DECISIONS OF THE

FEDERAL MARITIME COMMISSION

VOLUME 11

JULY 1967 TO JUNE 1968

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1969

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402 - Price $3.75

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 30, 1968

JOHN HARLLEE, *Chairman*

GEORGE H. HEARN, *Vice Chairman*

ASHTON C. BARRETT, *Member*

JAMES V. DAY, *Member*

JAMES F. FANSEEN, *Member*

THOMAS LISI, *Secretary*

CONTENTS

TABLE OF CASES REPORTED

DOCKET NUMBERS OF CASES REPORTED

TABLE OF CASES CITED

DECISIONS OF THE
FEDERAL MARITIME COMMISSION

355-301 O - 69 - 2

FEDERAL MARITIME COMMISSION

DOCKET NO. 66–35

THE BOSTON SHIPPING ASSOCIATION, INC., ET AL.

v.

PORT OF BOSTON MARINE TERMINAL ASSOCIATION AND MASSACHUSETTS PORT AUTHORITY

Decided July 24, 1967.

A change in the terminal tariff rule governing the assessment of wharfage which shifted charge from cargo to vessel did not require prior approval by the Commission under section 15, Shipping Act, 1916; 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 a wharfage charge against the vessel has not been shown to be either unjustly discriminatory, unduly prejudicial or unreasonable in violation of either section 16 or 17 of the Shipping Act, 1916.

Leo F. Glynn, attorney for Complainant.

Clarence I. Petterson and *Edwin Amidon*, attorneys for Massachusetts Port Authority.

John M. Reed, Attorney for Port of Boston Marine Terminal Association.

Donald J. Brunner and *Samuel B. Nemirow*, 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 on May 27, 1966, by the Boston Shipping Association (Complainant)[1] alleging that the

*Commissioner Fanseen did not participate.

[1] Complainant is a non-profit Massachusetts corporation, whose members are ocean steamship companies, agents for ocean steamship companies, or stevedores. Its function is to represent and protect the interests of all steamship owners, agents, operators and other

Port of Boston Marine Terminal Association and the Massachusetts Port Authority violated section 15 of the Shipping Act, 1916, by effectuating a tariff change in wharfage charges without prior approval of the Federal Maritime Commission; and that the aforementioned tariff change results in unjust discrimination and undue preference in violation of sections 16 and 17 of the Act.

Examiner Benjamin A. Theeman in his Initial Decision, served April 19, 1967, concluded that Complainant had failed to establish any of the alleged violations and, accordingly, recommended dismissal of the complaint. Exceptions and replies have been filed. Complainant's request for oral argument was denied.

FACTS

On or about February 26, 1962, five terminal operators in Boston, including Respondent Massachusetts Port Authority (Port Authority),[2] entered into an agreement, approved by the Federal Maritime Commission as Agreement No. 8785, establishing the Port of Boston Marine Terminal Association (Terminal Association).[3] The agreement by its terms covers, among other things, "wharfage, dockage, free time, wharf demurrage, usage charges", and "all services, facilities, rates and charges incidental thereto" (Article Third), and requires the parties to file, *inter alia*, "their respective tariffs, rates, and charges", and any "changes therein", with the Commission (Article Sixth).

Pursuant to Agreement No. 8785, the Terminal Association issued, and filed with the Commission, Terminal Tariff No. 1, effective July 1, 1962, which contains the regulations and charges of the participating members. Under Item 2 of Tariff No. 1, a wharfage charge[4] of $1.75 per ton is assessed against all *cargo* except (1) line-haul cargo moving

allied fields of waterfront activities in the Port of Boston. Its members are: American Export Lines, Inc.; American President Lines, Ltd.; Boston Shipping Corp.; Farrel Lines, Inc.; Furness, Withy & Co., Ltd.; Moore-McCormack Lines, Inc.; J. F. Moran Co.; Moran Shipping Agencies, Inc.; Norton Lilly & Co., Inc.; C. Campbell Patterson, Jr. & John I. Wylde, d.b.a. Patterson Wylde & Company; Peabody & Lane, Inc.; C. H. Sprague & Son Co.; and United States Lines Company.

[2] Massachusetts Port Authority is an agency of the Commonwealth of Massachusetts. Among other things, it is charged with the duty of promoting and protecting the commerce of the Port of Boston. The Port Authority owns all the public marine terminals in the Port of Boston (except one pier which is owned and operated by Wiggin Terminal Company). As of December 15, 1966 (the time of the hearings herein), the Port Authority was the operator of Commonwealth Pier 5 and Hoosac Pier No. 1.

[3] The other members are: The Mystic Terminal Company; Port Terminals, Inc. (replacing Terminal Operator, Inc.); Wiggin Terminal, Inc.; and New York Central System (Boston & Albany Division).

[4] This tariff defines wharfage as a "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 or when moored in slip adjacent to pier or wharf. Wharfage is solely the charge for use of pier or wharf and does not include charges for any other service."

to or from points outside the Boston Switching District, on which no wharfage is assessed, and (2) open-top cargo on which a charge of 87½ cents per ton is assessed if, but only if, such cargo moves by truck to or from the pier.

At a meeting of the Terminal Association, held on January 7, 1966, Mr. Thomas Soules, Director of the Port Authority, proposed changes in wharfage charges which would, *inter alia*, assess a wharfage charge of $1.00 per ton against the vessel for the use of the pier to unload its cargo. Mr. Soules stated that the Port Authority intended to adopt the tariff changes whether the other members of the Terminal Association did so or not and that the Port Authority would put the changes into effect pursuant to the authority given in the "independent action" clause of Agreement No. 8785. This clause, contained in Article Sixth, provides in relevant part that:

> . . . no changes in said tariffs, rates, charges, classifications, and rules and regulations shall be made without prior notice of such changes to members of the Association, who shall be afforded an opportunity for consultation and for the making of such exceptions as they may desire in the tariff rates, charges, classifications, and rules and regulations, with the understanding that the party proposing a change reserves the right to make it effective at its own wharves or piers regardless of the action of the other parties hereto, but not earlier than forty days after notice of the prior notice hereinabove referred to.

Subsequently, on January 13, 1966, at a meeting of the Terminal Association, the Port Authority distributed a draft of the proposed tariff changes. Mr. Soules reported that he had made it clear to the steamship companies in New York that this was an independent port authority proposal and that he had no knowledge as to the intention of the other Boston terminal operators. After discussion the Terminal Association voted:

> . . . that inasmuch as the Massachusetts Port Authority had fulfilled the requirements of the Agreement by presenting their proposal for consideration within the prescribed period, the Association waives its requirement of an additional 40 days' notice before the Port Authority could take independent action. This waiver is not to be construed as approval or disapproval of the proposal.[5]

Revisions to the Terminal Association's Tariff No. 1 were issued on February 28, 1966, and finally became effective on June 14, 1966. Item 2–A, as amended, of that tariff supersedes Item 2 at the piers operated by the Port Authority; namely, the Hoosac and Commonwealth Piers. It provides in substance that a wharfage charge of $1.00 per ton of 2,000 lbs. will be assessed against the vessel, except that a

[5] Minutes of meeting of the Port of Boston Marine Terminal Association, held Thursday, January 13, 1966, at 10 a.m., in the Conference Room of the Boston and Maine Railroad, 150 Causeway Street, Boston, Mass.

half-wharfage charge of 50 cents per ton will be assessed on cargo handled directly between vessel and truck or rail car and on woodpulp, newsprint, palletized, unitized, containerized or skidded cargoes.

The Port Authority's decision to adopt new tariff schedules was made in order to attain these three objectives:

1. To overcome the loss of truck traffic to the competing ports of New York, Philadelphia, and Baltimore, where no wharfage was assessed against cargo; [6]

2. To eliminate the possibility that truck traffic [7] at Boston may be discriminated against in favor of rail traffic by the continuation of the existing wharfage charge against cargo; [8] and

3. To assist some of the piers that were in financial difficulty and needed more revenue.[9]

In the first four months since the Port Authority revised its wharfage charges, tonnage handled over the Port Authority-operated piers has decreased. The record shows that the cargo lost by these piers has been diverted to other piers in the Port of Boston.

In its complaint, the Boston Shipping Association alleged in essence that: (1) Item 2–A constituted a "modification" of Agreement No. 8785 within the meaning of section 15 of the Act, and the effectuation of this wharfage charge without prior approval of the Commission was violative of section 15; (2) Item 2–A is unjustly discriminatory and unduly prejudical, in violation of section 16, in favor of those vessels using the Terminal Association piers where wharfage is not assessed against the vessel, but is assessed against the cargo; and (3) Item 2–A is an unjust and unreasonable practice within the meaning of section 17 of the Act in that it will prejudice development of traffic through the Port of Boston relative to that through other North Atlantic ports.

---

[6] Wharfage charges at these North Atlantic ports are assessed against the vessel. Members of Complainant Association have, without objection, been paying wharfage at those ports since it was imposed. Although vessels have incurred charges for wharfage at North Atlantic Ports other than Boston, the ocean freight rate has been uniform. Thus, shippers and consignees in the ports of Boston, New York, Philadelphia or Baltimore pay the same ocean freight rates.

[7] Approximately 90% of Boston's traffic is import cargo, and about 90% of that cargo moves from Boston by truck.

[8] During 1965, of 5,000 rail cars handled by the terminals, other than East Boston Terminal, wharfage was assessed on no more than 166 cars. (Figures for the East Boston Terminal were not available.)

[9] For the period from 1959 through 1965, there has been a steady decline of general cargo ships calling at Boston. The figures follow: 1959—1424 vessels; 1960—1417 vessels; 1961—1395 vessels; 1962—1389 vessels; 1963—1290 vessels; 1964—1204 vessels; 1965—1150 vessels.

DISCUSSION

In his Initial Decision, the Examiner found that the Complainant had failed to substantiate its allegations and, accordingly, dismissed the complaint. He concluded that the wharfage revision was a "routine" change, clearly within the intended scope of the basic agreement and required no approval by the Commission prior to effectuation. Furthermore, the Examiner found that Respondent's practice of assessing wharfage against the vessel was neither "prejudicial" nor "unreasonable" within the meaning of section 16 or 17 of the Act. Complainant excepted to the Examiner's findings and conclusions.[10] For reasons set forth below, we agree with the result reached by the Examiner.

Section 15

Complainant's contention that Item 2–A constitutes a "modification" of Agreement No. 8785 within the meaning of section 15 of the Act is wholly without merit. It is abundantly clear from a reading of pertinent provisions of the basic Terminal Association agreement and a review of the applicable case law that the tariff revision involved is one which requires no separate section 15 approval.

The Commission and its predecessors have uniformly held, as early as 1927, that the expression "every agreement" in section 15 does not include "routine operations" relating to current rate changes and other day-to-day transactions. *Section 15 Inquiry*, 1 U.S.S.B. 121, 125 (1927). "Routine operations" has consistently been interpreted by this Commission to include conventional rate changes. It is unnecessary to review this history at length. Suffice it here to reiterate what we stated in our decision in *Empire State H'w'y. Transp. Ass'n.* v. *American Export Lines*, 5 F.M.C. 565, 586 (1959), aff'd. *sub nom.*, *Empire State Highway Transp., Ass'n* v. *Federal Maritime Bd.*, 291 F. 2d 336 (D.C. Cir. 1961), that "modifications of uniformly applicable tariffs pursuant to an approved basic agreement are routine matters and are not new agreements or modifications of an agreement requiring prior section 15 approval." [11]

The issuance of the tariff revision, Item 2–A, was clearly authorized and contemplated by the approved basic agreement. In the first place, Agreement No. 8785 *specifically* authorizes the issuance of tariffs covering "wharfage" and provides for the filing of such tariffs and *any changes therein* with the Commission. Thus, the issuance of Item 2–A

[10] Generally, Complainant's exceptions and arguments in support thereof present but a recapitulation of contentions already advanced before the Examiner.

[11] See also: *International Packers, Ltd.* v. *F.M.C.*, 356 F. 2d 808 (C.A.D.C. 1966); *Agreement No. 9025: Middle Atlantic Ports Dockage Agreement,* 8 F.M.C. 381 (1965).

was merely in implementation of the general ratemaking authority provided in the basic agreement. Very recently, in Docket No. 66–28—*The Boston Shipping Association, Inc., et al.* v. *Port of Boston Marine Terminal Association, et al.* 10 F.M.C. 409, a proceeding involving all of the parties to the present case, we ruled that a change in a terminal tariff rule, effectuated pursuant to this very same agreement, which shifted a "strike storage" charge from cargo to vessel, did not require prior approval by the Commission under section 15. In concluding that the change constituted conventional rate change, which required no prior approval, we stated that:

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, and while a particular change in allocation may be an unreasonable practice under section 17 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. [Citations omitted]

This is dispositive of the Complainant's exception to the Examiner's finding that a shift in the wharfage charge was a "routine" change, within the terms of Agreement No. 8785.

Secondly, the action of the Port Authority with respect to a revision in the wharfage charges *only* at its piers is clearly sanctioned by the language of the agreement. Agreement No. 8785 contemplated that any of the parties might take independent action provided that party followed certain established procedures.[12] Article *Sixth* of that agreement *expressly* provides that "the party proposing a change reserves the right to make it effective at its own wharves or piers regardless of the action of the other [terminal operators]." The only limitation on this right of independent action is the requirement of adequate notice to the other members of the Terminal Association so that there might be an "opportunity for consultation." Here, the Port Authority complied with all the procedures embodied in the basic agreement and the wharfage change was effectuated at its terminals. The Port Authority's exercise of its right of independent action was taken pursuant to the provisions of Agreement No. 8785. Consequently, the Port Authority's action with regard to the issuance of Item 2–A, to the extent that it resulted from the exercise of a right

[12] As to the inclusion of the right of independent action in agreements of terminal conferences, we recently stated that: ". . . the right of independent action reserved by the parties provides a safety value to insure that the interest of each port area will be protected." *Agreement No. 9025: Middle Atlantic Ports Dockage Agreement, supra,* at p. 385.

afforded in the Terminal Association's basic agreement, is within the scope of that agreement.

On the basis of the foregoing, we conclude as the Examiner did, that complainant has failed to substantiate its claim that the effectuation, without prior approval, of Item 2–A violated section 15 of the Act.

Section 16

Complainant's contention that Item 2–A operates in a manner which is violative of section 16 is equally without substance or foundation. The thrust of its argument is that Item 2–A is "unjustly discriminatory" against carriers who have historically used the Port Authority piers and who must now pay a wharfage charge, and "unduly prejudicial" in favor of those carriers who serve *other piers* in the Port of Boston at which no such charge is assessed.

It is well settled that, unless a terminal operator controls both terminals at which the different charges are assessed, the terminal operator cannot be held to have illegally discriminated against or preferred a carrier. In *Terminal Charges at Norfolk*, 1 U.S.S.B.B. 357, 358 (1935), the contention was made that a section 15 agreement among terminal operators, imposing new and higher cargo charges, was "unjustly discriminatory or unfair as between carriers" because it resulted in the diversion of traffic to other terminals within the port to the detriment of a number of carriers. In specifically rejecting this contention, our predecessor, the Shipping Board Bureau, held that:

> As the . . . [terminal operators] are not in any way connected with and do not exercise any control over the terminals at which lower charges are assessed, no discrimination is attributable to them so long as they uniformly apply at their own terminals the charges covered by their agreement.

This rationale was reaffirmed in *Wharfage Charges and Practices at Boston*, 2 U.S.M.C. 245 (1940), where the Commission, in dismissing the contention that varying bases of wharfage charges at different piers resulted in unjust discrimination, noted that:

> . . . the rates of each respondent are the same to each class of shippers and that no individual respondent controls the rates assessed at any other pier. [2 U.S.M.C. 248]

Although the Port Authority owns all the public terminals in Boston, it operates none except those at Commonwealth and Hoosac. The record does not show that the Port Authority has any control over the wharfage charges assessed at those piers in the Port of Boston which it does not operate. It does not appear to have *any* connection whatsoever with those piers except as lessor. Therefore, the reasoning expressed in the aforementioned cases is equally applicable here. Under the present circumstances, the Port Authority's lack of control over the level, or method of assessment, of wharfage charges at piers not subject to its operation, precludes the existence of any unlawful discrimination or prejudice.

Neither can illegal discrimination or prejudice be attributed to Item 2–A with regard to its assessment at the Port Authority-operated piers. To constitute a violation of section 16, there must always be given unequal treatment of persons by the carrier *or other person subject to the Act*. *Huber Mfg. Co.* v. *N.V. Stoomvuart Maatschappij "Nederland,"* 4 F.M.B. 343, 347 (1953). The manifest purpose of this section is to require those subject to the statute to "accord like treatment to all shippers who apply for and receive the same service." *Am. Tobacco Co.* v. *Compagnie Generale Transatlantique*, 1 U.S.S.B. 53, 56 (1923). It is undisputed that the Port Authority has afforded equal treatment to all carriers since Item 2–A was put into effect. Item 2–A has been assessed equally against all users of Commonwealth and Hoosac. Moreover, there has been no showing of any competitive disadvantage injurious to any vessels using the Port Authority-operated piers. The Examiner was wholly justified in concluding on the basis of the present record that the effectuation of Item 2–A had not been shown to be unjustly discriminatory or unduly prejudicial in violation of section 16 of the Act.

Section 17

Finally, we consider the allegation that Item 2–A violates section 17. Complainant's position is that the shift of the wharfage charge to the vessel is "unreasonable" in that it will increase the cost of vessels calling at the Port of Boston, thereby driving ships away from that port. It concludes that "the charge is thereby detrimental to commerce and clearly against public interest as it contributes substantially to the destruction of the port." Complainant's position must be rejected. No evidence has been presented nor any showing been made to substantiate the claim that the tariff revision results in an unreasonable practice. Indeed, it would appear that Complainant is laboring under a serious misconception about just *what* constitutes *unreasonableness* within the meaning of section 17.[13]

[13] Even assuming, *arguendo*, that a showing that a terminal practice resulted in a diversion of traffic from a port, without more, was sufficient to substantiate a claim of "unreasonableness" under section 17, Complainant would not be in a better position. It has wholly failed to demonstrate on the basis of the present record that any cargo has been diverted from the Port of Boston as a result of Item 2–A. Quite to the contrary, it is undisputed that the cargo which was lost to Commonwealth and Hoosac Piers was diverted to and discharged at other piers in Boston. Moreover, the record shows that steamship lines remaining at the Port Authority-operated piers do not wish to leave them even though they are paying wharfage; further, that those lines that did leave and wished to continue calling at Boston were able to find piers elsewhere in the Port of Boston.

As used in section 17, and as applied to terminal practices, a "just and reasonable practice" means a practice *otherwise lawful*, but not excessive, and which is *fit and appropriate to the end in view. Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 547 (1966). Manifestly, wharfage assessed against the vessel is a proper and "otherwise lawful charge." Part of a carrier's transportation obligation requires it "to unload cargo onto a dock . . . [and] put it at a place of rest on the pier so that it is accessible to the consignee." *American President Lines, Ltd.* v. *Federal Maritime Board*, 317 F. 2d 887, 888 (D.C. Cir. 1962). Incident to this obligation to "tender for delivery" is the duty to provide to the shipper *adequate terminal facilities* upon which cargo may be placed by the shipper and/or from which it may be picked up by the consignee. *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 539 (1966). Since the terminal provides a service which is in furtherance of the *carrier's* obligation, it follows that "wharfage" is an appropriate charge against the vessel. Indeed, the Commission's General Order 15 expressly sanctioned this method of assessment. Section 533.6(d) (2) of that Order defines "wharfage" as a "charge assessed against the cargo or *vessel* . . ." (Emphasis added). Moreover, the record shows that competing ports of New York, Philadelphia and Baltimore all assess wharfage against the vessel.[14] The assessment of wharfage against the vessel may nevertheless be unlawful if it contravenes the provisions of the Shipping Act, 1916. Thus, the question becomes whether the Port Authority's practice of assessing wharfage against the vessel was "fit and appropriate to the end in view." We believe that it clearly was.

The present Port Authority wharfage charge was instituted primarily as the result of losses which the Port Authority has suffered in its pier operations. Boston is considered a "high cost" port by the steamship companies, mainly because of high labor costs. Because of such high cost factors, the number of ship calls to Boston has been declining over the past five or six years. Steamship companies have been by-passing Boston and discharging Boston cargo at New York, where these companies have felt that it is more economical to truck the cargo from New York to the consigneee or to Boston. The determination to change the method of charging wharfage that culminated in Item 2–A was made not only with knowledge that it would increase

---

[14] Complainant excepted to the Examiner's failure to compare the level of the terminal charges at these other east coast ports with those at Boston. The reasonableness of the level of the wharfage charges was not raised in the complaint and is not an issue in this proceeding. Accordingly, Complainant's exception is beyond the scope of the proceeding and need not be considered.

vessel costs, but also in the belief that it would attract more cargo to the Port Authority piers and thereby increase terminal revenues.

The Port Authority views its method of assessment of wharfage as a possible step toward the attraction of truck traffic, which might otherwise be lost to competing East Coast ports. The wharfage charge formerly in effect at Commonwealth and Hoosac Piers and still in effect at the other Terminal Association piers was and is assessed primarily on truck traffic. As a matter of fact, during 1965, wharfage charges were paid on a little over 3 percent of the rail freight at Boston public piers in contrast with an across-the-board assessment of wharfage against all truck traffic. In the words of respondents:

> This situation has been a competitive handicap to the Port of Boston and has had the effect of diverting truck traffic from Boston because truck shippers and consignees pay no wharfage charge at the competing ports of New York, Philadelphia and Baltimore.

The Port Authority envisions that the lowering of costs to the truck shipper and consignee will increase the movement of cargo over its piers. Since the availability of cargo is an important factor in steamship routings, the Port Authority also expects that the increase in cargo will result in an increase in the number of ships calling at Boston.

Furthermore, the Port Authority anticipates that the introduction of a tariff change will encourage more efficient pier utilization by creating an incentive for shippers to use unitization, palletization,[15] and containerization. Under present Item 2–A, a half wharfage charge is assessed on palletized, unitized, and containerized cargoes.

The Port Authority is charged with the public duty of promoting and protecting the commerce of the Port of Boston; it is a public body experienced in port and terminal management. Its decision to revise its wharfage charge appears to be in keeping with American business initiative and competitive methods.

The Commission is fully aware that there was a drop in tonnage at Commonwealth and Hoosac Piers for the months of June, July, August, and September 1966, as compared with the same months of 1965. But, as the Examiner succintly stated:

> It is unimportant that the plan be a success or failure so long as is does not violate the statute. Similar weight applies to the intent, methods, and causes leading to the initiation of the change. It is the reasonableness of Item 2–A and the contemplated practice under it that must be considered, not the motivating factors. cf. *Lopez Trucking Inc. et al.* v. *Wiggin Terminals, Inc.*, 5 F.M.B. 3, 17 (1956)

[15] The record shows that the Port of Boston is 10 to 15 years behind other world ports in the area of palletization.

We find and conclude that Complainant has failed to demonstrate that the assessment of a wharfage charge against the vessel by the Port Authority is an "unjust" or "unreasonable" practice within the meaning of section 17 of the Act.[16]

Ultimate Conclusions

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

(1) Item 2–A constituted a modification of Agreement No. 8785 and required no separate Commission approval under section 15 of the Act prior to effectuation; and

(2) Item 2–A has not been shown to be either unjustly discriminatory, unduly prejudicial or unreasonable in violation of either section 16 or 17 of the Act.

Accordingly, the complaint is dismissed.

By the Commission.

(Signed) Thomas Lisi,
Secretary.

---

[16] In his Initial Decision, the Examiner found that the ocean rate paid by shippers and consignees at Boston contains a factor for wharfage and concluded that, therefore, a double charge for wharfage is being made against shippers and consignees using the Terminal Association piers where wharfage is a charge against the cargo. He determined that this assessment of a double charge is unjust and unreasonable. Complainant excepts to the Examiner's finding that the freight rate for Boston includes a wharfage factor as unsupported on the record. We agree with Complainant. We have thoroughly reviewed the record and find no concrete evidence therein which would support the Examiner's finding that the ocean freight rate at Boston contains a wharfage factor or that the assessment of wharfage against shippers and consignees at the public piers in Boston, other than Hoosac and Commonwealth, involves a duplication of charges. Accordingly, we overrule the Examiner's findings and conclusions in this respect.

FEDERAL MARITIME COMMISSION

No. 66–9

IN THE MATTER OF AGREEMENT NO. T–1870: TERMINAL LEASE AGREEMENT AT LONG BEACH, CALIFORNIA

Decided July 26, 1967

Agreement No. T–1870 between the City of Long Beach, California and Sea-Land of California, Inc. (1) is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; (2) does not operate to the detriment of the commerce of the United States; (3) is not contrary to the public interest; and (4) does not violate the Shipping Act, 1916. It is therefore approved pursuant to the provisions of section 15 of the Shipping Act, 1916.

Leslie E. Still Jr., and *Leonard Putnam* for the City of Long Beach, California, respondent.

Sterling Stoudenmire and *J. Scot Provan* for Sea-Land of California, Inc., respondent.

Miriam E. Wolff and *Thomas C. Lynch* for the San Francisco Port Authority, petitioner.

Arthur W. Nordstrom, *Walter C. Foster*, and *Roger Arnebergh* for the City of Los Angeles, California, petitioner.

Robert Fremlin and *Edward D. Ransom* for Encinal Terminals, petitioner.

J. Kerwin Rooney for the City of Oakland, California, intervenor.

Donald J. Brunner as Hearing Counsel.

REPORT

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

PROCEEDINGS

By order of investigation served February 25, 1966, the Commission instituted this proceeding to determine whether Agreement No. T–

*Commissioner Fanseen did not participate.

