support the position that if the Commission is to effectively regulate water carriers, it must have supervision of all incidental facilities connected with the main carriers. They argue that a pickup and delivery service has been held to be a terminal facility incidental to ocean commerce by the courts and the Commission and cite *American Trucking Association* v. *U.S.*, 17 F. 2d 655 (1963); *Certain Tariff Practices of Sea-Land Service, Inc.*, 7 F.M.C. 504 (1963); *Pickup and Delivery Service in Official Territory*, 218 I.C.C. 441 (1936); and *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761 (1946).

Respondent truckers contend that they do not, as principals, furnish any service whatsoever and that in their capacity as Sea-Land agents, they are exempt from this Commission's jurisdiction in accordance

[4] The controversy between the parties hereto was originally submitted to the U.S. District Court for the District of Puerto Rico. The court granted respondents' motion to dismiss on the ground that primary jurisdiction was with the Federal Maritime Commission.

[5] Section 1 of the Shipping Act, 1916, in pertinent part provides:

> The term "other person subject to this act," means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

with the decision in *Matson Navigation Co.—Container Freight Tariffs*, 7 F.M.C. 480 (1963). Complainants also rely on this decision but take a diverse view as to its meaning and effect.

The *Matson* decision does not support complainants' position that truckers performing a pickup and delivery service on behalf of, or under contract with, a common carrier by water become subject to the provisions of the Shipping Act. The Commission did not assume jurisdiction over the land carriers but made clear that its regulatory authority attached only to the water carrier, stating:

> The service is offered by Matson in its capacity as a common carrier by water and it is in this capacity that Matson is subject to the regulatory jurisdiction of the Commission.

Further:

> We are merely subjecting to regulation a service authorized by the provisions of the Shipping Act offered by a common carrier subject to that act. If a portion of that service is conducted by a carrier subject to another agency's regulation and the carrier performs that service in violation of the laws administered by that agency, that is a matter for the agency concerned. Practical difficulties may arise but jurisdictional conflicts should not.

Moreover, the Commission did not attempt to regulate the rates agreed upon between the ocean carrier and the land carrier for performance of the pickup and delivery service, stating:

> Once the charge of the motor carrier to Matson becomes fixed it is like any other fixed cost of a water carrier and is to be considered as such in determining the reasonableness of the rate which that water carrier charged the shipping public.

Hearing Counsel do not consider the *Matson* decision as applicable to the situation here because the truckers performing the pickup and delivery service for Matson were subject to the regulatory authority of the Interstate Commerce Commission (ICC) and this Commission is precluded by section 33 of the Shipping Act from exercising any concurrent jurisdiction over ICC regulated carriers; but that in this proceeding, the truckers are subject to regulation by the Public Service Commission of Puerto Rico, an agency not specifically excluded from this Commission's jurisdiction by statute. They reason that if, as they contend, the truckers furnish "other terminal facilities" and are for that reason subject to the provisions of the Shipping Act, this Commission's jurisdiction is not diminished because of the Public Service Commission's concurrent jurisdiction.

Quoted above is the Commission's comment in the *Matson* decision that in connection with a pickup and delivery service performed by truckers subject to another agency's regulatory authority, "Practical difficulties may arise but jurisdictional conflicts should not." The

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matter of concurrent or conflicting jurisdiction is not deemed decisive of the issue here presented. In any event, the issue would not arise unless it was determined that the truckers are subject to this Commission's jurisdiction because they furnish terminal facilities as that term is used in the act.

The truckers involved in this proceeding enter the ocean terminal for the purpose of picking up or delivering cargo which they transport between the terminal and a shipper's or consignee's place of business. They do not furnish labor or equipment to transfer the cargo from one place on the terminal to another place thereon as in *Carloaders and Unloaders*, *supra*. They do not furnish labor or equipment to load or unload a vessel as did the contractor in *Philippine Merchants Steamship Co.* v. *Cargill, Inc.*, FMC Docket [996] 9 FMC 155. In those two proceedings the contractor's service was performed entirely within the terminal area and was a function necessary to the terminal's operation. Here, the truckers do no more than any other person who brings cargo to an ocean terminal or comes to the terminal to take delivery of an ocean shipment. Sea-Land unloads the vessels. It places inbound cargo on the terminal and it is from this place of rest that truckers pick up a trailer or LTL cargo and transport it inland. Outbound cargo is brought to the terminal from inland origins, placed on the terminal and from this place of rest, Sea-Land takes over to load the full trailer on a vessel or to stow LTL cargo in trailers for subsequent loading on a vessel. Equipment furnished by the truckers is limited to tractors for hauling Sea-Land trailers or trucks for hauling LTL cargo. The truckers do not furnish labor for loading or unloading full trailerload cargo, although they do load and unload LTL cargo at a place of rest on the terminal.

The term "other terminal facilities" is not defined by statute. In *Status of Carloaders and Unloaders*, *supra*, the Commission adopted the definition of terminal facilities as "All those arrangements, mechanical and engineering, which make easier transfer of passengers and goods at either end of a stage of transportation service." A common carrier by water has only the obligation to provide a reasonably available place for the receipt and delivery of property, and has no obligation to deliver the cargo to its ultimate destination. *American President Lines, Ltd.* v. *Federal Maritime Board*, 317 F.2d 887 (1962). Thus, the transportation service offered by a water carrier, when viewed as an obligation which attaches to common carriage, begins or ends at the place provided on a terminal for the receipt or delivery of property. The Commission, and the courts, have recognized that a common carrier by water may, by contract, extend its obligation to a

shipper to include a pickup and delivery service. The fact that an ocean carrier employs a land carrier to perform this contractual obligation does not place such land carrier in the position of performing an obligation imposed by statute on a common carrier by water.

A person, by virtue of a contract with a water carrier or terminal operator, may become subject to the Commission's jurisdiction provided the contract involves an activity covered by the act. But entering an ocean terminal for the sole purpose of picking up or delivering cargo does not amount to the furnishing of a terminal facility within the purview of section 1 of the Shipping Act. The cases cited to support the principle that a pickup and delivery service is a terminal facility involve the question of a Federal agency's regulatory authority over the activity of a carrier otherwise subject to its jurisdiction. The Federal agency regulates the carrier's service to the public, including its activities incidental to the common carriage of goods. But no authority is found to support the proposition that a contractor who carries out a pickup and delivery service, independently or on behalf of an ocean carrier, is subjected to the Commission's jurisdiction.

Alleged Violations of the Shipping Act.

Section 22 of the act provides that reparation may be awarded for injury caused by persons subject to the act and as respondent truckers are not within that category, the right to reparation would depend on proof of a violation of the act by respondent Sea-Land.

Complainants' brief furnishes but little guidance in relation to the evidence they adduced and their allegations that sections 14, 15, 16, 17, and 18 of the Shipping Act, 1916, have been violated. Counsel's preliminary statement at the hearing indicated an intent to prove that the rates applied to the pickup and delivery service were less than properly applicable; that Sea-Land required a rebate from the truckers for insurance, tires, repairs and demurrage, which, although counsel did not so specifically state, might amount to Sea-Land receiving more from the shippers than the applicable rate; that undue and unreasonable preference was given to certain persons by Sea-Land in connection with the pickup and delivery service, particularly respondent truckers to whom Sea-Land paid a higher rate than to other truckers; and that the pickup and delivery zones established by Sea-Land and the rates charged were "improper."

Hearing Counsel find no violations of the act except that all parties failed to file their interchange agreement as required by section 15 of the act. Inasmuch as the truckers have been found to be persons not subject to the act and, as the statute requires only the filing of agree-

ments between persons subject to the act, that issue has been disposed of above.

Section 14 of the act prohibits deferred rebates to any shipper and complainants presented no evidence whatsoever to establish that any shipper received a rebate from Sea-Land, much less the particular kind of rebate to which this section relates.

Section 16, First, makes it unlawful to give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever. The only evidence which might relate to preference or advantage is that Sea-Land assigned a greater portion of the cargo involved in its door-to-door service to the so-called Big Four than to other truckers. Even if section 16 could be extended to include a requirement that an ocean carrier must equally distribute the hauling of its cargo between inland truckers, which certainly the provision does not require, any preference shown was neither undue nor unreasonable. Under the circumstances shown on the record, it was reasonable for Sea-Land to agree with truckers that in return for accepting LTL cargo which required the purchase of additional equipment and was, at best, a marginal operation from a financial viewpoint, those truckers would be permitted to carry so-called "unassigned" or "unrouted" cargo.

Complainants' evidence does not even remotely relate to any charge, rate or fare which is unjustly discriminatory between shippers or port or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. The allegation that pickup and delivery zones and rates therefor were improper or unlawful is not borne out by the evidence. Sea-Land established the zones and rates after consultation with Puerto Rican Port Authority representatives and certain truckers. The zones and rates were based on maximum trucker costs, distance, road conditions, and traffic congestion within the various areas. No violation of section 17 has been shown in the absence of proof of unjust or unreasonable practices in connection with receiving or delivery of property.

Section 18 requires reasonable rates, just and reasonable regulations and practices in all matters relating to or connected with the receiving, handling, transporting, storing or delivery of property. The zones and rates in connection with the receipt and delivery of cargo were not shown to be other than just and reasonable.

Complainants' evidence that Sea-Land required a 3 percent deduction from the rate established for pickup and delivery service does not establish that Sea-Land received more than the tariff rate required to be paid by shippers or consignees. The record clearly establishes that

this insurance premium was passed on by Sea-Land to an insurance agent and that instead of profiting thereby, Sea-Land assumed the cost of administering the insurance program for the benefit of the truckers.

Complainants have failed to substantiate their allegations that respondents have violated the provisions of the Shipping Act as set forth in the complaint.

ULTIMATE CONCLUSIONS

1. Truckers performing the pickup and delivery portion of an ocean carrier's door-to-door contract of carriage with shippers, the services of the truckers being limited to entering an ocean terminal for the purpose of picking up or delivering cargo and transporting the cargo between a place of rest on the terminal and shipper's or consignee's inland establishment, do not furnish terminal facilities in connection with a common carrier by water within the purview of section 1 of the Shipping Act, 1916.

2. In the absence of proof to support the allegations of the complaint that a person subject to the act has violated a provision of the Shipping Act, 1916, complainants are not entitled to reparation.

The complaint is dismissed.

(Signed) HERBERT K. GREER,
Presiding Examiner.

COMMISSIONER HEARN, dissenting:

I disagree with the opinion of the majority in its discussion of the Federal Maritime Commission's jurisdiction over the truckers and the conclusions following therefrom.

There is today a tremendous amount of discussion in the shipping and transportation industries about the revolutionary changes arising from increased usage of containerization. There can be little doubt that containerization offers substantial benefits to the transportation industry and the general business community. Neither can it be doubted that containerization requires significant revision of traditional transportation concepts to meet the requirements of effective movement of containerized cargo. It is, therefore, essential that we do not seek to perpetuate old strictures intended to meet the needs and problems of cargo movement of yesteryear.

I find the reasoning of the majority shortsighted in respect to the Commission's jurisdiction over the Puerto Rican truckers. The facts and circumstances of this case are sufficiently set forth in the Presiding Examiner's Initial Decision and I shall therefore proceed to the discussion.

I take issue first of all with the Examiner's reading of the decision in *Matson Navigation Co.—Container Freight Tariffs*, 7 F.M.C., 480

(1963). The Examiner states that the *Matson* case does not stand for the proposition that truckers performing a pickup and delivery service are subject to the Shipping Act of 1916. That decision neither, however, supports the position of the Examiner and the Respondent truckers, i.e., that such truckers are *not* subject to the act. In this regard the decision stands solely for the proposition that the Commission is "merely subjecting to regulation a service authorized by the provisions of the Shipping Act offered by a common carrier subject to that act." 7 F.M.C. 480, 491.

More specifically, the Commission said in the *Matson* decision that the motor carriers did not by their actions "*remove* themselves from the jurisdiction of the Interstate Commerce Commission." 7 F.M.C. 480, 491. (Emphasis supplied.) Section 33 of the Shipping Act prohibits usurpation or concurrence of jurisdiction by the Federal Maritime Commission of matters within the jurisdiction of the Interstate Commerce Commission. It does not follow, however, that the Commission would not have been prepared, in *Matson*, to extend its jurisdiction over the truckers were it not for the limitations of section 33, and should be similarly prepared here since the Interstate Commerce Commission admittedly has no jurisdiction over the truckers herein.

In fact the *Matson* decision states that "[p]ractical difficulties and problems may arise but jurisdictional conflicts should not." 7 F.M.C. 480, 492. The Commission was apparently anxious to avoid or prevent regulatory inconsistencies but was unable to do so by law. No such jurisdictional restriction is present here. Although the Public Service Commission of Puerto Rico has jurisdiction over the truckers, there is no legal restriction to the concurrent jurisdiction of the Federal Maritime Commission. It is not at all clear, as stated by respondent truckers, that "the Commission may not pre-empt the jurisdiction of the Public Service Commission of Puerto Rico." Brief, p. 7. Moreover, there is reason to favor extension of the Federal Maritime Commission's jurisdiction.

Pickup and delivery services which are presently beyond the reach of any Federal agency are not limited to Puerto Rico; and it cannot be disputed that uniformity of regulatory control over such services (especially when involving federally regulated carriers) is desirable. Even were this not so, it should not be left open to such agencies as the Public Service Commission to create hindrances to the movement of cargo by carriers regulated by the Federal Maritime Commission, Interstate Commerce Commission, etc. Containerization and intermodal movements should not be handicapped by outmoded, unrealistic and/or inapplicable regulatory schemes.

I also take issue with the argument of the Examiner that the truckers are not "other persons" within the meaning of the Shipping Act. The Examiner acknowledges that pickup and delivery services are terminal services, but concludes that the truckers performing the services are not subject to Federal Maritime Commission jurisdiction absent authority to the contrary. Admittedly, there is no administrative or judicial decision which holds such truckers to be subject to the act, but neither is there any decision that holds them not to be so subject. The Examiner's reasoning in support of his conclusion serves to require the opposite conclusion as well. As the Examiner states, prior cases have not presented the question of the Commission's jurisdiction over truckers furnishing pickup and delivery services. (Initial Decision, p. 12.) Those cases dealt solely with the lawfulness of tariffs and other issues.

This is a case of first impression. As such it should not be decided on the basis of principles formulated without consideration of present conditions. The law is not static. As circumstances change so must the law. Technological advances in the transportation of cargo should not outstrip advances in regulatory practices.

The Examiner's statement that a common carrier by water "has no obligation to deliver the cargo to its ultimate destination" (Initial Decision, pp. 11, 12) exemplifies the parochial nature of the decision. The phrase "or other terminal facilities" in section 1 of the Shipping Act should not be limited by the preceding words "wharfage, dock, warehouse * * *." Such limitation attributes to the wording a redundancy which the act cannot have been intended to convey. A more realistic reading of the words is that other terminal facilities include not only those related to wharfage, dock and warehouse facilities, but also such others as may become current in the development of water transportation.

I admonish the Commission not to lose sight of its purposes "to meet the requirements of the commerce of the United States with its territories and possessions and with foreign countries * * *." (Preamble, ShippingAct, 1916.) In conclusion, I cannot overemphasize the need for progress in regulatory thinking to keep pace with progress in cargo transportation.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1182

RATES FROM JACKSONVILLE, FLORIDA TO PUERTO RICO

Decided May 8, 1967

Sea-Land, because its Jacksonville operation is profitable and its continued operation is not threatened, has shown no competitive necessity for eliminating TMT's differential. Since rate parity would probably drive TMT out of the trade, TMT may maintain its differential.

Sea-Land has not justified its proposed differentially lower rates between Jacksonville and Puerto Rico as compared with its rates between other Atlantic ports and Puerto Rico by sufficient proof of advantages in cost of operation, value of service to shippers, or other transportation conditions warranting such reduction.

As Sea-Land's lower rate on scrap metal from Puerto Rico to Jacksonville was not suspended, Sea-Land did not have the burden of proving its lawfulness and in the absence of evidence to support a finding that the rate is unlawful, it is lawful.

Warren Price, Jr., *Hugh H. Shull, Jr.*, and *J. Scot Provan* for respondent Sea-Land Service, Inc.

Homer S. Carpenter, *John C. Bradley*, and *Edward T. Cornell* for respondent TMT Trailer Ferry, Inc. (C. Gordon Anderson, trustee).

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

John Rigby for intervener Commonwealth of Puerto Rico.

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

REPORT

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

THE PROCEEDINGS

The general purpose of this proceeding is to examine the competitive relationship between Sea-Land Service, Inc., Puerto Rican division

and TMT Trailer Ferry, Inc. (C. Gordon Anderson, trustee). The specific issues are as follows:

1. Whether TMT may maintain rates differentially lower than Sea-Land's rates from Jacksonville because of TMT's method of service or level of cost.

2. Whether Sea-Land may charge different rates from Jacksonville to Puerto Rico than it charges from other Atlantic ports to Puerto Rico.

3. The lawfulness of Sea-Land's rate on scrap or used metal northbound from Puerto Rico.

FACTS

TMT commenced the original roll-on/roll-off trailer service in the Florida-Puerto Rico trade in 1954.[1] TMT serves only the port of San Juan in Puerto Rico. It offers two sailings each week from Jacksonville; alternate voyages include a stop at Miami, Fla. Transit time for direct sailings to San Juan from Jacksonville is approximately 7 days and from Jacksonville via Miami to San Juan approximately 9 days. Because of the nature of the tug and barge operation, scheduled service is frequently delayed from 1 to 3 days.

Sea-Land began its service between Jacksonville and Puerto Rico in 1959 with transshipment at Port Newark, N.J. In April 1963, Sea-Land instituted a direct weekly service between Jacksonville and Puerto Rico, and except for a temporary reversion to the indirect service due to vessel damage, Sea-Land has continued this service.[2] It serves, in addition to San Juan, the Puerto Rican ports of Ponce, Arecibo, and Mayaguez and operates terminals at each Puerto Rican port as well as at Jacksonville. Transit time between Jacksonville and San Juan is 3 days. Sea-Land uses containerships which are loaded by crane. Not all of Sea-Land's vessels return to North Atlantic ports via Jacksonville.

Upon entering the Jacksonville-Puerto Rico trade, Sea-Land filed rates based on the existing rates of other carriers. TMT thereupon filed lower rates which motivated Sea-Land to reduce its rates. Sea-Land has not fully met the most recent TMT reduction.

On the 11 major-moving commodities via TMT's southbound service, its truckload rates are lower than Sea-Land's corresponding rates with the exception of the rate on tin plate. For the year 1964, approximately

[1] TMT offers a tug and barge service, the barges being LSTs which have been modified to permit the movement of highway trailers on their own wheels between the dock and the deck of the vessel. The tugs operated in the service are chartered and owned by the Florida Towing Co.

[2] Sea-Land also operates out of the North Atlantic ports of Elizabeth, N.J. and Baltimore, Md., and recently began operating out of the South Atlantic port of Charleston, S.C.

20 percent of TMT's revenue from major-moving commodities came from cargo originating in areas rail-rate-favorable to North Atlantic ports, 37 percent from origins rail-rate-equal to North Atlantic ports and Jacksonville, and 32 percent from origins rail-rate-favorable to Jacksonville; the balance of cargo originating in areas rate favorable to Miami or from other sources.

The preponderance of Sea-Land cargo moving through Jacksonville originates in areas rail-rate-favorable to Jacksonville.[3] Sea-Land's major commodities moving through Jacksonville are paper and paper products, animal feed, food products, beer, sand and clay, iron and steel products, piece goods, and refrigerator cargo of poultry, eggs, ice cream, fish, produce and frozen foods. TMT carries small amounts of these commodities. Sea-Land's rates on bottles and paper products southbound are lower than the TMT rates on such commodities. Because of TMT's lower rates, Sea-Land has been unable to participate in the carriage of certain commodities.

The rates of Sea-Land from Elizabeth to Puerto Rico and from Jacksonville to Puerto Rico are on parity, with the principal exceptions of stoves and ranges southbound and rum, coconuts, and pineapples northbound, the latter rates being lower to Jacksonville than to Elizabeth. These northbound rates were reduced to meet TMT competition.

In establishing rates, TMT's principal consideration is the necessity to maintain a differential under the prevailing rates of Sea-Land because it feels it could not remain in business without a differential due to its inferior service as compared to the service offered by competitors operating self-propelled vessels.

The trade between the United States and Puerto Rico has grown rapidly from 1952 to 1964. Both Sea-Land and TMT have increased their tonnage during this period and have expanded their services. Sea-Land, upon entering the Jacksonville-Puerto Rico trade, developed new cargo and also obtained cargo formerly handled by other carriers. Sea-Land has become the dominant carrier in the trade.

Sea-Land established its present rate on scrap or used metal for the purpose of meeting TMT competition northbound. Now the rates are identical except that TMT absorbs insurance costs. As the southbound traffic substantially exceeds the northbound traffic, revenue derived by Sea-Land on the carriage of scrap and used metal serves to defray a portion of round voyage expenses. TMT does not carry scrap or used metal northbound.

[3] Sea-Land carries furniture out of Jacksonville from origins rail-rate-favorable to North Atlantic ports.

At rate parity with Sea-Land, TMT probably would lose all cargo from origins rate favorable to North Atlantic ports, approximately 20 percent of its major moving commodities based on 1964 data, and would lose substantial amounts of cargo it has handled from origins rate equal to Jacksonville and other ports served by Sea-Land. At rate parity, TMT's ability to compete probably would be seriously crippled. Elimination of TMT from the Jacksonville-Puerto Rico trade would leave Sea-Land in virtual control of that trade.