1870, a preferential assignment agreement between the City of Long Beach and Sea-Land of California (Sea-Land-Cal) should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act of 1916. Long Beach and Sea-Land appeared as respondents. The San Francisco Port Authority, City of Los Angeles, and Encinal Terminals appeared in opposition to approval.[1] The City of Oakland intervened in favor of approval. A hearing was held and briefs were submitted. An Initial Decision was issued by Examiner Paul D. Page, Jr. to which exceptions and replies have been filed. We have heard oral argument.

The Parties

Sea-Land-Cal is a wholly-owned subsidiary of McLean Industries, Inc., and is affiliated through McLean Industries with Sea-Land Service, a common carrier by water. The officers of Sea-Land-Cal are also officers of Sea-Land Service, and these same officers dictate the policies of both. Sea-Land-Cal serves as agent for Sea-Land Service and performs all husbanding for Sea-Land's vessels, receives and delivers cargo, performs the sales functions, and bills and collects for Sea-Land Service. These services are performed pursuant to an agency agreement.

Sea-Land Service is engaged as a common carrier in the Atlantic and Gulf Coastwise trades, the Intercoastal trade, the Puerto Rican offshore trade, the Alaskan trade, and North Atlantic European foreign trade, as well as trade with ports located in the Caribbean.

Sea-Land calls at the Port of Long Beach in its Intercoastal and Pacific Coast/Puerto Rico service. The vessel itinerary in that service is Elizabethport-Puerto Rico-Balboa-Long Beach-Oakland-Balboa-Puerto Rico-Elizabethport. Subsequent to the hearing, effective July 27, Sea-Land's intercoastal service was changed from one with a weekly sailing to one with a sailing every ten days. On June 14, 1966, the trailerships Elizabethport, San Francisco and Los Angeles began service between Oakland, California and Okinawa, carrying military cargo destined for Far Eastern trouble zones.

In excess of 1,200 shippers use Sea-Land's service to and from Long Beach, and except for the seasonal slump of the canned goods industry (mid-June to mid-August), the vessels sail full in both directions. The cargo destined to Long Beach is about three times greater than the cargo generated from Long Beach; it discharges 60 percent of its westbound containers at Long Beach and loads 20 percent of its eastbound containers there.

[1] San Francisco, Los Angeles, and Encinal will be collectively referred to as petitioners.

Sea-Land has operated at Long Beach since September 1962 at charges listed in the applicable Long Beach tariff except for the 5 months that another agreement, approved by the Commission, was in effect.

The Long Beach Board of Harbor Commissioners is charged with the administration of the harbor district of the City of Long Beach, California. There are both private as well as publicly-owned facilities within the Harbor District. The port opened to deep draft vessels in 1925 and began its major construction program in 1937 which was interrupted by the war and consequently has done most of its construction since 1946. The port has numerous berths, transit sheds, warehouses, and other operational facilities (e.g. bulk loader, grain terminal, bulk oil terminal) presently available and additional facilities are yet to be developed in accordance with the port's master plan. Presently Long Beach has 40 berths each of which is approximately 600 feet in length. In addition to the facility described in T–1870, Long Beach has 14 berths presently available capable of accommodating a ship based crane containership operation.

Los Angeles owns terminal facilities adjacent to those operated by Long Beach and although Los Angeles is a nonoperating port, a full range of terminal services is available at that port. The competition between Los Angeles and Long Beach is quite severe.

The San Francisco Port Authority, a state agency, owns terminal facilities in the San Francisco Bay area consisting of approximately 80 berths. The Port of San Francisco is a nonoperating port which leases its facilities at rates specified in its tariff on a preferential basis to organizations that operate the facilities.

Encinal Terminals is a privately owned corporation engaged in the wharfinger, trucking, warehousing, and stevedoring businesses located at Alameda, California in the San Francisco Bay area.

The Agreement

The preferential assignment agreement—FMC Agreement No. T–1870 is between Long Beach and Sea-Land-Cal for a term of 20 years. Sea-Land-Cal is granted a nonexclusive preferential assignment for the wharf and contiguous wharf premises together with two cranes and facilities located thereon described as berth 232. Sea-Land also has the option, during the term of Agreement T–1870, to another nonexclusive preferential assignment for the wharf and contiguous wharf premises described as Parcel 233 upon 90 days' written notice.

The use of the premises is limited to those activities associated with the loading and unloading of Sea-Land's vessels or vessels of an affiliate or subsidiary of Sea-Land. The General Manager of the port retains the right to make temporary assignment of any part of the premises which is not being used by Sea-Land provided that such assignment should not unreasonably interfere with the operations of Sea-Land.

Sea-Land shall pay to Long Beach all charges applicable under the Port of Long Beach tariff. If such charges do not total $303,000 for the 12-month period beginning with the commencement date of the agreement or for any succeeding 12-month period, Sea-Land must pay Long Beach an additional sum equal to the difference. For any such 12-month period that such charges shall exceed $346,000, no further compensation shall be paid. If the option for Parcel 233 is exercised, the minimum shall be $400,000 and the maximum $450,000.

The parties agree to renegotiate the compensation prior to the beginning of the fifth, tenth, and fifteenth year of the agreement and for each succeeding 5-year period.

The port computed the minimum compensation to equal the amount necessary to finance 4 percent bonds plus ½ percent to service these bonds amortized over a 30-year period. Four and one-half percent amortized over 30 years equals 6.14 percent to which was added 2.12 percent direct and pro-rated port costs equalling 8.26 percent. The 2.12 percent figure is a combination of 2 percent pro-rated costs and 0.12 percent direct costs.

The investment in Berth 232 was estimated as of August 12, 1965, at the time of the negotiations between Long Beach and Sea-Land of California to be as follows:

EXHIBIT 11.—*Sea-Land—Pier "Y," Berth 232*

A. Water (150'×725') 108, 750 S.F. @ 50¢/S.F.		$54, 375
B. Land—438,255 S.F. @ $2/S.F.		876, 510
C. Wharf—725 L.F. @ $1016/L.F.*		736, 600
D. Cranes—$1,331,200 plus $147,770*		1, 474, 970 (sic.)
E. Office—$35,000*	$484,000 plus 10.8% ($52,272)	536, 272
F. Utilities—$219,000*		
G. Dolly strips and bumpers—$23,000*		
H. Paving—$200,000*		
I. Fencing—$7,000*		
Total investment (estimated)		$3, 678, 727

*Harbor Department engineering cost (10.8%) included in these figures.

The total investment of $3,678,727 multiplied by 8.26% equals $303,862.85 rounded to the minimum of $303,000 contained in T-1870.

The maximum figure was computed so the port could realize a return based upon the cost of money at the time, i.e. 6% net instead of 4½% net. Thus, the maximum was computed as follows:

355-301 O - 69 - 3

Maximum—one berth—based upon typical port calculations

A. Water area—$54,375 @ 7% equals	$3, 806. 25
B. Land area—Includes direct and prorated port costs	105, 181. 20
C. Wharf—725'×1016/L.F.=$736,600×7.246% (7% 50 yrs.)	53, 374. 03
D. Cranes—$1,474,970×8.581% (7% 25 yrs.) equals	126, 667. 18
E. Special investment—$536,272 @ 8.581% (7% 25 yrs.) equals	46, 017. 50
	335, 046. 16
F. Investment in phase No. 2 at time phase No. 1 is built—*$135,000 @ 8.581% (7% 25 yrs.) $11,584.35 equals	11, 584. 35
	346, 630. 51
*Additional cost of wharf construction, Berth 233	69, 000. 00
Additional cost of electrical system, Berth 233	66, 000. 00
	135, 000. 00

In the event the total actual cost of construction shall differ from the estimated costs, the minimum/maximum annual compensation figures shall be increased or decreased by 8.61 percent of the difference between actual and estimated costs. As of May 18, 1966, there have been changes in the actual and estimated costs resulting in an adjusted minimum annual compensation of $296,000.26 and an adjusted maximum annual compensation of $339,000.26.

Background of this Proceeding

Marine terminals in California have conducted their operations by charging wharfage as early as the turn of the century, and dockage has been assessed on the Pacific Coast for the same period of time. California area terminals have operated under tariffs for 40 or 50 years. Apart from the proposed agreement, Long Beach has no agreements involving wharfinger facilities used for loading and unloading common carrier vessels, which have a maximum limit on the tariff charges assessed.[2]

The only general cargo marine terminal facilities in California at the present time which are furnished to a carrier on a flat rental basis or on a minimum/maximum arrangement are those which Sea-Land has obtained from the ports of Oakland and Long Beach.[3]

In 1963 Sea-Land entered into terminal lease agreements with both

[2] We take notice, however, that on August 23, 1966, Long Beach filed for approval of Agreement No. T-1985, a marine terminal lease with Evans Products Company whereby Evans will conduct a public wharfinger business at a rental based on Long Beach's tariff charges, but limited to a minimum-maximum payment.

[3] Matson Navigation Company has proposed, however, to transfer its container operations from Encinal terminals to Oakland where it has negotiated a flat-rent lease agreement.

Long Beach and Oakland. The agreements (T–4 and T–5) provided for payment at a flat yearly rental in lieu of tariff rates. The agreements were made subject of proceedings before the Commission.

In its Report and Order in Dockets No. 1128 and 1129—*Agreement No. T–4: Terminal Lease Agreement at Long Beach, California;* and *Agreement No. T–5: Terminal Lease Agreement at Oakland, California*, 8 F.M.C. 521 (1965), the Commission held that the agreements between Long Beach and Sea-Land and between Oakland and Sea-Land, covering terminal properties located at the port areas of the two ports (Long Beach and Oakland), were subject to section 15 of the Act. The agreements there under consideration granted to Sea-Land exclusive use of piers and adjacent areas at a flat yearly rental of approximately $147,000 in lieu of otherwise applicable tariff charges. The Commission approved the agreements over the protests of Encinal, San Francisco, and Los Angeles, who contended that the agreements granted "special rates" and thus were "unjustly discriminatory" because based on other than tariff rates, and on noncompensatory rentals, and were "contrary to the public interest" and "detrimental to the commerce of the United States" because their implementation would disrupt the allegedly traditional Pacific Coast system of assessment of terminal charges in accord with published tariffs. The Commission found the agreements not to be unjustly discriminatory, as the rentals prescribed therein provided adequate returns on the investments of the ports and no adverse effects were shown upon other carriers, other ports, or other terminals. The Commission was unable to find that approval of the agreement was likely to cause disruption of the traditional uniformity of terminal charges on the Pacific Coast.

Agreement No. T–5 between Sea-Land and Oakland was subsequently cancelled by the parties thereto who entered into a new agreement, T–1768, which provided for minimum and maximum payments based on Oakland's tariff. On April 9, 1965, the Commission instituted proceedings to determine whether Agreement T–1768 should be approved.

In its Report and Order in Docket No. 65–9—*Agreement No. T–1768—Terminal Lease Agreement*, 9 F.M.C. 202 (1966), the Commission held that a Preferential Assignment Agreement of marine terminal property from the City of Oakland to Sea-Land, providing for the payment of an annual minimum compensation based upon the Port of Oakland tariff, is subject to section 15 of the Act. The Commission held it was not shown to be unjustly discriminatory or unfair or otherwise violative of section 15. Agreement No. T–1768 was also approved by the Commission over the protests of Encinal, San Francisco, and Los Angeles, which were basically the same as the protests of the same parties in *Agreement Nos. T-4, T-5, supra.*

The agreement here before the Commission (T-1870 which supersedes Agreement No. T-4), with the exception of the dollar amounts required for the minimum and maximum payments follows the same format and principles embraced in the earlier approved Oakland-Sea-Land Agreement No. T-1768 in Docket No. 65-9, and all of the parties to this proceeding are also identical.

Discussion

The Examiner concluded that Agreement T-1870 between the City of Long Beach and Sea-Land (1) is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors; (2) does not operate to the detriment of the commerce of the United States; (3) is not contrary to the public interest; and (4) does not violate the Shipping Act, 1916; and it should therefore be approved, pursuant to section 15 of that Act. The Examiner's conclusions were based on his determination that there is no substantial competitor of Sea-Land at Long Beach and therefore neither Sea-Land nor its shippers are favored over competitive carriers or shippers. He also found that the maximum return under the agreements was compensatory and therefore would not burden other users of the Long Beach facility. He concludes that since no one is injured by the arrangement it cannot have the allegedly discriminatory or preferential effects.

The agreement may be regarded as one by which Long Beach furnishes terminal facilities to Sea-Land, which compensates Long Beach according to the agreement's terms. Briefly, it provides that if payments at tariff rates are less than $303,000 per year, Sea-Land will nevertheless pay Long Beach $303,000 per year, and if payments at tariff rates would total more than $346,000 per year, Sea-Land will nevertheless pay only $346,000. This agreement—as distinguished from the published tariffs of Long Beach, Oakland, and other major California terminals—was worked out between Long Beach and Sea-Land to secure terminal service for less than Sea-Land would pay at tariff rates. The result is that Sea-Land may use the terminal facilities more cheaply than other terminal users can.

The Sea-Land agreements with Long Beach and Oakland are an innovation in California, and a radical departure from a system of terminal ratemaking laboriously built up by California terminals (Long Beach and Oakland included) and the Commission's regulatory predecessors, its cornerstone being the assessment of dockage and wharfage (as well as storage and demurrage) as the measure of terminals' compensation for the use of their facilities.

In determining the minimum and maximum payment figures Long Beach sought to derive a return that would amortize its investment over thirty years with interest at 4½ percent for the minimum and 6 percent for the maximum. It was stated by Long Beach that they judged this to be a fair and reasonable return and would not place a burden upon Sea-Land.

Petitioners except to the Examiner's conclusions that Agreement T–1870 is not unjustly discriminatory or unfair between carriers or shippers, and that T–1870 does not give Sea-Land an undue and unreasonable preference and advantage in violation of section 16 First. Petitioners point out that no other user of the Long Beach facilities operates under a similar arrangement. All other users compensate Long Beach at tariff rates. Petitioners feel that this fact by itself is enough to constitute unjust discrimination or undue preference.

We have previously held that a terminal lease agreement is not unlawful or unreasonable merely because it does not follow the otherwise applicable tariff charges. *Agreement No. 8905, Port of Seattle & Alaska S.S. Co.*, 7 F.M.C. 792, 800 (1964).

Petitioners also seek to discount the importance of the Examiner's finding that it has not been shown who will be injured by this arrangement. They maintain the agreement should be disapproved in spite of the Examiners finding. They cite *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525 (1966) as supporting their view that discrimination can be found without a showing of injury.

Petitioners reliance on *San Diego* is misplaced. In that case we stated that it was not necessary to show a competitive relationship between shippers using a port to determine whether a free time practice met the standards of the Shipping Act. Because of the nature of the practice—granting excessive free time—we concluded that the cost of free storage would be shifted to nonusers of the service. Thus some injury would result.

Petitioners concede that Sea-Land has no competition at Long Beach for its intercoastal service. They seek on exception, however, to show that Sea-Land does face some competition at Long Beach. It is suggested that Sea-Land is soliciting cargo in Europe for transshipment at Elizabethport to the Pacific Ocean, that at least six carriers calling at Long Beach serve this same area, and that these carriers and their shippers do not enjoy an arrangement such as Sea-Land's. Petitioners also point out that Sea-Land has started a one-way MSTS service between Oakland and Okinawa, and suggest that if Sea-Land carries cargo on return voyages to the Pacific Coast it will be in competition with at least one carrier calling at Long Beach.

Even assuming the establishment of competition between Sea-Land and another carrier and between their respective customers, we would be unable to reach a conclusion of discrimination or preference inasmuch as Long Beach has expressed willingness to make similar arrangements available to other carriers.

Few other carriers have the financial resources necessary to take advantage of such an offer. More importantly, few other carriers have operations or facilities which would require or readily lend themselves to such an arrangement. Sea-Land, because of the size and character of its operations, is somewhat unique among the carriers serving Long Beach inasmuch as it is capable of operating under such a lease. This does not mean that Sea-Land is being preferred or that others are suffering from discrimination.

We turn then to a discussion of whether the return on the agreement to Long Beach is compensatory. It must be compensatory to support our conclusion that other users of facilities at Long Beach are not burdened by the Long Beach-Sea-Land arrangement.

There has been much discussion of what need be considered to determine whether the return is compensatory. Throughout the proceeding the opponents of the agreement have sought to establish a requirement that the rate of return be based upon the so-called Freas formula.

The Freas formula utilizes cost and expense of the whole terminal area including nonrevenue producing facilities such as roads, bridges, and administration buildings.

Long Beach and Sea-Land on the other hand have argued that they need only show that the return realized covers cost and expenses of the particular facility to be used by the carrier and in addition returns a reasonable profit.

It is quite true that in valuing the terminal property for the "ratemaking" which resulted in the maximum annual payment figure ($346,000) in the lease, Long Beach did not employ the Freas formula but it was not and is not compelled to do so. The Commission and its predecessors have sanctioned, but have never required its use. Long Beach used a method, now known as the "stand on its own feet method." The basic difference between "Freas" and "stand on its own feet" is that the former utilizes cost and expense of the whole terminal as its beginning point, whereas the latter uses the estimated cost and expense of the facility to be used by the carrier. Both methods have been approved, the former in *Terminal Rate Structure—California*

Ports, 3 U.S.M.C. 57 (1948), and the latter in *Agreement Nos. T–4, T–5*, as well as the *Oakland-Sea-Land* case, *Agreement No. T–1768.*

We have previously approved the approach advocated by Sea-Land and Long Beach, and feel that it is a proper approach here. The same method was used and approved by us most recently in *Agreement No. T–1768* which involved a virtually identical agreement.

Opponents of the agreement maintain that Long Beach failed to consider all required costs and that Long Beach's estimated rate of return was thereby exaggerated. Petitioners thereupon submitted a revised cost estimate which they felt contained a more realistic appraisal of the true costs which Long Beach would incur.

Long Beach's cost estimate, as revised by petitioners, contains an estimate of all direct costs for the particular facility, and also contains an estimate of a pro rata amount of indirect terminal operating costs, administrative costs, fire, safety, health and sanitation costs, streetlighting and maintenance, utilities, bad debts, public information and publicity, as well as related expenditures for bridges, freeway maintenance, harbor engineering and state lands, plus a return on the investments for all these items. Using petitioners' revised estimates, an additional $61,173.22 is added to Long Beach's cost estimate. The addition of this sum would reduce Long Beach's return on the investments from 6 percent to slightly more than 5 percent, a return which the Examiner found to be reasonable for Long Beach. Petitioners' expert witness who prepared the revised cost estimates was unable to cite a nonoperating California terminal that enjoys even a 5 percent return.

Petitioners point out that their revised cost estimates also include a showing of what effect the use of the straight line depreciation method would have on the cost study. Long Beach employed the capital recovery method. Using the straight line method, an additional $12,825.30 would be added to the cost for each of the 20 years of the term of the lease. This would reduce the return on Long Beach's investment to 4.9 percent.

We do not dispute Long Beach's decision to use the capital recovery method of depreciation. Long Beach's choice in this respect is a matter of business judgment with which we will not interfere. Nevertheless, a return of 4.9 percent which would result from the use of the straight line method, would also appear to be reasonable.

Petitioners also feel that the .0212 ratio of pro-rated costs used by Long Beach was too low, inasmuch as comparable ports used a higher figure. The basis of this contention is the opinion expressed by petitioners' witness that such was the case. Petitioners attempted to introduce an exhibit showing the comparison between the ratios used by Long Beach and other California ports. Petitioners could not produce any working papers to show how the comparative figures were reached and the exhibit, therefore, was withdrawn. We cannot conclude, on the basis of this opinion alone, that the ratio of pro-rated costs used by Long Beach was too low.

Petitioners seek to show on exception that neither Long Beach's cost estimate nor petitioners' revision made provision for a return on a portion of the nonrevenue producing wharf facilities, such as roads, bridges, and administration building. A review of the record, however, shows that it is not the roads, bridges, and administration building, but it is the *lands* which support these facilities for which no return was provided.

It does not appear that the failure to provide for a return on these lands will result in other users bearing costs which should have been allocated to Sea-Land. The lands in question were acquired by Long Beach by means of a grant from the State of California. Long Beach, therefore, has incurred no original cost in acquiring these lands. Furthermore, it is questionable whether any costs are incurred to maintain these lands considering the use to which they are put. The lands supporting bridges and the administration building would appear to require little or no maintenance. It might be said that the lands supporting the roads require maintenance, inasmuch as the roads themselves need to be maintained. However, the record shows that petitioners' cost revision did include an allocation of expenses for street and freeway maintenance. The record also shows that the cost revision provides for maintenance of the actual bridges and administration building.

In view of these circumstances, we conclude that there is no need to provide for a return on these lands and, therefore, the failure to provide for a return on such non-revenue producing lands will not result in a non-compensatory rate of return for the Long Beach-Sea-Land agreement. Neither will it cause other users of the Long Beach facilities to bear expenses which should have been allocated to Sea-Land.

Petitioners also maintain on exception that Long Beach did not provide sufficient data so that the actual rate of return on the investment can be determined. It may be that Long Beach did not provide enough information to determine what would be the rate of return under the Freas formula method. Nevertheless, we are satisfied that the information available supports our conclusion that the rate of return will provide a reasonable profit for the use of the particular facility. Such information has been supplied by Long Beach. Nothing more is required.

To summarize what has been said up to this point: our previous decision shows that Agreement T–1870 should not be condemned merely because it provides Sea-Land terminal charges at other than tariff rates; the return has been shown to be compensatory and places no burden on other users of the facility; there has been no showing that any competitor of Sea-Land or any other user of the Long Beach facilities has been denied a similar arrangement.

In view of all the foregoing we conclude that Agreement T–1870 will neither be unjustly discriminatory nor unduly or unreasonably preferential or prejudicial to any carrier or shipper.

Petitioners also maintain on exception that the Examiner erred in failing to find that the effects of this agreement will be contrary to the public interest and detrimental to the commerce of the United States.

The same arguments were made with respect to similar agreements in *Agreement Nos. T–4, T–5* and *Agreement No. T–1768*. We found the agreements in these proceedings to be in the public interest and not detrimental to the commerce of the United States. We said with respect to the agreement in *Agreement No. T–1768* that it has much to recommend it and that Oakland has acted to develop and improve its port. We concluded that Sea-Land as well as members of the Shipping public will benefit from such an agreement. We also found that petitioners' speculations as to the collapse of the stability of West Coast terminal operations were not substantiated by the record and as such could not form the basis of disapproval of the agreement.

Petitioners have maintained, however, that since approval in *Agreement No. T–1768*, there have been significant occurrences which substantiate their position. Petitioners point to the transfer by Matson Navigation Company of its container operations from Encinal terminals to Oakland. Matson has negotiated a flat-rent lease agreement with Oakland (Agreements T–1953 and T–1953-A). Matson's move will result in a decrease in revenue to Encinal of $845,316 per year. Petitioners feel that this is another of what will be a long line of similar arrangements resulting from the offer by terminals of promotional inducements of less than tariff rates. They feel the logical result will be that terminals will attempt to outbid each other at negotiated nontariff rates and terminal revenues will go downard to the detriment of the terminal operators.

We have long recognized the existence of competition between the various California terminals. Since there are uniform tariff rates, or an attempt to obtain uniform tariff rates, the methods of competition are solicitation and sales, plus providing specialized facilities when a need occurs. This is evidenced by the competition between San Francisco, Oakland and Encinal terminals in attempting to locate Sea-Land at their respective facilities, and in Matson's proposed move from Encinal to Oakland in which San Francisco bid to get Matson because it felt it had to compete.

We are not convinced that the new Matson arrangment or any other suggested developments which competition may breed are indicative that the predicted chaos will result. Since the appearance of the first such agreements at California ports in 1963 there has been only three other such agreements subject to proceeding before us for approval. These were T-1768 between Sea-Land and Oakland, the present agreement (T-1870), and Matson's new agreement with Oakland, T-1953.[4]

Moreover, only a few steamship companies are willing or able to assume the tremendous financial obligations inherent in such agreements. For this reason we do not share petitioner's apprehensions that a deluge of similar arrangements will be forthcoming.

With respect to whether such agreements will result in the disruption of the tariff system, it should be noted that Sea-Land's arrangement here with Long Beach, as well as its arrangement with Oakland (T-1768) are based on tariff rates at the respective ports. The minimum and maximum payments levels are determined according to charges paid pursuant to the respective tariffs. Tariff rates are employed to determine if and when the minimum payment level is reached. Charges at a level between the minimum and maximum are at actual tariff rates.

The Examiner saw much to recommend this type of arrangement and offered reason why it could exist alongside and be compatible with the traditional tariff arrangement. He said in his Initial Decision at 16:

> There is a benefit to both Sea-Land and Long Beach in the very thing that the opponents of approval make the foundation of their opposition—the possibility, which really seems a probability, that during a portion of certain years Sea-Land will pay less than tariff rates. What Long Beach loses thereby may well be a good investment for Long Beach. It may give Sea-Land help in expanding its service and doing bigger business with Long Beach, or keep it in service and doing business with Long Beach which might otherwise dwindle away. Not only is this advantageous to the parties to the agreement in particular; it is for that and other obvious reasons beneficial to the general public interest.

He further stated at 19–20:

> If the speedy and healthy development of first-class containerized operation in the intercoastal and foreign trade can be advanced by a modicum of price-

[4] We take official notice that a fourth such agreement has been filed for approval. It involves a lease of terminal property by Long Beach to Evans Products Company. Evans will conduct a public wharfinger business at a rental based on Long Beach's tariff charges, but limited to a minimum-maximum payment.