Discussion

Examiner Herbert K. Greer issued an initial decision in this proceeding. Examiner Greer decided that TMT was entitled to set rates differentially lower than Sea-Land. Although the Examiner approved Sea-Land's northbound rate on scrap metal to Jacksonville, he refused to permit Sea-Land, as a general practice, to charge rates lower between Jacksonville and Puerto Rico than between other Atlantic ports and Puerto Rico. Sea-Land excepted to the initial decision and we heard oral argument.

TMT's Rates

Generally TMT quotes rates on important commodities lower than Sea-Land's, and under this rate structure, TMT has retained a significant share of the traffic offered at Jacksonville. Indeed, TMT by this lower rate policy has attracted cargo from inland points that could also readily be served by North Atlantic ports.

TMT's ratemaking practices present several important questions:

1. May we permit a carrier to fix rates differentially lower than its competitor's rates because of a service disability?

2. Is TMT amenable to section 16 First which prohibits undue preference to one locality (port) and undue prejudice to another locality (port) where TMT does not serve the area which is allegedly prejudiced?

3. If so, has TMT, through its ratemaking practices, unlawfully prejudiced other ports?

TMT attempted to justify its rates on important commodities because of its inferior service, specifically slower transit time and inability to maintain a regular schedule. TMT simply contends that it cannot compete with Sea-Land at rate parity.

Sea-Land argues that TMT is not entitled to a differential as a matter of law. It contends that TMT's rates are unjust and unreasonable in violation of section 18(a), Shipping Act, 1916 and section 4, Intercoastal Shipping Act, 1933, to the extent that they are lower than

Sea-Land's rates or the rates applicable generally in the North Atlantic-Puerto Rican trade because TMT's rates (a) are lower than necessary to meet the competition, (b) result in needless dissipation of carrier revenue, and (c) are destructive of an entire rate structure.

The Examiner found that TMT's competitive position depends on its lower level of rates, and, given rate parity, TMT's survival would be improbable. Consequently, the Examiner concluded that TMT is entitled to a rate differential to prevent its elimination from the trade.[4]

The Examiner concluded that while TMT attracted cargo from areas from which the inland rail rate was lower to a North Atlantic port than to Jacksonville, this diversion of cargo does not amount to an unlawful preference or prejudice in violation of section 16 First. Nor did the Examiner find that the prospect of a rate war between TMT and Sea-Land would be so imminent as to require rate parity between the two.

Under the system of regulation of domestic offshore commerce enunciated in the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933, carriers have the initiative to set rates which fall within a general range of reasonableness and are not otherwise unlawful. Thus, various levels of rates in a single trade, or differentials, are not unlawful as such.[5] Consequently, TMT, if it meets the broad statutory standards, may set rates lower than a competitor's. On the other hand, Sea-Land has the right to initiate rates to meet competition provided that the rates are compensatory and not lower than necessary to meet the competition. *Alabama G.S.R. Co.* v. *United States*, 340 U.S. 216, 224 (1951); *Eastern-Central Association* v. *U.S.*, 321 U.S. 194, 200–02 (1944) (and cases cited at note 8); *U.S.* v. *Chicago, M., St.P. & P.R. Co.*, 294 U.S. 499, 507 (1935); *Oleomargarine, Cincinnati and Columbus to the East*, 294 I.C.C. 349 (1955). But a carrier's right to meet competitive rates is not absolute, *Atl. Refining Co.* v. *Ellerman & Bucknall S.S. Co., et al.*, 1 U.S.S.B. 242 (1932); *Switching Rates in Chicago Switching District*, 220 I.C.C. 119 (1937); *Foodstuffs Between Mich. and Pa. and to N.J. and N.Y.*, 310 I.C.C. 343 (1960). Rate

[4] However, the Examiner stated that the record would not support the conclusion that TMT is entitled to lower rates as the low cost carrier. Cost-wise, the Examiner could go no further than to indicate that TMT operates profitably and its rates are not wasteful of revenue. We concur.

[5] Originally the Commission regarded the offering of differentially lower rates as *per se* subjecting competing carriers to undue and unreasonable prejudice and disadvantage. See *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400 (1935). However, the Commission subsequently departed from this strict approach as explicated in *Anglo-Canadian Shipping Co., Ltd., et al.* v. *Mitsui Steamship Company, Ltd.*, 4 F.M.B. 535, 540 (1955). See also: *Huber Mfg. Co.* v. *N.V. Stoomvaart Maatschappij "Nederland"*, 4 F.M.B. 343 (1953) and *Eden Mining Co.* v. *Bluefields Fruit and S.S. Co.*, 1 U.S.S.B., 41 (1922).

reductions for that purpose must be just and reasonable and not discriminatory. Regulation of rates should not only prevent discrimination and prejudice but should prevent destructive and unfair competition as well, including competition which threatens the traffic or financial position of another carrier. A rate reduced for a destructive purpose is neither just nor reasonable "and the law will interfere * * * when competition * * * becomes destructive and wasteful." *Intercoastal Investigation, 1935*, 1. U.S.S.B.B. 400, 430 (1935); see also: *Canned Goods in Official Territory*, 294 I.C.C. 371, 390 (1955).

Whether TMT may preserve its rate differential depends upon its ability to attract cargo at rate parity with Sea-Land. Of course, a primary shipper consideration in selecting a carrier is total cost of transporting a commodity from origin to destination.[6] Where ocean freight rates are equal, minor considerations assume a major role. For instance, with slower transit time TMT's vessels are exposed to the hazards of ocean transportation for approximately twice the time experienced by Sea-Land's vessels. And hazard and the probable condition of the cargo upon arrival is a shipper concern.[7] Furthermore, a tug and barge service is inherently less stable and less reliable. Sea-Land's service is modern and efficient. TMT's vessels are not particularly modern or, in view of the inability to adhere to a schedule, efficient. We find that shippers would as a rule prefer the more modern, faster, and more dependable service of Sea-Land if rates were equal.[8] Sea-Land argues, however, that we must consider frequency of service as a factor inducing shippers to patronize a particular carrier. Sea-Land contends that since it has a weekly service and TMT has a twice-weekly service, Sea-Land operates under a service disability. We cannot agree. Because TMT's service is quite erratic, we find that at rate parity, shippers would prefer Sea-Land's dependable service.

TMT's service with respect to the commodities in question is not of such value to shippers that they would continue to patronize TMT irrespective of higher rates. Indeed, TMT will be injured if its rates

[6] *Reduced Rates on Autos—N. Atl. Coast to Puerto Rico*, 8 F.M.C. 404 (1965).

[7] *Sea-Land Service, Inc.* v. *S. Atlantic & Caribbean Line, Inc.*, 9 F.M.C. 338 (1966), where a shipper of trucks to Puerto Rico used another carrier because "TMT's * * * service exposed the trucks to a greater risk of damage."

[8] Sea-Land moved to strike an attachment to TMT's reply to exceptions which contained a statement of a Sea-Land official in a proceeding before the Interstate Commerce Commission. Since the foregoing discussion of the requirements of shippers in ocean commerce rests, not upon the attachment of TMT's paper, but upon this record and our general knowledge of the subject derived over the years, it is unnecessary to rule on the motion. Likewise, it is unnecessary to rule upon the propriety of the Examiner's exclusion from the record of letters from shippers because such letters would not change the above findings. We also overrule Sea-Land's exceptions that the Examiner erred in making similar findings in the absence of shipper testimony. Such testimony is not indispensable for a discussion of the general needs of shippers.

are increased through loss of traffic upon which the inland rail rate is favorable to North Atlantic ports. TMT would also be deprived of a substantial portion of its cargo from inland-rate-equal origins and from the Jacksonville area as well. At rate parity with Sea-Land, TMT would in all probability be forced out of business. Therefore, TMT's rates must serve as its inducement to shippers.

Furthermore, Sea-Land has no competitive necessity for lowering its rates and eliminating the TMT differential. Its Jacksonville operation is profitable and its continuance in the trade is not threatened. It carries substantial volumes of cargo in the Jacksonville trade despite TMT's rate advantage. In the face of these facts, Sea-Land would, in establishing rate parity, drive TMT out of business, and thus obtaining virtual control for itself of the trade between Jacksonville and Puerto Rico.[9] We, therefore, will not on this record permit Sea-Land to lower its rates to TMT's levels nor will we order TMT to increase its rates to the levels prevailing in the North Atlantic.

Sea-Land also asserts that the Examiner should have found that Sea-Land is the low cost carrier. We agree with the Examiner that the cost data of record are inadequate to determine which is the low cost carrier. The Sea-Land study purports to show the cost per box while TMT shows cost per measurement ton. A comparison of these data is meaningless and no restatement of these figures is particularly trustworthy. Accordingly we cannot decide this issue on the basis of cost data in this record.

Sea-Land also argues that cargo is diverted to Jacksonville from origins inland-rate-favorable to Elizabeth and Baltimore in violation of section 16 First.[10] In response TMT argues that as a matter of law it cannot be held to have violated section 16 First because it does not serve the ports in the North Atlantic which it allegedly has prejudiced.

We cannot agree with TMT's reading of section 16 First which reads:

> That it shall be unlawful for any common carrier by water * * *
>
> First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

This provision turns upon the correlatives, preference and prejudice. A violation depends upon these ingredients, not whether a car-

[9] See: *Alcoholic Liquors in Official Territory*, 283 I.C.C. 219 (1951).

[10] Sea-Land cites *Reduced Rates on Machinery and Tractors from United States Atlantic Ports to Ports in Puerto Rico*, 9 F.M.C. 465 (1966), to support the argument that such a diversion subjects North Atlantic ports to undue prejudice and disadvantage in violation of section 16 First.

rier serves both ports. Thus TMT erroneously contended that as a matter of law it cannot be held to have violated section 16 First. As we stated in a similar context in *Reduced Rates on Machinery and Tractors*, *supra*, at 481, if any injury to a port is caused by the rate-making practices of a carrier, section 16 First may be applicable.[11]

Under these circumstances it is appropriate to determine whether TMT's rates prefer Jacksonville and prejudice other ports.

Undoubtedly, the existing TMT rates attract cargo from origins which, based upon inland rail rates, are tributary to North Atlantic ports. This does not itself establish a violation of section 16 First. Whether the drawing away of traffic results in unjust or unfair discrimination or undue or unreasonable preference is a question of fact for determination in each instance. *City of Portland* v. *Pacific Westbound Conference*, 4 F.M.B. 664 (1955); *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 3 F.M.B. 556 (1951). Thus we must determine whether the rates of TMT divert traffic from a port to which the area of origin is naturally tributary, to a port to which the area is not naturally tributary. *Sea-Land Service, Inc.* v. *S. Atlantic & Caribbean Line, Inc.*, 9 F.M.C. 338 (1966). "Naturally tributary" is an economic concept. It depends upon the shipper's cost, the value of a carrier's service to a shipper, or other factors. Here the paucity of the record is patent. The record shows only that TMT, pursuant to an apparently reasonable rate structure, attracts cargo overland from areas which could be served by other ports. Those persons who would attack TMT's rates, must show more.[12] We will not find a violation of section 16 First on such a meager showing. Nor will we artificially allocate cargo among ports particularly where that course would have a disastrous impact on TMT.[13]

It is argued that TMT is a marginal operator with little promise for the future, and that to base port relationships on TMT's survival would be inappropriate. The Commission is not fixing port relationships. Rather, it is regulating competition between Sea-Land and TMT. TMT's entitlement to a differential is not based on TMT's right to survive lawful competition. Nor does slow transit time alone support our endorsement of TMT's differential. No transportation condition

[11] Accord: *Proportional Commodity Rates on Cigarettes and Tobacco*, 6 F.M.B. 48, 54–55 (1960); *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 3 F.M.B. 556, 565–66 (1951). Cf: *Imposition of Surcharge by the Far East Conference*, 9 F.M.C. 129, 139 (1965). But Cf: *California Packing Corp.* v. *States Steamship Co. et al.*, 1 U.S.S.B.B. 546 (1936); *Sugar from Virgin Islands to United States*, 1 U.S.M.C. 695 (1938); *American Peanut Corp.* v. *M. & M.T. Co. et al.*, 1 U.S.S.B. 78 (1925).

[12] *U.S.* v. *American Export Lines, et al.*, 8 F.M.C. 280, 290 (1964) and cases cited there.

[13] TMT competes at rate parity with South Atlantic & Caribbean Lines, Inc. (SACL) out of another Florida port. To require TMT to raise its rates would destroy its ability to compete with SACL.

warrants rate parity, but to the contrary the elimination of a differential would result in TMT's inability to remain competitive, thus leaving to Sea-Land the virtual control of the trade between Jacksonville and Puerto Rico. We believe that the Puerto Rican trade is best regulated and coordinated by the preservation of TMT's service.[14] The lack of a compelling transportation condition here serves to distinguish this proceeding from *Reduced Rates on Machinery and Tractors*, *supra*.

Sea-Land's Rates

Generally speaking, Sea-Land maintains uniform rates from Atlantic ports, including Jacksonville, to Puerto Rico. Sea-Land, however, contended that because it must meet TMT's competition out of Jacksonville, it should be allowed to publish lower rates from Jacksonville than from North Atlantic ports. The Examiner, using as a test whether Sea-Land was unabe to compete with TMT, concluded that the record would not support a finding of competitive necessity to justify a difference in Sea-Land's rates between various Atlantic ports. The Examiner based the determination upon the fact that Sea-Land is a strong competitor of TMT and has obtained its full share of business out of Jacksonville.

Sea-Land, because of competition, charges a lower rate on scrap or used metal to Jacksonville than it charges to North Atlantic ports. The Examiner stated that a difference in the rates on one commodity to different destinations is not unlawful per se, and since there was no evidence upon which he could otherwise find the rate to be unlawful, he found it to be lawful. In effect, the Examiner found no explicit evidence one way or the other as to the proper level of the northbound rate on scrap metal.[15]

Sea-Land's proposed rate structure presents the following question: To what extent may Sea-Land charge different rates at Jacksonville than other Atlantic ports in order to meet local competition?

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[14] This philosophy was expressed in *Intercoastal Rate Structure,* 2 U.S.M.C. 285, 311 (1940):

> * * * the record points clearly to the almost inevitable result of a one rate level—a gradual mastery of the trade by carriers furnishing the better service. We should not ignore the fundamental fact that shippers will pay only in proportion to the value of the service rendered. In recognition of this principle the carriers have always found it necessary to establish differentials in order to bring about a fair distribution of intercoastal traffic. When these differentials have been narrowed or abolished, the traffic has invariably gravitated to the better equipped lines. The question posed therefore is whether a merchant marine is best promoted and encouraged by a few strong lines with a monopoly of the traffic, or a larger number offering a variety of services at rates based on the value and cost of such services.

[15] No exceptions were filed to this holding. Therefore, we will not disturb this result.

As stated, Sea-Land maintains a single level of rates between Atlantic ports, including Jacksonville, and Puerto Rico. It contends, however, that the necessity of meeting TMT competition out of Jacksonville is a transportation condition warranting modification of this rate structure. In effect, Sea-Land proposes that if the Commission does not order TMT to increase rates to the prevailing level out of North Atlantic ports, Sea-Land has the right to reduce its rates out of Jacksonville to TMT's level without alteration of the rates out of North Atlantic ports. Sea-Land does not present as justification any difference in distance between North Atlantic ports to Puerto Rico than from Jacksonville, nor does it rely on any cost difference in relation to carriage between Jacksonville or between North Atlantic ports and Puerto Rico. Sea-Land propounds only its legal right to meet competition as the basis for its proposed rate policy.

Sea-Land's avowed purpose in seeking approval of different rates between North Atlantic ports and Jacksonville to Puerto Rico is to meet TMT's competition. Certainly no carrier should be required to maintain unreasonably high rates for the purpose of protecting the traffic of a competitor.[16] As a general rule, each carrier should have the opportunity to set rates which reflect the inherent advantages each has to offer so that the public may exercise its choice on cost and service. *West-bound Alcoholic Liquor Carload Rates*, 2 U.S.M.C. 198, 205 (1939). And carriers may reduce rates to a reasonable level to meet competition if they do not create undue preference or prejudice. *Iron and Steel to Iowa, Minn., Mich., and Wisc.*, 297, I.C.C. 363 (1955); *Brick from Mason City, Iowa, to La Crosse, Wisc.*, 251 I.C.C. 267 (1942); *Macaroni Between L.T.L. and S.W. Territories*, 238 I.C.C. 121 (1940). Furthermore, a carrier may set rates in order to retain or secure traffic which might otherwise move via a competitor provided the rate is lawful.

However, Sea-Land has not demonstrated its cost capacity to reduce rates out of Jacksonville. Thus, the Commission may not lawfully permit such a reduction without a concurrent reduction in Sea-Land's rates out of North Atlantic ports without a showing that cost or other transportation conditions justifies a rate policy which on its face works a preference to Jacksonville and prejudice to other Atlantic ports served by Sea-Land. The burden of showing these circumstances is upon Sea-Land, the carrier applying to change its rates.[17]

[16] *Seatrain Lines, Inc.* v. *Akron C. & Y. Ry. Co.*, 243 I.C.C. 199, 214 (1940); *New Automobiles in Interstate Commerce*, 259 I.C.C. 475 (1945).

[17] Where the Commission has instituted an inquiry into the lawfulness of proposed rates, the carrier must produce evidence to justify them. Financial data relating to operations and reasons which impelled proposed rates are in the carrier's sole possession. *Puerto Rican Rates*, 2 U.S.M.C. 117, 124 (1939).

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With regard to the cost data that should be adduced in justification of a proposed differential, there must be more than just a showing that the cost of operation at one port is greater than that at another competing port. Volume of traffic, competition, distance, advantages of location, character of traffic, frequency of service, and others are properly to be considered in arriving at adjustment of rates between ports. *Port Differential Investigation*, 1 U.S.S.B. 61, 69 (1925); *Port of New York Authority* v. *Ab Svenska et al.*, 4 F.M.B. 202, 209 (1953).

Had Sea-Land adduced evidence of the difference in cost of operation between North Atlantic ports and Puerto Rico as compared to cost of operation between Jacksonville and Puerto Rico, it might have been determined that a rate difference was justified on the basis of costs of the respective services. However, the only issue of fact presented for determination is whether a rate difference between ports is justified by competitive necessity.

Competitive necessity should be approached from the standpoint that a carrier finds itself unable to compete, and not on its ability to deprive a competitor of cargo. *Intercoastal Investigation, 1935, Supra.*

Here Sea-Land is a strong competitor. Sea-Land, in competition with TMT out of Jacksonville, has obtained its share of cargo.[18] Sea-Land's operation is profitable. Undoubtedly, TMT's lower rates have prevented Sea-Land from capturing cargo from TMT, but Sea-Land also obtains a share of cargo from inland-rate-equal origins regardless of rate differences. Therefore, the probable result of permitting Sea-Land to maintain lower rates for its Jacksonville service than for its North Atlantic service would: (1) seriously impair TMT's ability to attract cargo, and (2) induce the movement of cargo from Sea-Land's service at North Atlantic ports to its service at Jacksonville. On this record we find that Sea-Land has not justified its proposed rate policy.

COMMISSIONER HEARN dissenting:

I would remand this case to the Examiner for the further taking of evidence.

The majority states that the basic question is the competitive relationship between TMT and Sea-Land, and sets forth the three specific issues involved.[19] It then engages in a discussion of the issues, replete with admissions of insufficiency of evidence to support satisfactory conclusions.[20] The parties are, therefore, now left in *status quo ante* because the record is devoid of evidence to warrant any satisfactory conclusions as to the basic issues.

[18] Sea-Land excepted to the Examiner's finding that Sea-Land can compete with TMT despite the latter's lower rates. We overrule this exception.

[19] Majority Opinion, page 376.

[20] See for example, Majority Opinion, page 380, footnote 4; page 382, and page 383.

These issues are of substantial significance. They involve fundamental principles of rate regulation and economics and should not be treated so ineffectually as they are herein. I do not think the Commission should have attempted to decide this case on this incomplete record when further production of evidence would doubtless have permitted the development of a more productive case and a more meaningful and instructive decision.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 66-66

CORN PRODUCTS COMPANY
v.
HAMBURG-AMERIKA LINES
(HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN-GESELLSCHAFT)

Proceeding determined under Shortened Procedure, Rule 11 of the Rules of Practice and Procedure.

Hamburg-Amerika Lines, a common carrier by water, found to have violated section 18(b)(3) of the act by charging a higher rate for a shipment in foreign commerce than the rate on file in its tariff properly applicable at the time.

Pursuant to section 22 of the act, complainant is entitled to payment of reparation in the amount of $2,477.84.

Complainant is entitled to interest at 6 percent per annum on the amount found due as reparation.

Samuel W. Earnshaw, attorney and *M. A. Greene*, for the complainant.

Burton H. White, *Elliott B. Nixon* and *Randolph W. Taylor*, attorneys for respondent.

INITIAL DECISION OF EXAMINER BENJAMIN A. THEEMAN [1]

The complaint herein filed under Rule 11 (Shortened Procedure) of the Rules of Practice and Procedure of the Federal Maritime Commission (the Commission) alleges that respondents violated sections 18(b)(3) and 22 of the Shipping Act of 1916, as amended (the act) by charging and receiving payment of an inapplicable rate for the ocean transportation of 195 drums of dried onion powder. Complainants allege an overpayment of $2,764.57 and request reparation, with interest thereon at six (6) percent per annum. The respondent generally denied the allegations.