> wise competition between terminals with respect to these expensive specialized facilities without devastating results, the public interest will be advanced, not hurt. The heavy-container concept coupled with door-to-door service constitutes an industrial revolution in ocean carriage. In operation it requires special facilities, as this record demonstrates, and changes, perhaps even major dislocations in terminal rate structures may result. There appears no good reason, however, why container berths for the new service under contracts such as this, which may eventually merge into container service tariffs, and other berths for breakbulk ships where tariff rates are charged, cannot exist side by side.

We think the Examiner's approach is proper and that his reasoning is sound. On the basis of all the foregoing we conclude that it has not been shown how Agreement T–1870 will operate contrary to the public interest or to the detriment of the commerce of the United States.

Petitioners further argue that the practice of furnishing terminal services at other than tariff rates is an unjust and unreasonable practice under section 17 of the Act and that the Examiner erred in finding to the contrary. Petitioners' rely on *Storage Practice of Longview, Washington*, 6 F.M.B. 178, 184 (1960) as authority for this proposition.

This case, however, merely stands for the proposition that a terminal which holds itself out to the public to offer services solely by tariff must abide by that tariff. It does not support the proposition that a port cannot offer terminal facilities pursuant to an agreement as well as a tariff.

As we stated in *Agreement No. 8905*, 7 F.M.C. 792 at 800:

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

Petitioners also object to the Examiner's failure to find that Agreement T–1870 violates the California Association of Port Authorities' agreement No. 7345 pursuant to which the California terminals operrate. Petitioners claim Agreement 7345 requires that the Association members provide services only according to tariff rates. Our reading of the agreement is not so restrictive. As we previously said in *Agreement Nos. T–4, T–5*, 8 F.M.C. 521 at 533, "The agreement simply permits uniform, stable terminal rates as far as may be practicable. The agreement does not require uniformity." Furthermore, we read the agreement as requiring strict adherence to tariff rates only to the extent charges are proposed to be assessed by tariff. It does not prohibit an arrangement of the sort entered into here by Long Beach and Sea-Land.

Petitioners also except to the Examiner's failure to find Agreement T-1870 violative of the laws of the State of California. Petitioners are referring to the provision of the grant of the harbor to Long Beach by the State of California. The grant would prohibit Long Beach in the operation of the harbor from discriminating in rates, tolls, charges, or facilities.

We have already determined that Agreement T-1870 would not violate our standards which prohibit discrimination and have found it would not be contrary to the public interest. We answered the same argument of petitioners in *Agreement Nos. T-4, T-5*, 8 F.M.C. 521 at 533, and the same is applicable here:

> While we might consider State or local law in determining what the public interest may be, we cannot in this case disapprove the agreements on this basis. The record does not show that any adverse ramifications will ensue upon approval of the agreements. Since we cannot anticipate any consequences which might be contrary to the public interest, the legality of the terms of the leases under California law is a matter for the State, not for the Commission in a section 15 proceeding.

An appropriate order approving Agreement T-1870 will be entered.

By the Commission.

[SEAL]

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 66–9

IN THE MATTER OF AGREEMENT NO. T–1870: TERMINAL LEASE AGREEMENT AT LONG BEACH, CALIFORNIA

ORDER

The Commission has this date entered its Report in this proceeding, which is hereby made a part hereof by reference, and has found, *inter alia*, that Agreement No. T–1870 between the City of Long Beach, California, and Sea-Land of California, Inc., is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, nor detrimental to the commerce of the United States, contrary to the public interest, or violative of the Shipping Act, 1916.

Therefore, it is ordered, That Agreement No. T–1870 is hereby approved pursuant to section 15 of the Shipping Act, 1916.

By the Commission.

[SEAL]

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 67–15

MADDOCK & MILLER, INC.

v.

UNITED STATES LINES COMPANY, MAYER CHINA COMPANY, FINE CHINA ASSOCIATES, INC., BART MILLER, WILLIAM P. C. ADAMS, SCHMID BROS., INC., PAUL A. SCHMID, LITTLEFIELD, INC.

Adopted August 3, 1967

The action of United States Lines Company in changing its supplier of china did not violate section 14 First of the Shipping Act, 1916. Complaint dismissed.

W. Harvey Mayer for complainant.

Elmer C. Maddy for respondent United States Lines Company.

Lawrence M. McKenna and *Walter J. Josiah, Jr.*, for respondents Fine China Associates, Inc., Schmid Bros., Inc., and Paul A. Schmid.

Edward Brodsky for respondent Littlefield, Inc.

Patrick Owen Burns for respondent Mayer China Company.

INITIAL DECISION OF C. W. ROBINSON, PRESIDING EXAMINER [1]

By amended complaint filed February 27, 1967, it is alleged that complainant is a New York corporation dealing in glassware and chinaware; that prior to June 1963, complainant supplied to respondent United States Lines Company (USL) the products manufactured by respondent Mayer China Company (Mayer), pursuant to an agreement giving complainant the exclusive right to sell Mayer products; that commencing in March 1961, respondents Fine China Associates, Inc. (FCA), and William P. C. Adams (Adams), endeavored to obtain the USL business although china manufactured by respondent Littlefield, Inc. (Littlefield), sought to be sold by USL by FCA and Adams, Adams, Schmid Bros., Inc., Paul A. Schmid, and Littlefield threatened USL that if it did not purchase its china through FCA, respondents would ship via other ocean carriers and would induce affiliated companies to do the same.

[1] This decision became the decision of the Commission on Aug. 3 1967.

The switching by USL of its purchases of china from complainant to FCA in the spring of 1963 is alleged to have been a deferred rebate, in violation of section 14 First of the Shipping Act, 1916 (the Act). The complaint also alleges that "By reason of the foregoing the respondents, other than United States Lines have received and still are receiving unduly and unreasonably preferential rates," but complainant's attorney, after a general discussion at the commencement of the hearing, rested his case as to those respondents solely upon section 14 First.

The complaint was withdrawn as to respondents Mayer and Littlefield. Respondents Miller and Adams did not file answers or participate in the hearing. Complainant filed no reply brief.

Preliminary

The proceeding had its genesis in a civil antitrust suit brought by the present complainant in the U.S. District Court for the Southern District of New York.[2] Defendants in that suit (most of whom are respondents in the present proceeding) moved for an order dismissing the complaint on the ground that the court lacked jurisdiction of the subject matter. Under the "primary jurisdiction" rule, the court dismissed the complaint as to USL. The actions against the other defendants were stayed pending action by the Commission on any complaint filed with it by complainant. 241 F. Supp. 306 (1965). Appeal was taken by complainant to the Court of Appeals for the Second Circuit. Before that court rendered its decision, however, the Supreme Court decided *Carnation* v. *Pacific Westbound Conference*, 383 U.S. 218, 932 (1966), and on the basis of that ruling the Court of Appeals held that the District Court should have retained jurisdiction over USL "to ensure a full and adequate remedy if the Commission determines that the defendant did violate the Shipping Act." 365 F. 2d 98 (1966).

The Facts

Complainant began to supply USL with Mayer china in 1952. In its letter of March 29, 1961, FCA offered to supply USL with Shenango china (manufactured by Littlefield) and requested some samples of Mayer china to enable FCA "to give you a very advantageous quotation." On September 29, 1961, FCA submitted to USL a quotation for a specified quantity of Shenango china for use on the vessels *United States* and *America*. This offer was $20,812.06 less than the then current prices of complainant. Later offers for other requirements were

[2] An earlier complaint had been filed in the Supreme Court of the State of New York but was dismissed at complainant's request.

lower by $6,814.56, $3,652.61, $1,127.65, and $9,217.24. A comparison of the prices of complainant and FCA for 1962, 1963, and 1964, shows an average differential in favor of FCA of $12,391.63, or 14¾ percent.

Samples of Shenango china were submitted by FCA to USL "at least four or five" times between 1961 and 1963, but they did not meet the standards of Mayer china. Furthermore, to switch suppliers would raise problems for USL in liquidating complainant's stock. Since a change in suppliers was not a step to be taken "lightly," the situation remained unchanged until early in 1963, when USL learned that FCA would supply it with Mayer china of the same quality previously purchased from complainant, but at a minimum saving of 7 percent. At that point, USL decided to transfer its purchases from complainant to FCA. Even after complainant learned of the switch it made no offer to meet the prices of FCA.

Discussion and Conclusions

Respondent USL. Complainant contends, as already seen, that USL was forced to withdraw its china purchases from complainant because Schmid Bros. and its affiliates threatened to make their commercial shipments via ocean carriers other than USL, and that this group of shippers paid freight charges to USL of approximately $150,000 a year. It was stipulated, however, that the largest amount of freight monies received by USL from Schmid and FCA in any one of the years 1961, 1962, and 1963 was only $23,731.68. It must not be forgotten, too, that FCA was unsuccessful, between 1961 and 1963, in securing the china business from USL inasmuch as Shenango china handled by FCA did not meeet the quality of Mayer china, and that it was not until FCA secured a lower price from Mayer that it was able to offer USL the savings already referred to.

Although FCA, in its letter of March 29, 1961, informed USL's purchasing department that FCA and its affiliates (including Schmid Bros.) were substantial importers via USL ships, it is significant that between 1961 and 1963, the amount of freight paid annually by Schmid Bros. to USL remained fairly constant, which would seem to negative the idea that pressure was being brought to bear on USL.

The official of the purchasing department of USL who is supposed to have stated to complainant's president in 1963 that USL was pressured into buying china from FCA was unable to testify as he was critically ill. The sole USL witness was the director of the department of service and supply, which includes the former purchasing department. He was superintendent steward between 1962 and 1965, and worked closely with the purchasing department during those years.

This official testified that he had never heard of any pressure being put on USL to change its china supplier, and that during the period here involved "any contemplated changes in the procurement procedure would normally be discussed and our approval requested before any major change were [sic] placed in effect." Decisions of such magnitude as the changing of a supplier, with its attendant problem of assuring continuity of quality, would have required the consent of both the purchasing department and the superintendent steward.[3]

It is concluded and found that USL was not pressured into changing its china supplier, but this is really immaterial in view of the other conclusion which here follows. As previously stated, complainant's attorney grounded his case solely on section 14 First of the Act. To constitute a violation of that section the deferred rebate must be a "*return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.*" (Italics supplied.) Even if it were to be conceded by any stretch of the imagination that the action of USL here under consideration was a "deferred rebate," there is no proof whatever that such course of conduct was of the kind or description defined in section 14 First. The complaint is hereby dismissed as to USL.

Respondents other than USL. Miller was president of complainant when the company changed hands in early 1963. Adams was president of FCA during the same period. As earlier noted, neither of these individuals filed an answer or participated in the hearing. No attempt was made by complainant to make a case against them personally. The record is somewhat fuzzy as to the status of Schmid Bros. and Paul A. Schmid. The letter from FCA to the purchasing department of USL, dated March 29, 1961, refers to Schmid Bros. as one of its "associated companies." It is also mentioned therein that "Our hotel division would like to be your supplier of dinnerware," from which the Examiner assumes that the division referred to was Schmid Bros. A letter dated March 23, 1967, from the chairman of Schmid Bros. to the Examiner shows the company simply as "Importers"; it also appears from that letter that Paul A. Schmid is a brother of the chairman. A stipulation among counsel shows that in each of the years 1961,

[3] Complainant's president, who came with the company in early 1963 when ownership changed hands, testified that complainant's china and glass business with USL had amounted to about $250,000 a year.

355-301 O - 69 - 4

1962, and 1963, Schmid Bros. paid to USL considerably more freight monies than did FCA.

One thing is clear: None of the respondents mentioned in the preceding paragraph is a common carrier by water. As section 14 First of the Act, in its prohibitive terms, applies only to common carriers by water, the complaint as to such respondents is hereby dismissed.

Ultimate Conclusion

There being no showing that any of the respondents has violated section 14 First of the Act, the complaint is hereby dismissed in its entirety.

C. W. Robinson
Presiding Examiner.

FEDERAL MARITIME COMMISSION

No. 67-12

UNITED STATES OF AMERICA

v.

AMERICAN-ORIENTAL LINES, INC.

Decision adopted August 17, 1967

Respondent found to have collected charges in excess of those applicable under its tariff on a shipment of two trucks from Baltimore, Md., to Dacca, East Pakistan, via the port of Chittagong. Refund of the overcharge ordered.

Bertram E. Snyder for complainant.
W. A. Newcomb for respondent.

INITIAL DECISION OF CHARLES E. MORGAN, PRESIDING EXAMINER [1]

The shortened procedure was followed. The United States of America, by the Department of Justice, filed the subject complaint on February 15, 1967, against American-Oriental Lines, Inc., seeking reparation of $530.39 because of alleged overcharges on a shipment of two trucks from Baltimore, Md., to Dacca, East Pakistan, via the port of Chittagong, made on March 10, 1965.

The respondent had gone out of business, but its president accepted service of the complaint on March 7, 1967. At his and his counsel's requests, the time to answer the complaint was enlarged on three occasions. The answer of respondent does not admit the allegations, but does not contest the complaint. The complainant's memorandum in support of the complaint was filed on June 14, 1967, and no answering memorandum has been filed. Thus, all the facts of record appear in complainant's memorandum.

The United States on March 10, 1965, delivered two trucks at Baltimore to the respondent for shipment aboard the SS *Whitehall*, a vessel owned, chartered, operated, managed, or otherwise controlled

[1] This decision became the decision of the Commission Aug. 17, 1967.

by the respondent, for shipment in accordance with respondent's bill of lading No. 3, dated March 9, 1965.

Respondent submitted its bill for ocean freight and related charges on these two trucks on March 17, 1965, and the bill was paid on or about March 26, 1965. Later, it was audited by the General Accounting Office of the United States, which determined in its view that there was an overcharge.

Under Freight Tariff No. 1 of the respondent, the applicable rate of $48.75 per 40 cubic feet resulted in charges of $3,232.13 for part of, but not all of, the services provided. There is no dispute about this portion of the charges, which were based on 2,652 cubic feet.

Also under the same tariff, there are rates for the so-called heavy-lift service. The heavy-lift charges were billed and collected at a rate of $12.50 per 40 cubic feet, or $828.75. Rule 4, of the tariff, effective April 22, 1964, provided heavy-lift charges on all pieces or packages weighing over 8,960 pounds. The two trucks in issue had a total weight of 22,800 pounds, and apparently were 11,400 pounds each. The $12.50 heavy-lift rate erroneously charged applied on a piece or a package weighing from 24,640 to 26,880 pounds. On a piece or a package weighing 22,400 to 24,640 pounds, a rate of $11.25 applied. On a piece or package from 11,200 to 12,320 pounds, the heavy-lift rate was $4.50 per 40 cubic feet. Thus, on two pieces or packages, each of 11,400 pounds, the applicable heavy-lift rate was $4.50, resulting in heavy lift charges of $298.35.

The total applicable [2] charges on the two trucks were $3,232.13 plus $298.35, or $3,530.48, whereas the total charges collected were $4,060.87.

It is concluded and found that the complaint was timely filed, and that the United States was overcharged in the amount of $530.39 on the shipment in issue. The respondent is ordered to refund $530.39 to the United States.

S/(Signed) CHARLES E. MORGAN,
Presiding Examiner.

[2] Under sec. 18(b)(3) of the Shipping Act, 1916, a common carrier by water in the foreign commerce shall charge and collect for its transportation services at the rates specified in its tariffs on file with the Commission.

FEDERAL MARITIME COMMISSION

No. 67-18

AGREEMENTS NO. E-1985 AND T-1986: LEASE AGREEMENTS AT LONG BEACH, CALIFORNIA

Decision Adopted September 6, 1967

Amended Agreement No. T-1985, a marine terminal lease between the City of Long Beach and Evans Products Company, has not been shown to be unjustly discriminatory or unfair or otherwise unlawful under section 15 of the Shipping Act, 1916; Amended Agreement No. T-1985 is approved. Agreement No. T-1986, a warehouse lease to South Bay Warehouse Corporation, was terminated before it became effective.

Leslie E. Still, Jr. and *Leonard R. Putnam* for the City of Long Beach, California, respondent.

Reed Williams and *Amy Scupi* for Evans Products Company, respondent.

Miriam E. Wolff for the San Francisco Port Authority, petitioner.

Walter C. Foster and *Edward C. Farrell* for the City of Los Angeles, petitioner.

Donald J. Brunner and *Samuel Nemirow* as Hearing Counsel.

INITIAL DECISION OF CHARLES E. MORGAN, PRESIDING EXAMINER

By order of investigation served March 3, 1967, the Commission instituted this proceeding to determine whether Agreement No. T-1985, a marine terminal lease, between the City of Long Beach, California (Long Beach), and Evans Products Company (Evans), should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916 (the Act).

Also, this proceeding was intended to determine the lawfulness of Agreement No. T-1986, a warehouse lease between Long Beach and South Bay Warehouse Corporation, but this lease was terminated on July 10, 1967, before it became effective. Accordingly, there is no further need to consider Agreement No. T-1986.

The Commission's order of investigation referred to two protests, received from the City of Los Angeles and from the San Francisco Port Authority, against approval of the subject Agreements. Both of these petitioners appeared at the prehearing conference, and all the parties agreed on a July 11, 1967, hearing date. On June 29, 1967, Long Beach and South Bay Warehouse Corporation announced their intention to terminate Agreement No. T-1986. In view of that circumstance and because Long Beach and Evans had amended Agreement No. T-1985, the two petitioners decided, because of the expenses of litigation and for other reasons, not to appear at the hearing, which had been postponed to July 18, 1967.

By letter dated July 12, 1967, the City of Los Angeles withdrew its protest with reluctance "in view of recent decisions of the Commission approving this type of agreement * * *." Los Angeles stated in part:

> We have asked the Court of Appeals to review the Commission's decision in Docket No. 65-9. We assume that in the event the Court ultimately holds that the Commission should not have approved Agreement No. T-1768 (the subject of Docket No. 65-9) * * *, the Commission will review all other similar agreements, including T-1985, in the light of the principles laid down by the Court. * * * The City of Los Angeles will continue to press for a judicial determination (1) that publicly owned and operated ports are required to be operated as public utilities pursuant to tariffs containing charges, rates, tolls and regulations equally applicable to all, and (2) that special "deals" for the privileged few such as contemplated by T-1985 are contrary to law.

By letter also dated July 12, 1967, the San Francisco Port Authority stated that it has no objection to T-1985 until the minimum payment is exceeded, but from that point on it believes that the arrangements, providing for the division of wharfage and dockage between Evans and Long Beach and the 100 percent accrual to Evans of storage and wharf demurrage charges, are improper. San Francisco also stated in part:

> When the Commission made its decision in Sea Land it gave consideration to the fact that the matter under discussion was containerized cargo, a different kind of operation. We are now seeing an extension of the Sea Land doctrine into break-bulk operations. We would assume that in the event the Court reverses the Sea Land decisions this Commission will reopen the present proceeding and we withdraw from active participation on the assumption this will be done. * * * We hope that the Commission sees its way clear to re-establish the tariff system at the least for break-bulk operations where the terminal operator is a shipper-carrier of its own cargo.

Hearing Counsel and respondents participated in the hearing at Los Angeles. The respondents asked that the proceeding be expedited in view of the fact that the marine facilities which are to be leased under the subject agreement are under construction, and the construction may be completed sometime in September 1967. In lieu of omitting briefs as was suggested, early brief dates were set, thereby not foreclosing the filing of a brief by a petitioner.

The agreement in issue, No. T-1985, designated "Marine Terminal Lease," has been amended by another document, designated "First Amendment To Marine Terminal Lease." The lessor, Long Beach, is a municipal corporation and owner of land adjacent to the harbor area in Long Beach. The lessee, Evans, a Delaware corporation, is an importer, exporter, and manufacturer of plywood, and is a charterer of vessels in the foreign commerce, among other business enterprises. Evans currently has two vessels under charter, and four more vessels will come under charter to Evans by 1968. The operation of the two Evans' vessels is by Retla Steamship Company under an agency agreement on file with the Commission. Evans has a tariff on file with the Commission, and its vessels are in the Trans-Pacific trade between the Orient and ports on the U.S. West, Gulf, and East coasts. The principal commodities carried on Evans' vessels are steel, plywood, and general cargo. Evans' plywood imports are estimated by Evans to be less than 10 percent of the total tonnage which it anticipates would move across the docks of the premises to be leased. Steel and plywood would be the principal tonnage, with some general cargo. The handling of steel and general cargo would be for persons other than Evans. Plywood would be handled for Evans and other persons. The lease agreement is for 10 years, with a renewal option except as to the rental money which is to be renegotiated.

Under the amended agreement, Long Beach will lease to Evans certain premises in the harbor district of Long Beach situated on Pier F at Berths 204 and 205. The leased premises will include a transit shed, containing 90,000 square feet, now under construction and nearing completion. Berths 204 and 205 in total contain about 358,000 square feet.

The lease provides that Evans shall maintain and operate these premises as a public terminal for waterborne commerce for the accommodation of shipping by rail, truck, and water, including the handling of general cargo and packaged freight. Long Beach reserves the right to make secondary assignments to other persons when the premises are not required by Evans for its uses.

Charges are to conform as nearly as possible with like charges published in the tariff of Long Beach applying at municipal terminals of Long Beach. The latter is given the power to review and control the rates, charges, regulations and practices of Evans as lessee of this marine terminal. In fact, Evans intends to concur in Long Beach's tariff, and to assess charges uniformly to all shippers and consignees, including itself. Each of Evans' operations, including this marine terminal operation, is expected to sustain itself economically, and to reflect a profit, and it is not intended, for example, that Evans' marine terminal operation will subsidize Evans' operation as an importer of plywood.

The first amendment of the lease recites in its first paragraph that it was made and entered into on August 9, 1967, pursuant to an ordinance adopted by the Board of Harbor Commissioners of the City of Long Beach at its meeting of July 10, 1967. This first amendment has been signed by Evans as of July 3, 1967, but due to a formality in the Long Beach City Charter there is a 30-day referendum provision which necessitates that the first amendment be not signed and executed [1] by Long Beach until on or about August 9, 1967. The lease also provides that it shall not take effect until its approval by the Federal Maritime Commission, or a determination by this Commission that such approval is not required.

The compensation for the leased premises is set forth in Section 6 of the first amendment, which provides that Evans will pay to Long Beach a rental during each twelve-month period of the lease in the minimum sum of $188,000. All revenue from dockage, wharfage, wharf demurrage, wharf storage, and other applicable tariff charges accruing from Evans' operations upon the premises shall be paid to Long Beach, until the $188,000 minimum has been paid. After that minimum has been paid to Long Beach, the revenue earned in the balance of each twelve-month period for wharfage and dockage charges shall be divided, 25 percent to Long Beach, and 75 percent to Evans. All other tariff charges, such as for wharf demurrage and wharf storage, accruing during the balance of each twelve-month period shall accrue 100 percent to Evans, and are to be retained by Evans.

In its operation of the leased premises, Evans hopes to obtain yearly revenues in excess of the $188,000, but this minimum is payable to Long Beach whether or not the revenue received from the operation is less than, equal to, or in excess of this minimum.

After and in the event that the minimum is reached, Evans' share of revenues above the minimum will be utilized first to defray the expenses of operating the terminal, and thereafter any sums remaining will be considered as profit to Evans in its capacity as a marine terminal operator.

[1] Counsel for respondent, Long Beach, stated at the hearing that he would advise the Federal Maritime Commission later of the fact and time that the first amendment is actually signed and executed by Long Beach.

Under terms of the lease, Evans is required to pay the cost of water, fuel, electricity, gas and other utilities furnished to or used in or on the leased premises, the cost of maintenance and repair of the premises, the cost of certain liability insurance policies and certain property taxes, and the cost of tackle, gear, and labor for the docking or mooring of vessels at the premises. Evans is not responsible for reasonable wear and tear and the action of the elements on the premises, nor is it responsible for repairs to the fender system where damage is not caused by Evans.

The amended lease agreement also provides to Evans the option and right of first refusal to lease Berth 203 of the harbor district of Long Beach. Berth 203, which is adjacent to Berths 204 and 205, and also is on Pier F, contains about 161,000 square feet. The rental compensation for berth 203 for each twelve month period shall be not less than $38,640 or such sum as shall be equal to the annual rental provided in a bona fide offer from a third party, whichever sum shall be less, and which sum shall be added to the minimum obligation of $188,000 in connection with the lease of Berths 204 and 205, and which sum shall be used in the computation and apportionment of tariff charges for wharfage and dockage in like manner as in connection with the lease of Berths 204 and 205.

The agreement requires Evans to keep full and accurate books and accounts of its operations of the leased premises, with the said books and accounts subject to audit by Long Beach.

Long Beach estimated an investment of $2,242,571 in Berths 204 and 205, and $402,462 in Berth 203. On berths 204 and 205, the minimum rental would produce a gross return of 8.38 percent, and on Berth 203, its minimum rental would produce a gross return of 9.60 percent, or a composite of 8.57 percent for all three berths. At the time of the lease negotiations Long Beach could have sold revenue bonds at a gross cost of 4.5 percent including servicing. To return a net of 4.5 percent on its investment amortized over 30 years, Long Beach calculated that it required 6.14 percent per year income on its investment. In addition, Long Beach estimated prorated overhead port costs of 2.13 percent and direct costs of 0.16 percent, or a total of all factors of 8.43 percent. The record contains no contrary estimates and calculations of the return on investment of Long Beach on the premises to be leased, and Long Beach's estimates appear to be reasonable.

Hearing Counsel agree that the rental agreement apparently will yield an adequate return to Long Beach in consideration of its investment in the leased premises, and Hearing Counsel emphasize that the agreement will provide Long Beach with a guaranteed minimum income irrespective of tonnage handled over the facility.

Long Beach believes that this new facility is part of its progress in improving its total port facilities. The leased premises will have an extra wide area between the transit shed and wharf, for the easy handling of long steel beams, pipes, and plates, with more room for the mobile cranes than upon the standard apron wharf. The new facility is considered by Long Beach as a specialized facility for handling steel.

Section 15 of the Act provides that the Commission shall approve agreements such as No. T–1985, unless, after notice and hearing, it finds that the agreement is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports or between exporters from the United States and their foreign competitors, or that the agreement operates to the detriment of the commerce of the United States, or that the agreement is contrary to the public interest, or otherwise in violation of the Act. In order to disapprove Agreement No. T–1985, it must be shown to be unlawful under section 15. This record contains no conclusive evidence of unlawfulness.

The proposed lease was well publicized, and no steamship company objected to this agreement, nor did any shipper. There was no suggestion that any cargo would be diverted from any port or terminal, or that any carrier would shift its operation to a different port or terminal. Nothing in the agreement suggests that operations by Evans will be performed in any unlawful manner. In any event, the Commission retains jurisdiction for the future should there be a complaint.

On brief no one opposes the lease agreement. Concerning the matter of whether the return to Long Beach is fair and reasonable for the rental of the leased premises, it may be said that this is not a rate case where we have a direct interest in the level of the Long Beach's return on its terminal facilities, and beyond this, Long Beach is a public body experienced in terminal management, and the record affords no grounds for disputing Long Beach's judgment in negotiating this lease agreement. See *Agreement No. T–1768—Terminal Lease Agreement*, 9 F.M.C. 202, 207 (1966).

Long Beach points out that in Docket No. 65–9 *Agreement No. T–1768—Terminal Lease Agreement*, *supra*, at page 205, it was stated:

> The record discloses no unlawful discrimination or prejudice against any carrier, shipper, port or terminal. No carrier testified against approval of the agreement, and the port of Oakland in fact has openly stated its willingness to assign other terminal properties in the same manner and under the same conditions offered to Sea-Land.

Long Beach reasons that the identical holding could be made in this proceeding substituting Long Beach for Oakland and Evans for Sea-Land.

It has been held that a terminal lease agreement is not unlawful or unreasonable merely because it does not follow the otherwise applicable tariff charges. *Agreement No. 8905—Port of Alaska and Seattle S. S. Co.*, 7 F.M.C. 792,800 (1964). Also, *Agreement No. T–1870—Terminal Lease Agreement At Long Beach, California*, 11 F.M.C. Approved July 26, 1967.

It is concluded and found that Agreement No. T–1985, as amended, has not been shown 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. An order will be entered approving Agreement No. T–1985 as amended herein. It further is concluded and found that Agreement No. T–1986 was terminated before it became effective, and that any issue as to that agreement is moot.

(Signed) CHARLES E. MORGAN,
Presiding Examiner.

WASHINGTON, D.C., *August 10, 1967.*

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

No. 67–18

IN THE MATTER OF: AGREEMENTS NO. T–1985 AND T–1986: LEASE AGREEMENTS AT LONG BEACH, CALIFORNIA

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER APPROVING AGREEMENT

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 that the decision became the decision of the Commission on September 6, 1967.

It is ordered, That Agreement T–1985, as amended by the document entitled "First Amendment to Marine Terminal Lease" and executed by Evans Products Company and City of Long Beach on August 9, 1967, is approved and this proceeding is discontinued.

By the Commission.

[SEAL] (Signed) FRANCIS C. HURNEY,
Assistant Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 67–33

CALCUTTA, EAST COAST OF INDIA AND EAST PAKISTAN/U.S.A. CONFERENCE

Decided September 13, 1967

Agreement No. 8650 canceled for failure of certain parties signatory thereto to comply with subpoenas lawfully issued pursuant to section 27 of the Shipping Act, 1916.

Elmer C. Maddy and *John Williams* for respondents, Calcutta, East Coast of India and East Pakistan/U.S.A. Conference.

Burton H. White and *Elliott B. Nixon* for intervener, North Atlantic Mediterranean Freight Conference.

Edward D. Ransom for intervener, Pacific Westbound Conference.

Edward S. Bagley for intervener, Gulf Conferences (Gulf/Mediterranean Ports Conference, Gulf/United Kingdom Conference, and Gulf/Scandinavian and Baltic Sea Ports Conference).

J. M. Allen for intervener, Textile Bag Manufacturers Association.

Peter J. Nickles and *H. Thomas Austern* for intervener, Ludlow Corporation.

Donald F. Turner, *Joseph J. Saunders*, and *Paul Ferber* for intervener, Department of Justice.

Donald J. Brunner, Hearing Counsel.

REPORT

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

By order of May 24, 1967, we directed the Calcutta, East Coast of India and East Pakistan/U.S.A. Conference and the member lines thereof to show cause why its agreement (No. 8650) should not be canceled as contrary to the public interest. The proceeding was restricted to the filing of affidavits of fact and memoranda of law and replies thereto. Several petitions to intervene were granted.[1] Oral argument before the Commission was held on July 19, 1967.

FACTS

The Calcutta, East Coast of India and East Pakistan/U.S.A. Conference was established by approved Agreement No. 8650 which covers the trade from the East Coast of India and East Pakistan ports to United States Atlantic and Gulf of Mexico ports. The Conference members are all common carriers by water in the foreign commerce of the United States and, as such, they are subject to the provisions of the Shipping Act, 1916 (46 U.S.C. 801 *et seq.*).[2]

The Conference has a dual rate contract system approved under section 14b of the Act. Ludlow is a signatory to a conference dual rate contract and is, therefore, subject to certain exceptions required to ship its cargoes on conference vessels.

On July 6, 1965, the Conference increased its rates on certain jute products and gave notice to Ludlow that the increase would become effective on November 11, 1965.

In August of 1965, Ludlow filed a complaint with the Commission alleging that the increased rates were in violation of sections 14b, 15 and 18(b)(5) of the Shipping Act.

In September of 1965, Ludlow sought the issuance of nine subpoenas duces tecum directed to each of the Conference members. The Presiding Examiner, over the opposition of respondents, issued the subpoenas requested, but insofar as they did not "require production of documents from any place not in the United States", the Examiner pointed out that application for subpoenas requiring production of documents located elsewhere may be made to the Commission itself.

Ludlow applied to the Commission for the issuance of additional subpoenas duces tecum covering documents not located in the United States. The Commission granted the application and the additional subpoenas were issued by Examiner Page. Certain respondents refused to comply with the subpoenas on the ground that they were invalidly issued in excess of the Commission's authority.

Ludlow then applied for and obtained an order to show cause in the Federal District Court for the Southern District of New York to compel respondents to comply with the subpoenas issued by the

[1] Interveners were North Atlantic Mediterranean Freight Conference, Pacific Westbound Conference, Gulf Conferences (Gulf/Mediterranean Ports Conference, Gulf/United Kingdom Conference, and Gulf/Scandinavian and Baltic Sea Ports Conference), Textile Bag Manufacturers Association, Ludlow Corporation, and Department of Justice.

[2] The members are American Export Lines, Inc.; Thos. & Jno. Brocklebank Ltd., Hellenic Lines, Ltd.; Isthmian Lines, Inc.; Nedlloyd Lines; Scindia Steam Navigation Co. Ltd.; Shipping Corporation of India Ltd.

Federal Maritime Commission. The District Court upheld the validity of the subpoenas but stayed their enforcement pending appeal to the Court of Appeals for the Second Circuit. This stay was later extended by the Court of Appeals.

The Court of Appeals affirmed the enforcement order of the District Court, and on December 8, 1966, the Supreme Court denied certiorari. The District Court issued an order directing the respondents to comply with the subpoenas on January 4, 1967.

On January 12, 1967, and January 20, 1967, Examiner Page issued notices of referral to the Commission of the asserted "failure" and "refusal" of the representatives of the Shipping Corporation of India, Ltd., the Scindia Steam Navigation Company, Ltd., Thos. & Jno. Brocklebank, Ltd. and N. V. Nedlloyd Linjen, Holland, "to produce documents, if any, located outside the United States." The Examiner noted that "The United States flag lines and Hellenic Lines (Greek) intend to comply fully" and, further, that "Counsel for Ludlow stated that he would not insist upon data from the lines stating their willingness to comply pending further proceedings against those not complying."

The District Court for the Southern District of New York denied the motion of the Commission to adjudge the members of the Conference which had refused compliance and their American-based agents in contempt. The present proceeding was then instituted.

Discussion and Conclusions

The issue before us is simply whether we shall cancel, as no longer in the public interest, our previous approval of a conference agreement because a portion of the conference membership has failed to comply fully with the demands of an admittedly valid subpoena duces tecum. The question is, of course, fundamental to the effective regulation of our water-borne foreign commerce.

Agreement 8650 was approved under section 15 of the Shipping Act, 1916 (46 U.S.C. 814) as *inter alia* an agreement "fixing or regulating" ocean transportation rates and charges and upon our approval, it was exempted from the provisions of the antitrust laws. That same section requires us to cancel any agreement "whether or not previously approved" which we find to be "contrary to the public interest."

That conferences are, under ordinary circumstances and conditions, deemed by Congress and this Commission to be necessary and beneficial to the foreign commerce of the United States and thus in the public interest can no longer be doubted. But the conditions and circumstances attendant to this conference are at present extraordinary and, therefore, its continued existence must be re-examined to determine afresh whether continued approval of the agreement under which the conference operates remains in the public interest.

The antitrust exemption which results from the approval of agreements under section 15 was granted by Congress only on the assumption that the anticompetitive combinations thereby authorized would be effectively supervised and controlled by an agency of the government. This justification for immunizing certain activities of the shipping industry from the reach of the antitrust laws was first articulated in the now renowned Alexander Report (House Document No. 805, 63rd Cong., 2d Sess. (1914)), which concluded:

> While admitting their many advantages, the Committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision. To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action (p. 417).

The Committee further stated:

> * * * the purpose of the law should be to protect the shipper against any unreasonably high rate which the lines may have within their power, by virtue of their agreements and conference arrangements, arbitrarily to impose in the absence of governmental supervision and control.

The Alexander Report's pronouncements on the need for government regulation of the conference system have been continually reaffirmed. As recently as 1961, Congress, in enacting certain amendments to the Shipping Act, said:

> The Shipping Act of 1916 recognized the need for self-regulation of international shipping through steamship conferences and in an attempt to reconcile the concept of free competition, that act provided an exemption from the antitrust laws, provided that there was effective governmental supervision of conference activities (H.R. Rep. No. 498, 87th Cong., 1st Sess. (1961), p. 2).

One of the 1961 amendments to the Shipping Act clearly expressed Congress' renewed concern with unreasonably high freight rates. Thus, section 18(b) (5) added to the Act by Public Law 87–346 authorizes us to disapprove any rate which we find is "so unreasonably high or low as to be detrimental to the commerce of the United States." The present controversy settles upon the efforts of a shipper, Ludlow Corporation, to secure information relevant to his charge that the rates of the respondent conference are in violation of section 18(b) (5). The relevance of the subpoenaed documents to the complaint of Ludlow is now settled. The courts have held the documents necessary to the proper determination of the validity of the disputed rates under that section. *Federal Maritime Commission* v. *DeSmedt*, 366 F 2d. 464, 468 (2d.

Cir.), *cert. denied*, 385 U.S. 974 (1967); *Ludlow Corporation v. DeSmedt*, 249 F. Supp. 496, 502 (S.D. N.Y. 1966). Without the information called for by the subpoenas, we cannot discharge our duty under section 22 of the Act to investigate all properly filed complaints, and if we conclude that there has been a violation of the statute, to provide appropriate relief. Thus, the failure to produce the information has prevented us from fulfilling our statutory responsibilities. Surely the public interest requires that we remove the aegis of section 15 from the concerted activities of an anticompetitive combination whose refusal to supply lawfully demanded information frustrates our efforts at effective supervision and control of those activities and deprives a shipper in our commerce of the necessary means to proscute his complaint under the Act. Our failure to cancel Agreement 8650 would grant the parties thereto that "unrestricted right of action" which Congress itself withheld in 1916. (See Alexander Report, p. 417, quoted *supra* at page 4.)

Our decision then would seem clear. Respondents and interveners, however, for a variety of reasons think otherwise. All of the arguments of these parties reduce themselves to two basic propositions. We are either without the power to cancel this agreement or we should withhold our exercise of that power in this case, although it is sometimes difficult to tell whether an argument goes to the former or the latter.[3]

In denying our power to cancel Agreement 8650, respondents and interveners point to two provisions proposed to Congress in 1961 when it had under consideration certain amendments to the Shipping Act. One proposal would have conditioned approval of any agreement under section 15 upon (1) the designation of a person up on whom service of process could be made within the United States, and (2) a provision in the agreement that every signatory would agree in advance to furnish records or other information, wherever located, required by any proper order of the Commission. A second proposal would have amended section 21 of the Act in much the same way, i.e. every carrier would be required to designate an agent and furnish records and information upon proper order. Neither of these proposals was enacted into law and this, argue respondents and interveners, demonstrates that Congress did not intend our power under section 15 to extend to the

[3] A somewhat obscure argument accuses us of incorporating into the concept of the "public interest" a "public convenience and necessity standard." Respondents simply state without specifying what language is concerned, that our order "clearly connotes employment of a test similar to that utilized in cases involving a certificate of public convenience and necessity." What we have already said should make clear just what we have found involved in our scrutiny of the agreement in the light of the public interest. That a certificate of public convenience and necessity is not involved should be equally clear.

cancellation of conference agreements for the failure of its members to supply information.

Respondents quote extensively from the Senate Committee report explaining the failure to enact the proposed provisions (Sen. Rep. No. 860, 87th Cong., 1st Sess., pp. 24 and 25). The Committee pointed out that the proposals had evoked "a storm of protests" from friendly nations and from both foreign and U.S. flag carriers. The Committee deemed it wiser to delete the proposals. This same legislative history was before the court in *Federal Maritime Commission* v. *DeSmedt*, *supra*, and the court had the following to say:

> We read this history as indicating only a desire by Congress to leave the agency's powers to require production of documents located abroad to extend however far the courts might decide under the existing statute, neither adding thereto nor subtracting therefrom; the lack of intention to renounce power to obtain documents from abroad is implicit in the recognition that the courts of appeal had already upheld the actions taken by the agency under § 21, *id.* at 224, and the refusal to overrule these decisions by amendment. The Supreme Court has warned against drawing an inference "that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress. Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47, modified 339 U.S. 908 (1950). This is a *fortiori* true when all that has happened is that, at the request of the Department of State to preserve the *status quo*, a committee of one house has rejected an amendment passed by the other which exceeded the clarification the agency had sought. *Id.* 473.

We obviously agree with the court's interpretation of this bit of legislative history and we find nothing that indicates any intent on the part of Congress to alter or withdraw our power of cancellation under section 15, but respondents would have us withhold the exercise of this power in this case.

First, it is urged that cancellation would be based upon the erroneous "fact" that some demand had been made upon the conference itself and not, as was actually done, upon the individual members. Second, cancellation would "punish" all members for circumstances beyond their control—the members offering full compliance for the actions of those refusing full compliance and those refusing full compliance for the actions of their respective governments. Finally, and perhaps not separately from the second argument, it is urged that cancellation would result in our interfering "in the internal activities and affairs of foreign nations, a course not permitted by the Shipping Act."

In arguing that dissolution of the conference is uncalled for since no demand was made upon the "conference," respondents attempt to draw a distinction which does not exist. The conference is and can only be its member lines. The "conference" does not fix rates; the members do and the "conference" does not grant or deny a shipper's rate request, the individual members according to their disposition, and by whatever vote controls, take the action. Respondents would convert a name or a convenient and traditional term of reference into a real entity within or behind which the individual members may remain free to operate as they choose and without regard to the law.

The fact that some of the members have offered full compliance with the subpoenas does not relieve the others of their obligations to comply, but it is to this that respondents' argument reduces itself. If we withhold cancellation in deference to those offering full compliance, the fact remains that the continued operations of the conference could or would be screened from our supervision insofar as that supervision is dependent upon full compliance with our lawful demands for information. Such a result is not to be contemplated lightly since, because of its nature, effective supervision is almost totally dependent upon our ready access to information of conference activities and actions.

It matters not that those members refusing compliance are doing so because of laws or decrees of their respective sovereigns and we do not "reproach" them for their failure to respond. But this does not alter the fact that effective government supervision and control, in a word regulation, is the *sine qua non* for antitrust exemption under the Shipping Act; and since regulation is directly dependent upon compliance with our lawful orders, we cannot, if we are to discharge our statutory responsibilities, continue an antitrust exemption for the concerted activities of any combination even a portion of whose members refuse compliance with such lawful demands whatever such refusal may be based upon.

This is not, contrary to respondents, interfering in the internal activities and affairs of foreign nations nor is it "punishment" for activity over which respondents have no control.

Foreign governments, of course, remain free to prohibit or allow their national flag carriers to produce documents located within those governments' borders. Our cancellation of an agreement can hardly be said to interfere with any internal matters of any foreign sovereign any more than our approval or refusal to approve any agreement would do so. It would be naive to suggest that no problems could arise from conflicting laws, but here we are confronted with a situation that permits of only one solution for it is the very integrity of the regulatory program of this country which is at stake. Since effective supervision and control of respondents' concerted activities is not possible in the present posture of the conference, the antitrust exemption which our approval granted respondents must be withdrawn. To do so is not to punish respondents in any sense of the word. All we are doing here is to restore the regulatory forces of free and open competition. We cannot do otherwise under the law and still protect shippers, both exporters and importers from the possibility of unreasonably high rates which could result from an unfettered freedom of concerted anticompetitive activity.

Our cancellation of the agreement is, of course, without prejudice to the rights of those carriers willing and able to comply with the subpoenas to file a new conference agreement and, if they desire a new dual rate agreement. The Commission could be expected to act with reasonable dispatch. Should this agreement be submitted and approved, the trade in question would continue to benefit from conference service.

There remains but one more argument which should be mentioned because of the apparent seriousness with which it is urged. Respondents seem to suggest that there is a lack of "substantial evidence" upon which to base our cancellation of Agreement 8650. Respondents do not indicate what evidence is lacking; rather, they draw a distinction between disapproving a newly filed agreement and cancelling an already approved agreement. The latter, it is urged, requires something more than the former. As Hearing Counsel and the Department of Justice point out, no such distinction exists, but even if it did, we think it clear that what we have already said shows that the agreement should be cancelled as contrary to the public interest within the meaning of section 15.

We have considered all the arguments of interveners and any which are not specifically dealt with are rejected as without merit or as immaterial to our decision. Accordingly, for the reasons set forth, an order cancelling Agreement No. 8650 will be issued.

Vice Chairman GEORGE H. HEARN, concurring:

I join with the other members of the Commission in withdrawing antitrust immunity from this conference, as presently constituted. I do so not reluctantly, but with a feeling of disappointment since I believe conference service in this trade is beneficial to the foreign water-borne commerce of the United States.

Admittedly, the conference system as currently operating in our foreign water-borne commerce is not perfect, due in part to its conflict with United States antitrust policy. Consequently, when a group of carriers act in concert, they do so not of right but by privilege granted by Congress through the regulatory body authorized to evaluate the grant in each case. Although the privilege is given without preference to carrier or flag, it can and must be withdrawn when a conference or its members refuse to abide by the lawful rules and orders of this Commission and the laws of this country.

This case is made more difficult because the failure of compliance was due to the acts of foreign governments acting in their sovereign capacity; thus creating an international impasse. It was not due to any managerial decision by the carriers independently or in conference.

This situation certainly in no way renders the refusal to honor our orders proper, and cannot be accepted in mitigation of the Commission's action herein. Another judgement, however, is warranted from these circumstances and the fact of the importance of conference service to the shipping public. I do not think the conditions of this case, created by acts of foreign governments, should result in the disruption or termination of conference service in the trade involved. This is even more so because a dual rate contract is in force between the conference and shippers in the trade.

In expressing our disapproval of the actions of some of the conference members, thereby removing the cloak of antitrust immunity from them, we are acting under the mandate of the Shipping Act of 1916. Conference agreement 8650, originally approved on March 31, 1964, has been beneficial to the shippers in the trade, absent any evidence to the contrary. Therefore, I think the Commission should do all it can to permit continuance of conference service under the existing agreement by the members of the conference who have indicated a willingness to comply with the Commission's subpoenas and orders. I would continue approval of conference service in the trade by the remaining members of the present conference who comply with Commission orders, subpoenas and rules. It is presumed that those members will continue to act under Agreement 8650. Such action would continue conference service in the trade.

FEDERAL MARITIME COMMISSION

DOCKET NO. 67–33

CALCUTTA, EAST COAST OF INDIA AND EAST PAKISTAN/U.S.A. CONFERENCE

ORDER

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

It is ordered, That Agreement 8650 be cancelled effective January 12, 1968.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

Docket No. 66–45

Agreement for Consolidation or Merger Between American Mail Line Ltd., American President Lines Ltd., and Pacific Far East Line, Inc.

*Decided September 29, 1967**

The Federal Maritime Commission has jurisdiction pursuant to section 15 of the Shipping Act, 1916, over agreements to merge among competing carriers subject to said Act.

Prior approval of agreement among affiliated competing carriers, providing for purchasing and data processing to be performed by jointly owned corporations, continued in effect.

Proceeding remanded to Examiner for the taking of further evidence.

Warner W. Gardner and *Benjamin W. Boley* for respondents.

Alvin J. Rockwell, *John E. Sparks*, *Thomas A. Welch*, *Willis R. Deming* and *David F. Anderson* for Matson Navigation Company, intervener; *James L. Adams* and *R. Frederic Fisher* for States Steamship Company, intervener; *Donald F. Turner*, *Joseph J. Saunders* and *Miles Ryan, Jr.*, for the Department of Justice, intervener.

Donald J. Brunner and *Paul J. Fitzpatrick*, Hearing Counsel.

REPORT

By the Commission: John Harllee, *Chairman*, and Ashton C. Barrett, *Commissioner*. George H. Hearn, *Vice Chairman*, Joining in part in his separate opinion. *Commissioner* James V. Day, dissenting and concurring. *Commissioner* James F. Fanseen, dissenting and concurring.

This proceeding was instituted by order of investigation dated August 3, 1966, to determine whether Agreement 9551, providing for the merger of American President Lines, Ltd., American Mail Lines, Ltd., and Pacific Far East Line, Inc.,[1] was subject to the requirements of section 15 (46 U.S.C. 814) and, if so, whether the agreement should be approved thereunder.

---

[1] The parties to the agreement, U.S.-flag carriers operating in the foreign commerce of the United States, are all subject to the Shipping Act, 1916 (46 U.S.C. 801 *et seq.*).

*See Supplemental Report decided Dec. 21, 1967 at page 81.

States Steamship Company and Matson Navigation Company protested approval of the agreement and were made parties to the proceeding. The Portland (Oregon) Commission of Public Docks intervened but took no further part in the proceeding. The United States, through the Department of Justice, intervened for the sole purpose of submitting a brief on the question of jurisdiction. Hearing Counsel became a party to the proceeding pursuant to Rule 3(b) of the Commission's Rules of Practice and Procedure.

While the hearing was in progress, the Commission approved an agreement among the respondents, designated FMC Agreement No. 8485–C–3, which provides for purchasing and data processing services to be performed for the three companies by a jointly-owned subsidiary. This agreement, which amends and supplements earlier approved agreements (No. 8485 and supplements thereto) relating to cooperative working arrangements, had been protested by Matson. A supplemental order was entered in the present proceeding directing that Agreement No. 8485–C–3 be examined to determine whether the section 15 approval then given should be continued.[2]

In an initial decision served May 16, 1967, Examiner Walter T. Southworth concluded that Agreement 9551 was within the ambit of section 15 and that it should be approved thereunder. He further concluded that approval of Agreement 8485–C–3 should be continued.

Matson takes exceptions to all of the Examiner's conclusions while States excepts to the Examiner's conclusions concerning Agreement 9551. The Department of Justice excepts to the Examiner's conclusion that we have jurisdiction over Agreement 9551 but takes no position as to its approval under section 15. Hearing Counsel join the Justice Department in excepting to our jurisdiction over Agreement 9551 but urge that, should we agree with the Examiner and conclude that we do have jurisdiction, we should approve the agreement. Oral argument was held on July 24, 1967.

Basically, the agreement calls for the merger or consolidation of APL, AML, and PFEL with at least AML remaining a separate division for steamship operations; or, in the alternative to merge APL and PFEL into a single corporation with AML remaining a subsidiary. As preliminary steps to the actual merger or consolidation, the agreement calls for the establishment of an interim planning group and an interim operations group. The former will draft the actual plan of merger while the latter will develop and adopt procedures

[2] The merger agreement provides for the cancellation of Agreement 8485 upon accomplishment of the conditions precedent to the merger.

to achieve the "maximum degree of coordination of sailings and joint traffic solicitation" in the trades which are served by APL and PFEL and to the extent appropriate AML. The establishment of a planning group is not made contingent upon section 15 approval, but the operations group is, and while "informational" reports will be filed by the planning group, no further section 15 filing appears contemplated by the operations group. The actual plan of merger would not require approval under section 15 nor, it would appear, would the sailing arrangements and the joint solicitation agreements to be worked out prior to the actual merger.

The threshold issue is, of course, that of our jurisdiction over the agreement to merge. We agree with the Examiner's formulation of that issue:

> The sole question is whether an agreement to merge among carriers covered by the Act is an agreement with respect to a subject mentioned in section 15 of the Act,[3] which the statute authorizes and directs the Commission to approve or disapprove depending on its findings with respect to certain matters specified therein.