All necessary parties have consented to the application of Rule 11. Accordingly, this proceeding has been conducted without oral hearing and upon written submission of facts and arguments.

[1] This decision became the decision of the Commission on May 9, 1967.

A. *The Undisputed Facts Are:*

1. Respondent, Hamburg-Amerika Lines (Hamburg-Amerikanische Packetfahrt-Actien-Gesellschaft) is a common carrier by water in foreign commerce as defined in section 1 of the act.

2. On or about October 22, 1965, complainant shipped prepaid from New York to Rotterdam, via the respondent, 195 drums of dried onion powder weighing 62,650 pounds. The cargo designation in the bill of lading was "Drums Dehydrated Onion Powder."

3. Respondent billed complainant and the latter on November 10, 1965 paid $3,575.66 for ocean freight at the general cargo rate of $72.75 per 40 cu. ft.

4. Respondent's tariff on file with the Commission, applicable to said shipment, was North Atlantic Continental Freight Conference, Tariff 26, FMC–1. The tariff contained the following items:

Item 5175____	Condiments, Packed, N.O.S_____	$39.25 per 2,240 pounds
Item 5287____	Onions, N.O.S. Freight Must Be Prepaid.	29.00 per 2,240 pounds
Item 9161____	General Cargo * * * N.O.S_____	72.75 W/M

5. The shipment was dry dehydrated onion powder, without additives or other processing than dehydration.[2]

6. On or about December 27, 1965, complainant filed a claim with respondent alleging an overcharge. Respondent denied that claim.

DISCUSSIONS

Complainant's request for reparation is stated as though the applicable rate was Item 5287 "Onions, N.O.S." However, complainant's entire presentation shows that the request was being made in the alternative with the greater emphasis on Item 5175, "Condiments, Packed N.O.S." or "seasoning" as it is also referred to by complainant. Respondent has chosen to respond as if the request was only on the basis of Item 5287. In its answering brief, respondent states:

> Complainant has incidentally urged some alternative classifications for the dried onion powder in drums * * *. Complainant has not raised the question as to the applicability of "seasoning," although complainant has distinctly stated that the powder was, and was intended, for use as a seasoning. If overcharges are alleged on the basis of these alternative classifications, respondent would wish to meet whatever arguments are subsequently raised.

Examination of the record shows that the alternative classification (Item 5175) has not been "incidentally" urged but has been substantially presented. Item 5175 was the basis upon which complainant

[2] The manufacturing process as described by complainant involved peeling fresh onions, slicing them, and dehydrating them with warm air; then grinding them without any additive to the dry powdered product.

requested payment in a letter to the conference dated June 23, 1966, attached as an exhibit to respondent's answering brief. Item 5175 is dealt with fully in complainant's opening brief, and is the obvious purpose for the attachment of Exhibits II and III. In its opening brief, complainant states that, "the shipment here was both a 'condiment' and a product within the description of 'Onions, N.O.S.' " Complainant then continues with an entire paragraph to show why the shipment was a condiment. Complainant's reply brief again stated the alternative classification. Paragraph 1 reads as follows:

> The sole issue before the Commission here is whether the North Atlantic Continental Tariff No. 26 description and rate on "General Cargo, N.O.S.," or on "Onions, N.O.S.," or on "Condiments" applied on complainant's shipment of dehydrated onion powder, in drums, freight charges prepaid.

The respondent has shown that it is fully aware of complainant's alternative classification contention. As stated above, one of respondent's exhibits is a copy of a letter from complainant demanding reparation on the basis of the condiment rate. In its answering brief, respondent makes specific reference to complainant's Exhibit II which contains an opinion that onion powder is commercially considered "seasoning." Neither respondent nor the conference is naive in tariff matters or in proceedings of this nature before the Commission.

The purpose of shortened procedure is self evident, to save time and money for all parties including the Government. As of the time of the issuance of this decision nothing further has been heard from respondent, nor under the rules is a reply to a reply permitted. The record clearly shows that respondent has in no way been misled by the papers submitted by the complainant in this case. In failing to respond to the alternative classification contention, respondent has not exercised due diligence. To permit further presentation under shortened procedure would be unreasonable.

In *Ludwig Mueller Co. Inc.* v. *Peralta Shipping Corporation, etc.*, 8 FMC 361 (1965), the Commission laid down the rule that it has since consistently adhered to: section 18(b)(3) shall be strictly applied. In *Peralta*, the Commission stated that the clear obligation imposed by section 18(b)(3) is:

> No common carrier by water in foreign commerce * * * shall charge or demand or collect or receive *a greater or less or different compensation* for the transportation of property * * * than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; * * * [Emphasis added.]

The Commission stated on page 364:

> Moreover, an unintentional failure to file a particular rate, a bona fide rate mistake, a hardship visited upon an innocent shipper by inadvertence of a carrier,

or a stenographic omission are not sufficient reasons for departing from the requirements of section 18(b)(3). [Footnotes omitted.]

In a recent case *Ocean Freight Consultants* v. *Bank Line, Ltd.* 9 FMC 211, decided January 11, 1966, the Commission citing court precedent reaffirmed (p. 213) that "the principle is firmly established that the rate of the carrier as duly filed is the only lawful charge."

In keeping with the foregoing, this case boils down to one issue. To determine the rate in Tariff 26 applicable to the 195 drums of "dried onion powder."

Complainant contends, though not too strongly, that Item 5287 "Onions, N.O.S." is the applicable rate. In support of this contention, complainant urges a copy of a letter signed by the Chief, Division of Tariffs and Informal Complaints of the Commission. The letter states in part:

> If in fact the commodity shipped was onions, dehydrated, powdered, without additives, it is our informal opinion that in the absence of a specific rate named in the tariff for dehydrated onion powder, the description provided in the tariff for Onions, N.O.S. is broad enough to cover the commodity in question.

This informal opinion states a conclusion but the facts upon which it is based are not in the record. Respondent contends that Onions, N.O.S. dealt generally with fresh onions and not onion powder. Complainant in the past showed agreement with respondent's contention. In the above-mentioned letter to the conference first presenting complainant's claim, the latter stated, that it had "noted the Onion, N.O.S. rate, but felt that it had reference to fresh onions and therefore did not seek adjustment of the freight based on this latter rate."

The Dictionary of Commodities Carried by Ship, Captain Pierre Garoche, published 1952 (Cornell Maritime Press) contains on page 204 the following information concerning "onions" as merchandise transported by ship:

> ONIONS * * * Dry onions amount to a big item in shipping. Packing: bags or crates. Exported from Italy, Spain, Portugal and East Europe. Must be thoroughly dry before shipping. Green onions heat and yield a considerable amount of moisture. They are satisfactorily carried only in refrigerated compartments. Smelly. Affected by heat; crushing due to pressure or shock. Sometimes the packing is deteriorated by contents. They require careful through-ventilation stowage in a dry and cool place, preferably 'tweendecks' or in a refrigerated compartment, away from products affected by smells and moisture. Careful handling to avoid shocks. Do not overstow.

In view of the foregoing in which no reference is made to powder and the substantial evidence shown in the next paragraph that onion powder is a condiment, it is concluded that the rate for Onions, N.O.S. Item 5287 was not the applicable rate for this shipment.

Complainant offers undisputed evidence to show that the cargo was a condiment, to-wit: A letter from the U.S. Department of Agriculture, Consumer and Marketing Service signed by the Head, Standardized Section, Processed Products Standardization and Inspection Branch, Fruit and Vegetable Division states that in the United States there are no mandatory or legal standards for the product commercially known as "Onion Powder"; that the United States purchases onion powder (by means of Federal specification); that the latter is not mandatory; nor does the specification refer to onion powder as a condiment per se. The letter continues as follows:

> Nonetheless, in a generic sense onion powder is an aromatic or savory vegetable substance used to impart a special taste to food. It is not used as a single article of food nor is it used to garnish foods, as are some other dehydrated vegetables (diced green or red pepper, for example).
>
> In commercial trade, onion powder is grouped with other "styles" of dehydrated onion products, regardless of the kind of packing, and sold as seasoning for foods.

As "seasoning" onion powder is unquestionably a "condiment."[3] Complainant points out that in Rogets International Thesaurus (Third Edition, Page 182) onion is listed as a condiment. Webster's Third New International Dictionary Unabridged shows seasoning and condiment to be in effect interchangeable. The definition of condiment on page 473 states:

> condiment: * * * Something usually pungent, acid, salty, or spicy added to or served with food to enhance its flavor or to give added flavor: SEASONING: *a:* an appetizing and usually pungent substance of natural origin (as pepper, vinegar or mustard) *b:* any of various complex compositions, having similar qualities (as curry or chili powder, pickles, or catsup).

The definition of seasoning on page 2049 states:

> seasoning *1.* Something that serves to season as *a:* an ingredient (as a condiment, spice, or flavoring) added to food primarily for the savor it imparts * * *.

In light of the foregoing it is reasonable that onion powder be classed as a condiment.[4]

The Commission laid down the rule of reasonability in dealing with the interpretation of tariff terms many years ago in *National Cable and Metal Co.* v. *American Hawaii S.S. Co.* 2 U.S.M.C. 471 (1941). At page 473 it stated:

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[3] The Chief, Division of Tariffs and Informal Complaints of the Commission indicated that onion powder was not a condiment. However, when he rendered his informal opinion, he did not have the benefit of the letter from the Department of Agricnulture; and as his informal opinion indicates, he was under the erroneous impression that the manufacture of a condiment required addition of another substance or an additive process to the basic component.

[4] Cf. *Atlantic Bridge Co.* v. *Atlantic Coast Line R. Co.* 56 F(2d) 163 (D.C.S.D. Fla.) 1932.

In interpreting a tariff the terms used must be taken in the sense in which they are generally understood and accepted commercially, and neither carriers nor shippers could be permitted to urge for their own purposes a strained and unnatural construction. Tariffs are to be interpreted according to the reasonable construction of their language; neither the intent of the framers nor the practice of the carriers controls, for the shipper cannot be charged with knowledge of such intent or with carrier's canons of construction. A proper test is whether the article may be reasonably identified by the tariff description.

In any event, it is evident that the General Cargo, N.O.S. rate is inapplicable to the shipment because of the existence of the condiment rate in the tariff.[5] Accordingly it is found that Item 5175 is the tariff rate applicable to the shipment herein.

It is clear that the collection by respondent of the rate of $72.75 is not in accord with the tariff on file with the Commission. This action constitutes a violation of section 18(b)(3). Section 22 of the act provides for the payment of "Full reparation to the complainant for the injuries caused by said violation." In this case full reparation represents the difference between the rate that complainant should have paid on Item 5175 for 195 drums and the rate it actually paid, or the sum of $2,477.84, with interest at six (6) percent per annum from November 10, 1965. See *States Marine Lines, Inc.* v. *F.M.C.*, 313 F.2d 906, 909 (CADC, 1963) and cases cited therein; *Oakland Motor Car Co.* v. *Great Lakes Transit Corp.*, 1 U.S.S.B.B. 308, 312 (1934).

Ultimate Findings and Conclusions

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

(a) The applicable rate in Tariff No. 26 in effect at the time of the shipping of 195 drums of dehydrated onion powder is Item 5175 Condiments, Packed N.O.S. at $39.25 per 2,240 pounds.

(b) Respondent violated section 18(b)(3) of the act by charging a rate of $72.75 per 40 cu. ft.

(c) Complainant is entitled to reparation under section 22 of the act in the amount of the overcharge.

(d) Pursuant to section 22 of the act, respondent is directed to pay to complainant the sum of $2,477.84 representing the difference between the rate charged and the applicable rate, with interest thereon at six (6) percent per annum from November 10, 1965.

(Signed) Benjamin A. Theeman,
Presiding Examiner.

April 10, 1967

[5] Cf. *Cone Brothers Const. Co.* v. *Georgia R.R. Co. et al.* 159 ICC 342 where on page 343, the ICC set out two principles: (1) as between two unequal commodity rates, both adequately descriptive, the applicable rate is the lower; (2) where a commodity shipped is included in more than one commodity description in the same tariff, that description which is more specific will be found applicable.

FEDERAL MARITIME COMMISSION

ADOPTION OF INITIAL DECISION

May 9, 1967

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

No exceptions having been filed to the initial decision of the Examiner in this proceeding, and the Commission having determined not to review same, notice is hereby given, in accordance with Rule 13(g) of the Commission's Rules of Practice and Procedure (46 CFR 502.227), that the initial decision became the decision of the Commission on May 12, 1967.

This proceeding is hereby discontinued.

JAMES V. DAY, COMMISSIONER, concurring:

The Commission has laid down the rule of reason in dealing with the interpretation of tariff items. In this case the evidence shows that cargo was a condiment. Therefore, tariff Item 5175 (condiments) should apply and not Item 5287 (onions) or Item 9161 (general cargo). In charging the general cargo rate, the respondent overcharged complainant. Reparation should be awarded in the amount of $2477.84, with interest thereon, at 6 percent per annum.

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

FEDERAL MARITIME COMMISSION

No. 1218

SEA-LAND SERVICE, INC.

v.

TMT TRAILER FERRY, INC.
(C. GORDON ANDERSON, TRUSTEE)

Decided May 11, 1967

Section 18(a) of the Shipping Act, 1916, requires a common carrier by water to make an affirmative disclosure in its tariffs of the fact that it is offering to transport refrigerated cargo whenever such is the case.

Respondent, TMT, found to have violated section 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933, by failing to disclose the availability of refrigerated cargo service and by charging, demanding and collecting compensation different from the greater than that specified in its tariff legally on file with the Commission.

Experimental services are not exempt from the operation of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933.

Record in this case does not support a finding of violation of section 16, First.

Homer S. Carpenter, Esq. and Edward T. Cornell, Esq. for TMT Trailer Ferry, Inc.

J. S. Provan, Esq. and Warren Price, Jr., Esq. for Sea-Land Service, Inc.

REPORT

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

Complainant, Sea-Land Service, Inc., a common carrier by water in the domestic offshore trade between Florida and Puerto Rico, alleges that respondent, TMT Trailer Ferry, Inc., a competing carrier in the same trade, is in violation of section 2 of the Intercoastal Shipping Act, 1933 and sections 16 First and 18(a) of the Shipping Act, 1916, by initiating and operating a refrigerated cargo service without having first published and filed rates applicable to the carriage of such commodities with the Commission. Respondent, TMT, joins issue in its

answer admitting that it does not publish a specific tariff for refrigerated cargo but asserting that its "Cargo, N.O.S." (Cargo, Not Otherwise Specified) rate is the legally applicable rate especially where the service is experimental in nature.

THE FACTS [1]

TMT is a common carrier by water operating between ports in Florida and Puerto Rico. This carrier utilizes seagoing tugs which tow unmanned barges (converted LSTs) which, in turn, carry trailers in a roll-on, roll-off operation. Since there are no personnel aboard the barge during the voyage to service and tend machinery or electrical systems, this type of operation in the past did not lend itself to the carriage of refrigerated cargo and, prior to 1964, TMT did not hold itself out to the shipping public, by tariff publication or otherwise, as engaging in reefer service.

In October 1964, however TMT embarked upon an experimental program by which specially equipped, insulated trailers could be transported safely even though there was no one aboard the barges to service the machinery for a period of several weeks.

TMT publishes two freight tariffs in the Florida-Puerto Rico trade. Freight Tariff No. 1 (FMC–F No. 2) names rules, regulations and charges; and Freight Tariff No. 4 (FMC–F No. 5) names class and commodity rates. Freight Tariff No. 4 makes no provision for commodities requiring refrigeration or controlled temperature protection. Item No. 1, subparagraph G of Freight Tariff No. 1, provides that where freight is not

> * * * susceptible of being loaded in carriers standard equipment, by reason of weight, size of other characteristics, special arrangements must be made with the carrier and cargo must bear all additional expenses incident to the furnishing of equipment and transportation of such cargo. Quotation of charges will be made for furnishing of such special equipment.

The minimum ocean freight charge assessed by TMT on refrigerated cargo is $866.40 per trailer, which is the "Cargo, Not Otherwise Specified" rate of $.60 per cubic foot subject to 1,444 cubic feet minimum. In addition, TMT assesses a "special equipment charge" of $33.60 per trailer for the insulated trailer and liquid nitrogen used in the refrigeration process. This "charge" is assessed pursuant to the provisions of the special equipment regulation quoted above.

Between October 1964 and March 31, 1966, TMT carried more than

[1] By agreement of the parties there were no evidentiary hearings. The record, therefore, consists solely of the uncontroverted assertions of the parties, admissions and stipulations as to the facts.

2,411,000 pounds of refrigerated cargo,[2] for which it has collected a total in charges of some $67,000. TMT has never charged less or more than $866.40 for the movement of the refrigerated cargo in each of its trailers plus the $33.60 special charge referred to above.

Sea-Land is also a common carrier by water between ports in Florida and Pureto Rico. It maintains a weekly sailing from Jacksonville to Puerto Rico and carries refrigerated cargo. It has specific refrigerated cargo rates on file with the Federal Maritime Commission.

From October 1964 to the present time there has been an increase in the number of refrigerated containers that Sea-Land transports from the Jacksonville area to Puerto Rico and during the same period, Sea-Land has also increased the number of refrigerated trailers that it owns.

The Initial Decision

In his initial decision served February 2, 1967, Examiner Edward C. Johnson concluded that TMT's failure to file specific refrigerated cargo rates and assessment of unspecified special equipment charges constitute violations of section 2 of the Intercoastal Shipping Act and section 18(a) of the Shipping Act and that TMT's failure to file refrigerated cargo rates is a violation of section 16, First of the Shipping Act. He rejected TMT's argument that experimental services are exempt from the operation of the Shipping Acts.

Exceptions to the Initial Decision

TMT excepts to each of the conclusions contained in the initial decision. Sea-Land has filed its reply in opposition. Neither party requested oral argument and none was held.

Issues Involved

This case presents three basic questions:

1. Whether a carrier which engages in the carriage of refrigerated cargo is required to establish and file a specific tariff or classification for such cargo.

2. Whether TMT collects a rate different from or greater than that specified in its tariff; and

3. Whether TMT's practices constitute a violation of section 16, First of the Shipping Act in that it gave a preference to shippers who used TMT's refrigerated service and prejudiced those shippers who were unaware that the service was available.

These issues are discussed seriatim below.

[2] The cargo moving by TMT is primarily frozen poultry, fresh eggs, frozen seafood and meat, and some frozen citrus concentrates and ice cream.

Discussion

1. *Establishment of a Specific Tariff or Classification for Refrigerated Cargo.*

Section 18(a) of the act provides in pertinent part that "every common carrier by water in interstate commerce shall establish * * * just and reasonable classifications * * * regulations and practices relating thereto * * *."

Section 2 of the Intercoastal Shipping Act, 1933 requires that carriers subject to its provisions shall file with the Commission all the "rates, fares and charges for or in connection" with the transportation offered and makes it unlawful for a carrier to engage in transportation until its tariffs are filed.

As was said in *Intercoastal Investigation*, 1935, 1 U.S.S.B.B. 400 (1935) at 447:

> It cannot be too strongly stressed that every transportation service, or service in connection therewith, must be clearly shown in the tariff before a carrier may lawfully engage therein, and this applies with equal force to services for which a charge is made as well as to services for which no charge is made * * *.

Prior to October 1964, TMT was not equipped to and did not carry refrigerated cargo, and as has already been noted, TMT's tariffs contained no rate, rule or regulation specifically covering the carriage of such cargo. When in October of 1964, TMT achieved refrigerated cargo carrying capability, no change was made in its existing tariff to reflect this significant change in service.[3]

TMT insists that the application to refrigerated cargo of the Cargo, N.O.S. rate coupled with the special handling charge satisfies the requirements of the statutes. But the fact remains that nothing in the tariffs of TMT would disclose the fact that it carried refrigerated cargo. The very nature of its operation would lead to the opposite conclusion; and as for shippers who had sought refrigerated space in the past and found that none was available with respondent, no change was made in the tariff to reflect the change in service.[4] The failure of TMT to apprise the public of its newly acquired capability for handling refrigerated cargo constituted a failure to establish just and reasonable

[3] TMT would no doubt contend that because it was only an "experimental" or "pilot" program, its refrigerated cargo service, consisting as it did then of only one trailer was not significant. Indeed, TMT offers the experimental nature of the service as a defense for its failure to establish a specific refrigerated cargo tariff or classification. The significance of refrigerated capability is not founded on the amount of space afforded but rather upon the addition of another and specialized service to the total capabilities of the carrier. As for the defense posed by the experimental nature of the program, it is sufficient to point out that the statutes make no exception for experimental or pilot programs.

[4] See *Puerto Rican Rates*, 2 U.S.M.C. 117, 130 (1939), where the failure of respondents to affirmatively disclose the maintenance of precooling plants and the charge therefore in their tariffs was found contrary to section 2 of the 1933 act.

classifications, regulations and practices within the meaning of section 18(a).

2. *Charging Rates Not on File*

As we noted above, in addition to charging the basic Cargo, N.O.S. rate, TMT assesses a surcharge of $33.60 per trailer under the authority of its "special equipment" regulation. Section 2 of the 1933 act requires every common carrier in domestic commerce to file with the Commission "all rates, fares and charges for or in connection with transportation on its own routes * * *."

The language of section 2 is clear and specific, the precise rates and charges for transportation must be filed, at least where they are known or knowable.[5] No other reading of the language will achieve the purpose sought—that of closing the door on possible unlawful rebates or concession to favored shippers. See *Matson Navigation Company*, 7 FMC 480 at 488. But the regulation relied upon by respondent to justify this extra charge does not specify any charges; it says merely that, "Quotation of charges will be made for furnishing such special equipment."