All parties agree and the facts demonstrate that there is substantial competition among at least two of the parties to the merger, APL and

---

[3] Section 15, as amended, provides as far as pertinent:

SEC. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger raffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings conferences, and other arrangements.

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

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

Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the [antitrust laws] * * *.

PFEL. With this fact in mind, the jurisdictional question can be disposed of upon an examination of the agreement and the statute.[4]

Section 15 requires the filing and approval of any agreement "controlling, regulating, preventing or destroying competition". Thus, an agreement to merge, since it eliminates all competition between the parties to the merger, is within the literal language of the Act. Respondents would have us stop here, having found that the "plain meaning" of the statute grants us the jurisdiction in question, *Browder v. United States*, 312 U.S. 335 (1941). *Terminal Lease Agreements—Oakland-Long Beach*, 8 FMC 521, 531 (1965). While the existence of the "plain meaning" rule of statutory construction is undisputed, its applicability today would seem at best doubtful, and its validity has been seriously challenged by the Supreme Court itself, *Employees v. Westinghouse Corp.*, 348 U.S. 437 (1955). In any event, the length and vigor of the arguments of both sides would indicate that to them at least the meaning of the language of section 15 is something less than plain.

What then did Congress intend when it drafted section 15? What types of anticompetitive agreements did Congress intend to subject first to the approval of our predecessors and later to our own? The protestants of jurisdiction[5] would say that section 15 would require approval of virtually all anticompetitive agreements except agreements to merge, which are perhaps the most anticompetitive of them all. The piece of legislative history relied upon for this assertion is the so-called Alexander Report[6] which in 1914 concluded an exhaustive investigation of the shipping industry by the House Merchant Marine

[4] The exceptions taken to the Examiner's subordinate findings and conclusions, as well as those taken to his ultimate conclusion that jurisdiction over Agreement 9551 is found in section 15 of the Shipping Act (46 U.S.C. 814), are all in the nature of a reargument of the original positions urged before the Examiner. They challenge in one way or another the Examiner's entire rationale. We do not specifically set forth each exception in the discussion which follows. All the arguments against jurisdiction are of course considered though not specifically labeled as exceptions. Any argument not specifically repeated has been considered and found to be either irrelevant or immaterial to our decision herein or without merit.

[5] As already noted, States, Matson, the Justice Department, and Hearing Counsel oppose jurisdiction. Each does not of course make all the arguments of the others nor do they all take the same exceptions to the Examiner's decision. While all arguments and exceptions, not deemed without merit or irrelevant, are dealt with herein, we have not, for the sake of brevity and clarity of discussion matched argument and exception to party. Though the Justice Department and Hearing Counsel were not actual "protestants" to the agreement, for the sake of convenience, the term as used herein will include them unless otherwise specified or indicated by the context.

[6] Report on Steamship Agreements in the American Foreign and Domestic Trade (House of Representatives: 63d Congress, Proceedings of the Committee on Merchant Marine and Fisheries in the Investigation of Shipping Combinations under H.R. 587). The report of the committee, of which Representative J. W. Alexander was chairman, was first submitted to the 63d Congress in 1914, and a bill to carry out its recommendations was introduced but not passed. Substantially the same bill was reintroduced in the 64th Congress and became the Shipping Act, 1916. See *Maritime Board v. Isbrandtsen*, 356 U.S. 481, 490, n. 11 (1958).

and Fisheries Committee. The investigation was launched under resolutions[7] which directed the Committee to, among other things, investigate whether the steamship lines had formed among various arrangements, "agreements for the purpose of preventing or destroying competition". The Committee concluded that it was the almost universal practice for carriers in the foreign commerce of the United States to operate under written agreements, conference arrangements, or gentleman's understanding which had as their purpose the regulation of competition through either:

(1) the fixing or regulation of rates, (2) the apportionment of traffic by allotting the ports of sailing, restricting the number of sailings, or limiting the volume of freight which certain lines may carry, (3) the pooling of earnings from all or a portion of the traffic, or (4) meeting the competition of nonconference lines. (Alexander Report, 415).

The Committee went on to say, and this is the portion of the report relied upon:

* * * To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle they would consolidate through common ownership. Neither result can be prevented by legislation and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement.

From this the parties opposing jurisdiction would conclude that Congress never intended that section 15 would cover agreements for corporate consolidation or merger.

They urge that in 1914, Congress had passed the Clayton Act, section 7 of which dealt expressly with corporate consolidations, and had Congress desired to include such transactions within section 15, the appropriate language to do so was close at hand. Thus, the absence of Clayton Act language in section 15 coupled with the above-quoted excerpt from the Alexander Report, demonstrates that Congress was satisfied that existing law was adequate to deal with problems of steamship mergers and that it would be imprudent to grant the Commission merger jurisdiction, with its attendant antitrust immunity.

We quite agree with the proposition that the termination of the anticompetitive agreements then existing would probably bring about corporate consolidations or rate wars. But we do not see from the quoted excerpt that Congress intended to exclude merger agreements from a statute which by its language includes such agreements. That legalizing existing agreements would slow down the movement toward consolidations was recognized by the Committee:

In addition to the combinations by agreement there are numerous instances

[7] House Resolutions, 425 and 587, 62d Cong., 2d sess.

of consolidations among steamship lines by actual amalgamation or through stock control of subsidiaries. (The most notable examples of such consolidations are the International Mercantile Marine Co., the Royal Mail Steam Packet Co., the Hamburg-American Lines, and Furness, Withy & Co.). This movement' toward actual consolidation by ownership, various witnesses have emphasized, would have taken place more rapidly and on a much larger scale if the making of steamship agreements and conferences had been impossible. In the absence of cooperation through written or oral agreements, according to these witnesses, only two alternatives present themselves, viz., consolidation by actual ownership or the elimination of the weaker lines through cut-throat competition. (Alexander Report 301).

But is it to be concluded from this that the Commission, which was to control all other anticompetitive combinations, was not to apply the same transportation expertise to the control of mergers or consolidations? We think not. Rather, it is clear that the Committee and Congress recognized that it could not legislatively control totally foreign mergers any more than it could effectively legislate against rate wars. And it would seem to us, that the same considerations which led Congress to grant this Commission the power to exempt anticompetitive rate fixing and pooling agreements from the strictures of the antitrust laws, would apply to a grant of the same power over agreements among domestic carriers to merge.

But, say the parties, therein lies the fatal flaw in our reasoning because the language of section 15 makes no distinction by flag or nationality among carriers subject to its requirements, and if we read into it such a distinction, we are doing violence to its very language and to our own principle that we regulate without regard to flag.

Section 17 from whence we draw our power to regulate the practices of terminals makes no distinction between domestic terminals and foreign terminals and a literal reading of the section would apply it to both. Yet, it has never been applied to a foreign terminal to exercise regulatory supervision over that terminal's practices. Nor is it likely that it would be. A reasonable construction of section 15 would normally exclude foreign mergers from the coverage of its provisions just as it would include domestic mergers.

In this same vein, Hearing Counsel have expressed grave concern that the assertion of merger jurisdiction would present the Commission with insurmountable difficulties in the case, for example, of a merger agreement between a U.S.-flag carrier and a foreign-flag carrier. Difficulties there may be, but no more than there would be under the antitrust laws were business entities other than common carriers by water involved in the hypothetical merger.

We have on many occasions stated our abiding concern with equality of treatment regardless of flag under the Shipping Act. Our concern, of course, has been that we do not let our natural desire to see the American merchant marine prosper influence our treatment of foreign-flag carriers under the Act to their detriment. But how is subjecting an agreement to merge between American-flag carriers to our scrutiny under section 15 going to operate to the detriment of foreign-flag carriers? It, of course, will not, and protestants are reaching when they make such an argument.

The protestants argue that when Congress intends to extend agency control and antitrust immunity to mergers, it has done so in clear and specific language. Specifically, they point to the Interstate Commerce and Federal Aviation Acts (49 U.S.C. 5(a) and 1378) in which the word "merger" appears, and it is urged that the absence of any reference to mergers in section 15 clearly demonstrates that Congress never intended mergers to be covered by that section. This argument ignores chronology and history.

While many of the provisions of the Shipping Act were copied from or patterned after the Interstate Commerce Act, there was in 1916, no provision comparable to section 15 in the Interstate Commerce Act. It went only so far as to prevent the pooling of traffic or revenues (24 Stat. 380). Section 15, of course, applies to these kinds of agreements but also extends to many many more. It is clear that section 15 was intended to expand the Shipping Board's jurisdiction over water carrier agreements beyond the then existing jurisdiction of the Interstate Commerce Commission over railroad agreements. Section 5b, the section which is now comparable to section 15 and which grants the Commerce Commission general jurisdiction over anticompetitive agreements, was not enacted until 1948. Again, in 1938, Congress enacted the Civil Aeronautics Act, section 412 (49 U.S.C. 1382) of which was admittedly patterned after section 15, and in addition to section 412, Congress included another provision, section 408 (49 U.S.C. 1378) which specifically dealt with mergers.

It follows from all this, say the protestants, that since section 15 does not specifically provide for the inclusion of merger agreements within its coverage, that merger agreements are not included. It seems to us that this argument would have merit if the chronology of the several statutes was reversed. If Congress, having once distinguished between merger agreements and other anticompetitive agreements and separately and specifically provided for both, failed to do so in a later statute to the exclusion of one or the other, it would make sense to construe this failure as an intention not to grant the excluded authority. But does the reverse of this follow? Having once granted the broadest possible authority over anticompetitive agreements in of course, has been that we do not let our natural desire to see the American merchant marine prosper influence our treatment of foreign-flag carriers under the Act to their detriment. But how is subjecting an agreement to merge between American-flag carriers to our scrutiny under section 15 going to operate to the detriment of foreign-flag carriers? It, of course, will not, and protestants are reaching when they make such an argument.

The protestants argue that when Congress intends to extend agency control and antitrust immunity to mergers, it has done so in clear and specific language. Specifically, they point to the Interstate Commerce and Federal Aviation Acts (49 U.S.C. 5(a) and 1378) in which the word "merger" appears, and it is urged that the absence of any reference to mergers in section 15 clearly demonstrates that Congress never intended mergers to be covered by that section. This argument ignores chronology and history.

While many of the provisions of the Shipping Act were copied from or patterned after the Interstate Commerce Act, there was in 1916, no provision comparable to section 15 in the Interstate Commerce Act. It went only so far as to prevent the pooling of traffic or revenues (24 Stat. 380). Section 15, of course, applies to these kinds of agreements but also extends to many many more. It is clear that section 15 was intended to expand the Shipping Board's jurisdiction over water carrier agreements beyond the then existing jurisdiction of the Interstate Commerce Commission over railroad agreements. Section 5b, the section which is now comparable to section 15 and which grants the Commerce Commission general jurisdiction over anticompetitive agreements, was not enacted until 1948. Again, in 1938, Congress enacted the Civil Aeronautics Act, section 412 (49 U.S.C. 1382) of which was admittedly patterned after section 15, and in addition to section 412, Congress included another provision, section 408 (49 U.S.C. 1378) which specifically dealt with mergers.

It follows from all this, say the protestants, that since section 15 does not specifically provide for the inclusion of merger agreements within its coverage, that merger agreements are not included. It seems to us that this argument would have merit if the chronology of the several statutes was reversed. If Congress, having once distinguished between merger agreements and other anticompetitive agreements and separately and specifically provided for both, failed to do so in a later statute to the exclusion of one or the other, it would make sense to construe this failure as an intention not to grant the excluded authority. But does the reverse of this follow? Having once granted the broadest possible authority over anticompetitive agreements in language virtually constitutional in its breadth and scope, can it be argued that subsequent specificity on the part of Congress in another statute diminished the previously granted authority? We think not. The subsequent specificity could well reflect nothing more than a later stylistic preference in legislative draftsmanship. Moreover, the merger sections of both the Interstate Commerce Act and the Federal Aviation Act extend to all corporate mergers and unifications whether by agreement or not, which could well explain the separation of those provisions from the sections dealing with other anticompetitive agreements. But it is argued that this is yet another indication that merger agreements are not within the intended coverage of section 15; i.e. the failure to grant authority over all mergers proves that Congress never intended to grant jurisdiction over any mergers and to hold otherwise, it is urged, would involve us in an inconsistency. We do not see the inconsistency.

The original section 7 of the Clayton Act, which was plainly designed to control corporate unifications and which itself did not mention mergers, left mergers by agreement (if they did not monopolize) subject to the provisions of section 1 of the Sherman Act. Like price-fixing agreements, merger agreements violated the antitrust laws only if they destroyed competition to the extent of being a contract or combination in restraint of trade. *United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61, 85–86 (1912). It may well be that this Commission should have the power to control all corporate unifications among U.S.-flag steamship lines, and assuming that this power has been withheld, it does not follow that agreements clearly covered by the plain language of the statute are or were intended to be excluded therefrom. Concerning this plain language of section 15, one other argument deserves treatment.

It is argued that section 15 extends only to those agreements over which we can exercise continuing jurisdiction, e.g., an agreement such as a conference agreement which preserves the separate identities of the parties. Thus, section 15 authorizes us to disapprove, cancel, or modify any agreement "whether or not previously approved", and after listing several types of agreements, the section provides for approval of agreements "in manner providing for an exclusive preferential or cooperative working arrangement" [8] which, it is argued, characterizes the other types of agreements. Granted, section 15 provides for con-

[8] One party urges that the prohibition, added by amendment in 1961, against approving agreements "between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive", unless the right of indpendent action were allowed shows that merger agreements are not within section 15. We think the Examiner's disposition of this argument was clear, well founded and proper, and we adopt it as our own.

tinuing supervision where it is called for—but we do not concede that the provision for continuing supervision of agreements requiring it limits our authority to only those agreements. The Examiner so concluded and we agree. We are necessarily given the power to stop or modify any continuing practice if we find that it has become detrimental to the commerce of the United States or contrary to the public interest even though we have previously approved the practice. But even here our disapproval or modification is only prospective; we cannot undo what has already been done. We are now concerned with the approval of a merger of three steamship lines, approval of which is to be granted unless we find that the merger would operate to the detriment of the commerce of the United States, be contrary to the public interest or unfair as between carriers, or otherwise in violation of the Shipping Act, 1916. It does not follow, of course, that our approval of the agreement once granted can never be withdrawn or that we cannot order the agreement modified. Just what the consequences of such an action would be are not before us now and speculation on the matter would be fruitless.

But protestants argue that our lack of power to order divestiture which power both the ICC and the CAB get from section 11 of the Clayton Act, is still further proof that we are without jurisdiction over mergers. We think the protestants have failed to distinguish between mergers by agreement and mergers which are accomplished without agreement. In the case of the former, the agreement must be filed for approval under section 15 and if the agreement is approved, the merger takes place. If the agreement is not filed and it is nevertheless carried out, the parties to it are at large under the antitrust laws and any remedy appropriate to those laws would be applicable, *Carnation Company* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966). Thus, we are concerned with what might be termed a pretransaction scrutiny. As to mergers accomplished without any agreement, it would appear that divestiture under the Clayton Act is ordered because the scrutiny is posttransaction, i.e. the particular acquisition of control, usually already accomplished, results in the proscribed lessening of competition or monopoly. In the case of agreements to merge under section 15, the need for orders of divestiture is substantially lessened if not eliminated.

From the foregoing, we think it clear that neither the language of section 15 nor its legislative history show that Congress did not intend section 15 to cover agreements to merge. Indeed, we have quite recently held directly to the contrary. In Docket No. 931—*Agreement No. 8555 Between Isbrandtsen Steamship Co., Inc., Isbrandtsen Company,* *Inc., and American Export Lines, Inc.*, 7 FMC 125 (1962), we found the agreement in question had:

the overall effect of the Isbrandtsen-Export arrangement before us (which has been designated F.M.B. Agreement No. 8555 and is hereinafter called "No. 8555") will be for Isbrandtsen, which recently acquired 26.37 percent of the outstanding Export common stock, *to transfer its liner fleet* of 14 ships, *and its entire business (including good will) as a common carrier by water* in the foreign commerce of the United States to Export, agreeing as a part of the transaction not to compete in the services transferred without Export's consent. (Emphasis added).

Upon this finding, together with findings to the effect that both Export and Isbrandtsen operated as carriers of commercial cargo on Trade Routes 10 and 18, we concluded that Agreement No. 8555 "in its entirety" constituted an agreement "controlling, regulating, preventing and destroying competition", which it was required by the "clear, unqualified language of section 15" to approve, disapprove, cancel or modify (7 FMC at 128). All protestants purport to find some distinction between the instant situation and that in *AEIL*, and further contend that if the *AEIL* decision be deemed to control, it was wrong and should be overruled. The prime ground upon which *AEIL* would be distinguished is the existence in that agreement of a "covenant not to compete". It is urged that even after consummation of the transaction in *AEIL*, the Isbrandtsen Company remained a viable entity with vast resources and considerable knowledge of and experience in the steamship industry. Thus, it is argued, but for the covenant not to compete, Isbrandtsen Company could go out and acquire ships (which, it is offered, are readily available) and enter into competition with American Export-Isbrandtsen Lines. Whatever may be the practical feasibility of such an action by Isbrandtsen Company, the argument overlooks the most salient fact of all—the decision in *AEIL* does not base jurisdiction on the covenant not to compete. Concerning our jurisdiction, we said simply that:

* * * Congress (by Section 15 of the Act) authorizes and requires us to approve, disapprove, cancel, or modify "*every* agreement * * * controlling, regulating, preventing, or destroying competition." To read this language as authorizing and requiring us to approve, disapprove, cancel, or modify every agreement * * * controlling, regulating, preventing, or destroying competition *except agreements of the nature of the agreement here under scrutiny*, would constitute statutory amendment masquerading as statutory construction. We are not authorized anywise, with respect to particular types of agreements (or any thing else), to emascu-

late the Act to the detriment of the public interest, and this (although it might make our task substantially easier) we will not do. (7 FMC at 128).[9]

But we are urged not to follow *AEIL* even if we find it applicable. Two considerations are offered. First, the case was decided before the Supreme Court's decision in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) and at a time when the Commission tended to view its jurisdiction over the shipping industry as all pervasive to the complete exclusion of the antitrust laws, and second, the decision was never subjected to review by the courts.

In *Carnation, supra*, the Supreme Court held that agreements which had not been filed for approval under section 15 remained subject to the antitrust laws. The decision had nothing to say about agreements which had been filed for approval and consequently nothing about the agreement in issue here. Whatever may then have been the view concerning the pervasiveness or exclusivity of jurisdiction under section 15, only speculative hindsight can say what part that view may or may not have played on the decision reached in *AEIL*. Such speculation has no place here. The fact that *AEIL* was never reviewed by the courts affords us no reason for departing from a precedent which we think so clearly right. Moreover, the *AEIL* decision is not just one isolated expression of the view that section 15 extends to agreements for consolidation or merger.

In 1949, Congress was taking steps to plug the loopholes in section 7 so as to bring within its scope the entire range of corporate amalgamations, including assets, acquistions, and mergers, as well as the stock acquisitions which alone had been covered. Between 1914, when the section was originally enacted, and 1949, several agencies had been created or given additional authority. These included the Civil Aeronautics Board, the Federal Communications Commission and the Federal Power Commision, as well as the Federal Martime Commission's predecessor; and the Interstate Commerce Act had been amended to cover mergers and acquisitions of control (49 U.S.C. 5). To make

[9] This fact notwithstanding, it is argued that testimony before a Congressional Subcommittee by Thomas E. Stakem, then Chairman of the Commission clearly demonstrates that the *AEIL* decision based jurisdiction upon the covenant not to compete. (See Progress Report—Federal Maritime Commission, Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 2d Sess. (1962) at 22). This testimony shows only what a single member of the Commission may have felt in casting his vote in the case and its course cannot change the literal language of the decision nor stand as evidence for some unexpressed legal rationale lurking behind the actual holding of the case.

355-301 O - 69 - 6

it clear that the amendment of section 7 would not affect the authority of these agencies over mergers, the following was added to section 7:

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

In the version first passed by the House, the amending bill (H.R. 2734) omitted reference to the Commission's predecessor. Under date of September 29, 1949, the Commission, by its Vice Chairman, called this omission to the attention of the Senate Committee. The letter is set forth in full in the margin.[10] After stating the Commission's understanding that the Clayton Act amendment would prohibit certain asset acquisitions, the letter described the provisions of section 15 of the Act with respect to the filing and approval or disapproval by the Commission of any agreement among carriers or other persons subject to the Act "if such agreement, among other things, is one 'controlling, regulating, preventing, or destroying competition'"; and noted that approved agreements were excepted from the antitrust laws. A copy of the pertinent provisions of section 15 was attached. The letter suggested that the Commission be included among the agencies specifically listed in H.R. 2734. It noted that H.R. 2734 did not appear to affect the section 15 exemption provision, but suggested that inclusion

[10] My dear Senator O'Conor: The attention of the Maritime Commission has been called to the provisons of the bill H.R. 2734, now under consideration by your subcommittee. Among other things, this bill would amend section 7 of the Act of October 15, 1914 (the Clayton Act), to prohibit certain corporations from acquiring the assets of competing corporations where in any section of the country the effect of such acquisition would be substantially to lessen competition or tend to create a monopoly. The bill would also add a new paragraph to section 7 to provide that nothing contained in such section shall apply to transactions duly consummated pursuant to authority given by certain specified Federal commissions and agencies under any statutory provision vesting such power in such commission or agency.

Section 15 of the Shipping Act, 1916, as amended, which is administered by the Maritime Commission, requires every common carrier by water or other person subject to the Act to file with the Commission any agreement with another such carrier or other person subject to the Act if such agreement, among other things, is one "controlling, regulating, preventing or destroying competition". The Commission has authority to disapprove any such agreement "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 to the commerce of the United States, or to be in violation of this Act." Agreements approved by the Commission under this provision are "excepted from the provisions of the Act approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the government, and for other purposes', and amendments and Acts supplementary thereto" (commonly referred to as antitrust laws). A copy of the pertinent provisions of section 15 of the Shipping Act is submitted herewith for your reference.

of the Commission among the agencies mentioned would avoid controversy arising from any contention that failure to do so made approved section 15 agreements subject to the provisions of section 7 of the Clayton Act. Obviously such agreements could not be subject to section 7 unless they were merger agreements of one kind or another.

The Senate Committee thereupon amended H.R. 2734 to include the Commission among the agencies listed in the above-quoted paragraph of section 7. In its Report No. 1775 (81st Cong., 2d Sess., June 2, 1950), the Committee on the Judiciary noted (p. 2):

> The purpose of the amendments is to include in the bill the recommendations of the United States Maritime Commission and the Securities and Exchange Commission, which the committee believe to be justified * * *.

The Committee's Report also noted (p. 7):

> The Maritime Commission, at its request has been included in the category of agencies to which the act does not apply when transactions are duly consummated pursuant to authority given to that Commission. In making this addition, however, it is not intended that the Maritime Commission, or, for that matter, any other agency included in this category, shall be granted any authority or powers which it does not already possess.

Of course, the amendment did not add to the Commission's jurisdiction nor, as the letter made clear, did the Commission expect it to. While we would hesitate to join the Examiner in characterizing the inclusion of the Commission in section 7 as an "unqualified acceptance of section 15 merger jurisdiction ," it nevertheless shows that Congress was aware that the Commission claimed such jurisdiction under section 15 in a carefully prepared and documented letter. Congress thought the inclusion of the Commission in section 7 to be "justified" and has not seen fit to change its position since then. But it is argued that any reliance on section 7 for merger jurisdiction is misplaced [11] and that Congress, in a least two instances, included agencies in section 7 which were later determined by the Supreme Court to have no such jurisdiction. See *Milk Producers Assn.* v. *U.S.*, 362 U.S. 169 (1961) and *Califronia* v. *Fed. Power Comm'n.*, 369 U.S. 482 (1962).

In *Milk Producers*, there was no statutory provision vesting power in the Secretary of Agriculture to approve the transaction in question and thus immunize it from the antitrust laws. In the *California* case, while the Power Commission had the statutory authority to approve the acquisition of one natural gas company by another, its approval did not exempt the transaction from the antitrust. The Supreme Court in that case simply held that the Commission should have stayed its hand and not acted during the pendency of an antitrust suit in the dis-

[11] We are, of course, not relying upon section 7 for merger jurisdiction. That jurisdiction comes to us from section 15.

trict court over the same transaction. Mergers, as agreements requiring approval under section 15 are, upon such approval, expressly exempted from the provisions of the antitrust by the language of that section. Consequently, we find nothing in the *Milk Producers* or *California* cases which alters our jurisdiction under section 15.

Again in 1956, our immediate predecessor the Federal Maritime Board, advised the Senate Subcommittee on Antitrust and Monopoly that "merger agreements approved by the Board * * * and the resulting mergers, are exempt from section 7." [12] Finally, in 1962, the Chairman of this Committee reported to Congressman Celler's subcommittee that "section 15 and our decision in the Isbrandtsen-Export merger case constitute notice that merger agreements must be filed with the Commission and that it is unlawful not to file such agreements promptly or to carry out such agreements prior to Commission approval." [13] It may be noted that the "Celler Report" issued in March 1962, referred to the *AEIL* transaction recently approved by the Federal Maritime Commission without questioning the Commission's jurisdiction.[14]

But it is argued that our construction of section 15 contravenes the longstanding principle that repeals of the antitrust laws by implication are disfavored. Agreements approved under section 15 are expressly exempted from the antitrust laws by the language of that section. We have concluded that the present agreement to merge is within the language of section 15 and to the extent that the section does not contain such words as "merger" or "corporate unifications" in describing the agreements covered therein, some implication is admittedly involved. But a great many other agreements are not by name expressly included within the coverage of section 15. Terminal leases, transshipment agreements and a host of agency agreements are but a few. We have already had a word to say about the scope and breadth of section 15's language. Agreements to merge are literally agreements "controlling, regulating, preventing, or destroying competition," and when approved, they are expressly exempted from the anti trust laws. We think the principle invoked is inapplicable here.