Moreover, it is our view that the so-called "special equipment" charge was in this instance nothing more than a portion of the basic rate, which did not become a "charge" merely by labeling it so. TMT charged exactly the same amount for each trailer carried. The $33.60 was a constant and unvarying additive to the cargo N.O.S. rate. This can only lead to the conclusion that the proper rate for the movement was the N.O.S. rate plus $33.60.[6]

On the basis of the foregoing, we conclude that TMT has charged a rate for refrigerated cargo which is other than and greater than that specified in its tariff in violation of section 18(a) of the Shipping Act, and section 2 of the Intercoastal Shipping Act, 1933.

3. *Section 16, First Allegation*

Sea-Land argues that TMT's use of its Cargo, N.O.S. rate to cover the shipment of refrigerated cargo violates section 16 First,[7] because it constitutes an unjust or unreasonable preference to shippers actually

[5] See *Intercoastal Rates of Nelson S.S. Co.*, 1 U.S.S.B.B. 326, where rules authorizing port equalization, but which failed to specify the actual amount of equalization, were condemned.

[6] Its validity under the rule relied upon by TMT becomes even more doubtful when it is considered that there is nothing unusual or extraordinary about the furnishing of the refrigerated trailers by TMT. They are a part of the "carrier's standard equipment." No "special arrangements" had to be made by the shipper with the carrier, since TMT chose to equip itself with trailers which could accommodate refrigerated cargo.

[7] Section 16 First of the Shipping Act forbids any common carrier by water:

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

using the service and its prejudicial to shippers who did not know about the availability of this service, but would have used it had they known, and the Examiner so found in his initial decision.

While the record would indicate the possible existence of shippers who were unaware of TMT's refrigerated service but who would have used it had they known, a violation of section 16 First, should not be based on such speculation. It may well be that were there actual evidence of such shippers and such a lack of knowledge worked a prejudice, a violation of the section could be found. However, we reserve that question for the proper case.

Conclusions

In summary, we conclude:

(1) That the failure of respondent TMT to make affirmative disclosure in its tariff that it is engaging in the carriage of refrigerated cargo violates section 18(a) of the Shipping Act, 1916, in that it constitutes a failure to establish a just and reasonable classification.

(2) That the practice of respondent TMT, whereby it assesses an unspecified special handing and equipment charge in addition to its Cargo, N.O.S. rate, is in violation of section 2 of the Intercoastal Shipping Act in that it constitutes a charge other than that on file with the Commission.

(3) That this record contains insufficient evidence to support a finding that section 16 First has been violated.

An appropriate order will be entered.

s/ Thomas Lisi,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 1218

SEA-LAND SERVICE, INC.
v.
TMT TRAILER FERRY, INC.
(C. GORDON ANDERSON, TRUSTEE)

ORDER

This proceeding having been instituted on the complaint of Sea-Land Service, Inc., and the Commission on this day having made and entered of record a Report stating its findings, conclusions, and decisions thereon, which Report is hereby referred to and made a part hereof:

Now, therefore, it is ordered: That respondent TMT Trailer Ferry, Inc. (C. Gordon Anderson, Trustee), cease and desist from:

(a) engaging in the carriage of refrigerated cargo or in any other specialized class of service unless and until the availability of such services and the terms and conditions pertinent thereto are affirmatively disclosed in the applicable tariff;

(b) failing to specify with particularity in its tariffs all rates, charges or assessments made in connection with the performance of such services where such charges are of a recurring, ordinary or regular nature or where they may be reasonably predicted in advance;

(c) charging, demanding or collecting or receiving a greater, or less or different compensation for the transportation of property or for any service in connection therewith than the rates, fares, and/or charges which are specified in its schedules filed with the Commission in compliance with section 2 of the Intercoastal Shipping Act, 1933.

It is further ordered: That said respondent shall within thirty (30) days of the service hereof file an amended tariff with the Commission.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

299-843 O-68—27

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 401 AARMO BRISTLE PROCESSING & BRUSH CO.

v.

ZIM ISRAEL NAVIGATION CO., LTD.

Decided June 6, 1967

Application to charge shipper in foreign trade less than specified in tariff on file denied.

REPORT

BY THE COMMISSION: (John Harllee, *Chairman;* George H. Hearn, James F. Fanseen, *Commissioners.*)

Zim Israel Navigation Co., Ltd. (Zim), a member line of the North Atlantic Israel Eastbound Freight Conference, has filed this application for an order authorizing adjustment of ocean freight charges in the sum of $1,224.08 in connection with a shipment of horsehair from New York, New York, to Haifa, Israel.

Examiner Paul D. Page, Jr., issued an initial decision denying Zim's application. This proceeding is now before us on our own motion to review.

The facts alleged in the verified application and found by the Examiner are substantially as follows:

Historically, the Conference has maintained a rate of $8.50 per 100 lbs. for the carriage of horsehair from the east coast of the United States to Israel. The Conference, however, inadvertently deleted the horsehair item and the corresponding $8.50 rate from its tariff when it prepared a new tariff to comply with the Commission's General Order 13 (46 CFR 356).[1]

Subsequently, but before it realized that the $8.50 rate had been deleted, Aarmo Bristle Processing and Brush Co., by bill of lading dated February 10, 1966, consigned a shipment of horsehair to Halvaave-

[1] General Order 13, which was published in the Federal Register on May 27, 1965, governs the form and manner of filing tariffs by common carriers by water in the foreign commerce of the United States and conferences of such carriers.

kisachon Jaffa Tel Aviv Cooperative Society, Ltd. The shipment was carried on the Zim vessel SS *Israel* Voy. 87. Since Zim had no rate on file for horsehair, the appropriate tariff classification for this commodity was the General Cargo rate of $81.50 w/m. Therefore, Zim had no choice but to assess freight in the amount of $2,294.23 based on that rate.

The freight was to be paid at destination in Israel by Messrs. Zipim, the receivers of the shipment. When the shipment arrived, however, these receivers declined to take delivery. They advised Zim that they considered the freight charges excessive and that they were not in a position financially to pay the freight as billed. Zim alleges that they have been advised that unless the charges are reduced, the shipment, which remains in custom custody at the Port of Haifa, will be abandoned.

As soon as the Conference realized its tariff error, it immediately filed and reinstated its $8.50 per 100 lbs. rate on horsehair.

Zim now requests that "the $8.50 rate be regarded as continuously in effect and governing the above-mentioned shipments," and that the Commission authorize it to charge and collect freight based on this rate in order to meet the good faith intentions and expectations of all concerned. Freight based on the $8.50 rate would amount to $1,070.15, whereas freight based on the General Cargo rate of $81.50 w/m, the rate legally in effect at the time of shipment, produces an additional charge of $1,224.08.

In his initial decision, the Examiner denied Zim's application and determined that the Commission's decision in *Ludwig Mueller Co., Inc.* v. *Peralta Shipping Corporation, Agents of Torm Line*, 8 FMC 361 (1965) was controlling and required the denial of the application.

Discussion and Conclusion

Our decision in *Ludwig Mueller*, *supra*, wherein we held that we were without authority to permit deviations from field tariffs in the foreign trades, is clearly dispositive of this proceeding.

Zim recognizes that *Ludwig Mueller* is applicable here. It nevertheless takes the position that since the "shippers shipped in reliance upon historical rate levels" and the "carriers carried at a rate caused by inadvertence", the Commission should waive its holding in *Ludwig Mueller* and grant the relief requested.

In *Ludwig Mueller*, we specifically stated that "an unintentional failure to file a particular rate * * * [is] not sufficient [reason] for departing from the requirements of section 18(b)(3)",[2] which reads:

[2] 8 F.M.C. 361 at 364.

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

Zim characterizes our holding in *Ludwig Mueller*, as "a rather stern rule". We are well aware of that fact. In this regard, however, we can merely reiterate what we stated in *The East Asiatic Co. Inc.—Application for Permission to Waive Collection of Undercharges*, Special Docket 382, 9 F.M.C. 169.

We are well aware now, as we were in *Ludwig Mueller*, that this strict interpretation of our statutes with respect to special docket applications, may result in hardship in certain instances but the statutes, enacted by Congress and administered by this Commission are abundantly clear and we must adhere to them.

An order denying this application will be entered.

VICE CHAIRMAN BARRETT and COMMISSIONER DAY dissenting:

Upon ascertainment that no other shipments of horsehair were carried under similar circumstances, we would grant the relief prayed for in accord with our position in *Ludwig Mueller Co., Inc.* v. *Peralta Shipping Corp., etc.*, 8 F.M.C. 361, 367.

ORDER

In the absence of exceptions to the initial decision in this proceeding, the Commission served notice of its intention to review the decision.

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

It is ordered, That the application of Zim Israel Navigation Co., Ltd., to waive the collection of certain freight charges be, and hereby, is denied.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 402

AYRTON METAL AND ORE CORP. AND ASSOCIATED METALS AND MINERALS CORP.

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

Decided June 13, 1967

Application to charge shippers in foreign trade rates less than specified in tariff on file, denied.

REPORT

BY THE COMMISSION: (John Harllee, *Chairman*; George H. Hearn, James F. Fanseen, *Commissioners*.)

American Export Isbrandtsen Lines, Inc., has filed this application for approval to pay a total of $5,861.62 to the nominal complainants herein, Ayrton Metal and Ore Corp. and Associated Metals and Minerals Corp., as alleged overcharges on shipments of brass and/or copper scrap from New York and Baltimore to ports in Italy.

Examiner Benjamin A. Theeman issued an initial decision denying the application. This proceeding is now before us on exceptions filed jointly by the nominal complainants and applicant, and by Ayrton individually.

The exceptions are but a restatement of the arguments made in the application. These arguments were properly rejected by the Examiner in line with our decision in *Ludwig Mueller Co., Inc.* v. *Peralta Shipping Corp.*, 8 F.M.C. 361 (1965). Accordingly, we hereby adopt the Examiner's decision which is set forth below.

INITIAL DECISION OF BENJAMIN A. THEEMAN, PRESIDING EXAMINER [1]

This application under rule 6(b) signed by the steamship company, requests on behalf of the steamship company and the shippers, ap-

[1] This decision was adopted by the Commission on June 13, 1967.

proval for the voluntary payment by American Export Isbrandtsen to Ayrton of $2,468.65 and to Associated of $3,392.97 as alleged overcharges on 5 shipments of brass and/or copper scrap. Three shipments went from New York to Venice, one from New York to Genoa, and one from Baltimore to Naples.

All the shipments moved during the month of February 1966, pursuant to B/Ls dated during that month. The charges were paid during March 1966.

The applicable and existing tariff rate for each shipment was the general cargo rate of $81.50 (w/m) as set forth in the North Atlantic Mediterranean Freight Conference Tariff No. 9, FMC 2 [2] filed with the Commission by the Conference on December 10, 1965, effective January 1, 1966.

Historically, the Conference has maintained a rate on the brass scrap of $31.75 per long ton. When the Conference prepared and filed Tariff No. 9 it deleted the brass scrap item and the corresponding $31.75 rate from the tariff.

Tariff No. 9 was filed by American Export Isbrandtsen to comply with FMC General Order No. 13 (30 F.R. 7138, 5/27/65) establishing rules dealing with the codification of tariffs. Nothing in the general order required the steamship company to delete the brass scrap item from its tariff.

American Export Isbrandtsen alleges that the deletion was error; that as soon as the tariff discrepancy was called to the attention of the Conference, the latter filed with the Commission and duly made public the reinstated rate of $31.75 per long ton.

The freight collected totalled $8,439.55; the freight sought to be applied totals $2,577.93. The difference of $5,861.62 is the refund sought to be made.

In support of their position the parties state: [3]

Respondent American Export Isbrandtsen Lines, Inc. recognizes that the Commission has held in several recent cases that in the foreign trade governed by section 18(b)(3) of the Shipping Act it is without statutory authority to allow the voluntary payment by a steamship line to a shipper of the difference in the amount between the higher rate on file in the tariff and the lower rate which the carrier and the shipper jointly agree should have been on file for the commodity. *Ludwig Mueller Co* v. *Peralta Shipping Corp.*, 9 FMC 361; *Tilton Textile Corp., et al.* v. *Thai Lines, Ltd.*, 9 FMC 145. We submit that this is a rather harsh and stern rule which in this instance should be waived in an enlightened exercise of the administrative discretion which the Commission must be endowed with to administer its regulatory duties. Accordingly, it is

[2] American Export Isbrandtsen at all times mentioned was a member of the Conference

[3] There is no contention made nor evidence submitted to show that the filed rate is "unreasonably high" within the meaning of section 18(b)(5).

respectfully requested that the $31.75 rate be regarded as having been continuously in effect and as governing the brass scrap movement.

But for the requirements of the Commission's own new foreign tariff circular the $31.75 rate for brass scrap would have been applied. Similarly, if the tariff rate situation had been called to the Conference's attention prior to these shipments it would have corrected the tariff provision by publishing the lower rate. These two complainant shippers shipped in reliance upon the well-known and historical rate level. To disallow the requested refund would not, in our considered judgment, serve any regulatory purpose. To allow the refund and issue an order of payment would merely conform to the Commission's earlier practice in special docket applications under Rule 6(b) (46 CFR 502.92) which the Commission's recent action pursuant to Rule 13(g) in giving notice of intention to review the Initial Decision in Special Docket No. 401—*Aarmo Bristle Processing & Brush Co.*, v. *Zim Israel Navigation Co., Ltd.* suggests may be about to be resurrected.

DISCUSSION

In the *Peralta* case (Special Docket No. 377)[4] cited above by the steamship company, the Commission laid down the principle that by virtue of section 18(b)(3), the Commission has no authority as to shipments in foreign commerce to permit deviations from rates on file, or to give effect to an unfiled or unpublished tariff regardless of the equities involved.[5] The Commission has since adhered to that principle. Until the Commission holds otherwise, there is no basis under the act to grant special docket relief as to foreign commerce shipments.

Accordingly, it is concluded that the decision on Special Docket No. 377 is dispositive of the application herein. An order denying the application will be entered.

(Signed) BENJAMIN A. THEEMAN,
Presiding Examiner.

NOVEMBER 18, 1966

ASHTON C. BARRETT, VICE CHAIRMAN, and JAMES V. DAY, COMMISSIONER, dissenting:

In accord with our position in *Ludwig Mueller Co.* v. *Peralta Shipping Corp.*, 8 F.M.C. 361 (1965), we would grant the relief requested upon ascertainment that there were no other shippers similarly situated.

[4] 8 F.M.C. 361.

[5] See Special Docket No. 400, *Waterman Steamship Corporation* v. *Chrysler International S.A.*, decided by the Commission Apr. 21, 1966. 9 FMC 428.

ORDER

The Commission having this date entered a report in this proceeding, adopting the initial decision of the Examiner herein, which report is hereby referred to and made a part hereof:

It is ordered, that the application of American Export Isbrandtsen Lines, Inc. to refund certain freight charges is denied.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

10 F.M.C.

FEDERAL MARITIME COMMISSION

No. 66-28

THE BOSTON SHIPPING ASSOCIATION, INC., ET AL.

v.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION, ET AL.

Decided June 23, 1967

Assessment of "strike storage" charges for cargo remaining on premises of terminal during longshoremen's strike is subject to the jurisdiction of the Commission as a practice within the meaning of section 17 of the Shipping Act, 1916.

A change in the terminal tariff rule governing the assessment of "strike storage" which shifted charge from cargo to vessel did not require prior approval by the Commission under section 15, Shipping Act, 1916, where rule is contained in a tariff filed with the Commission under an existing approved section 15 agreement; such change constituting neither a modification to the already approved basic agreement nor a new agreement within the meaning of section 15.

The assessment of the "strike storage" against the vessel for cargo still in "free time" when the strike begins does not constitute an unjust and unreasonable practice within the meaning of section 17, Shipping Act, 1916.

While the assessment by a terminal of a charge against the vessel for services rendered to the cargo for benefit of the consignee raises issues under section 17 as to the justness and reasonableness of the allocation it does not constitute an undue or unreasonable prejudice under section 16 since the cargo and vessel are not users of the same service.

Cargo of the consignees was "prevented from removal" within the meaning of the strike storage provision of respondents' tariff by the longshoremen's strike and the application of that provision for the period in question did not constitute an unjust and unreasonable practice within the meaning of section 17, Shipping Act, 1916.

Leo F. Glynn, Esq., attorney for the complainants.

John M. Reed, Esq., attorney for respondents other than Massachusetts Port Authority.

George W. Stuart, Esq. and *Neil L. Lynch, Esq.*, attorneys for Massachusetts Port Authority.

Donald J. Brunner, Esq. and *Samuel B. Nemirow, Esq.*, Hearing Counsel.

REPORT

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

This proceeding arises out of a complaint filed April 21, 1966, by the Boston Shipping Association. Hearings were held before Examiner Benjamin A. Theeman who issued his decision February 17, 1967. Oral argument was held May 11, 1967. The complainant, the Boston Shipping Association, Inc., is a nonprofit Massachusetts corporation, whose members are ocean steamship companies, their agents, or stevedores, while the respondent (PBMTA) is an association of "other persons" subject to the Shipping Act, 1916, each of which owns or operates a marine terminal in connection with a common carrier by water. The complainant alleges that respondent has violated section 15 of the Act by putting certain tariff modifications into effect without first securing the approval of the Commission, and sections 16 and 17 of the Act by unjustly assessing against the vessel the charge for so-called "strike storage" of cargo during strikes of the vessel employees instead of assessing it to the cargo as had previously been the practice. The Examiner found violations of sections 16 and 17, but not section 15. Respondent and intervenor hearing counsel have taken exception to the Initial Decision and complainant has replied. Our conclusions differ somewhat from those of the Examiner.

FACTS

Respondent PBMTA operates under approved Agreement No. 8785, Article Third of which provides that the agreement authorizes the fixing of rates and charges for wharfage, dockage, free time, wharf demurrage, and all terminal facilities and services. Article Sixth of the agreement provides that rate charges, classifications, rules and regulations adopted under the agreement and any additions or changes in them will be promptly filed with the Commission.

Pursuant to Agreement No. 8785, PMBTA issued Terminal Tariff No. 1, effective July 1, 1962. This tariff provided, among other things, for wharfage,[1] wharf demurrage,[2] dockage,[3] and free time.[4] It con-

*Commissioner Fanseen did not participate.

[1] The term "wharfage refers to the charge assessed against all cargo passing or conveyed over, onto or under wharves or between vessels or overside vessels when berthed at pier or wharf. Wharfage is solely the charge for use of pier or wharf and does not include charges for any other service."

[2] The term "wharf demurrage refers to the charge assessed against cargo remaining on a pier or wharf after the expiration of free time."

tained no provision specifically dealing with strike storage. Under the tariff as originally filed, dockage was assessed against the vessel on general cargo at 20 cents a ton; wharf demurrage was assessed on import cargo at 2½ cents per 100 pounds per day. Free time of 5 days was allowed on import cargo, and 7 days allowed on export cargo. There is no issue presented as to the reasonableness of these periods.

When cargo was "prevented from removal by factors beyond the consignees' control such as strikes, weather conditions, or similar situations affecting the entire Port area" wharf demurage was assessed on cargo at a reduced rate of 1 cent per 100 pounds per day.[5] All the services at the terminals operated by respondents were governed by these provisions and subsequent amendments made during the period of record.

Ocean freight rates on general cargo into the Port of Boston cover transportation from a place of rest to a place of rest which is generally a point and place in a designated area inside the pier shed to which cargo is removed from where it has been landed under ship's hook. It is the vessel's obligation to move the cargo to the place of rest. This is accomplished by stevedoring companies performing under contract with the vessels and under the direction of the chief clerk, an employee of the vessel. The longshoremen employees of the stevedore and the clerks belong to union locals affiliated with the ILA.

On inbound shipments, the vessel sends an arrival notice to the consignee who usually receives it the morning the vessel docks, but in no event later than the time the vessel finishes unloading. The notice contains the date that free time will expire. The major portion of the cargo is picked up by the consignee during free time. The usual procedure is for a truckman or a railroad freight handler on the consignee's behalf to arrive at the pier with an order for the cargo; the cargo is tallied by a clerk, an employee of the vessel; and while being tallied, the cargo is loaded by the consignee's representatives, one of whom signs the tally. The procedure is reversed but substantially similar in the case of export cargo. Wharf demurrage is assessed against the consignee for cargo left on the pier after free time expires. In some instances, cargo in demurrage is not moved from the place of rest. In others, the terminal moves the cargo to another area of the terminal to place it in demurrage or storage.

[3] The term "dockage refers to the charge assessed for the service of providing space alongside of wharf, pier or seawall structure for the docking or berthing of watercraft, or for the mooring thereof, or other watercraft docked."

[4] The term "free time refers to the period which cargo is allowed to remain on a pier free of charge, immediately prior to loading of the vessel or subsequent to its discharge from a vessel."

[5] The terminal tariff further provided that "When removal of cargo is prevented by strike of *terminal employees* no wharf demurrage will be assessed." (Emphasis ours).

Each of the complainants enjoys the continuous or exclusive use of an assigned pier for the berthing of its vessels. Before all the cargo unloaded from one vessel is delivered or removed from the pier, another vessel will have berthed and unloaded its cargo. This process is repeated as succeeding vessels unload. Thus, there regularly exists on the pier a mix of general cargo in different stages of discharge and delivery, some in free time and some in wharf demurrage. Because of this, complainants do not consider that their responsibility toward the cargo on their piers ends at the expiration of free time. Rather, they believe that they should use average care to see that cargo is delivered in the same condition in which it was received. Complainants employ watchmen to guard against such things as pilferage, and complainants insure the cargo while it is on their piers. Complainants consider delivery takes place when they receive a signed receipt of some kind from the party that next takes over the cargo. The record reveals that complainants consider that when this occurs, their obligation ceases.[6]

The terminal maintains guards to police the terminals, and service employees for the upkeep and maintenance of the terminal piers and premises. Both the terminal's guards and the complainant's watchmen belong to unions not affiliated with the ILA.

In August of 1964, PBMTA received a letter from one of its members, the Massachusetts Port Authority, stating in part:

> Over the years terminal operators and the Port of Boston have been severely criticized by consignees of import cargo or the shippers of export cargo when wharf demurrage charges are assessed during strike periods. Many times, it seems almost useless to advise them that a reduction in charges is established in the tariff for that purpose.

Shortly after this letter, PBMTA decided to reduce wharf demurrage to ½ cent per 100 pounds per day and to assess it against the vessel instead of the consignee. In September 1964, BSA found out about the proposal to shift the charge to the vessel and protested by telegram to PBMTA. In the next few months, two or three meetings took place, which ended with the parties still at odds. PBMTA told BSA that it would continue to assess the charge against the vessel and that if there was any complaint to file it here with the Commission. BSA's reply was that it would not pay the charge. A longshoremen's strike that had been brewing for about a month in the Port of Boston commenced on September 30, 1964. Tally clerks and other clerks of the

[6] Other common carriers in Boston whose schedules provide only an occasional call at a particular pier operate differently and discharge at the pier ends their operation there. Cargo left on the pier at the end of free time would be turned over to the terminal for storage.

BSA also struck. On November 18, 1964, wharf demurrage assessed against the vessel for cargo remaining on the pier during a strike of the vessel's employees or employees of the agent of the vessel was renamed "strike storage." On December 21, 1964, this "strike storage" charge was eliminated from the wharfage section of the tariff and set aside as a separate item. On October 1, 1964, a court injunction stayed the strike, but it began again on January 11, 1965, and lasted 33 days. During this time, truckmen and railroad men representing the consignees refused to enter the terminal and pick up cargo. All guards and watchmen remained on duty during the strike.

Pursuant to the tariff, strike storage was assessed against complainants. Upon refusal of complainants to pay the assessed charges, PBMTA brought an action in the U.S. District Court, District of Massachusetts. The Court stayed proceedings, holding that the matter was within the primary jurisdiction of the Commission. The present complaint resulted.

Discussion

A. *Prior Approval of the Strike Storage Provision Under Section 15*

A threshold issue [7] to be disposed of before dealing with the validity of the strike storage charge under sections 16 and 17 is the question of whether the tariff revisions containing the present strike storage rule required our approval under section 15 prior to their implementation. The Examiner found no merit in this contention of complainant and we agree.

Prior to the present rule, the tariff contained a provision providing for reduced "wharf demurrage" to be assessed against the cargo in the event removal of it was prevented by a strike. The present charge is in effect this same wharf demurrage though now called strike storage. Thus, the only real change effected by the controversial provision is the shift of the charge from cargo to vessel.

Approval of Agreement No. 8785, the basic agreement under which the terminals operate, assumed that the various costs of providing terminal services would be allocated as between users of those services. The authority granted under the agreement to jointly fix charges carried with it the continued authority to properly allocate those charges,

[7] Taking the position that this is a ratemaking case, complainants also contended that we were without jurisdiction. They do not, however, challenge the level of the strike storage charge and their only concern is with its assessment against them. That the proper allocation of the costs of providing terminal services as between users of those services is a matter within our jurisdiction under section 17 is too well settled to be disputed now. *Practices, etc., San Francisco Bay Area Terminals,* 2 U.S.M.C. 588 (1941) aff'd *California* v. *U.S.,* 320 U.S. 577 (1944); *Free Time and Demurrage Charges—New York,* 3 U.S.M.C. 89 (1948).

and while a particular change in allocation may be an unreasonable practice under section 17 or unlawful under section 16 or some other section of the Act, it does not constitute a new agreement or a modification to the existing agreement calling for a new anticompetitive, monopolistic or rate-fixing scheme not contemplated in the original agreement. See *International Packers, Ltd.* v. *F.M.C.*, 356 F. 2d 808, 810 (C.A.D.C. 1966); *Agreement No. 9025: Middle Atlantic Ports Dockage Agreement*, 8 F.M.C. 381, 384 citing *Empire State Highway Transportation Association* v. *Federal Maritime Board*, 291 F. 2d 336 (C.A.D.C. 1961) c.d. 368 U.S. 931 (1961). For changes outside the scope of approved agreements and needing prior approval, see those items listed in *The Persian Gulf Outward Freight Conf. (Agr. 7700)—Establishment of a Rate Structure Providing for Higher Rate Levels for Service via American-Flag Vessels versus Foreign-Flag Vessels* . . . Docket 66–27—10 FMC 61; and the discussion on the subject in *Contract Between the North Atlantic Mediterranean Freight Conference and the United Arab Co. etc.*, Docket No. 66–3, 9 FMC 431. No prior approval under section 15 was required.

B. *The Allocation of the Strike Storage Charge Under Section 17*

As "other persons subject to [the Shipping] Act"[8] terminals are required by section 17 of that Act to establish "just and reasonable regulations and practices relating to or connected with the receiving handling or storing of property". We are authorized by section 17 whenever we find a regulation or practice to be unjust or unreasonable, to prescribe a just and reasonable one.

Terminal operators form an intermediate link between the carriers and the shippers or consignees. In consequence the terminal operators perform some services for the carriers and other services for the shippers. *Terminal Rate Increases-Puget Sound Ports*, 3 U.S.M.C. 21, 23 (1948). A just and reasonable allocation of charges under section 17 is one which results in the user of a particular service bearing at least the burden of the cost to the terminal of providing the service. *Practices, Etc. San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941) aff'd. *California* v. *United States*, 320 U.S. 577 (1944); *Investigation Free Time Practices-Port of San Diego*, 9 F.M.C. 525 (1966). Where the users of a particular service do not provide their share of essential

[8] Section 1 provides:
"The term 'other person subject to this Act' means any person not included in the term 'common carrier by water' carrying on the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water."

terminal revenues a disproportionate share of the burden is unjustly and unreasonably shifted to users of other terminal services. *Practices, Etc. San Francisco Bay Area Terminals*, *supra*, see also Terminal *Rate Structure-California Ports*, 3 U.S.M.C. 57 (1948). In view of the multiplicity of methods used by terminal operators in furnishing facilities to carriers, shippers and consignees, it is essential, in considering whether a particular allocation or assessment is just and reasonable, to first determine for whom the service is performed. The necessary distinction to be made is between those services which are attributable to the transportation obligation of the carrier and those which are not, the latter normally being performed for the shipper or consignee. *Terminal Rate Increases-Puget Sound Ports*, *supra*. This, of course, involves a clear delineation of the obligations of the carrier to the shipper or consignee in performing its transportation service.

Complainants' simplistic characterization of a common carrier's duty as the "duty to carry" does not go far enough, and the carrier's obligation does not end with the deposit of the goods upon a "reasonable pier." The carrier must also "tender for delivery" which obligation requires that the carrier unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee and afford the consignee a reasonable opportunity to come and get it. *American President Lines, Ltd.* v. *Federal Maritime Board*, 317 F. 2d 887, 888 (D.C. Cir. 1962). Once this has been done, and absent a special contract, the carrier's transportation obligation is discharged.

In discharging its obligation to tender for delivery, the carrier must provide a convenient and safe place to receive the cargo from the shipper and for the consignee to accept delivery. *Terminal Rate Increases—Puget Sound Ports*, 3 U.S.M.C. 21 (1948). Thus, the carrier must provide adequate terminal facilities *Intercoastal Rates to and from Berkeley*, 1 U.S.S.B.B. 365 (1935), *Intercoastal Investigation 1935*, 1 U.S.S.B.B. 400 (1935). A carrier may not divest itself of this obligation, *Terminal Rate Increases—Puget Sound Ports*, *supra*, though it may contract for the facilities of another person such as a terminal operator in which case the terminal operator is in effect the agent of the carrier. *Free Time Practices—Port of San Diego*, 9 F.M.C. 525 (1966).

At Boston, "free time", or the period reasonably required to allow a consignee to pick up his cargo, appears in the respondent terminals' tariff and no comparable provision appears in the carrier's tariff. The piers and wharfs are actually provided by respondents. The obligation to provide free time and effective facilities to make that free time

meaningful and realistic remains the carrier's. At Boston, the free time period is 5 days. Once the cargo has remained on the pier for these 5 days, the transportation obligation of the carrier is ended and the services performed by the terminal for the carrier are also at an end. Any other services performed by the terminal in receiving, handling, storing, or delivering the property are normally performed for the consignee or the shipper.

With the foregoing in mind, we move to a discussion of the application of the strike storage provision during the period in question. The strike storage rule clearly would apply to (1) cargo on the pier which is in free time when the strike begins; and (2) cargo which is on the pier in wharf demurrage when the strike begins.[9]

1. *Cargo in Free Time*

When the cargo is in free time, the terminal facility—the pier—is being provided by the terminal to the carrier so that the carrier may discharge its full transportation obligation to the consignee. It is the duty of the carrier to provide this service to the consignee and it has chosen to do so through an arrangement with the terminal. No one would argue that the carrier should pay the terminals' cost of providing the pier for the free time period itself. Why then should the consignee pay for the interim period of the strike? The Examiner would appear to conclude that the consignee should pay for two reasons (1) that "the terminal services rendered, that is, the supplying of the pier and the attendant services as well as the free time involved were being supplied to the cargo"; and (2) that "the reasons advanced by PBMTA for making the change [from consignee to vessel] were not valid".

That the services in question were supplied to the cargo is in one sense a valid statement. In transportation all the services, be it the actual carriage or the variety of attendant services, are performed for or supplied to the cargo, the ultimate object being to move the cargo from the point of origin to its ultimate destination. But the cargo cannot be divorced from the persons owing obligations to it. In the past when considering the proper allocation of terminal charges, it has been customary to divide terminal services into two general categories: those performed for the "vessel" and those performed for the "cargo". While we have no desire to change this customary usage, it must always be borne in mind that the cargo is not some separate

[9] The Examiner concluded that a broad reading of the rule could lead to its application to cargo the terminal had signed for and removed from the pier used by the vessel, presumably, to another pier, since strike storage is defined as a "charge assessed against cargo *on the pier* at the commencement of a strike." (Emphasis ours). We do not read the rule as applying to cargo removed from the pier by the terminal itself after it has signed for the cargo. In any event, as will appear later, an attempt to apply the rule to such cargo would, as respondents themselves appear to recognize, constitute a reasonable practice.

entity which is itself capable of paying for services rendered. The charges must always be paid by some person standing in a prescribed relationship to the cargo.[10] Thus, where the terminal is the intermediate link between the carrier and the shipper or consignee, one of these two persons must pay the terminal's cost of providing the services rendered. The question here is which of these two should pay the charge in issue.[11] We would place the burden upon him who at the time of the strike owes an undischarged obligation to the cargo. Thus, where the cargo is in free time and a strike occurs, it is the vessel which has yet to discharge its full obligation to tender for delivery and it is to the vessel that the terminal is at this point in time supplying the attendant facilities and services. It is therefore just and reasonable to require the vessel to pay the cost of the supervening strike which renders the discharge of that responsibility impossible.

After reviewing respondents' past practices under the old reduced wharf demurrage provision which governed charges for storage during a strike, the Examiner concluded that the reasons advanced by respondents for shifting these charges from the consignee to the vessel were invalid. Thus, in the Examiner's view, "The terminals are arbitrarily and unfairly charging the vessel strike costs * * * for services not rendered to them." Respondents contend that the Examiner has misconceived the past practice. We find it unnecessary to resolve this dispute.

We have already concluded that the charge in question was for a service rendered the vessel in order to allow the vessel to discharge its duty to tender for delivery. Therefore, the practice is a just and reasonable one under section 17. Its validity under section 17 is not affected by respondents' motives. A bad motive does not make a reasonable allocation unreasonable just as a good motive does not make an unreasonable allocation reasonable. The nature of the practice itself is of course controlling.

2. *Cargo in Demurrage*

Once free time has expired, the vessel's transporation obligation has ended. Absent a special contract, the carrier has done all that its transportation obligation requires it to do. Thus, in our view, it is only just and reasonable that the consignee, who has failed to avail himself of the opportunity to pick up his cargo during free time, should bear

[10] We can only assume that convenience alone led to the substitution of "cargo" for the term "shipper or consignee" depending *inter alia* whether the shipment was outbound or inbound.

[11] No party to this complaint case has argued that the terminal itself should absorb the cost of providing strike storage and the record here is silent as to the terminal's ability to do so.

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the risk of any additional charges resulting from a strike occurring after free time has expired. The fact that the carrier may remain liable for loss or damage to the cargo due to its own negligence, *American President Lines* v. *F.M.B.*, 317 F. 2d 887 (C.A.D.C. 1962) in no way relieves the consignee of its duty to pick up the cargo or bear those risks attendant to a failure to do so. Thus, we conclude that as to cargo which is in demurrage when the strike begins, it is an unjust and unreasonable practice within the meaning of section 17 to assess strike storage against the vessel.

C. *Application of the Strike Storage Rule as a Violation of Section 17*

The Examiner further concluded that the language of the strike storage itself rendered it inapplicable to the situation here in question. Pointing to the fact that under the rule itself, strike storage was assessable only on cargo "prevented from removal" by a strike, the Examiner found that "The refusal by consignee's employees was voluntary, and evidently was not pressed, possibly in order to avoid further complications and danger." The key to the Examiner's conclusion would seem to be his finding that a "longshoremen's strike does not present a legal obstacle preventing the agents or employees of the consignee from picking up its cargo." [12]

To adopt the Examiner's conclusion is to place a strained and unnatural interpretation upon the language of the rule. As the Examiner himself points out, "The parties to this proceeding have been acting under the assumption that the longshoremen's strike prevented the consignee from receiving his cargo." Thus, only the Examiner has construed the language to mean "legal obstacle." Giving the language "the fair and reasonable construction required," *Thomas G. Crowe* v. *Southern S.S. Co.*, 1 U.S.S.B. at 147 (1929), we do not agree that the language "prevented from removal" means or was intended to mean "prevented from removal by a legal obstacle." We have long ago recognized the "physical and moral force of picket lines" and the impact of a strike which effectively prevents consignees from removing their shipments," *Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89 (1948).[13] When the truckers and railroad men upon whom the consignees must rely to pick up their cargo refuse to enter the terminal because of the longshoremen's strike, it can hardly be said that the consignee's "refusal" to pick up their cargo was "voluntary." We

[12] The Examiner cited section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act and certain cases dealing with "secondary boycotts" in support of this conclusion.

[13] That the *Free Time and Demurrage* case involved a trucker's strike as opposed to a longshoremen's strike is of no consequence to our conclusions here.

therefore conclude that the strike storage rule was applicable to the situation in issue and of itself did not constitute an unreasonable practice under section 17.

D. *The Assessment of Strike Storage Under Section 16 First*

There remains only the Examiner's conclusion that a violation of section 16 first had been committed. Citing only our recent decision in *Investigation of Free Time Practices—San Diego*, 9 F.M.C. 525 (1966), the Examiner concluded that the *San Diego* decision "would seem to make any undercharge or overcharge to any user, preferential or prejudicial * * * ." To the Examiner, "It follows that a section 16 violation exists in the present instance since the vessel is being charged for a service to the cargo even though the cost allocation system under which the terminal operates has not been shown." The Examiner then suggests that we "* * * may wish to consider whether a distinction should be drawn between the *San Diego* case and the present one" insofar at least as *San Diego* would appear to apply to different classes of users of terminal services, i.e. between cargo and vessel.

The distinction to be drawn is not between the *San Diego* case and this one but between section 16 and section 17.[14] The practice involved in *San Diego* was the granting of excessive free time to shippers and consignees. We discussed the validity practice under both sections 16 and 17. Under section 16, we stated that because the business practices of some shippers would not allow them to take advantage of the full free time granted, the obstensible offer to all shippers was illusory and the practice worked preference and prejudice within the meaning of section 16.[15] We further pointed out that the practice could be an unreasonable one under section 17 since by providing valuable services free or at reduced rates, the terminal was placing a disproportionate share of the burden of providing essential terminal revenues upon users of other services.

Thus, under section 16, there were two users of the same service—free time. In the present case, this ingredient is missing for the very question in issue is which of the two interests, cargo or vessel, is the actual user of the service in question. The distinction to be made is not between classes of users[16] but whether there are two interests seeking

[14] The Examiner felt that "Under such circumstances, any distinction between section 16 and section 17 seems to be eliminated insofar as terminals are concerned."

[15] We also pointed out that because of the nature of the service free time or free storage, it was unnecessary to show any competitive relationship between particular shippers or consignees, See e.g. *New York Foreign Freight F. & B. Assn.* v. *F.M.C.*, 337 F. 2d 289 (1964).

[16] We can for example see no reason for a terminal to charge say a shipper one rate for pure storage and carrier yet another rate for such storage.

the same or substantially the same service. Here the service is for either the consignee or the vessel depending upon whether the particular cargo is in free time or demurrage. While the particular assessment of strike storage may result in an unreasonable practice under section 17, it does not in the situation at hand result in a violation of section 16.

On the basis of the foregoing, we conclude that the assessment of strike storage against the vessel for cargo on which free time has expired constitutes an unjust and unreasonable practice under section 17 of the Shipping Act, 1916, and respondents will be ordered to amend their strike storage rule accordingly.

By the Commission.

ORDER

The Commission has this day made and entered a report stating its findings and conclusions herein, which report is made a part hereof by reference, and

It is ordered, That respondents herein shall amend their Terminal Tariff No. 1 in a manner not inconsistent with the Commission's decision herein.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
Secretary.

TABLE OF COMMODITIES

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[Numbers in parentheses following citations indicate pages on which the particular subjects are considered]

Violation of a general order of the Commission which was not issued to explain, interpret, or implement section 15 need not be a violation of section 15. Outward Continental North Pacific Freight Conference, 349 (354).

—Admission to conference membership

The Commission is not precluded from disapproving a conference agreement for failure to comply with self policing requirements, conference admission requirements, or shippers' requests and complaints procedures, on the ground that it can only disapprove an agreement if it finds that the agreement operates in one of the four ways set out in section 15. Section 15 specifically provides for disapproval of an agreement for failure to maintain adequate policing, reasonable procedures on shippers' complaints, and reasonable and equal membership provisions. If these standards are not met, no further inquiry as to the general effect of the agreement is necessary. Outward Continental North Pacific Freight Conference, 349 (352–353).

General Orders 7, 9, and 14 are not invalid on the ground that the Commission cannot by rule prescribe the system to be used by a conference in fulfilling the statutory requirements in the areas of the Orders. The Orders do not dictate any single form of compliance with the statute. Id. (355–356).

General Order 9 requires a conference agreement to contain provisions in substantially the form of the nine provisions enumerated therein. These provisions contain standards designed to guarantee that the essential elements of qualification for admission and safety from expulsion are met. The Order does not require that the enumerated provisions be incorporated verbatim. Mere statement of the procedures in the agreement will not guarantee reasonableness and equality of treatment and, therefore, reports of actions taken are required. Id. (356).

The Commission has no guarantee that conferences which inform it of their procedures and reports on actions taken thereunder have necessarily operated fairly, with respect to General Orders 7, 9, aud 14. Compliance with the orders does guarantee that conferences have established a general framework under which the mandates of section 15 can be carried out. As to actual operations, once the Commission receives reports it can decide whether to investigate further to determine if a conference's operations are proper. Id. (357–358).

The Commission's attempt to enforce its General Orders 7, 9, and 14 against a conference was not an attempt to enforce the orders abroad. The conference served the foreign commerce of the United States and operated under an approved basic conference agreement for many years. The mere fact that the conference agreement is subject to Commission jurisdiction should preclude the conference from questioning the applicability of the general orders to its activities.

The Commission cannot see how the activities of a conference serving U.S. foreign commerce can have no effect on U.S. shippers, or U.S. carriers which might seek to join the conference. Id. (358–359).

—Antitrust laws

Section 15 of the 1916 Act exempts steamship conferences and other anticompetitive groups from the antitrust laws when and only as long as the agreements establishing such groups are approved by the Commission. In deciding whether continued approval should be allowed unanimity and tieing rules they must be examined in the light of the four criteria of section 15. Passenger Steamship Conferences Regarding Travel Agents, 27 (33).

In determining whether to approve initially or to allow continued approval of an agreement under section 15 the Commission must reconcile, as best it can, two statutory schemes embodying somewhat inconsistent policies, the antitrust laws and the Shipping Act. It is valid to say that congressional policy is that of encouraging or at least allowing the conference system; it is less than valid to contend that this represents a complete and unqualified endorsement of the system. Id. (33).

The determination to approve or to allow continued approval of an agreement requires consideration of the public interest in the preservation of the competitive philosophy embodied in the antitrust laws and a consideration of the circumstances and conditions existing in the particular trade in question which the anticompetitive agreement seeks to remedy or prevent. Before legalizing conduct under section 15, which might otherwise be unlawful under the antitrust laws, the Commission's duty to protect the public interest requires that it scrutinize the agreement to make sure that the conduct legalized does not invade the prohibitions of the antitrust laws more than is necessary. Id. (34).