We find nothing inconsistent with the intent of Congress to include mergers by agreement within the scope of section 15 and our jurisdiction over Agreement 9551 under that section is clear.

---

[12] Hearings on Legislation Affecting Corporate Mergers, Senate Judiciary Committee, Subcommittee on Antitrust and Monopoly, 84th Cong., 2d Sess. (1956) at 527.

[13] Progress Report, Federal Maritime Commission, Hearings before the Antitrust Subcommittee of the House Judiciary Committee, 87th Cong., 2d Sess. (1962) at 1.

[14] The Ocean Freight Industry; Report of the Antitrust Subcommittee, House Report No. 1419, 87th Cong., 2d Sess., p. 47.

While we consider that the record in this proceeding now affords a sufficient basis upon which to take action, we will nevertheless join Commissioner Hearn in remanding the proceeding to the Examiner for the taking of further evidence on the matters specified in Commissioner Hearn's concurring opinion.[15]

Existing Cooperation Under Approved Agreement 8485 and Supplements

In 1960, the Commission approved an agreement (FMC No. 8485) among APL, AML, and PFEL whose stated purpose was to eliminate "unnecessary expense" arising out of duplication of "offices, terminals, facilities and personnel" among themselves, and to eliminate "unnecessary or wasteful competition among themselves." For this purpose, it established a "Coordinating Committee" to consist of two representatives from each line plus a Chairman, not an employee of any line, to be elected by the six representatives. Any recommendations of the Committee were not to become operative until approved by the Commission.

The agreement directed the Coordinating Committee to study and make recommendations upon such matters as joint shoreside facilities, joint purchasing, coordination of sailings to avoid competing loadings, joint solicitation, and pooling arrangements—including money, cargo and sailings pools.

The Committee immediately engaged in a number of studies covering specific subjects with its broad franchise, and soon reported, among intangible benefits, that "much worthwhile information is being exchanged and put to good advantage." Its activity led to the following, all established under supplementary agreements approved by the Commission:

1. A limited joint purchasing program. In practice this has been confined in substance to the purchase of meat and janitorial supplies for APL and PFEL, but it is estimated to have saved them some $85,000 per year on annual joint purchases aggregating about $1,450,000.

2. Joint placement of Hull & Machinery and Protection and Indemnity insurance. The present annual rate of savings is estimated at $85,000 for the three companies on Hull & Machinery insurance alone, with additional though less substantial savings expected on Protection & Indemnity insurance.

[15] We consider questions of the impact of the merger upon subsidy and its recapture to be matters within the jurisdiction of the Department of Commerce, Maritime Administration, but since the parties have injected the issues into the proceeding, we will join with Commissioner Hearn in seeking further clarification of these matters.

3. Joint Los Angeles terminal. A jointly owned corporation, Consolidated Marine, Inc. (hereinafter "CMI"), was set up to lease and operate terminal facilities at Los Angeles. The joint operation is estimated to save amounts equal to about 50 cents per revenue ton handled, in terminal and husbanding services.

Agreement No. 8485-C-3; the Supplemental Order in this Proceeding.

As noted, a further supplement to Agreement No. 8485, designated No. 8485-C-3, was approved while the hearing in this proceeding was in progress; and the Commission supplemented its order of investigation and hearing to direct that Agreement No. 8485-C-3 be examined to determine whether the said approval should be continued.

Agreement No. 8485-C-3 provides for enlargement of the approved activities of CMI (the jointly owned corporation formed to operate joint terminal facilities at Los Angeles) to include (1) the entire purchasing department function for each of the three lines, and (2) data processing for each of the three lines. CMI would maintain offices in San Francisco for these purposes, and its costs would be distributed to the three companies in accordance with "sound accounting principles." The agreement would enable the three companies to adopt joint procedures with respect to purchasing and data processing whether or not the merger is approved.

The record indicates that the joint data processing and joint purchasing programs under the agreement would produce savings somewhat comparable to, but probably less than, the savings to be expected in these areas upon merger. Neither Hearing Counsel nor States finds anything objectionable about Agreement No. 8485-C-3, but Matson contends that it should be disapproved as an anticompetitive arrangement for which no "compelling need" has been shown. The alleged anticompetitive effect, so far as pertinent here, is the expected ability of respondents to get better prices on quantity purchases than would be available to competitors. Matson does not say anything for or against the joint data processing arrangement.

Matson's claim of detriment from joint purchasing is considered below, following discussion of Matson's present and proposed business and the impact of the proposed merger upon it.

Matson's Claim of Detriment from Agreement No. 8485-C-3.

Matson objects to the continued approval of Agreement No. 8485-C-3 (which would permit respondents to have their purchasing and data processing done by CMI, a jointly owned corporation), on the general ground that it allows inherently anticompetitive arrangements for which no need has been shown.

Matson also alleges possible competitive damage, particularly through joint purchase of bunker fuel under the agreement. It seems that the sellers of fuel oil establish a public, posted price, from which everyone tries to get a discount; Matson is successful in its efforts, and presumably others are too, although there was no evidence beyond conjecture that the sellers' treat competing buyers differently. Respondents think they can get a better price through greater volume purchases and so does Matson.

Fuel oil is delivered to each vessel by the seller as required, regardless of the annual volume of purchases, so that any substantial cost justification for volume discounts seems a remote possibility. Under the Robinson-Patman Act (15 U.S.C. 13), price discrimination in the sale of like goods is unlawful without regard to quantity, unless price differentials can be justified as making no more than "due allowance" for cost differences in sales to different buyers. The statute also makes it unlawful "knowingly to induce or receive a discrimination in price which is prohibited by this section." See *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 64–65 (1953). Matson says it would therefore be unlawful for respondents to induce volume discounts; and so it would, if respondents knew or should have known that such discounts were not cost-justified (assuming also, as is probably the case, that the Robinson-Patman Act applies to commodities sold to U.S.-flag vessels for consumption on the high seas as well as in territorial waters).

But the same thing applies to Matson or any other person who thus induces unjustified volume discounts. And regardless of the buyer's liability, a vendor would expose itself to severe penalties under the antitrust laws if it charged unjustifiably different, discriminatory prices to competing vessel operators on identical goods such as fuel oil. It cannot be assumed that respondents would or could induce such illegal discrimination.

Under questioning by Matson's counsel, Mr. Dant of States agreed that *if* respondents were able to save "several million dollars a year" by the joint purchase of fuel oil, it would put States at a disadvantage; but, he candidly added, "I don't understand quite how they could do that." Neither does the Examiner; and there was no proof of any such possibility.

It may be assumed that there would be some price as well as administrative economies in joint purchasing of some supplies; it cannot, however, be assumed that they would be of the order suggested by Matson or that they would be discriminatory and unlawful to Matson's damage.

Agreement No. 8485-C-3.

This is the agreement providing for purchasing and data processing on behalf of respondents by a jointly owned corporation, which has been examined, pursuant to the supplemental order of the Commission, to determine whether in the light of the record established herein the approval heretofore given under section 15 should be continued.

This agreement would permit the respondents to realize a portion of the administrative efficiencies and economies which the proposed merger pursuant to Agreement No. 9551 would produce in due course. Standing alone, it could come under section 15 only as a cooperative working arrangement among carriers subject to the Act; but since it provides for cooperation with respect to practices which do not affect competition between the parties thereto in their dealing with the shipping public, it might not be subject to section 15 at all if it were not a modification of an approved section 15 agreement (No. 8485) having as its purpose the elimination of wasteful competition between the parties. *Volkswagenwerk Aktiengesellschaft* v. *Marine Terminals*, 9 FMC 77, 82 (1965). In any event, no evidence or argument adduced herein tends to establish that Agreement 8485-C-3 is, or modifies Agreement No. 8485 in such a way as to make that agreement unjustly discriminatory or unfair, detrimental to the foreign commerce of the United States, contrary to the public interest or in violation of the Act; and it is therefore found that the approval heretofore granted should be continued.

Ultimate Conclusions

Upon the record in this proceeding, it is concluded and found that:

1. The Federal Maritime Commission has jurisdiction over Agreement No. 9551 in its entirety.

2. Agreements 8485 and 8485-C-3 are not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, do not operate to the detriment of the commerce of the United States and are not contrary to the public interest or in violaion of said Act; and accordingly, the approval heretofore granted said Agreements 8485 and 8485-C-3, pursuant to section 15 of the Act, is continued in effect.

By Vice Chairman HEARN:

I join Chairman Harllee and Commissioner Barrett in their opinion and conclusion that the Commission has jurisdiction over Agreement 9551; however, concerning the approvability of the agreement, Matson and States contend that because the agreement does not (1) include the actual plan of merger; and (2) contains none of the terms and conditions which are to govern interim operations, the agreement is insufficiently detailed to warrant approval. I can make no determination as to approval of the agreement. In fact, I do not reach that question because I find the agreement deficient as a matter of law.

It is nothing more than an agreement to agree—insufficient as to scope and inadequate as to detail. The jurisdiction issue became, perhaps unfortunately, the main focus of this case with not enough attention given to the sufficiency of the agreement and its merits. That does not warrant the Commission giving less attention to what is the ultimate issue here; whether to approve Agreement 9551 as in the public interest.

Agreement 9551 is not of the same genre as most section 15 agreements. Its primary distinguishing characteristic is the relative finality of possible Commission approval. It would be very difficult for the Commission to subsequently dissolve a merged company or even to require changes in its structure in the same manner as it continually reevaluates other approved section 15 agreements. Nonetheless, the Commission has always required all section 15 agreements to include specifics sufficient for a thorough analysis of the agreement (see e.g., *Joint Agreement—Far East Conf. and Pac. W. B. Conf.*, 8 FMC 553, 558) and any lesser requirement is particularly undesirable in this case. Less should not be demanded of a merger agreement than of a pooling or dual rate agreement.

The agreement, as filed, says nothing more definite than that the parties agree "either to merge or consolidate". There is no commitment to a type of merger plan, final corporate structure or any of the other necessary components of a corporate agglomeration.

The parties not only do not say what the merger plan is, but they apparently do not know yet what it will be, in many respects. Agreement 9551 provides in part:

> AML, APL, and PFEL * * * hereby agree to merge or consolidate * * * in form and by the procedures as the directors and the stockholders of the three companies should approve.

This Commission cannot be expected to evaluate properly a section 15 agreement which evidently is in such an early embryonic stage that, seemingly, not even its creators know it final form or substance.

A further fault lies in the fact that the parties will submit *informational* reports to the Commission as to the progress of the merger and no additional section 15 approval is envisioned by the terms of the agreement. It is the Commission and not the parties who should decide what needs to be filed and presented for approval.

In order for me to reach the question of whether or not the agreement should be approved, I require additional information as outlined hereinafter. The items mentioned below are intended to be indicative of the type of aditional information I require. The statement of items is not exhaustive, and I hope the parties to the agreement will take this opportunity to make a complete divulgence of their contemplated activities.

I am aware that some of these matters may be subject to the jurisdiction of the Maritime Administration (and it is unfortunate that that agency did not intervene in this case); but it is a *non sequitur* that this Commission should therefore ignore their competitive consequences or their obvious effect upon the public good. Neither can we be concerned only with matters competitive. On the contrary, before this Commission can grant approval of any agreement which is subject to section 15 of the 1916 Act, that agreement must comport with the provisions which Congress has seen fit to specify in that section. Section 15 provides that agreements must not (1) be unjustly discriminatory or unfair, or (2) operate to the deteriment of the commerce of the United States, or (3) be contrary to the public interest, or (4) be otherwise in violation of the Act.

The Commission does not approve agreements simply because it has jurisdiction over them. It requires that the parties to such agreements furnish it with documentation of the need for such agreements. The desire of the parties to enter into agreements alone is not considered sufficient to warrant approval:

> [T]he kind of information necessary to this judgment is in the hands of those seeking approval of the agreement * * * and it is incumbent upon those in possession of such information to come forward with it. *Mediterranean Pools Investigation*, 9 FMC 264, 290.

Of the additional information there must be at least the final form of the merger or consolidation, including a determination of whether AML will be a division or a subsidiary; the operational procedure and the managerial structure; the procedures by which these ends will be reached and the economic effects of the former.

The Hearing Examiner and the applicants refer to a variety of transportation efficiencies which will be produced by the merger (I.D. 30–35 and 39–44, Respondent's Reply to Exception 43–50). The listing of benefits and efficiencies appears quite formidable but, in the main, represents hopeful surmises rather than supportable conclusions.

In addition, I would like the respondents to clarify as many of the other uncertainties as possible. The unclear areas include the following:

—What measures will the parties to the merger and the merged company take to prevent an adverse effect of the merger on subsidy recapture? This question cannot be avoided by saying the effect "would depend upon speculative factors." (I.D. 38.)

—Also, will the proposed merger result in greater value for the subsidy dollar?

—Will the obvious immediate benefits to the parties be paralleled by concommitant overall service benefits to the public?

—What adequate safeguards will be provided for affected employees and potential local labor problems?

—How will shippers be advantaged by greater berth coverage if at the same time their choice of carrier could be severely reduced by near blanketing? (Tr. 250–252.) It is no answer that there will be merely tougher competition.

—There should be greater exposition of benefits to container operations, especially as to acquisition of shore facilities. (Tr. 278–279).

—The service description of the merged company should be presented, especially as to the effect on itineraries due to LASH operations; and including for example, any proposed change in AML's "short-run" service. (Tr. 343–344, 346–347.)

—On what basis will the merged company have greater access to shore facilities in Japan? (Tr. 401–402.) Bigness of the new company does not seem enough.

—More particularity should be presented as to potentialities for integration with land transportation. (Tr. 424–426.)

—What specifically will be the benefits to commerce to be derived from decreased competition for MSTS cargo? (Tr. 789.) The record admittedly fails to prove this point. (I.D. 48.)

—How will the LASH operations be integrated into the merged company, and what will be the benefits therefrom? (Tr. 795.)

With the above additional information before it, the Commission can better evaluate the proposed merger. It is unrealistic to say that details of the merger plan can make no difference in determining approvability. The foundation of regulatory policy will be undermined unless the most complete disclosure of relevant information is required. Reasoned decisions can be reached only with all the facts at hand. *Mediterranean Pools Investigation*, *supra*.

Without such information, the Commission cannot determine, for example, whether the economies forecast cannot be attained by alternatives more readily revocable and of comparable effectiveness. Neither can we judge whether the benefits of the merger and its costs will be evident in benefits to the public.

For all the reasons stated, I would remand this case to the Examiner for the taking of further evidence in an expeditious manner.

I join with Chairman Harllee and Commissioner Barrett in continuing approval of Agreements 8485 and 8485–C–3.

Dissenting and concurring opinion of Commissioner JAMES V. DAY:

The Commission does not have jurisdiction over the agreement to merge.

The majority view is defective in several respects.

The language of Section 15

Section 15 requires the filing and approval of agreements "controlling, regulating, preventing or destroying competition".

The majority admits that the meaning of this language is *less than plain* and that *implication* is admittedly involved if agreements to merge are to be considered as covered thereby.

The U.S. Supreme Court has taken the position that repeals of the anti-trust laws by *implication* are disfavored.[16]

This view would apply here and negates a claim of jurisdiction.[17]

The Intent of Congress

The respondent states that the legislative history "bears no very clear reward for either side". I am not persuaded by the majority's merely saying that "it would seem to us, that the same considerations which led Congress to grant this Commission the power to exempt anticompetitive rate fixing and pooling agreements from the strictures of the antitrust laws, would apply to a grant of the same power over agreements among domestic carriers to merge".

The Alexander Report which Congress considered and relied upon in passing section 15 stated that rate fixing and pooling agreements should be regulated to deter mergers. Congress then would hardly have encouraged merger agreements by including them within those agreements which could be granted immunity from the antitrust laws, pursuant to section 15; especially not so through use of ambiguous language where it had previously passed the Clayton Act and the Sher-

[16] See *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 217–220 (1966); *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651 (1964); *United States* v. *Philadelphia National Bank,* 374 U.S. 321 (1963); *California* v. *Federal Power Commission,* 369 U.S. 482, 485 (1962); *United States* v. *Borden Co.,* 308 U.S. 188, 200–201 (1939).

[17] It is no answer to say that agreements such as terminal leases, transhipment agreements and agency agreements are also not specified and where these are recognized as subject to section 15 so should be agreements to merge. On their face these other arrangements are dissimilar to mergers—the parties thereto remain viable entities after consummation of such arrangements. A reasonable accommodation between section 15 and section 7 of the Clayton Act would, furthermore, suggest that we be particularly careful with respect to jurisdiction in the area of amalgamations such as the proposed arrangement before us which go to the very heart of the subject matter of the antitrust laws.

man Act dealing with consolidations.[18] The majority states it cannot see this rationale—to me it is more persuasive.

When Congress has meant to extend regulatory power to exempt merger agreements from antitrust laws it has done so not ambiguously, but expressly and precisely as witness the subsequent passage of the provisions of the Federal Aviation Act and the Interstate Commerce Act and also the listing of regulatory agencies, in section 11 of the Clayton Act, authorized to enforce section 7 thereof.[19] I do not attribute such preciseness to "nothing more than a later stylistic preference in legislative draftsmanship" or a lesser need for section 11 authority as would the majority.

Other Transportation Agencies

When Congress has intended to extend agency control it has shown this intent clearly and precisely. The CAB and the ICC have in their laws express language covering merger jurisdiction. We do not. The scope of CAB and ICC authority extends beyond the limited authority the majority claims here. With respect to mergers submitted for approval these other agencies have quite precise criteria or guidelines; more so than those of section 15.[20] The majority is guessing at guidelines.[21] Better that clear-cut direction from the Congress would be provided.[22] Under section 11 of the Clayton Act other agencies can order divestiture of mergers. We cannot. Inconsistency abounds when we compare the claimed jurisdiction of this agency and those agencies controlling the other modes of transportation.

Commission Statements and Administrative Actions

The majority make much of the AEIL decision which approved a transaction involving a covenant not to compete. This is not the situation here. The cursory and only rationale concerning jurisdiction in AEIL is contained in a footnote in that opinion. Let us also remember that AEIL was decided prior to the Supreme Court's pro-

[18] See *U.S.* v. *Philadelphia Nat. Bank,* 374 U.S. 321 (1963) for further discussion.

[19] Other agencies regulating transportation, but not this Commission, have expressed power under section 11 to order divestitures.

[20] In addition to statutory language criteria, President Kennedy's message in 1962 before Congress asked that an interagency committee be established to prescribe additional criteria that CAB and ICC might utilize in merger cases. The Committee issued later a release specifying these additional criteria.

[21] The majority has specified certain information it desires but as Commissioner Hearn says, "The items mentioned below are intended to be indicative of the type of additional information I require. The statement of items is not exhaustive, and I hope the parties to the agreement will take this opportunity to make a complete divulgence of their contemplated activities."

[22] Cf. the Federal Aviation Act and the Interstate Commerce Act.

nouncement in Carnation where it found that Congress had granted to the shipping industry only a limited exemption from the antitrust laws. That decision also makes clear that the Shipping Act does not provide the only instrument for dealing with every phase of shipping arrangements. Were this judicial guidance given earlier the AEIL decision might well have been less cursory. Certainly, today, AEIL is of doubtful validity on the precise situation here before us.

A number of other instances of action and inaction by the Commission are cited by the majority or by respondents and the parties in opposition to jurisdiction as supporting or destroying jurisdiction. No attempt is here made to detail them and, at best, the totality of the examples offered can only demonstrate a tendency to vacillate between jurisdiction and no jurisdiction. They are certainly not a demonstration of that sufficiently consistent and traditional agency interpretation which the courts have said is entitled to great weight in construing the agency's statute.

In conclusion, it indeed may well be that this Commission with its inherent expertise should have the power to regulate U.S.-flag corporate unifications. But I can only state that in the absence of express guidance from the Congress, the language of section 15, the legislative history of section 15, and Congressional treatment of other transport regulatory agencies all lead to one result—no jurisdiction.

I join my brethren in continuing our approval of Agreement No. 8485 and its modification Agreement No. 8485–C–3.

Dissenting and concurring opinion of Commissioner JAMES F. FANSEEN:

The threshold issue with which we are confronted here, in my opinion, should be dispositive of the case. The question is:

> * * * whether an agreement to merge among carriers covered by the Act is an agreement with respect to a subject mentioned in section 15 of the Act, which the statute authorizes and directs the Commission to approve or disapprove depending on its findings with respect to certain matters specified therein.[23]

The agreement in question is Agreement No. 9551. The majority holds section 15 of the Shipping Act to be sufficiently definite to allow our jurisdiction to encompass this agreement.

I disagree as I see no basis for the majority decision either in the statute or in our prior decisions. Section 15 of the Shipping Act, 1916, is unclear as to whether agreements to merge among competing carriers are within the purview of our control. Unless it is clear and explicit that Congress intended to subject mergers to our regulation, we have no jurisdiction over such matters.

[23] See Initial Decision.

Congress had quite specific purposes in mind in enacting section 15. Section 15 was intended to deal with agreements to fix rates, allocate traffic, pool earnings, and jointly set the terms of competition against nonconference lines. It is clear that the purposes of section 15 were not intended to include regulation of corporate consolidations or immunizing corporate consolidations from the antitrust laws.

Section 15 does not expressly or impliedly refer to mergers. When all of section 15 is read together, it becomes clear that the phrase "controlling, regulating, preventing, or destroying competition" relates to continuous operations of separate entities subject to the Act.[24] There is at least one factor which inescapably points to this conclusion. The whole thrust of the first paragraph of section 15 is directed to working agreements among separate steamship companies. Therefore, the seventh phrase of the first paragraph of section 15, "or in any manner providing for an exclusive, preferential, or cooperative working arrangement", appears to characterize the first six phrases.

In the instances where Congress has wished a regulatory agency to exercise jurisdiction over mergers, it has done so in clear and specific language. The Interstate Commerce Commission (49 U.S.C. § 5(2)), the Civil Aeronautics Board (49 U.S.C. § 1378), and the Federal Communications Commission (47 U.S.C. § 222) are each authorized in clear and unambiguous language to approve the acquisition of one regulated carrier by another, by merger, stock acquisition, consolidation, or othewise. The Shipping Act, 1916, contains no such language. The care with which Congress has circumscribed the merger jurisdictions of the ICC, the CAB, and the FCC stands in stark contrast to the attempt of the majority to carve out an attenuated merger jurisdiction by implication where none is expressly provided.

Moreover, the legislative history of section 15 does not support an implied merger jurisdiction. The whole thrust of the Alexander Report (H.R. Doc. No. 805, 63d Cong., 2d Sess. (1914)) was that the various operating arrangements which had grown up in the international shipping community were necessary to prevent the eruption of destructive competition and wholesale mergers. Any attempt to apply the full scope of the antitrust laws to the shipping industry would be disastrous. The solution suggested was government regulation of operating agreements and working arrangements among steamship companies, coupled with limited exemption from the antitrust laws.[25] While there was some discussion in the Report respecting the

[24] It is of course a fundamental rule of statutory construction that the various parts of a statute must be considered together. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949).

[25] For an illustration of this point, see the Alexander Report, pp. 415–416.

control of domestic water carriers, the Congress made no recommendations respecting regulation of mergers between water carriers.

The legislative history of the 1961 amendments reaffirms the Congressional intent of section 15 to head off the concentration of power in the industry by regulating working arrangements among existing companies, rather than seeking to regulate mergers as such among them. Nowhere in this legislative history is there any expressed intent to regulate mergers.

In many circumstances, it is appropriate to define the scope of a regulatory agency's jurisdiction by giving a very broad and inclusive interpretation to its statute. However, this approach is not proper when the statute must be accommodated with another Federal statute which has specific application to a class of transactions, and the extension of the regulatory agency's authority would result to abrogating the other statute with respect to those transactions approved by the agency. Congress has repeatedly so held with respect to regulatory schemes and the antitrust laws: the antitrust laws are not to be repealed by implication, and only clear and explicit authority given to a regulatory body may allow that body to immunize from the antitrust laws transactions otherwise subject to the reach of such laws. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 217–220 (1966); *California* v. *Federal Power Commission*, 369 U.S. 482, 485 (1962); *United States* v. *Borden Co.*, 308 U.S. 188, 200–201 (1939).

The majority places substantial reliance upon *Agreement No. 8555 Between Isbrandtsen Steamship Company, Inc., Isbrandtsen Company, Inc., and American Export Lines, Inc.*, 7 FMC 125 (1962) (*AEIL*) for the proposition that we have already determined that we have merger jurisdiction as such, as well as the power to immunize such mergers from the antitrust laws.

I submit that the *AEIL* case is distinguishable from the instant case. It is conceded that we had jurisdiction over the covenant not to compete at least to some extent, and that our approval of that agreement was not nugatory. However, although we approved the Isbrandtsen-Export agreement, there is doubt whether we were acting only on the ancillary covenant not to compete or were purporting to exercise jurisdiction over the ultimate merger. The *AEIL* decision nowhere makes reference to an agreement to merge or to a merger as such.[26] Although the jurisdictional issue was clearly raised in the proceeding, we neither met nor articulated in detail the jurisdictional basis for our action. I believe that the *AEIL* case is not a persuassive

[26] We merely characterized Agreement No. 8555 as "such agreements," "No. 8555," or "agreements such as those before us." See *AEIL* case, *supra*, at 128–131.

precedent one way or another. None of the other "precedents" seem of sufficient significance to warrant further discussion here.[27]

Other Federal agencies are specifically charged with the duty of enforcing the laws regarding mergers. Neither the language nor the legislative history of the Shipping Act support a decision subjecting to our jurisdiction agreements for merger, consolidation, or acquisition of control as being within the class of agreements subject to section 15. No subsequent enactment has effectuated any change in our authority under the Shipping Act in this respect.