Parties seeking exemption from the antitrust laws must show that their agreement is required by a serious transportation need, or in order to secure important public benefits. Otherwise, and whatever may have been the policy of the Commission's predecessors, it is the Commission's 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. This applies equally where the question is whether to allow prior approval of an agreement to continue unmodified. Id. (34–35).

—Approval of agreements

A prior approval under section 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. Passenger Steamship Conferences Regarding Travel Agents, 27 (34).

The Commission cannot approve a new agreement under section 15 if, prior to approval, one of the parties withdraws. The Commission's initial task under section 15 is to deal with *agreements* among or between carriers or other persons subject to the Act, not disagreements. The Commission cannot compel a carrier to participate in a section 15 type agreement against its will. Approval of an agreement after withdrawal of a participant would be tantamount to compelling the withdrawing party to participate. Agreement No. 9431, Hong Kong Tonnage Ceiling Agreement, 134 (141–142).

The Commission's conditional approval procedure is not contrary to its obligations under section 15. If the parties to a proposed agreement do not wish to avail themselves of this purely procedural short cut to approval, the Commission will set the matter down for hearing. The Commission is not required to approve a proposed agreement instantly or set it down immediately for a hearing. Id. (142).

Where a conference filed a modification to its basic agreement (to include self-policing and admission and withdrawal provisions) and prior to approval a conference member withdrew from the modification agreement, no agreement existed for the Commission to act upon. A fair reading of the telegram of withdrawal to the Commission was that its opposition to the whole modification agreement was unqualified and its withdrawal was complete. The decision in *Hong Kong Tonnage Ceiling Agreement*, 10 FMC 134, was applicable. The agree-

ment in that case was found to be a new agreement and not a modification, but this was a distinction without a difference, particularly in view of the fact that the voting provisions of the basic agreement required unanimity whenever a substantial change in the arrangement was contemplated. Petition of New York Freight Bureau (Hong Kong) for Declaratory Order, 165 (168).

Where a conference member withdrew from an agreement amending the basic conference agreement prior to approval of the amendment, the approval given by the Commission was void *ab initio*. Id. (169).

When one of the original parties to a new agreement filed for section 15 approval withdraws from the agreement prior to approval, the Commission's jurisdiction is destroyed. Before approval a conference agreement is no more than a contingent agreement depending for its vitality on Commission approval. Modification of Agreement 5700–4, 261 (269–270).

A joint agreement between five conferences in the North Atlantic Outbound/European Trade, providing for meetings and consultations on common problems, excepting matters described in section 15 other than "cooperative working arrangements", could not be approved. The Commission must know precisely what it is approving and the agreements must set this forth clearly, and in sufficient detail to apprise the public, just what activities will be undertaken. The agreement also failed to comply with section 15 standards in that it would be contrary to the public interest to approve an agreement whose coverage was so vague that the public could not ascertain the coverage by reading it, and in that the agreement was not "true and complete". Agreement 9448—Joint Agreement Between Five Conferences in the North Atlantic Outbound/European Trade, 299 (306–307).

Agreement between conferences setting forth in detail activities to be undertaken jointly is approved, and elimination of provisions relating to joint participation in office services and the filing of reports and circulars with the Commission is permitted. Id. (312–313).

The Commission is not precluded from disapproving a conference agreement for failure to comply with self-policing requirements, conference admission requirements, or shippers' requests and complaints procedures, on the ground that it can only disapprove an agreement if it finds that the agreement operates in one of the four ways set out in section 15. Section 15 specifically provides for disapproval of an agreement for failure to maintain adequate policing, reasonable procedures on shippers' complaints, and reasonable and equal membership provisions. If these standards are not met, no further inquiry as to the general effect of the agreement is necessary. Outward Continental North Pacific Freight Conference, 349 (352–353).

—Cessation of trade

The Commission is not required to and will not disapprove agreements involving the trade between the United States and Cuba because of the cessation of trade. The situation, unlike that in prior cases, was not due to the voluntary action of the conference members. Cessation of trade was brought about by sovereign act. It would be illogical and inequitable for an agency of the government which imposed the embargo to disapprove the agreements. Continued approval would facilitate resumption of service when the embargo was lifted. Agreements Nos. 4188, Etc., 92 (94).

A transshipment agreement would not be disapproved as to the portions dealing with transshipment at Singapore and Penang on the ground that the trade at those ports was nonexistent, due to the confrontation between Indonesia and Malaysia. There was every reason to believe that normal trade relations would

be resumed in the near future. It would place an unreasonable burden on the carriers involved to require them to wait until transshipment at the ports had again become an accomplished fact. Moreover, where a cessation of a trade is brought about by a sovereign act, this fact does not constitute grounds for modification or disapproval of an otherwise acceptable agreement involving that trade. Transshipment and Apportionment Agreements from Indonesian Ports to U.S. Atlantic and Gulf Ports, 183 (193).

—Conference tieing rule

Restraints imposed by conference tieing rule, prohibiting travel agents appointed by conference members from selling passage on nonconference lines, on the agents, the nonconference lines, and the traveling public have operated against the best interests of all three groups. Once this was shown, the conference was required to demonstarte that the 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. The rule was not shown to be necessary to maintain conference stability and was not justified by the services performed for the agents by the conference. Passenger Steamship Conferences Regarding Travel Agents, 27 (46–47).

—Detriment to commerce

Passenger steamship conference rule as implemented contrary to the business judgment of nearly all conference members, requiring unanimous vote of the membership to fix or alter the maximum commission payable to travel agents appointed by the conference to sell passenger bookings has worked to the detriment of the commerce of the United States. Passenger Steamship Conferences Regarding Travel Agents, 27 (38).

Passenger steamship conference rule requiring unanimous vote of members to fix or alter the maximum commission payable to travel agents has had an effect inconsistent with the desires of most members to meet the air challenge. Lack of unanimity has on several occasions prevented the conference's subcommittee, which has initial responsibility for commissions, from even reporting the positions of member lines to the principals. Id. (38).

Conference unanimity rule with respect to the maximum commission payable payable to travel agents blocked attempts by a majority of the member lines to change the general commission level for at least 6 years and the tour commission level for over 2½ years. The logical inference may as well be that the present level is frozen at a level undesired by a majority of the conference members. The fact that the record does not show whether or not a majority would decide to raise the commission level is irrelevant. If the rule has been shown to operate to the detriment of commerce, 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. Id. (40).

Evidence of the blocking of the desires of a majority of the member lines to achieve their goal present in the proceeding is a sufficient reason for declaring conference unanimity rule, with respect to the maximum commission payable to travel agents, detrimental to the commerce of the United States. Id. (40).

The "economic factor" that it takes travel agents more time to book sea passage than air passage could have been overcome but for conference unanimity rule requiring unanimous vote of membership to fix or alter the maximum commission payable to travel agents. The purely superficial equilibrium between commissions for booking sea and air passage would have been replaced by the majority of

conference members by a higher "percentage level" of commissions for sea passage. The record indicates that until this 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 contrary to the public's interest on 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". The Commission's responsibility for protecting that interest requires that it not grant continued approval to anticompetitive conduct which tends to reduce the effectiveness of our merchant marine. Since the unanimity rule creates the situation which tends to foster airline booking at the expense of potential steamship bookings it is detrimental to commerce of the United States within the meaning of section 15. Id. (42–43).

Conference unanimity rule has prevented a majority of members from raising the levels of travel agents' commission and has periodically worked to freeze commissions at levels effectively lower than commissions paid by airlines. This disparity fosters a tendency on the part of travel agents to push air travel, thus depriving the undecided traveler of his right to deal with an agent free of any motivation based on economic self-interest. This situation is detrimental to the waterborne foreign commerce of the United States and contrary to the public interest in the maintenance of a sound and independent merchant marine. Id. (43–44).

Passenger steamship conference rule which prohibits travel agents appointed by conference members from selling passenger bookings on competing nonconference lines without prior permission from the members operates to the detriment of the commerce of the United States and has to be disapproved under section 15. The rule prevents travel agents from selling transportation on nonconference lines, denies the nonconference carriers the use of agents on whom they had to depend for the sale of transportation, and denies prospective passengers the right to use the valuable service of agents in fulfilling their desires to travel on nonconference vessels. Id. (46).

—Discrimination

Congressional allowance of the conference system was and is conditioned on subjection of conferences, agreements, and operations under agreements to strict administrative surveillance to insure fair play, equality of treatment, and protection from discrimination. Passenger Steamship Conferences Regarding Travel Agents, 27 (35).

Passenger steamship conference rule prohibiting travel agents from selling passage on nonconference lines is unjustly discriminatory as between carriers within the meaning of section 15. The admitted intent of the rule is to eliminate nonconference competition. Agents have lost prospective bookings. Nonconference lines have been denied access to channels controlling 80 percent of the business. Rule must be disapproved. Id. (47).

—Filing requirements

Where an approved conference agreement expressly referred to payments to brokers if unanimously agreed on by the parties, an agreement reached unanimously to pay a 3 percent commission to forwarders was not required to be filed under section 15. Practices, Etc. West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Trade, 95 (109).

While an agreement fixing or regulating the amounts of brokerage is an agreement within the meaning of section 15 that has to be filed for approval, once a conference agreement has been approved, conference arrangements regarding

brokerage payments to forwarders are permissible without separate section 15 approval. Id. (109).

Agreements between three members of a conference to pay commissions to forwarders on a deferred basis were unfiled and unapproved section 15 agreements. Both the failure to file immediately and the effectuation of the agreements without approval are violations of section 15. The agreements cannot be described as merely reiterations of the conference requirement not to pay rebates. Id. (109–110, 114).

Section 15 requires absolute compliance. There is no room for technical violations. Exoneration of respondents cannot be premised on the mere designation of failure to file agreements as technical or insubstantial. It is immaterial that agency personnel knew of the agreements. Ramifications of the decision upon the subsidy program is also immaterial to the question of whether the agreements were subject to section 15 and were filed. Nor was a U.S.-flag carrier being discriminated against because the proceeding did not have coextensive thrust against foreign-flag carriers. Id. (110–111, 114–115).

Transshipment agreements concluded between individual carrier must be filed for approval under section 15. Transshipment and Apportionment Agreements from Indonesian Ports to U.S. Atlantic and Gulf Ports, 183 (192).

An agreement between a number of carriers to agree to enter into an agreement with other carriers for the transshipment of cargo was not subject to section 15. It was only when a final agreement had been concluded that the requirements of section 15 came into play. Id. (196).

An agreement between a number of carriers to agree to enter into an agreement with another group of carriers for the transshipment of cargo is not subject to section 15. A mere agreement to negotiate, among the members of one side of the ultimate bargain, cannot, standing alone, accomplish those things covered by section 15 and therefore such an "agreement" does not come within the section. Transshipment and Through Billing Arrangement Between East Coast Ports of South Thailand and United States Atlantic and Gulf Ports, 199 (215).

Court decisions holding that the action of a group of carriers (members of a conference) in initiating a "scheme" of dual rates in a particular trade requires approval under section 15 before it can be carried out because the basic conference agreement does not provide a "cover of authority" to adopt such a "scheme", do not by analogy require that an agreement between a number of carriers to agree to enter into an agreement with another group of carriers for transshipment of cargo be submitted for Commission approval. In the dual rate situation the Commission approves the "scheme" and the conference then enters into thousands of uniform dual rate contracts. Unlike the individual dual rate contracts, the Commission must scrutinize each proposed transshipment agreement to see if the special terms, in the special circumstances of the trade, are compatible with section 15 standards. Id. (216–217).

An interchange agreement between a carrier and truckers who performed a pickup and delivery service on behalf of the carrier was not required to be filed with the Commission. The truckers were not subject to the Shipping Act. Portalatin Velazquez Maldonado *v.* Sea-Land Service, Inc., 362 (372).

No prior approval under section 15 was required for terminals to revise a tariff to make strike storage payable by the vessel rather than the cargo. Approval of the basic agreement under which the terminals operated carried with it continued authority to jointly fix charges and properly allocate them. While a particular change in allocation may be an unreasonable practice under section 17 or unlawful under section 16 or some other section, it does not constitute a new

agreement or a modification to the existing agreement. Boston Shipping Assn., Inc. *v.* Port of Boston Marine Terminal Assn., 409 (413–414).

—Foreign-to-foreign commerce

A conference agreement covering passenger traffic between European ports, on the one hand, and United States and Canadian ports, on the other hand, was approvable, even through foreign-to-foreign commerce was involved. The Commission would not depart from the decision in Oranje Line *v.* Anchor Line Ltd., 5 FMB 714 [in which case the Maritime Board held that it had jurisdiction under section 15 over an agreement covering both foreign commerce of the United States and the intimately related foreign commerce of Canada]. Approved Scope of Trades Covered by Agreement 7840, as Amended—Atlantic Passenger Steamship Conference, 9 (12).

—Jurisdiction of Commission

The Commission had jurisdiction over a proceeding involving agreements of carriers to pay commissions to foreign freight forwarders. The agreements had an impact on the landed cost of goods in this country. More importantly, the Shipping Act specifically has extra-territorial application and does not require demonstrable impact on our commerce. The Commission cannot divest itself of its responsibility because it is difficult to investigate and regulate misconduct which occurred abroad. Practices, Etc. West Coast of Italy, Sicilian and Adriatic Ports/ North Atlantic Range Trade, 95 (112, 115).

For the Commission to have jurisdiction there must be (1) an *agreement* among (2) common carriers by water or other persons subject to the Act (3) to engage in anticompetitive or cooperative activity of the types specified in section 15. If one or more element is lacking, the Commission does not have jurisdiction under section 15. Most fundamental is the requirement that there be an actual, viable agreement to which all the parties have given and continue to give their assent until approval is had. Agreement No. 9431, Hong Kong Tonnage Ceiling Agreement, 134 (140).

If at any time prior to approval by the Commission, one of the parties to a new agreement filed with the Commission changes its mind and withdraws from the agreement, the document previously filed becomes obsolete. The act of withdrawal destroys the subject matter of the Commission's jurisdiction. A section 15 agreement is not a private contract but a public contract. The right of the parties as against each other for breach of "contract" must be distinguished from the question of whether there is in existence an approvable agreement under section 15. Id. (140–141).

First Carriers (under a transshipment agreement) were subject to the Shipping Act, not withstanding that they were foreign and it would be impossible to obtain *in personam* jurisdiction over them. There was no need for the Commission to do so in order to carry out its regulatory obligations under section 15. It was enough that First Carriers were engaged in the transportation by water or property between a foreign country and the United States. The Commission did have *in personam* jurisdiction over the other carriers involved. Transshipment and Apportionment Agreements from Indonesian Ports to U.S. Atlantic and Gulf Ports, 183 (191).

The Commission, in exercising its regulatory duties under section 15, directs its attention more to the agreement and not so much to the parties thereto. As long as the parties satisfy the definition of common carriers by water in the transportation of goods from a foreign country to the United States, the Commission has jurisdiction over the agreement. Id. (192).

Section 18(b), added to the 1916 Act, requires common carriers in foreign commerce and conferences of such carriers to file their rates with the Commission "for transportation to and from United States ports and foreign ports between all points on its own route *and on any through route which has been established*", and gives the Commission jurisdiction over the rates so filed. Congress cannot be charged with the futile action of assigning this responsibility to the Commission to regulate rates on a through route if the Commission had no authority over inter-carrier agreements under which such rates are established. Argument that inclusion of the italicized words shows a congressional intention to omit them from sections 1 and 15 is unacceptable. Transshipment and Through Billing Arrangement Between East Coast Ports and South Thailand and United States Atlantic and Gulf Ports, 199 (213).

—Modification of agreement—Commission authority

Section 15 clearly gives the Commission authority, after notice and hearing, to modify agreements without consent of the parties. Prior non-use of the power did not operate to "repeal" it. When the power is exercised by direct action, the agreement ceases to be an "agreement of the parties". It becomes a modified agreement. Modification of Agreement 5700–4, 261 (268–269).

Where a conference with a unanimous voting rule files an amendment to its basic agreement for approval and one of the members withdraws from the amendment prior to approval, the amendment no longer may be considered as a *conference generated modification*, Id. (270).

Conference agreement will be modified to add self-policing and membership provisions. Withdrawal of approval would penalize 16 out of the 17 member lines who indicated their willingness to comply with General Orders 7 and 9. Since the conference had a unanimous voting procedure, it was powerless to accept modification proposed in order of conditional approval. Id. (273).

Initial Decision is adopted, with the exception that the agreement involved is modified and, as modified, approved. The modifications specify the particular areas in which the member conferences are authorized to meet and discuss mutual problems. Agreement as modified does not authorize the parties to agree on anything except housekeeping arrangements. Agreement 9448—Joint Agreement Between Five Conferences in the North Atlantic Outbound/European Trade, 299 (300).

—Public interest

From substantial evidence of record it is reasonable to conclude that but for conference unanimity rule the majority of member lines would have increased travel agents' commissions, and that an increase would have enhanced the competitive position of the steamship lines. In the absence of a showing that the rule was required by some serious transportation need, or was necessary to secure an important public benefit, or was in furtherance of some purpose or policy of the Shipping Act, disapproval of the rule is required to protect the public interest against an unwarranted invasion of the prohibitions of the antitrust laws, since it was not shown to be necessary in furtherance of any valid regulatory purpose under the Act. Passenger Steamship Conferences Regarding Travel Agents, 27 (44).

Passenger steamship conference rule prohibiting travel agents from selling passage on nonconference lines 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 Shipping Act and there has been no showing that the rule is

required by a serious transportation need or is necessary to secure important public benefits. Id. (47).

Conference agreements providing that member lines may negotiate rates with MSTS do not prohibit the conference members from responding to the MSTS competitive bidding plan. Any agreement or rule promulgated thereunder, which could properly be construed as permitting the foreign-flag segment of a conference to refuse to sanction a particular method by which the U.S.-flag member lines may deal with the government for cargo reserved by law to U.S.-flag section 15. If one or more element is lacking, the Commission does not have lines, would be contrary to the public interest within the meaning of section 15. Carriage of Military Cargo, 69 (86–88).

—Rates

Provision of conference agreement covering "establishment and maintenance of agreed rates, charges and practices for or in connection with transportation of cargo by members" did not authorize a two-level rate structure based on vessel flag. The system (1) introduced an entirely new scheme of rate combination and discrimination not embodied in the basic agreement, (2) represented a new course of conduct, (3) provided new means of regulating and controlling competition, (4) was not limited to the pure regulation of intraconference competition, and (5) constituted an activity the nature and manner of effectuation of which could not be ascertained by a mere reading of the basic agreement. Separate approval is required. Persian Gulf Outward Freight Conference (Agreement 7700)—Rate Structure, 61 (65).

Project rate systems have never been held by the Commission or its predecessors not to require specific authorization in a section 15 agreement. Id. (66).

Legislative history of Public Law 346, amending section 15, and cases construing it, indicate that it is intended absen additional approval to limit conference authority, such as contained in conference agreement provision covering establishment and maintenance of agreed rates, charges and practices, strictly to the rate making authority contained therein. A two-level rate system based upon vessel flag is not authorized by such a provision and cannot be effecuated prior to Commission approval. Id. (66).

—Self-policing

A conference self-policing system must provide specific and realistic guarantees against arbitrary and injurious action. Arbitrary and injurious action can flow both from an unsupported finding of guilt or an unconscionably large penalty. Both the finding of violation as well as the level of the penalty should be included in the arbitrator's scope of review. This is essential where the conference itself sits in judgment upon an accused member. Modification of Agreement 5700–4, 179 (180–181).

Section 15 of the Shipping Act requires that conference agreements contain a system for self-policing, and the Commission has the authority to require inclusion of self-policing as a condition precedent to continued approval of an agreement. Adequate procedures must be set forth in the basic agreement whereby the machinery for self-policing is established; and there must be implementation of that machinery in practice. If the conference does not implement the machinery in good faith, withdrawal of approval is indicated by the 1961 amendment to section 15. A conference cannot legally police itself unless the basic agreement includes a self-policing system. Modification of Agreement 5700–4, 261 (272–273).

There is no single self-policing system which the Commission considers best and this is left to individual conferences to work out for their own purposes. Self-policing system at one time agreed to by all members of conference is selected by the Commission for the New York Freight Bureau (Hong Kong) Conference. Objections of one member consist of conjectures as to how the system might be used as an instrument of oppression. If the system is not administered in a fair manner, a finding of "inadequate policing" would be supported for which the mandatory penalty is disapproval of the entire conference agreement. Id. (274).

The Commission is not precluded from disapproving a conference agreement for failure to comply with self-policing requirements, conference admission requirements, or shippers' requests and complaints procedures, on the ground that it can only disapprove an agreement if it finds that the agreement operates in one of the four ways set out in section 15. Section 15 specifically provides for disapproval of an agreement for failure to maintain adequate policing, reasonable procedures on shippers' complaints, and reasonable and equal membership provisions. If these standards are not met, no further inquiry as to the general effect of the agreement is necessary. Outward Continental North Pacific Freight Conference, 349 (352–353).

General Orders 7, 9, and 14 are not invalid on the ground that the Commission cannot by rule prescribe the system to be used by a conference in fulfilling the statutory requirements in the areas of the Orders. The Orders do not dictate any single form of compliance with the statute. Id. (355–356).

General Order 7 requires that a provision for self-policing be contained in a conference agreement. The method or system used, the procedures for handling complaints, and the functions and authority of persons having responsibility for administering the system must be described. Reports must be filed twice a year. The Order does not dictate what method or system is to be used. Id. (356).

The Commission has no guarantee that conferences which inform it of their procedures and reports on actions taken thereunder have necessarily operated fairly, with respect to General Orders 7, 9 and 14. Compliance with the Orders does guarantee that conferences have established a general framework under which the mandates of section 15 can be carried out. As to actual operations, once the Commission receives reports it can decide whether to investigate further to determine if a conference's operations are proper. Id. (357–358).

The Commission's attempt to enforce its General Orders 7, 9, and 14 against a conference was not an attempt to enforce the Orders abroad. The conference served the foreign commerce of the United States and operated under an approved basic conference agreement for many years. The mere fact that the conference agreement is subject to Commission jurisdiction should preclude the conference from questioning the applicability of the General Orders to its activities. The Commission cannot see how the activities of a conference serving U.S. foreign commerce can have no effect on U.S. shippers, or U.S. carriers which might seek to join the conference. Id. (358–359).

—Shippers' requests and complaints

Requiring of self-policing provisions in section 15 agreements, without requiring such agreements to have provisions relating to shippers' requests and complaints, is not inconsistent under the language of section 15. The requirement with respect to shippers' requests and complaints relates to adoption of reasonable procedures for hearing requests and complaints and does not effect a substantive change in the scope of the conference agreement. A conference can adopt and

implement adequate procedures for dealing with shippers' complaints and requests without obtaining prior approval under section 15. Self-policing procedures, however, require specific approval. Modification of Agreement 5700–4, 261 (273).

The Commission is not precluded from disapproving a conference agreement for failure to comply with self-policing requirements, conference admission requirements, or shippers' requests and complaints procedures, on the ground that it can disapprove an agreement if it finds that the agreement operates in one of the four ways set out in section 15. Section 15 specifically provides for disapproval of an agreement for failure to maintain adequate policing, reasonable procedures on shippers' complaints, and reasonable and equal membership provisions. If these standards are not met, no further inquiry as to the general effect of the agreement is necessary. Outward Continental North Pacific Freight Conference, 349 (352–353).

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General Order 14 requires that procedures adopted by a conference, with respect to hearing and considering shippers' requests and complaints, be reasonable. It defines shippers' requests and complaints. Conferences must file a statement outlining in complete detail procedures adopted and quarterly reports describing requests and complaints received and action taken. The Order does not specifically dictate the type of procedures to be adopted. Id. (357).

The Commission has no guarantee that conferences which inform it of their procedures and reports on actions taken thereunder have necessarily operated fairly, with respect to General Orders 7, 9, and 14. Compliance with the Orders does guarantee that conferences have established a general framework under which the mandates of section 15 can be carried out. As to actual operations, once the Commission receives reports it can decide whether to investigate further to determine if a conference's operations are proper. Id. (357–358).

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—Transshipment agreements

A carrier transporting cargo from Indonesian outports to Indonesian base ports under an exclusive arrangement with other carriers for on-carriage to United States ports is a common carrier by water in the foreign commerce of the United States. Where there exists a unitary contract of affreightment such as a through bill of lading by which two or more carriers or conferences of carriers hold themselves out to transport cargo from a specified foreign port to a point in the United States with transshipment at one or more intermediate points from one carrier to another, each of the carriers so involved is "engaged in" transporting cargo by water from a foreign country to the United States. Transshipment and Apportionment Agreements from Indonesian Ports to U.S. Atlantic and Gulf Ports, 183 (190–191).

First Carriers (under a transshipment agreement) were subject to the Shipping Act, notwithstanding that they were foreign and it would be impossible to obtain in personam jurisdiction over them. There was no need for the Commission to do so in order to carry out its regulatory obligations under section 15. It was enough that First Carriers were engaged in the transportation by water of property between a foreign country and the United States. The Commission did have in personam jurisdiction over the other carriers involved. Id. (191).

Transshipment agreements concluded between individual carriers must be filed for approval under section 15. Id. (192).

An agreement between carriers transporting cargo from foreign outports to foreign base ports and other carriers for on-carriage of the cargo to United States ports is subject to section 15 for three reasons: (1) Since both groups of carriers are subject to the Act, any agreement among them meets the criteria of section 15 as to parties to the agreement; (2) the agreement is one "fixing or regulating transportation rates or fares . . . preventing or destroying competition . . . allotting ports . . . (and) providing for an exclusive, preferential, or cooperative working arrangement; and (3) since the on-carriers actually serve United States ports, effective, practical regulation of the agreement can be achieved without in personam jurisdiction over the originating carriers. Id. (192).

Under long established policy and consistent practice, the Commission and its predecessors have always required approval of transshipment agreement under section 15. The fact that in many instances the carrier or carriers on one side of the agreement do not touch United States territory is immaterial. The consistent administrative construction of the Act is entitled to great weight. Inference that inclusion of the phrase "on its own route or any through route which has been established" in section 18(b) shows Congress' intent to exclude jurisdiction over such "through routes" in the original Act, is unwarranted. Id. (192–193).

Exclusive dealing provision of a transshipment agreement requiring the only originating carrier in the trade to patronize exclusively conference carriers on-carrying the cargo involved to United States ports must be disapproved, since the possibility of any independent on-carrier entering the trade was utterly precluded. Such a provision went far beyond the permissible limits of section 15, unduly prevented competition, and was therefore contrary to the public interest. A similar agreement was approvable where there were other originating carriers which could be utilized by an independent on-carrier. The Commission will not sanction an absolute monopoly in an important segment of a trade in United States foreign commerce. Id. (193–195).

An agreement providing for the apportionment among conference carriers of some of the transshipment cargo carried under a transshipment agreement was approved. The agreement could have little or no effect upon an independent competitor. It was shown that the agreement would tend to eliminate wasteful practices and promote orderly continuity in the flow of cargo in the trade. Id. (196–197).

Carriers transporting cargo from Thailand to Singapore under an exclusive arrangement with other carriers for on-carrying the cargo to the United States are common carriers by water in the foreign commerce of the United States, both by virtue of their actual carryings and because of their joint activity with the on-carriers covering the entire route. Transshipment and Through Billing Arrangement Between East Coast Ports of South Thailand and United States Atlantic and Gulf Ports, 199 (208).

A transshipment agreement between carriers transporting cargo from Thailand to Singapore and other carriers for on-carriage to United States ports is not

exempt from section 15 because the originating carriers do not make any direct calls at United States ports on other routes, or because the through bills of lading are issued by the on-carriers. Other activities of carriers have no bearing on the legal status of the transshipment agreement. In most, if not all transshipment agreements either the originating carrier or the on-carrier issues a through bill for the whole trip, but this has never been held to prevent the agreement being subject to section 15. Id. (209).

A transshipment agreement involving exclusive dealings between the two groups of carriers is not exempt from section 15 because the transshipment points (unlike those in the *Canal Zone* case, 2 USMC 675) are in foreign territory and the Canal Zone agreement did not involve exclusive dealings and included through movements by single member carriers as well as transshipment. The Commission treated the *Canal Zone* case as a situation where the originating carriers did not touch a United States port and the Canal Zone has always been treated as foreign commerce. The *Canal Zone* case also had exclusive features. Id. (210).

Under frequent rulings and decisions, long established policy, and consistent practice, the Commission and its predecessors have always required approval of transshipment agreements under section 15. The fact that in many instances the originating carriers do not touch U.S. territory makes no difference. All transshipment agreements, whether or not they contain exclusive features, fall within section 15. They are invariably "cooperative working arrangements". Id. (211).

An exclusive transshipment agreement between carriers transporting cargo from Thailand to Singapore and carriers on-carrying the cargo to U.S. ports is subject to section 15. To treat it as an innocuous, incidental facet of the overall activities of the carriers would overlook the spirit as well as the letter of the Act. The exclusive arrangement goes far beyond the elimination of intraconference competition and attempts to restrict the competition of independent carriers. Without surveillance under section 15, such predatory devices are obviously capable of being of being discriminatory, of detriment to our foreign commerce, and contrary to the public interest. Id. (211–212).

Section 18(b), added to the 1916 Act, requires common carriers in foreign commerce and conferences of such carriers to file their rates with the Commission "for transportation to and from United States ports and foreign ports between all points on its own route *and on any through route which has been established*", and gives the Commission jurisdiction over the rates so filed. Congress cannot be charged with the futile action of assigning this responsibility to the Commission to regulate rates on a through route if the Commission had no authority over intercarrier agreements under which such rates are established. Argument that inclusion of the italicized words shows a congressional intention to omit them from sections 1 and 15 is unacceptable. Id. (213).

First Carriers under a transshipment agreement are "engaged in" (participating in) "the transportation of property between the United States and a foreign country" within the meaning of section 1 of the 1916 Act when they carry rubber on the initial leg of the through route. They are also constructively "engaged" in the whole trip from Thailand to New York by entering into the agreement because the carriage on the entire trip then becomes a joint and common undertaking between two groups of carriers. Switching the cargo to a different vessel at Singapore does not change the fact that the transportation is part of the foreign commerce of the United States. Id. (214).

Exclusive transshipment arrangement between a group of originating carriers which operate exclusively between Thailand ports and Singapore, and a group of on-carriers which operate from Singapore to U.S. ports, was not shown to be

unjustly discriminatory or unfair or detrimental in its operation to United States commerce, or contrary to the public interest or in violation of the 1916 Act. It would promote a more efficient and orderly transshipment of rubber in the trade and provide service to shippers in lean times. Arrangement for sorting the cargo by the originating carriers would speed the transshipment process. The factor that there woul be some restriction on competition did not prevent approval under section 15, and the agreement should be approved. Id. (214–215).

Each and every transshipment agreement should be looked at on its own merit. This cannot be achieved by a flexible and varying approach to the question of whether originating carriers under such agreements are common carriers by water in the foreign commerce of the United States. The Act must be applied uniformly to all carriers. Each agreement between originating carriers and on-carriers is subject to section 15. The incidental agreements between the members of each group, first to negotiate and then to sign, are merged into the transshipment agreement and every facet of individual agreements can be examined as part of the scrutiny of the transshipment agreement. Id. (218).

If an arrangement between on-carriers under a transshipment agreement to enter into the transshipment agreement could be isolated from the agreement itself it could be approvable under section 15. Certainly, if the entire agreement is approvable, one of its antecedent parts, standing alone, could not be found to create evils that would contravene the statute. Id. (219).

Exclusive transshipment arrangement represented the complete understanding between the parties and had not been carried out without Commission approval. Id. (219–220).

—Voting requirements

Unanimity in respect of matters under agreements is not the policy of the United States which governs water carriers under section 15 agreements. Congress has left resolution of the question to the Commission to be settled by rule or regulation if the Commission determines it necessary to resolve the issue on an industry-wide basis. Passenger Steamship Conferences Regarding Travel Agents, 27 (36–37).

Passenger steamship conference rule as implemented contrary to the business judgment of nearly all conference members, requiring unanimous vote of the membership to fix or alter the maximum commission payable to travel agents appointed by the conference to sell passenger bookings has worked to the detriment of the commerce of the United States. Id. (38).

Passenger steamship conference rule requiring unanimous vote of members to fix or alter the maximum commission payable to travel agents has had an effect inconsistent with the desires of most members to meet the air challenge. Lack of unanimity has on several occasions prevented the conference's subcommittee, which has initial responsibility for commissions, from even reporting the positions of member lines to the principals. Id. (38).

Passenger steamship conference rule requiring unanimous vote of membership to fix or alter the maximum commission payable to travel agents may be "merely the procedure" by which a maximum level of commissions is fixed, but it is entirely incorrect to conclude that the level fixed must be found unlawful before the "procedure" itself can be ordered modified. In dealing with the rule itself the Commission must determine to what degree it will permit rigidifying or circumscribing of the flexibility of operations under an anticompetitive agreement—a far different 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 one consideration is not dependent upon the other. Id. (38).

Conference unanimity rule with respect to the maximum commission payable to travel agents blocked attempts by a majority of the member lines to change the general commission level for at least 6 years and the tour commission level for over 2½ years. The logical inference may well be that the present level is frozen at a level undesired by a majority of the conference members. The fact that the record does not show whether or not a majority would decide to raise the commission level is irrelevant. If the rule has been shown to operate to the detriment of commerce, 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. Id. (40).

Evidence of the blocking of the desires of a majority of the member lines to achieve their goal present in the proceedings is a sufficient reason for declaring conference unanimity rule, with respect to the maximum commission payable to travel agents, detrimental to the commerce of the United States. Id. (40).

Record shows that conference unanimity rule with respect to the maximum commission payable to travel agents frustrated the desire of the majority of the member lines. Determination of the effect of the rule upon actions of the principles has been made difficult by failure of the conference to keep and file complete minutes of its meetings. This failure has caused whatever evidentiary sketchiness exists as to the effect of the rule, and the responsibility for this failure cannot be shifted to the Commission. Id. (40).

Conference procedures must be reasonably adapted to the goal of conference activity; namely, the voluntary effectuation of the desires 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 sufficient flexibility under the conference agreement to alter action which the members may once have found desirable but later appears to thwart their desires. Id. (40–41).

Outlawing of unanimous voting requirements, because they failed voluntarily to effectuate the desires of conference members, has often occurred. Evidence exists in this proceeding of both veto usage and blocking of the desires of a strong majority of member lines for many years to raise the level of travel agents' commissions. Such results are clearly detrimental to commerce 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. For these reasons the unanimity rule must be declared unlawful under section 15. Id. (41–42).

Conference unanimity rule with respect to maximum commissions payable to travel agents must also be disapproved because it resulted in maximum level of commissions which places bookings of steamship travel at a competitive disadvantage with airline travel. The record clearly shows that it is not economic factors entirely beyond conference members' control which have caused this competitive disadvantage but the rule itself. Id. (42).

The "economic factor" that it takes travel agents more time to book sea passage than air passage could have been overcome but for conference unanimity rule requiring unanimous vote of membership to fix or alter the maximum commission payable to travel agents. The purely superficial equilibrium between commissions for booking sea and air passage would have been replaced by the majority of conference members by a higher "percentage level" of commissions for sea passage. The record indicates that until this 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 contrary to the public's interest in the

—Fixing of rates

In determining the reasonableness of rate and, if necessary, in fixing minimum reasonable rates, the Commission has authority to insure that, in the absence of valid transportation ratemaking factors militating against such result (including cost of transportation to carrier, value to shipper and distance), cargo move through naturally tributary areas. It also has authority to insure that, where it becomes necessary in the public interest, high value commodities move at rates high enough to enable the carriage of essential low value commodities at rates lower than those at which the low value commodities would be carried solely in consideration of the usual transportation factors alone. Reduced Rates on Machinery and Tractors from United States Atlantic Ports to Ports in Puerto Rico, 248 (250–251).

The Commission has authority to increase rates which are compensatory. Id. (251).

In determining rates distance has an important bearing particularly where because of a shorter distance between transit points a carrier incurs lesser costs. Id. (252).

A minimum rate will not be fixed merely because a lower rate would be wasteful of revenue. There is no principle which would require a carrier to charge rates higher than he chooses to charge unless the carrier's level of rates is so low that it or other carriers are about to be driven from a trade which will be left with inadequate service, or unless the carrier's rates have an unlawful impact upon someone or thing, e.g., another carrier, shipper, or port. Id. (252).

Where carriers from North Atlantic ports to Puerto Rico maintained rates of 50 cents per cubic foot on heavy machinery and South Atlantic carriers maintained rates of 48 cents, voluntarily since vacation of a Commission order; the results indicated a movement of naturally tributary cargo back through the port of New York; and there appeared to be no need to act with respect to the needs of the Puerto Rican economy, there was no need to set minimum rates, and the rates currently in effect were found to be lawful as just and reasonable. Id. (253).

—Pickup and delivery service

The *Matson* decision, 7 FMC 480, does not support the position that truckers performing a pickup and delivery service on behalf of, or under contract with, a common carrier by water become subject to the 1916 Act. The Commission made it clear that its regulatory authority attached only to the water carrier. The Commission did not attempt to regulate the rates agreed upon between the ocean carrier and the land carrier for performance of the service. Portalatin Velazquez Maldonado v. Sea-Land Service, Inc., 362 (369).

The transportation service offered by a water carrier, when viewed as an obligation which attaches to common carriage, begins or ends at the place provided in a terminal for the receipt or delivery of property. A common carrier by water may, by contract, extend its obligation to a shipper to include a pickup and delivery service. The fact that an ocean carrier employs a land carrier to perform this contractual obligation does not place such land carrier in the position of performing an obligation imposed by statute on a common carrier by water. A person by virtue of a contract with a water carrier or terminal operator may become subject to Commission jurisdiction provided the contract involves an activity covered by the 1916 Act. Truckers who enter an ocean terminal for the sole purpose of picking up or delivering cargo are not furnishing terminal facilities within the purview of section 1 of the Shipping Act. Such

truckers, acting independently or on behalf of an ocean carrier, are not subject to the Commission's jurisdiction. Id. (370–371).

Even if section 16 could be extended to include a requirement that an ocean carrier must equally distribute the hauling of its cargo between inland truckers, assignment by the carrier of a greater portion of cargo involved in its door-to-door service to truckers who agreed to accept less-than-trailerload cargo would not be undue or unreasonable preference. Trucking of less-than-trailerload cargo represented, at best, a marginal operation from a financial viewpoint. Id. (372).

Evidence failed to show any violation of section 17 of the Shipping Act in connection with a carrier's pickup and delivery service performed for it by truckers. Id. (372).

Evidence failed to show any violation of section 18 of the Shipping Act in connection with a carrier's pickup and delivery service performed for it by truckers. The zones and rates in connection with the receipt and delivery of cargo were not shown to be other than just and reasonable. Id. (372).

—Policies of merchant marine laws

To the extent that MSTS competitive bidding system is asserted to be unlawful, as violating the policies of the merchant marine statutes, without specific allegations of violation of particular substantive provisions of the statute, the Commission points out that expressions of policy are nothing more than the goals sought to be achieved by Congress. Standing alone a statement of policy grants no substantive power and prohibits no specific conduct. It is not "violated" in the sense that substantive provisions of a statute are violated. Carriage of Military Cargo, 69 (74).

The national shipping policy which is to be ultimately deducted 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". The Commission's responsibilities are exclusively regulatory. The Commission may not "promote". Neither may it "regulate" without regard to the consequences on our merchant marine, because the merchant marine is itself a part of United States foreign commerce and, as such, is entitled to the full protection of the Shipping Act. Shippers and "other persons" are also entitled to protection afforded by the Act. Id. (75–76).

—Preference or prejudice

Consideration of lawfulness under section 16 First of MSTS proposed procurement program is premature. The "preference" to MSTS is a reduced rate and nothing else. Only undue or unreasonable preferences are outlawed by section 16 First. Undueness or unreasonableness cannot be determined at this time. Carriage of Military Cargo, 69 (72–73).

Carrier's reduced rate on flour from the mainland to Hawaii, to meet competition from an unregulated barge line carrying wheat in the same trade, did not result in undue preference or prejudice in violation of section 16 First of the 1916 Act. Matson Navigation Company, Reduced Rates on Flour from Pacific Coast Ports to Hawaii, 145 (148).

Section 16 First of the 1916 Act says that *all* unreasonable prejudice is unlawful. Insofar as a carrier utilizes rates to enable it unreasonably to prejudice a port locality, the carrier's conduct is unlawful whether it is the result of an unlawful equalization or a single unjustifiably low ocean rate which has the same effect. Reduced Rates on Machinery and Tractors from United States Atlantic Ports to Ports in Puerto Rico, 248 (251).

A carrier may violate section 16 First even though it does not serve ports which it allegedly prejudices. A violation depends on preference and prejudice, not whether a carrier serves both ports. A carrier whose rates from Jacksonville to Puerto Rico attract cargo from origins which, based on inland rail rates, are tributary to North Atlantic ports is not necessarily in violation of section 16 First. Whether the drawing away of traffic results in unjust or unfair discrimination or undue or unreasonable preference is a question of fact for determination in each case. Where the record shows only that the carrier, pursuant to an apparently reasonable rate structure, attracts cargo overland from areas which could be served by other ports, no finding of a violation of section 16 First can be made. Rates From Jacksonville, Florida To Puerto Rico, 376 (382–383).

A carrier's rate on scrap metal from Puerto Rico to North Atlantic ports, which was higher than the rate from Puerto Rico to Jacksonville, was not unlawful per se, and in the absence of proof that the rate was unlawful, it was lawful. Id. (384).

A carrier maintaining uniform rates from Atlantic ports including Jacksonville, to Puerto Rico would not be permitted to lower its rates from Jacksonville to meet competition out of Jacksonville. The Commission may not lawfully permit such a reduction without a reduction in rates out of North Atlantic ports without a showing that cost or other transportation conditions justify a rate policy which on its face works a perference to Jacksonville and prejudice to other Atlantic ports served by the carrier. There must be more than just a showing that the cost of operation at one port is greater than at another competing port. Volume of traffic, competition, distance, advantages of location, character of traffic, frequency of service, and other matters are properly to be considered in arriving at adjustment of rates between ports. The probable result of permitting the proposal would be to seriously impair the low rate carrier's ability to attract cargo, and induce movement of cargo from the higher rate carrier's service at North Atlantic ports to its service at Jacksonville. This was not justified on the record. Id. (385–386).