Although I do not think that the merger agreement before us now in any way offends the Shipping Act, I submit that if mergers of carriers should be subject to the Shipping Act and, upon our approval, immunized from the antitrust laws, Congress can enact legislation clearly directed to this end.

Since I believe that we do not have jurisdiction over Agreement No. 9551, I respectfully dissent.

I join my fellow Commissioners in continuing approval of Agreements No. 8485 and No. 8485–C–3.

---

[27] These "precedents" take the form of case citations and presumed advices to Congress that section 15 applies to mergers.

355-301 O - 69 - 7

FEDERAL MARITIME COMMISSION

DOCKET NO. 66–45

AGREEMENT FOR CONSOLIDATION OR MERGER BETWEEN AMERICAN MAIL LINE, LTD., AMERICAN PRESIDENT LINES, LTD., AND PACIFIC FAR EAST LINES, INC.

ORDER

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

It is ordered, That this proceeding is remanded to the Examiner for the purpose of taking further evidence upon the completion of which the Examiner is to certify the record to the Commission for decision. Briefing dates will be fixed by the Commission upon certification of the record.

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 66–45

AGREEMENT FOR CONSOLIDATION OR MERGER BETWEEN AMERICAN MAIL LINE, LTD., AMERICAN PRESIDENT LINES, LTD., AND PACIFIC FAR EAST LINE, INC.

Decision Adopted December 21, 1967

Agreement to merge approved pursuant to section 15 of the Act where substantial administrative and operating economies and improved operational and transportation service will result, merger will not have destructive or stifling effect upon competition or competitors or lessen competition except for elimination of service competition among merging carriers, adequate competition will remain, and benefits of merger will outweigh any potential injury.

Warner W. Gardner and *Benjamin W. Boley* for respondents.

Alvin J. Rockwell, *John E. Sparks*, *Thomas A. Welch*, *Willis R. Deming* and *David F. Anderson* for Matson Navigation Company, intervener; *James L. Adams* and *R. Frederic Fisher* for States Steamship Company, intervener; *Donald F. Turner*, *Joseph J. Saunders* and *Miles Ryan, Jr.*, for the Department of Justice, intervener.

Donald J. Brunner and *Paul J. Fitzpatrick*, Hearing Counsel.

SUPPLEMENTAL REPORT ON RECONSIDERATION

By John Harllee, *Chairman*, and Ashton C. Barrett, *Commissioner*.

This proceeding involves section 15 approval of Agreement 9551 under which respondents, American President Lines, Ltd., American Mail Line, Ltd., and Pacific Far East Line, Inc. would merge their respective companies. It is before us now on respondents' petition for reconsideration granted October 13, 1967. On October 3, 1967, we served our report in which we found jurisdiction over Agreement 9551, continued approval of Agreement 8485–C–3, and joined our brother, Vice Chairman Hearn in remanding the proceeding to Examiner Southworth for taking of further evidence on the matters set out in the Vice Chairman's separate opinion. In voting to remand, we said, "* * * we consider that the record in this proceeding now affords a sufficient basis upon which to take action * * *." We joined the Vice Chairman in the remand only to prevent this case from languishing in some administrative limbo for lack of a majority in favor of some action which would ultimately lead to final disposition of the proceeding on the merits. We remain convinced that the record before us is sufficient and think it unnecessary to remand this case for the additional evidence sought by the Vice Chairman.

Two areas with which the Vice Chairman is concerned are, in our opinion, without the scope of this proceeding—the impact of the merger upon subsidy and what, if any, safeguards will be provided for affected employees and potential local labor problems? How subsidy recapture will be affected by the merger and whether the merger will result in greater value for the subsidy dollar are, it seems to us, clearly and exclusively questions for resolution by the Maritime Administration under the specific provisions of the Merchant Marine Act of 1936. Employee protection and the prevention of local labor problems are peculiarly within that area of labor management relations which has, insofar as we are aware, been considered to be a part of managerial discretion beyond regulatory intervention by this Commission and its predecessors.

The remainder of the Vice Chairman's concerns are with service integration and other operational problems. As to these, we think the record is as complete as it need be.

Finally, we think Agreement 9551 is more than a mere agreement to agree. In our view, the agreement is sufficient for approval and should be approved.

No exceptions were taken to the findings of fact upon which the Examiner based his conclusion to approve Agreement 9551. Furthermore, a careful analysis and consideration of the exceptions of protestants Matson and States[1] to the conclusion that Agreement 9551 be approved reveals nothing not argued to and disposed of by the Examiner. We have reviewed the Examiner's disposition of these arguments and we are of the opinion that they are well founded and proper. Accordingly, we adopt the Examiner's findings and conclusions as our own only omitting quotation marks and renumbering footnotes. No other changes have been made and the Examiner's appendices have been retained.[2]

---

[1] The only other parties filing exceptions were the Department of Justice and Hearing Counsel. As we pointed out in our report of October 3, 1967, Justice excepted only to the conclusion that the Commission had jurisdiction over the agreement and that Hearing Council joined Justice in excepting to jurisdiction but urged that should we find jurisdiction, that Agreement 9551 be approved.

[2] The Examiner's ultimate conclusions concerning jurisdiction over Agreement 9551 and the continued approval of Agreement 8485–C–3 have been eliminated since they were dealt with in our report of October 3, 1967.

The History and Corporate Relationships of Respondents

APL was incorporated in 1929 under the laws of Delaware as Dollar Steamship Lines Inc., Ltd. Predecessors had operated steamship services under the Dollar name since 1895, including a trans-Pacific service started in 1901 and a round-the-world service started in 1923. In 1938, when the corporation was in financial difficulties, the Dollar interests were required to transfer their stock, representing over 90 percent of the voting shares outstanding, to the United States Maritime Commission, as a condition to the grant of subsidy under the Merchant Marine Act, 1936; and its name was changed to American President Lines, Ltd. Some years later, the Dollars sued to recover their stock. Under a compromise settlement in or about 1952, the stock was offered at public sale, the proceeds to be split between the Government and the Dollar interests. Ralph K. Davies, who was then a director of APL, formed a group which was incorporated under the name of APL Associates, Inc. (hereinafter "Associates") to bid for the stock in conjunction with Signal Oil and Gas Company. The bid was successful; Associates and Signal acquired over 90 percent of the voting stock of APL, and Davies, who had been an APL director since 1948,[3] was made Chairman of the Board of APL.

The Murchison interests of Texas had bid unsuccessfully for the APL stock. In 1954, they offered for sale their controlling interest in AML, a Delaware corporation incorporated in 1930 whose predecessors had been in the steamship business since 1850 and operated a trans-Pacific service begun in 1917. Davies negotiated the purchase of the Murchison's AML stock (about two-thirds of its outstanding shares) by APL, and APL has since continued to purchase additional shares as they became available. APL now owns 92.9 percent of the outstanding stock of AML. Its purchases required MARAD approval as substantial asset acquisitions by a subsidized carrier, and such approval was obtained as required.

In 1956, Associates transferred its APL stock to Natomas Company in return for stock of Natomas, a corporation which had not theretofore been connected with the shipping business. Associates was thereupon liquidated; it distributed its Natomas stock to its stockholders, and was dissolved. As a result of this transaction and subsequent acquisitions of APL stock by Natomas and Signal, the outstanding

[3] Mr. Davies was President of American Independent Oil Company from 1947 to 1962. Previously he had been Deputy Petroleum Administrator, under Secretary of the Interior Ickes, from 1942 to 1946, and before that Senior Vice President of Standard Oil Company of California.

voting stock of APL[4] (made up of 2,100,000 shares of Class B capital stock, 252,000 shares of Class A capital stock and 34,343 shares of 5-percent noncumulative preferred stock, par value $100 per share) is now owned beneficially as follows:

	Shares	Percent
Natomas	1, 219, 288	51. 096
Signal Oil & Gas Co	1, 151, 277	48. 246
Others	15, 678	658
	2, 386, 243	100. 000

Upon consummation of the Natomas-Associates transaction, Davies (who immediately prior thereto owned about 33 percent of the outstanding Associates stock and 5 percent of the outstanding Natomas stock) became the largest stockholder of Natomas, with about 25 percent of its outstanding shares; and he was then elected Chairman of its Board of Directors, a post which he still holds. He now owns about 28 percent of the outstanding stock of Natomas.

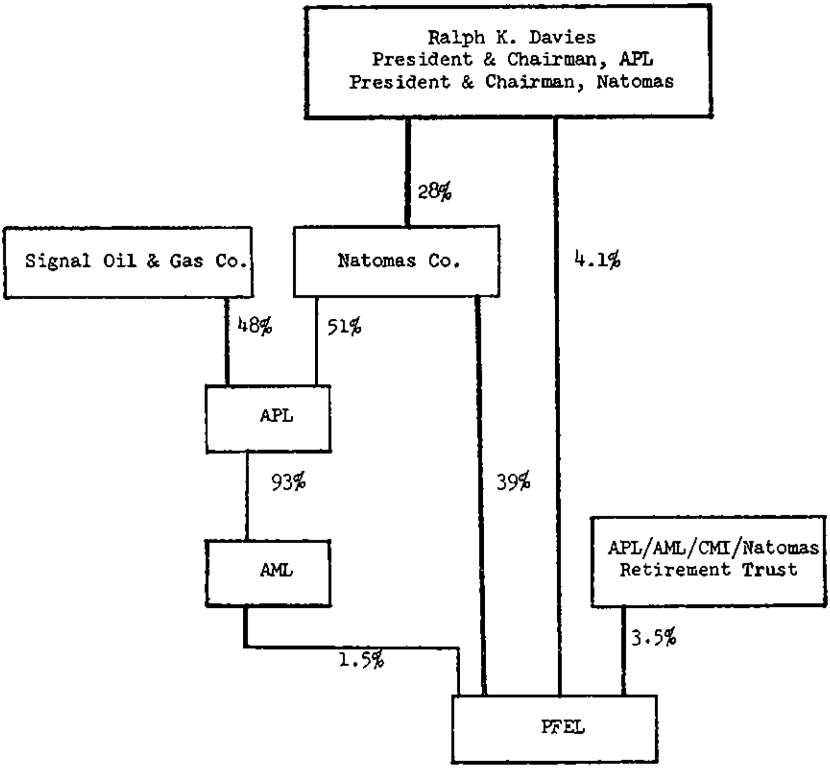
During the same year of 1956, Natomas purchased large blocks of PFEL stock owned by Chicago Corporation and Foremost Dairies. PFEL, a Delaware corporation organized in 1946, had conducted various trans-Pacific services, as well as other services which had been abandoned in 1952; the company was doing well and Natomas considered it an attractive investment. The two 1956 purchases aggregated about 29 percent of PFEL's outstanding shares. Subsequent purchases have brought the Natomas holdings up to 39.1 percent. In addition, Davies now owns 4.1 percent, and AML owns 1.5 percent, of PFEL's stock, giving an aggregate affiliated ownership of 44.7 percent. Ownership of the remaining 55.3 percent of PFEL's stock is distributed widely among some 1,700 stockholders; as far as Natomas knows, the only large stockholder among these is the APL/AML/CMI/Natomas Retirement Trust, which owns 32,571 shares, or about 3.5 percent of the total outstanding.

Prior to its acquisition of APL stock (which brought with it a majority interest in AML) and PFEL stock, the principal business of Natomas had been gold mining by the dredging process, in which

[4] Natomas owns 50 percent of the Class B, 56 percent of the Class A, and 45 percent of the 5 percent Preferred; Signal owns 50 percent of the Class B, 35 percent of the Class A, and 33 percent of the Preferred stock. Together they own all the Class B, 91 percent of the Class A, and 78 percent of the Preferred stock. The Class A shares are entitled to any common dividends declared, and to remaining assets on dissolution, at five times the rate per share paid on the Class B stock. Each share of each of the three classes of stock is entitled to one vote; in terms of voting control, therefore, they may be lumped together.

it had engaged since about 1850. The 1956 acquisition of APL and PFEL stock put into effect a policy, adopted by Natomas in 1955, to continue in business through the acquisition of other businesses, rather than to liquidate as its available mining ground became exhausted. Other Natomas enterprises include ownership and operation of a 22-story office building in San Francisco, land holdings in California and Colorado, oil refining and marketing abroad, and geothermal development in the Western United States.

The present affiliated interests in the stock of respondents may be shown graphically as follows:



Signal Oil & Gas Co. has entered into a "Stock Voting Agreement" with Bank of America, under which the Bank is appointed Signal's proxy to vote its APL stock in the Bank's sole discretion and judgment, subject to certain limitations. Neither the Bank nor Signal may vote the stock for the election of directors or officers of APL. The purpose of the agreement, which is revocable on 7 days' notice, is stated to be to assure MARAD that Signal "will not be able to exercise nor attempt to exercise any control or controlling influence over the management or the management policies of APL." Such assurance to MARAD is apparently required by reason of Signal's interests in an airline and in foreign flag tankers. Although Davies testified that he doesn't forget Signal's large interest in APL, consults Signal before selecting directors and keeps it informed as to important developments, and tries to make Signal's lack of representation on the board meaningless as a practical matter, he also testified that Signal has continued to rely on his recommendations. Signal has indicated to Davies that it favors the merger now proposed.

It is apparent from the foregoing that Natomas has the power to direct or cause the direction of the management and policies of APL and PFEL and, through APL, of AML. See *Willheim* v. *Murchison*, 231 F. Supp. 142, 145 (S.D.N.Y. 1964).

Under section 253 of the Delaware Corporation Law, APL, as a corporation owning 93 percent of the shares of stock of AML, may merge AML into itself by filing a certificate of ownership and merger setting forth, among other things, the securities, cash, or other consideration to be paid upon surrender of shares of the subsidiary. Under this "short merger" procedure, applicable where a corporation owns at least 90 percent of a subsidiary's stock, the right of the parent is unilateral in nature and in no sense dependent upon any action of the board of directors of the subsidiary; and while minority stockholders of the subsidiary may challenge the adequacy of the value put on their shares through an appraisal proceeding, they cannot sue to set aside the merger. *Stauffer* v. *Standard Brands Inc.*, 178 A. 2d 311, 312–316. Thus, Agreement No. 9551 is not essential to the merger of AML into APL, since the merger can be accomplished unilaterally without agreement or understanding between the two carriers.

The Steamship Services of Respondents

I. *APL Services*

APL operates four services, all of which are subsidized under the Merchant Marine Act, 1936. All the services touch at California ports and Far East ports; however, only one of these services, the trans-Pacific Freighter Service, is devoted exclusively to carrying cargo between California and the Far East in the relatively high-volume

Trade Route 29 [5] service. It is only upon this route that substantial port-to-port competition exists among respondents.

The four APL services are as follows:

1. Trans-Pacific Freighter Service: California to Japan, Korea, Taiwan, Okinawa, Hong Kong, the Philippines, Vietnam and Thailand, and return to California.

This service is maintained with five modern Mariners, built 1961–1966, and one C–3, built 1943. APL's operating-differential subsidy ("ODS") contract calls for 32 minimum and 37 maximum trans-Pacific sailings annually. APL has applied for construction differential subsidy ("CDS") funds to build four new LASH ("lighter-aboard-ship") vessels for use on this service. The application has not yet been granted. The LASH vessels are a new and untried type of vessel which would carry either lighters, loaded and off-loaded by shipboard equipment, or containers, in any desired proportion.

2. The Round-the-World ("RW") Service: Westbound from North Atlantic United States ports through the Panama Canal, calling at California ports (usually Los Angeles and San Francisco), Honolulu (occasionally), Japan, Okinawa, Taiwan, Hong Kong, South East Asia, Singapore, West Coast of India, to the Mediterranean via Suez Canal, Italy and (every other voyage) Spain, and on to the North Atlantic Coast of the United States.

The RW service is maintained with eight 20-knot Mariner vessels, built 1952–1954. The ODS contract calls for 24 minimum, 28 maximum sailings annually.

3. The Atlantic/Straits ("A/S") service: North Atlantic United States ports through Panama Canal, calling at California ports (principally San Francisco), Guam, the Philippines, Vietnam, Indonesia, Malaysia, and return via the Philippines, Hong Kong, Okinawa, and Japan to Los Angeles and back to the Atlantic Coast.

The A/S service now uses eight 16.5-knot C–3 vessels, built 1943–1946, but APL has five 23-knot C–4 "Seamasters" under construction for the service. The ODS contract calls for 24 minimum and 28 maximum sailings per annum.

---

[5] Pursuant to section 211 of the Merchant Marine Act, 1936, the Maritime Administration has determined ocean routes ("Trade Routes") and services which are essential to the foreign commerce of the United States. Trade Route 29—U.S. Pacific/Far East—is defined as "Between U.S. Pacific ports (Alaska, Washington, Oregon, California, United States Islands lying between continental Pacific Coast United States and the Far East) and ports in the Far East (continent of Asia from the Union of Soviet Socialist Republics to Thailand, inclusive, Japan, Formosa, Philippines and other Pacific Islands lying between continental Pacific Coast United States and the continent of Asia as heretofore described)."

4. Trans-Pacific Passenger Service: California to Honolulu, Yokohama, Hong Kong, Manila, and return, via same ports.

This service is maintained with three P–2 combination passenger and freight vessels, built 1944–1947. The service carries relatively small amounts of cargo. The ODS contract requires 20 minimum and 27 maximum sailings per annum.

II. *AML Services*

AML operates under subsidy between Pacific Coast Northwest ports and Far East ports, with an extended service to Indonesia-Malaysia and Bay of Bengal ports; only the latter service touches at California ports, and that only inbound, with certain restrictions in the ODS contract as to commodities permitted to be carried to California, particularly from Japan.

The two services are described generally as follows:

1. The so-called "Short Run" service: Pacific Northwest (Washington, Oregon, British Columbia) to Japan, Korea, Okinawa, Taiwan, the Philippines, Hong Kong, and return via Japan to the Pacific Northwest.

This service uses five 20-knot Mariner-type vessels.

2. The "Bay of Bengal" service: Pacific Northwest to Japan (Yokohama) Singapore/Malaysia, West Coast of India, Bay of Bengal, back to Singapore, touching at Japan, to the Pacific Northwest via California.

This service uses four 16.5-knot C–3-type vessels. Three 20–21 knot vessels are under construction.

AML's ODS contract calls for minimum 36 and maximum 48 annual sailings, of which 12 are allotted to the Bay of Bengal service and the remaining 24–36 are in the "Short-Run" service.

III. *PFEL Services*

PFEL operates a subsidized trans-Pacific service between California and the Far East and an unsubsidized service to Guam, described generally as follows:

1. The Trans-Pacific Service: Between California and Japan, the Philippines, Hong Kong, Korea, Taiwan, Thailand, Vietnam and Okinawa.

This service is maintained with nine 20-knot C–4 Mariners, built 1952–1962, and a 17-knot Victory, built in 1945. The subsidy contract calls for 53–63 sailings annually. PFEL has been allocated subsidy funds for the construction of three 22½-knot LASH vessels, with an option to construct three additional vessels. The company estimates that six such vessels could take the place of the nine Mariners and one Victory now in the subsidized service. Under present arrangements, however, the first new vessel could not be delivered before the fall of 1969.

2. The Guam Service: Between the Pacific Coast and Guam, Wake and Kwajalein via Hawaii.

This unsubsidized service uses five C-2 vessels, built 1942–1945.

Summary Comparison of Respondents' Services

APL provides service in several essential trade routes,[6] as does AML to a lesser degree. Some of these trade routes are common to both carriers, but APL's calls at Pacific Coast ports are limited to California ports, while AML's services originate and terminate at Pacific Northwest ports, with only occasional calls, inbound in its Bay of Bengal service, at a California port. Except for these California calls, AML is competitive with the California-Far East services of APL (and PFEL) only to the extent that, under existing inland and ocean rate structures, inland shippers and consignees in certain parts of the country may use either California or Pacific Northwest ports; and it may be noted that Gulf or Atlantic Coast ports, or both, provide additional competitive services for many of these inland shippers and consignees. Where APL and AML both operate in a trade other than TR 29, there are additional differences in their services which further reduce such competition as exists between them. This appears from the above descriptions of APL's Round-the-World and Atlantic/Straits services, compared with AML's Bay of Bengal service. Thus, AML's service is primarily an extension of APL's service; AML's direct, port-to-port competition with either APL or PFEL is minimal.

PFEL service in foreign commerce is limited to TR 29, with all voyages originating and terminating at California ports and no calls at Pacific Northwest ports. It competes directly with APL's TR 29 services and indirectly with AML's to the same extent as does APL.

The only trade within which the proposed merger would have a direct and immediate effect upon competition among respondents is the portion of TR 29 between California and the Far East. Details concerning such competition in TR 29 and the California portion thereof are set forth in appendices D, E, and G; they will be considered subsequently in connection with discussion of the effect of the merger upon protestants and competition generally.

[6] APL's passenger service does not show a profit, after subsidy, over and above allocated overhead, although it contributes to overall profit through absorption of administrative overhead. The Atlantic/Straits service, after subsidy, overhead and depreciation, makes a net contribution to profit before taxes, but is closer to the break-even point than the Round-the-World service. The Trans-Pacific Freighter Service is the most profitable, on a per diem vessel earnings basis and overall; it makes more than any of the other three services, although there are fewer ships in the service.

Management and Operating Relations Among Respondents

Natomas, through Davies personally, regularly participates in major affairs of APL. AML's management is to a large degree autonomous, without outside control in operational matters. APL and Natomas each has a representative on AML's Board of Directors. Davies and Natomas have likewise refrained from taking any part in the operations and operational policies of PFEL. Following the death of PFEL's president in 1959, Davies arranged to have its affairs surveyed by an outside consultant and, in effect, by his long-time associate, Mr. Ickes, who eventually was made president of PFEL and continued as such until he was made president of APL in 1966. Notwithstanding the obvious fact of Mr. Davies' control over these top-level moves, the record does not suggest that Davies and Natomas had ever exercised their power of control to lessen competition among APL, AML, and PFEL; on the contrary, the operating managements have been left to compete with each other vigorously within the limits of their respective services. In the case of APL and PFEL, the area of such service competition covers the entire scope of PFEL's trans-Pacific operations. Pursuant to filed agreements approved by the Commission, however, the three lines have investigated the possibility of joint efforts to eliminate "wasteful competition", and have undertaken certain cooperative activities, as set forth *infra.*

Financial Facts; the Effect of Merger upon Subsidy Recapture

Appendix B sets forth income statements of APL, AML, and PFEL, consolidated income statement of APL and AML, and a combined income statement of the three lines, for the year 1965. Income statements of protestants States and Matson are also shown, in comparable detail, for the same year.

Appendix C contains balance sheets as of December 31, 1965, corresponding to the respective income statements in Appendix B.

Under applicable law and their ODS contracts, subsidized operators are required to deposit in statutory reserve funds certain amounts which include depreciation on subsidized vessels, proceeds of sale or other disposition of such vessels, and earnings in excess of 10 percent per annum of capital necessarily employed in contract operations. Earnings deposited or required to be deposited in the statutory reserve funds are not subject to Federal income taxes unless withdrawn for general purposes or unless contract operations are terminated. The balance sheets and income statements of APL, AML, and PFEL (and likewise of States and of Matson, whose consolidated subsidiary is a subsidized operator) do not reflect any provision for Federal income taxes to which reserve funds could thus become subject. Of the amounts on deposit or required to be deposited, as of December 31, 1965, the portion which could, under such circumstances, become subject to Federal income taxes was approximately $14 million in the case of APL and AML (consolidated; $3,925,000 in the case of AML alone) and $9,166,276 in the case of PFEL.

Of net income for 1965, the amount depositable in statutory funds was $4,129,000 for APL and AML (consolidated; $1,487,050 for AML alone) and $2,452,875 for PFEL.

Operating-differential subsidy is subject to recapture by MARAD to the extent of one-half of the amount by which earnings from contract operations during each 10-year accounting period under the agreement, exceeds 10 percent per annum of capital necessarily employed in such operations (as defined by MARAD). APL and AML have not incurred recapture in their current 10-year accounting periods, which began January 1, 1958, for APL and January 1, 1961, for AML/PFEL has accrued $3,465,000 for the first 3 years of its current 10-year accounting period, which began January 1, 1963.

Upon a simple combination of figures as of December 31, 1965, or as projected to December 31, 1966, a merger of the three companies would wash out any accrued recapture, since the aggregate amount by which APL and AML earnings fell short of recapture would exceed the amount of PFEL earnings subject to recapture. The overall effect which merger ultimately might have either to decrease or increase recapture from the three lines would depend upon speculative factors, such as the amount by which overall net earnings might increase by reason of the merger versus the relative earnings of the individual companies to the end of their respective accounting periods if they were not merged. Most important, however, would be the treatment of the three separate ODS contracts upon merger; and presumably MARAD would stipulate such terms as it deemed appropriate to protect the public interest against any forseeable adverse effect upon recapture. Protestants' contentions of probable detriment to the public interest in connection with the ODS contracts of respondents are without substantial merit.

Benefits of the Merger

As might have been expected in view of the inter-corporate relation described above, Natomas and particularly Mr. Davies, have from time to time considered merging the three companies. The possibility of savings through combined operations was obvious, but through

Commission approval of Agreement No. 8485, it was possible to effectuate some of these without the intramural upheaval which a merger involves. It became apparent, however, that this approach had its limitations, as long as there were diverse stock interests outstanding as well as separate managements each disinclined to subordinate itself to the others. A factor in the timing of the decision to merge was the departure in the spring of 1966 of APL's president, following which Mr. Ickes, who had been president of PFEL since 1962, was made president of APL.