—Reduced rates to government

Absence in the Shipping Act of any express provision for reduced rates to the government does not bar MSTS competitive bidding procedure designed to reduce cargo rates. Court cases involving tariffs filed with the CAB did not deny the right of the government to reduced rates when the reduced rate was properly filed and part of the published tariff of the carrier. Under the MSTS procedure, all rates agreed upon are to be published and filed under section 18(b) of the Shipping Act. Carriage of Military Cargo, 69 (80–81).

—Reduced rates to meet competition

A regulated carrier's reduced rates (which returned less than fully distributed costs) on flour from the mainland to Hawaii was necessitated by competition with an unregulated barge line carrying wheat in the same trade. The fact that a differential in rates exists between raw materials and the finished product does not mean that the two commodities cannot be competitive. The fact that the competitive relationship between the carriers was an outgrowth of a more direct competitive relationship between a local Hawaiian mill and mainland mills for the sale of flour did not detract from the fact that the carriers were in competition. Matson Navigation Company, Reduced Rates on Flour from Pacific Coast Ports to Hawaii, 145 (149–151).

A regulated carrier's rate reduction on flour from the mainland to Hawaii was necessary to enable mainland mills to compete with a mill in Hawaii for

the sale of flour in Hawaii, in view of evidence that the mainland mills were losing their business in Hawaii, and that a reduction in their price of flour was necessary to enable them to compete there. It was not necessary to permit an inquiry into the cost of production or profit margin of the mainland mill shippers to show a compelling necessity for the rate reduction below fully distributed costs. The important criteria to be considered were the transportation considerations and not whether the mainland mills could compete by reducing their own profits. The Commission has consistently refused to permit the "profitability" of a shipper's business to determine the reasonableness of a carrier's rates. The true measure of the advantage of the Hawaiian mill lay in its lower cost of transportation of flour in the form of wheat (via an unregulated barge carrier) compared with the mainland mills' costs of transporting flour in finished form under the regulated carrier's rates. Id. (151–153).

Carrier's rate reduction on flour from the mainland to Hawaii, to meet competition with an unregulated barge line carrying wheat in the same trade, did not unfairly distort the existing rate structures, thereby resulting in unfair discrimination among shippers. Argument that by allowing barge shippers selective rate reductions which return les than full costs, without affording similar reductions to smaller shippers of other commodities, the carrier was placing an undue burden on the latter shippers, was not valid in view of the conclusion that the reduced flour rate did in fact return a net-to-vessel contribution of $78.59 per container. The shipments returned a sufficient amount to cover extra expenses incurred as the result of a particular flour shipment and also contributed an additional $78.59 per container toward administrative and vessel expense. Id. (152–153).

In determining whether a carrier's rate reduction on flour from the mainland to Hawaii was contrary to the public interest, it was sound and proper to restrict the consideration to transportation conditions and the effect the reduction might have thereon. Id. (154).

Carrier's rate reduction on flour from the mainland to Hawaii was not unlawful because it would enable the carrier to prevent entry of a new carrier in the trade. In view of the determinations that the reduction was compelled by competition and that it returned an amount in excess of out-of-pocket costs, the assumption that approval of the reduction would amount to a condonation of arbitrary rate reductions below compensatory levels, and that the carrier could employ such reductions to keep new carriers out of the trade, was unwarranted. Id. (154).

Carrier's rate reduction on flour from the mainland to Hawaii was not unlawful on the ground that it would result in an unreasonable rate structure in Hawaii in which one commodity would be subsidized by another. The effect of a rate reduction on other commodities and the overall rate structure is important to a consideration of the public interest. However, the reduction, since it returned a net-to-vessel contribution, did not distort the rate structure in such a way as to place an undue burden on one commodity or one shipper. Id. (154).

Carrier's reduced rate on flour from the mainland to Hawaii was not unlawful because, if the carrier prevailed in allowing a specific commodity rate reduction at the request of a barge shipper, large influential shippers would always be able to gain similar concessions at the expense of small shippers. It could not be assumed that the carriers would make indiscriminate rate reductions to please large shippers. In the present case, the carrier had given the shipper a rate reduction less than requested, and then only when it was apparent that the cargo would be lost . Also, the reduced rate was justified because it returned

more than out-of-pocket costs and because it was probable that the carrier would otherwise have lost most of the flour trade. Id. (155).

Carrier's reduced rate on flour from the mainland to Hawaii to meet the competition of an unregulated barge line carrying wheat in the same trade was not contrary to the public interest on the ground that it would effectively deter the establishment of new industry in Hawaii, since the carrier could control industry expansion by making spot rate reductions on whatever commodities a new industry was seeking to market in Hawaii. Experience with the reduced flour rate did not support any such fear. Id. (155).

Domestic offshore carriers have the initiative to set rates which fall within a general range of reasonableness and are not otherwise unlawful. Various levels of rates in a single trade, or differentials, are not unlawful as such. Where a carrier lawfully sets rates lower than a competitor's the competitor may initiate rates to meet competition provided the rates are compensatory and not lower than necessary to meet the competition. The right to meet competitive rates is not absolute. Rate reductions to meet competitive rates must be just and reasonable and not discriminatory. Rates From Jacksonville, Florida To Puerto Rico, 376 (380–381).

Whether a carrier may preserve its rate differential lower than its competitor's rates depends upon its ability to attract cargo at rate parity. A primary shipper consideration in selecting a carrier is total cost of transportation. Where rates are equal, minor considerations assume a major rule. With slower transit time the lower rate carrier's vessels were exposed to the hazards of ocean transportation for a longer period. Hazard and probable conditions of the cargo upon arrival is a shipper concern A tug and barge service, offered by the lower rate carrier, was inherently less stable and less reliable. The higher rate carrier's service was modern and efficient compared to the lower rate carrier's. Shippers would as a rule prefer the more modern, faster and more dependable service if rates were equal. The lower rate carrier's service, while twice weekly, was quite erratic and the other carrier's service, though only weekly, was dependable. Id. (381).

Carrier whose rates were differentially lower than those of its competitor from Jacksonville to Puerto Rico would be injured if its rates were increased through loss of traffic upon which the inland rail rate was favorable to North Atlantic ports. The carrier would also be deprived of a substantial portion of its cargo from inland-rate equal origins and from the Jacksonville area as well. At rate parity the carrier would be forced out of business. Therefore, the carrier's rates must serve as an inducement to shippers. The higher rate carrier had no competitive necessity to lower its rates and eliminate the differential. Rate parity would drive the low rate carrier out of the trade. On the record, the high rate carrier would not be permitted to lower its rates to the levels of the low rate carrier and the latter would not be ordered to increase its rates to levels prevailing in the North Atlantic. Id. (381–382).

—Undercharges

Where a carrier properly filed rate increases to become effective on February 1, 1964; and on April 23, 1964, filed the same increases to become effective August 1, 1964, and at the same time attempted to cancel the earlier filing, reinstate the rates in effect prior to February 1, 1964, and postpone the rate increase until August 1, 1964, the result was that the higher rates were the applicable rates from February 1, 1964, to April 23, 1964 (and from and after August 1). Retroactive application of rates was clearly nullified by section 18(b)(2). Refunds made to shippers for the period between February 1 and April 23 were thus refunds of a

portion of rates duly published and in effect during this period within the meaning of, and contrary to, section 18(b). However, because the illegal manner of filing was the result, at least in part, of actions of the Commission as reasonably interpreted by the conference, the Commission would not seek penalties from the conference for the "refunds." Application for leave to waive collection of undercharges was denied. Java Pacific Rate Agreement *v.* Numerous Shippers in the Trade from Indonesia, 157 (161–163).

—Unfair device or means

MSTS competitive bidding procedure, under which bids for cargo must be submitted under seal, is not an unfair device or means to obtain transportation at less than rates which would otherwise be applicable within the meaning of the first paragraph of section 16. Whatever rates are established must be filed with the Commission, published in a tariff, and made available to all in a way which is not unjustly discriminatory or unduly prejudicial, etc., and this is all that the Shipping Act requires. Carriage of Military Cargo, 69 (83–84).

Section 16 of the Shipping Act clearly contemplates, not that a tariff rate will not be changed, but rather that the 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, to rebate a portion of the freight rate to a particular shipper, to withhold information from the carrier essential to determination of the proper rate, or to seek a lower rate or rebate by false billing. Under MSTS bidding procedure the rates will be filed with the Commission and and it will be 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) of the Shipping Act. Id. (85–86).

MSTS competitive bidding procedure cannot be equated with the type of "unjust or unfair device or means" contemplated in the first paragraph of section 16. It is therefore lawful under section 16 Second as well. Id (86).

—Volume rates

Consideration of lawfulness under section 14 Fourth of MSTS proposed procurement program is premature, since no particular contract for any stated volume of cargo at a fixed rate had been made. Prime concern of carriers was that rates would be reduced 25 percent as the product solely of competitive bidding. Whatever the validity of this assumption, it is itself precisely the reason why there can be as yet no determination under section 14 Fourth. That section does not outlaw all contracts based on volume of freight only, but only those which are unfair or unjustly discriminatory. Such a contract is unfair or unjustly discriminatory if the advantages offered under it are not based on transportation factors which are altered by the "volume of freight offered". MSTS Cargo Commitment contract is sought if the offeror needs a fixed volume to provide his "best rate". The contract is geared to a rate. Not even the most strained reading of section 14 Fourth can render unlawful the mere pro forma solitication by a shipper, no matter how large, of contracts based on volume of freight. Carriage of Military Cargo, 69 (72–73).

Section 14 Fourth is not, because of the newly enacted section 14b, to be read as requiring that contracts originally unlawful under 14 Fourth only if "unfair or unjustly discriminatory" must now be filed for approval and contain provisions concerning such things as prompt release of the shipper. If Congress had intended to alter the status of contracts based on volume of freight offered, it would have made its intention clear. Id. (78).

The MSTS Cargo Commitment contract is a volume contract. The contract 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." Id. (78).

The dual-rate contract struck down by the Supreme Court in FMB *v.* Isbrandtsen Co., as unlawful under section 14 Third is not like the MSTS Cargo Commitment contract. The Court distinguished dual rate contracts from ordinary requirements contracts under which conference members are obligated to furnish ships at regular intervals and at rates effective for a reasonably long period. Such contracts had, since 1916 been lawful under section 14 Fourth so long as they were not unfair or unjustly discriminatory. Section 14b will not be read as altering the longstanding status of these contracts. MSTS Cargo Commitment is the kind of contract which the Supreme Court found similar to an ordinary requirements contract. Whether a particular Cargo Commitment is unfair or unjustly discriminatory and thus unlawful under 14 Fourth is dependent upon such things as the particular amount of cargo committed and the specific rate fixed. Id. (78–80).

REBATES.

Commission paid to foreign forwarders, even if considered to be paid to shippers, were not necessarily "deferred rebates" prohibited by section 14 First which speaks 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". The missing ingredient in the agreements to pay commissions was the continued obligation of the shipper to remain loyal. Practices, Etc. West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Trade, 95 (113–114).

Section 14 of the Shipping Act prohibits deferred rebates to any shipper but truckers presented no evidence to establish that any shipper received a rebate from a carrier in connection with an agreement between the carrier and truckers under which the truckers performed the pickup and delivery portion of a door-to-door contract of ocean transportation on behalf of the carrier. Portalatin Velazquez Maldonado *v.* Sea-Land Service, Inc., 362 (372).

PREPARATION.

Failure of the Commission to promulgate a proposed rule, prohibiting limitation of the time within which claims for adjustment of freight charges may be presented to a carrier to less than two years after date of shipment, is not to be interpreted to allow carriers in any way 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 1916 Act with the Commission at any time within two years of accrual of the cause of action which is the basis of such injury and claim. The two-year statute of limitations in section 22 is not a "pure statute of limitations" 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. Time Limit on the Filing of Overcharge Claims, 1 (5).

Practice of the ICC, prior to 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 Maritime Commission purposes. The Maritime Commission is empowered by Congress to grant reparation for any violation of the statutes it administers, and there is a statute of limitations governing the time within which such reparation may be sought embodied in the 1916 Act itself.

No reference for the applicable time limitation need be made to principles of general law or State statutes of limitations as was necessary under ICC practice before the statutes were amended. 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, and the Commission will not permit it. Id. (5–6).

A carrier-imposed time limitation for the filing of claims for freight adjustments cannot be declared unlawful unless shown to operate in a fashion contrary to some provision of law administered by the Commission. Id. (6).

Carrier-imposed time limitations might be utilized in such a way as to prevent shippers from filing or recovering reparation pursuant to claims with the Commission for injury caused by violation of the Commission's statutes. Such effect would be contrary to the public interest embodied in section 22 of the Shipping Act. No showing was made, however, that carrier-imposed time limitations have had such effect. Id. (6–7).

Sections 18(b)(3) of the 1916 Act and 2 of the 1933 Act would not outlaw carrier-imposed time limitations as such. They merely prohibit a carrier from retaining freight charges greater than those specified in its tariff. A carrier could retain such charges if a claim for reparation before the Commission were brought after two years from time of accrual of the cause of action. The carrier's limitations would violate the sections only if it could be shown that they had the effect of preventing shippers' recovery based on just claims prior to expiration of the two-year period. Id. (7).

The second paragraph of section 17 of the 1916 Act, under which carriers' time limitations on filing of freight adjustment claims were alleged to be invalid does not relate to such practices. 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 Id. (7).

Where a carrier had a tariff rate for "Condiments" and a rate for "Onions, n.o.s.", the applicable rate for a shipment of dehydrated onion powder was the rate for "Condiments". Complainant, which was charged the general cargo, n.o.s. rate, a violation by the carrier of section 18(b)(3), was entitled to the difference between the rate charged and the applicable rate, with interest at six percent. Corn Products Co. *v.* Hamburg-Amerika Lines, 388 (392–393).

The Commission has no authority to permit deviations from filed tariffs in the foreign trades. Unintentional failure of a carrier to file a particular rate is not sufficient reason to depart from the requirements of section 18(b)(3). Aarmo Bristle Processing & Brush Co. *v.* Zim Israel Navigation Co., Ltd., 402 (403–404).

The Commission has no authority as to shipments in foreign commerce to permit deviations from rates on file, or to give effect to an unfiled or unpublished tariff regardless of the equities involved. Ayrton Metal & Ore Corp. *v.* American Export Isbrandtsen Lines, Inc., 405 (407).

SELF-POLICING. See Agreements under Section 15.

SHIPPERS' REQUESTS AND COMPLAINTS. See Agreements under Section 15.

SHOW CAUSE ORDERS. See Practice and Procedure.

STATUTE OF LIMITATIONS. See also Reparation.

The Commission was not barred by the statute of limitations from investigating violations of the Shipping Act. The statute applies to the collection of

civil and criminal penalties, not to investigations instituted by the Commission. Practices, Etc. West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Trade, 95 (114).

STEVEDORING. See Terminal Operators.

STORAGE CHARGES. See Terminal Operators.

SURCHARGES. See also Dual Rates.

Conclusions of the Examiner, to which no exceptions were filed, that there was 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 ports as prohibited by section 17 in connection with imposition of a surcharge on 30 days' notice, and no showing that the level of the surcharge was so unreasonably high as to be detrimental to commerce contrary to section 18(b), are sustained. Imposition of Surcharge at United States Atlantic and Gulf Ports, 13 (20).

In view of the unprecedented refusal of longshoremen to accept a contract agreed to by their leaders, the ensuing intransigence of the union in insisting on an all-ports-or-none rule despite an existing injunction against all-port bargaining, and the unprecedented port congestion that followed the longshoremen's strike in 1965, occurrences which could not have been foreseen by the exercise of a high degree of diligence, extraordinary conditions existed justifying imposition of surcharges on 30 days' notice. Id. (23–24).

Carriers, in imposing surcharges on short notice, as a result of a longshoremen's strike, and in later adopting a permanent rate increase, were not in effect increasing rates permanently on less than 90 days' notice. Carriers may increase their regular rates or impose surcharges, if conditions warrant. The entire regulatory scheme of the Shipping Act is based on the recognition that carriers are obliged to observe reasonable, nondiscriminatory standards, but they are also entitled to fair remuneration for their services. Id. (25).

Surcharges imposed by carriers as a result of a longshoremen's strike did not violate the public interest because they remained in effect for a time after port congestion ended. Spreading of the surcharge over a longer period than the duration of the congestion, in order to reduce the rate of the surcharge, was a reasonable means of recouping the losses occasioned by the strike. Id. (25).

TARIFFS. See also Rates and Ratemaking; Reparation; Terminal Operators.

Failure of a carrier to apprise the public in its tariffs of its newly acquired capability for handling refrigerated cargo constituted a failure to establish just and reasonable classifications, regulations and practices within the meaning of section 18(a). As for the defense that the program was experimental in nature, the statutes make no exception for experimental or pilot programs. Application to refrigerated cargo of the cargo, n.o.s. rate coupled with a special handling charge did not satisfy statutory requirements. Nothing in the tariffs of the carrier disclosed the fact that it carried refrigerated cargo and the nature of its operation (tug and barge) would lead to the opposite conclusion. Sea-Land Service, Inc. *v.* TMT Trailer Ferry, Inc., 395 (398–399).

A carrier which, in addition to charging the basic cargo, n.o.s. rate for refrigerated cargo, assessed a surcharge of $33.60 per trailer, under the authority of its "special equipment" regulation, charged a rate for refrigerated cargo which was other than and greater than that specified in its tariff in violation of section 18(a) of the Shipping Act and section 2 of the Intercoastal Shipping Act. The "special equipment" regulation merely stated that "quotation of charges will

be made for furnishing such special equipment". The "special equipment charge" was a constant and unvarying addition to the n.o.s. rate, and this could only lead to the conclusion that the proper rate for the movement was the n.o.s. rate plus $33.60. Id. (399).

Carrier's use of its Cargo, n.o.s. rate to cover shipment of refrigerated cargo could not be found to violate section 16, First as constituting an unjust or unreasonable preference to shippers actually using the service and prejudice to shippers who did not know about the availability of the service, but would have used it had they known, since there was no actual evidence of shippers who lacked knowledge and would have used the service. Id. (399–400).

TERMINAL OPERATORS. See also Free Time.

There are agreements between New York terminal operators and carriers whereby certain revenues collected from lighter operators are "refunded" to the carriers. Truck and Lighter Loading and Unloading Practices at New York Harbor, 234 (236, 239).

Agreements between New York terminal operators and carriers whereby certain revenues collected from lighter operators are "refunded" to the carriers do not violate provision of conference agreement that "no rates or charges assessed or collected pursuant to such tariffs shall be directly or indirectly refunded or remitted in whole or in part in any manner or by any device". Id. (236, 239).

No finding is made as to whether agreements between New York terminal operators and carriers, whereby certain revenues collected from lighter operators are "refunded" to the carriers, are subject to section 15. Some stevedoring contracts do contain refund provisions, but the Commission has not seen these in the context the entire contracts. The Commission is unable to determine the effect of such provisions without seeing the context. In any event, the operators had been ordered to change their tariff in such manner that no future refunds were possible. Id. (237–238).

Assessment of strike storage charge for cargo remaining on the premises of a terminal during a longshoremen's strike was a practice subject to Commission jurisdiction under section 17. Proper allocation of costs of providing terminal services as between users of the services is a matter within the Commission's jurisdiction. Boston Shipping Assn. *v.* Port of Boston Marine Terminal Assn., 409 (413).

Terminal operators perform some services for carriers and other services for shippers. A just and reasonable allocation of charges under section 17 is one which results in the user of a particular service bearing at least the cost to the terminal of providing the service. In considering whether a particular allocation or assessment is just and reasonable, it is essential to first determine for whom the service is performed. The necessary distinction to be made is between those services which are attributable to the transportation obligation of the carrier and those which are not, the latter normally being performed for the shipper or consignee. Id. (414–415).

Assessment of a strike storage charge against the vessel for cargo in free time when a strike begins is not an unjust or unreasonable practice under section 17. It is the vessel which has yet to discharge its full obligation to tender for delivery and it is to the vessel that the terminal is at this point in time supplying the attendant facilities and services. It is therefore just and reasonable to require the vessel to pay the cost of the supervening strike which renders discharge of that responsibility impossible. Id. (417).

Assessment of a strike storage against the vessel for cargo in demurrage when a strike begins is an unjust and unreasonable practice under section 17. It is only just and reasonable that the consignee, who has failed to avail himself of the opportunity to pick up his cargo during free time, should bear the risk of any additional charge resulting from a strike occurring after free time has expired. Id. (417–418).

Application of strike storage rule, under which a strike storage charge was assessable on cargo "prevented from removal" by a strike, to a situation involving a longshoremen's strike was proper and did not of itself constitute an unreasonable practice under section 17. The language "prevented from removal" did not mean and was not intended to mean "prevented from removal by a legal obstacle". When truckers and railroad men on whom consignees must rely to pick up their cargo refused to enter the terminal because of a longshoremen's strike, it could hardly be said that the consignee's "refusal" to pickup cargo was "voluntary". Id. (418–419).

Assessment of strike storage charge against the vessel was not a violation of section 16 First. The ingredient of two users of the same service, free time, was missing. The question was whether the cargo or the vessel was the actual user of the service. The service was for either the consignee or the vessel depending on whether the particular cargo was in free time or demurrage. The *San Diego* case, 9 FMC 525, involved the granting of excessive free time to shippers and consignees and the practice worked preference and prejudice as between shippers. Id. (419–420).

TRANSSHIPMENT. See Agreements under Section 15.

TRAVEL AGENTS. See Agreements under Section 15.

UNDERCHARGES. See Rates and Ratemaking.

UNFAIR DEVICE OR MEANS. See Rates and Ratemaking.

VOLUME RATES. See Rates and Ratemaking.

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