Respondents list, as gains to be expected from the merger, strengthened management; administrative economies; more regular service and reduced turnaround time, with better vessel utilization through coordination of sailings; increased financial strength and flexibility; greater ability to meet and take advantage of imminent changes in ocean transport methods growing out of containerization; and increased ability to meet the impact of stronger Japanese competition resulting from recent combinations and mergers of Japanese-flag lines. It is found that, to a greater or lesser degree, such benefits will result; they will be discussed briefly *seriatim*.

1. *Management*.—In the opinion of an experienced management consultant who had surveyed the management structure of the three lines, a real benefit of the merger would be an improvement in the "managerial capacity" of the three companies. He was not specific, but it was not in the best interests of the companies to be specific under the circumstances. The record indicates that the three companies have been and are now well managed, although, as noted, APL's president was recently replaced by the former president of PFEL, whose place was taken by PFEL's financial vice president. The overall top management of all three companies is controlled by, or is subject to control by, Mr. Davies through Natomas. There is no evidence of any management problem which might be magnified by merger. A complete unification of the companies would permit optimum utilization of the best managerial talent of all three companies and thereby strengthen management.

2. *Administrative economies*.—Estimated administrative savings of about $1,700,000 per year are not seriously challenged by protestants and are accepted by the Examiner. The amount, it may be noted, is more than 10 percent of the combined earnings, before Federal income tax, of the three respondents in 1965, and more than 14 per cent of their combined after-tax earnings. These savings would result from such things as centralized electronic data processing making common use of more "sophisticated" equipment, streamlining of accounting proce-

dures, joint purchasing bringing about reduced aggregate inventories of supplies and some cost saving through volume purchasing, joint engineering and research staff, joint use of house counsel and consequent reduction of internal and outside legal expenses, and consolidation of branch office facilities. Substantial portions of the savings would come through payroll reduction. It was stipulated that the $1,700,000 does not include savings that might be achieved through combining the operations and freight traffic departments, as to which no evidence was submitted.

Of the estimated $1,700,000 annual savings, it was estimated that about $750,000 could be realized without merger through maximum theoretical use of the "coordinating committee" procedures.

3. *Sailing coordination; elimination of duplicated calls at minor ports.*—This would affect only the trans-Pacific services of APL and PFEL, except for the possibility of some improved flexibility in adjusting schedules of inbound Atlantic/Straits vessels. In the trans-Pacific services, the sailing schedules of the six APL vessels and 10 PFEL vessels would be coordinated to provide sailings at regular intervals and to avoid, as far as possible, having two APL–PFEL vessels on the same berth at the same time. Ninety sailings per year would be within the combined minimum-maximum ranges of the APL and PFEL subsidy contracts, and with 16 vessels would make it possible to have a vessel on the San Francisco and Los Angeles loading berths every day of the year. APL considers that this would be attractive to some shippers because they would be able to move their cargo directly to shipside at any time, although most cargo is booked for a particular sailing date before the ship comes to port. Alternating some of the minor ports among vessels of the combined fleet would, according to company estimates, eliminate as many as two ports per voyage with a consequent saving in turnaround time, while still giving adequate service to such ports.

With the flexibility provided by a larger fleet, schedules could be more readily and effectively adjusted to compensate for delays caused by wind and weather, port congestion, labor difficulties, breakdowns and the like. While the advantages of sailing coordination could theoretically be brought about through approved agreements, they could not be fully realized in practice, since that would often require that the earning power of a particular ship be sacrificed for the overall benefit of the entire enterprise. This would present practical difficulties in the absence of an integrated enterprise.

As Matson says, there can be no doubt that the merged company would gain considerable flexibility and would become in many ways a more formidable competitor as a result of the integration of the fleets. Such results are pro-competitive and therefore in the public interest, unless they may drive less efficient competitors out of business. Protestants' claim of resulting detriment to themselves will be discussed hereinafter.

4. *Financial strength and flexibility.*—The balance sheets in Appendix C show that each of the three respondents is in good financial condition, and they do not assert to the contrary; although, as mentioned in the discussion of financial data above, it should be noted that the statutory reserves of respondents would become, to a considerable extent, subject to Federal income tax if used for purposes other than new vessel construction.

Respondents point out that a large portion of their current assets, particularly in the case of APL, is represented by operating differential subsidy receivables; and that where payment thereof is held up, as has occurred, APL has had to borrow from banks. If all funds were in a common till, such exigencies affecting only a part of the enterprise could more readily be met without outside financing. Without subsidy receivables the combined balance sheets as of December 31, 1965, show a slightly better current ratio than APL alone.

Variations in annual earnings of the three companies have not been uniform in degree or direction so that the merger would tend to stabilize earnings.

With net current assets of over $21 million and shareholders' equity in excess of $113 million, the combined company would undoubtedly have greater financial strength and flexibility than the three companies separately. In this connection, it should be noted that the abnormal demands of Vietnam, which we may hope will not continue indefinitely, contribute to the present prosperity of respondents, and that respondents are no exception to the general rule that shipping companies historically have not been attractive to investors. That the three respondents separately are not in evident financial straits at the moment is not reason to discount the benefit of improved financial strength which the merger would produce.

5. *Enhanced ability to meet expected changes in ocean transport methods.*—The record demonstrates that containerization in one form or another is already at hand in the Pacific Coast/Far East trade, but opinions differ as to the timing and probable extent of its development and how to meet or take advantage of the trend. It will in any case require expenditures for equipment and facilities which a strengthened financial position would facilitate. It appears that there may be some advantage to a larger operator in acquiring, through lease or otherwise,

the necessary priority on use of shoreside facilities which is essential if full advantage of containerization is to be realized. Matson, which is planning a containership operation, apparently finds it desirable to enter into a joint venture arrangement with Japanese lines for this reason.

As a general proposition, the larger the fleet, the greater the flexibility and, therefore, the greater opportunity to develop specialized vessels (such as full containerships or LASH vessels) in the fleet.

6. *The Japanese mergers.*—In 1964 eleven major Japanese shipping lines were merged into six companies, each of which operates in TR 29; they are the six Japanese flag lines shown in Appendix D. As appears from Appendix I, each of these lines is larger in tonnage, and five of them are much larger in number of vessels, than APL, AML and PFEL together. Only parts of their respective fleets are employed on TR 29; however, a substantial part of respondents' combined fleet will also operate in other trades in addition to TR 29. The 1964 mergers were brought about by the Japanese government, which arranged for a moratorium on mortgage indebtedness and the reduction of mandatory interest payments as part of the plan of amalgamation.

Japanese shipping lines had been in financial difficulties, having overextended themselves in the postwar construction race to the extent that they were unable to discharge indebtedness incurred at high interest rates. In 1963, Japan enacted a law "for the reconstuction and reorganization of shipping enterprises," which provide for the amalgamation of the lines into prescribed groups, a moratorium on mortgage indebtedness, and reduction of mandatory interest payments. By the end of 1965, the financial condition of all the lines had improved very substantially, and most of them were well on the way of discharging overdue indebtedness and accrued depreciation. N.Y.K. had resumed dividend payments after a 13-year suspension.

Also, the Japanese Minister of Transportation caused the five companies operating between the Atlantic Coast and Japan to enter into an arrangement to "adjust the number of sailings and take various measures for rationalization of the services," through the New York Liner Administration Company, established in 1964.

The Japanese lines have been materially strengthened, as well as increased in size, as a result of the mergers, cooperative sailing arrangement and financial relief brought about by Japanese government action. The record does not indicate that any respondent or other American-flag carrier has been affected as a result, except perhaps as it may have failed to gain any advantage from what appears to have been the imminent financial collapse of Japanese competition; and that,

355-301 O - 69 - 8

under antitrust principles, could not be considered injury. The Japanese mergers were shown to be pro-competitive rather than anticompetitive in effect, and give promise of putting added pressures on respondents and other carriers to improve their economic performance. See Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1328.

Competition on TR 29

Appendix D shows the sailings of all lines during 1964 on TR 29 between the Pacific Coast and the Far East and between California and the Far East. In the latter service there were, in addition to the 159 outbound and 133 inbound sailings of respondents, 692 outbound and 652 inbound sailings among 26 lines (including some with very few sailings, and some with sailings in only one direction).

Appendix E shows comparative volume (in tons and percentages) of cargo carried on TR 29 between the Pacific Coast and the Far East during 1964 by respondents, States, all other U.S-flag lines, and foreign flag lines, as well as by nonliners. Appendix G shows comparative volume (in percentages) on the California-Far East portion of TR 29 during 1964; it shows percentages of liner as well as nonliner liner totals, separately as to commercial and commercial plus military cargo. In order to show comparatively a greater number of pertinent percentages without unduly complicating the table, tonnage figures have been omitted in Appendix G. Overall tonnage figures for the California-Far East portion of TR 29 in 1964 are shown in Appendix F, broken down as to commercial bulk, commercial general and defense cargo, liner and nonliner.

Opposition to the Merger

There was no shipper or port testimony or argument for or against the merger. States, a major competitor on TR 29, alleges that it would be adversely affected. Matson, which is not now a competitor but expects to be one, also opposes the merger and alleges that it would have an adverse impact upon its planned TR 29 operation as well as its existing Pacific Coast-Hawaii service. There is no other opposition to the approval of Agreement No. 9551 other than the objections on jurisdictional grounds discussed above.

The Business of Protestant States and the Impact of the Merger upon it

States is a subsidized operator in the Pacific Coast/Far East trade (TR 29). Its corporate history is complicated, involving mergers and acquisitions among predecessors, one of which engaged in trans-Pacific operations as early as 1919. In 1954, it acquired the stock of Pacific Transport, a subsidized steamship line which was merged with States in 1957 with Federal Maritime Board approval.[7] In 1955, States operated five Victory ships and two C–2 vessels; Pacific Transport had five C–3's and a Victory. States now owns five C–3's, two Mariners and six California class vessels, which are considerably improved versions of the Mariner class ships. It has on order five 23-knot Colorado class vessels, which are of a new design, larger than the Mariners. These will replace the C–3's and give States a modern fleet of thirteen 20- and 23-knot vessels. Since 1958, it has operated four services, all subsidized:

A service—2 C–3's—Pacific Northwest/Japan-Korea-Okinawa-Formosa.

B1 service—3 C–3's—Pacific Northwest and California/Japan-Korea-Okinawa-Formosa.

B2 service—3 Mariners—Pacific Northwest and California/southern area of TR 29: Hong Kong, Manila, Saigon, Bangkok.

C service—5 Mariners (California class)—California and Hawaii/Japan-Okinawa-Manila-Hong Kong.

Between California and the Far East, States thus competes directly with APL and PFEL; between the Pacific Northwest and the Far East, it competes directly with AML. States has incorporated special features in its vessels calculated to make them serviceable for a vessel life of 25 years, regardless of the rate of growth of containerization. Besides providing for increasing numbers of containers, including reefers, States has developed advanced methods of handling cargo in conventional stow. It is improving handling through such devices as unitization (e.g., combining eight or more separate packages into one large unit for handling by mechanical means), palletization, and the use of slings and other aids to rapid handling which stay with the cargo from loading until discharge. It believes that containerization is the coming thing, but will not develop as fast in the Far East as in other trades; and that it will not be desirable, in the foreseeable future at least, for all cargo or in all ports in TR 29. It is somewhat skeptical of the proposed LASH vessels.

States is in good financial condition (Appendices B and C contain 1965 income statement and balance sheet as of December 31, 1965).

---

[7] At the request of States' attorneys, the Board by letter confirmed States' understanding "that on the same date, August 23, 1957, the Federal Maritime Board granted its prior or simultaneous approval, if necessary, under section 15 of the Shipping Act, 1916, as amended, in connection with the merger of Pacific Transport Lines, Inc., and the new States Steamship Company."

It is a family-owned corporation; its president, Mr. J. R. Dant, owns a beneficial interest of 84 percent and, together with his family, of more than 98 percent.

States carries more cargo than any one of respondents (or, apparently, any other carrier, U.S. or foreign flag) on TR 29, but less than either APL or PFEL in the California/Far East portion of the trade (Appendices E and G). It serves all areas of TR 29 between the Pacific Coast and the Far East, as do respondents in combination although none of them does so separately.

The record shows States to be a well-run, progressive, financially healthy ocean carrier. Owned and operated by United States citizens under the United States flag, with the best-equipped and most suitable types of modern vessels, constructed in the United States, it exemplifies the American merchant marine that the Merchant Marine Act, 1936, was designed to foster and encourage.[8] The Examiner adopts the proposed finding of States that it has an important competitive position as a U.S.-flag carrier on TR 29 and that its effectiveness as such a carrier should not be weakened or jeopardized.

States' claim of probable injury is concerned principally with the expected coordination of sailings of APL and PFEL in the California/Far East trade and consequent advantages to the merged company. It also alleges probable injury from "predatory pricing" in connection with MSTS cargo.

The "predatory pricing" prediction arose out of testimony adduced by respondents with the evident purpose of suggesting that the merger might save the government money in connection with a system of competitive bidding which it has inaugurated for MSTS cargo. This procurement program, as originally proposed, is described in *In the Matter of the Carriage of Military Cargo*, Docket No. 66–42 (10 FMC 69). It appears that sealed bids are solicited for the quotation of rates guaranteed for one year. The low bidder gets first refusal on each booking; if he does not offer suitable space and delivery schedule, the cargo is booked with the next highest bidder. Respondents' counsel undertook to show that the merged company's bids would tend to be lower, rather than higher, after the merger. The witness, an officer with traffic experience, said that in bidding for the merged company, he would take into account the circumstances prevailing at any given time, as would with any one of the separate companies, but that with the larger fleet his "responsibility would be towards being lower rather than higher" with the larger number of ships, because of the greater importance of a guarantee of available base cargo; he would "be inclined towards being a little tighter with my

[8] See Title I—Declaration of Policy—46 U.S.C. § 1101.

bidding, to do everything I could to assure myself to a reasonable degree without giving away too much money, without leaving too much on the table and to have as first thought the maximum amount of MSTS cargo." The latter procedure of course describes pretty well the normal action of any bidder who really wants an award, and the testimony fell somewhat short of showing that the merger would probably bring about lower rates on MSTS cargo. Protestant States, however, seized upon it as proof of a planned practice of "predatory pricing", which would be disastrous to States and contrary to the public interest as well as one of the "rankest forms of antitrust law violations". "Predatory pricing" may be defined as "selling at a lower price than customary profit-maximizing considerations would dictate, for the purpose of driving equally or more efficient competitors out of all or the greater part of the market." [9] The practice is indeed a plain violation of the Sherman Act, and would not be immunized by Commission approval of the merger, since it would not be any part of that transaction. But there is nothing in the record to indicate that predatory pricing is a reasonable probability, much less a planned practice, as a result of the proposed merger. The concept of predatory pricing is inconsistent with the sealed bid system described in Docket No. 66–42 *supra*, under which it would seem likely that no one would be hurt by attempted predatory pricing as much as the predator himself. Furthermore, as thereinafter mentioned, it appears that the government will continue to determine conditions of competition with respect to government cargoes beyond any power of the merged respondents to do so. It is concluded, upon the record, that there is no probability that States or any other competitors would be adversely affected by the proposed merger with respect to MSTS or other government cargo.

With respect to coordination of sailings of the PFEL and APL trans-Pacific fleets, the president of States confirmed respondents' testimony to the effect that it would permit the merged company to cover major and minor ports more frequently, while calling at fewer ports on each sailing. For example, States might call five minor ports on a sailing, while the merged company, with two sailings, could cover three of those ports on one sailing and the other two on one sailing, resulting in faster turnaround. With a larger fleet, it would have greater flexibility and better opportunity for specialized vessel operations. Apart from, or in connection with, these "efficiencies of scale," however, Mr. Dant was concerned over the "blanketing" [10] of States

[9] Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harvard Law Rev. 1313, 1340.

[10] Blanketing, as defined by Mr. Dant, means that "a competitor has sailings perhaps the day before you are sailing and the day after you are sailing. In other words, he practically puts a blanket over your sailing date."

sailings by the merged company. With a sailing every 4 days, any States sailing—from California—could not be more than 2 days away from a competitive sailing. Mr. Dant conceded that, under present conditions, there are often entire weeks when there is more than one competitive sailing every day; however, he considers that sort of thing "just competition." [11] As to whether it would make any difference whether States were "blanketed" by an APL ship on one side and a PFEL ship on the other, or by ships of the merged line, he reasoned that in the mind of the shipper they are now separate entities, "and we have been able to compete with them, but when they are one company I am not so sure that we will be as successful." Mr. Dant's concern is consistent with Mr. Ickes' testimony that for a single company to have a ship on berth at all times is attractive to shippers and a help to the company's freight solicitors—that is to say, a selling point. However, the net effect of Mr. Dant's testimony is simply that the merged company will present tougher competition, not that it will present any clear danger to States' ability to compete. Mr. Dant's attitude is perhaps summed up best in this statement of his:

> I would like to convey this thought, that I think the consolidation of the companies will affect States Steamship Company and take more cargo away from (it) than the companies are now taking away as a single entity. Now, just how they are going to do this is for them to design. I don't intend to let up, as far as we are concerned, in trying to develop cargo for States' ships, whether the companies are combined or not.[12]

States' concern comes down to the straightforward proposition that the merger will present it with stronger service competition in the California-Far East trade, as a result of which it might "lose" more cargo to respondents than it is now "losing". However, States' accomplishments of the past decade, its modern fleet and equipment, and its plans for the future suggest that it is not likely to lose much, if any, of its cargo expectancy to respondents, merged or not. Its

[11] During the 18-month period January 1, 1965, to June 30, 1966, out of 31 States sailings from Yokohama to San Francisco, over 60 percent were on the same day, the day before, or the day after, a PFEL or APL sailing. Out of 55 States sailings westbound to Japan from San Francisco, the same was true as to 64 percent

[12] He also testified that the combined company might not be as aggressive in seeking cargo if the competition between them were eliminated, and that it might lose some cargo because some shippers allocate their cargo among American lines (so respondents might get one instead of two shares of such cargo). Also, States, in its brief, disparages the benefits of regularly spaced sailings on a 4-day headway, pointing out that respondents' vessels are now sailing full westbound, and arguing that free space eastbound is normal and not due to lack of coordinated sailings; that most cargo is booked in advance before the ship arrives, so it doesn't matter that the merged company might have a ship on berth at all times at San Francisco and Los Angeles; and that respondents' coordination plan is rudimentary at best and will be of short duration anyhow, because things will be changed when the new LASH ships are delivered. While these arguments and speculations run counter to States' conjectures about its loss of cargo, they do not detract from the proposition that improved operating efficiencies would result from fleet coordination.

opposition to the merger is understandable. Of course, it would prefer not to have to meet the stronger service competition which the merger may bring about; but opposition on that ground, however natural among businessmen, is not in the public interest. The record does not demonstrate any probability that the proposed merger would stifle or substantially attenuate the competition of States.

The Business of Protestant Matson and the Impact of the Merger upon it

Matson has served Hawaii since 1882 and is the predominant carrier in the domestic trade between Hawaii and the Pacific Coast. In 1964, it carried 98 percent westbound and 99 percent eastbound, of all cargo carried between California and Hawaii in dry cargo, self-propelled vessels. Of all cargo of every description between Hawaii and the Pacific Coast, including petroleum products carried in tankers and all other proprietary cargo, Matson carried about 48 percent westbound and 84 percent eastbound (tankers carried 43.6 percent westbound and 14.9 percent eastbound; the balances not carried by Matson were 8.5 percent westbound and 0.8 percent eastbound). It operates 14 cargo vessels, all 16- to 16½-knot vessels built 1944–1946; seven of them were converted, 1960–1965, into specialized container ships, combination container-bulk cargo ships, or automobile carriers. Matson pioneered in the development of containerization; after some years' research, it started a container service in August 1958, and now owns or leases 5,500 containers. It took about 7 years to get full shipper acceptance of the container principle. Although containers are used in other services, including Pacific Coast/Japan, Matson feels that there is still no container service comparable to its own. Matson has been able to maintain rates at or below 1961 levels.

Matson emphasizes that it receives no subsidy, construction, or operating, in its domestic Pacific Coast/Hawaii service. However, such subsidies, which are designed to compensate U.S.-flag operators for the additional cost of constructing and maintaining vessels in U.S. yards and of manning them with U.S. citizens, are not available to operators in the domestic trades for the logical reason that such operators are protected by our cabotage laws against the competition of low-cost foreign-flag operators. In addition to its domestic Hawaiian service, Matson operates, through a wholly owned subsidiary, a service from the Pacific Coast to New Zealand and Australia. That operation is subsidized. In 1965, the subsidiary received more operating differential subsidy than PFEL and nearly as much as AML, though only a sixth of the amount received by the three respondents combined (Appendix B).[13]

Matson is a 93.9 percent-owned subsidiary of Alexander & Baldwin, Inc., a conglomerate corporation with total assets, at December 31, 1965, of $192,420,000 and stockholders' equity of $116,394,000. Gross revenues of the parent in 1965 (including $ 122,155,000 from transportation and terminal services) were $193,370,000. Besides ocean transportation, its interests include majority interests in three Hawaiian sugar plantations and a pineapple grower and canner, and divisions and subsidiaries engaged in land development, insurance, trucking and terminal services, and merchandising in wholesale and retail fields. Its portfolio of investment securities (excluding stock of subsidiaries) had a market value of $30 million.

Matson alleges that it would be injured not only in its Pacific Coast/Hawaii service, but also in a new service which it proposes to inaugurate in October 1967, on TR 29.

The alleged injury to its domestic Hawaiian service is concerned with an agreement among APL, Isthmian Lines, Inc., and Castle & Cooke, Inc. (a conglomerate corporation whose interests include Hawaiian operations similar to some of Alexander & Baldwin's) to establish a new U.S.-flag steamship company, to be called Hawaiian Lines, Inc., to provide a service between the mainland and Hawaii. APL and Isthmian would each have a 40-percent stock interest, and Castle & Cooke a 20-percent stock interest, in the new company, which would compete directly with Matson's Hawaii service. The agreement has been filed for Commission approval and, upon Matson's petition, the Commission has (since the conclusion of the hearing herein) issued its Order of Investigation and Hearing, in Docket No. 67–25*, to determine whether the agreement should be approved. The merits of the agreement are not within the scope of this proceeding, although considerable evidence relating thereto was adduced upon Matson's claim of background relevancy. The only effect of the merger allegedly related to Matson's Hawaiian service, however, is the "adverse impact"—not otherwise specified—of the increased financial strength of the merged company, which would take APL's place as a 40-percent stockholder in the Hawaiian Lines ventures. There is no evidence that the combined available resources of the three stockholders, absent the merger, would not be adequate for that venture; in fact Castle &

[13] Although the subsidiary (acquired in 1925) has never paid a dividend to its parent, $15½ million of the $43 million retained earnings shown in Matson's consolidated balance sheets at December 31, 1965, were retained earnings of the subsidiary. Restrictions in loan agreements and the subsidiary's subsidy agreement left $6,650,000 of consolidated retained earnings available for dividends, of which $1,700,000 was the unrestricted portion of the subsidiary's retained earnings.

*Order of Discontinuance July 14, 1967.

Cooke is a stronger company than APL, AML, and PFEL combined, with net current assets of $57 million and stockholders' equity of $128 million, without any of the reservations applicable to the balance sheets of subsidized steamship operators. It is found that the merger is so remotely related to the Hawaiian Lines venture as not to be a material factor in whatever effect that venture might have upon Matson.

Matson's principal objection relates to its proposed TR 29 container service. For several years, Matson has discussed such a service between the West Coast and Japan, as the success of its pioneering container operations in the Hawaiian service became apparent. In September 1965, application was made to MARAD for approval of a nonsubsidized freight service carrying cargo in containers and in conventional stowage between the Pacific Coast or Hawaii and the Far East; such approval being required because of what Matson's controller realistically referred to as Matson's subsidized operations. MARAD approved the application in February 1966. Matson plans to start operations in October 1967, with a service between Los Angeles, San Francisco, and Seattle or Portland, and a Tokyo Bay port and Kobe in Japan. Using two vessels, there would be about 19 voyages annually on a 36-day turn. Matson is proceeding to have two of its C–3 vessels converted to full containerships, with the installation of new 52-foot midsections, in a Japanese yard. It plans also to have two new 24-knot 33,000-ton containerships built in Japan; after receipt of these, possibly in 1968, the 16-knot C–3's would be used in a feeder service between Japan and ports elsewhere in the Far East, and the trans-Pacific service performed by the two new foreign-built ships. Discussions with NYK, a Japanese line, are in progress looking toward the establishment of adequate container terminal and drayage facilities in Japan. Matson has made careful studies to ascertain the cargo potential for its containership service, applying its experience to data concerning the trade. It considers that the attractions of its container service should give it a proportionately greater share of available cargo than "simply a sailing basis". It expects to be able to fill as many containers eastbound as westbound. Its plans were formally announced while the hearing herein was in progress; it has been proceeding with its planning as fast as it could, and the planning has not been affected by the present merger proposal.

Matson asserts that the merger would be harmful to its proposed service because of the merged line's ability to schedule the 90 sailings of its trans-Pacific vessels so as to blanket Matson's sailings. Matson's approach to the asserted blanketing hazard was quite different from States'. Whereas States was concerned about a regular service on a 4-

day-headway which would inevitably put a sailing within 2 days of each of its own sailings, Matson bases its prediction of injury upon the merged lines' ability to meet particular competitive situations through scheduling of its vessels. Matson's executive vice president, Mr. Scott, defined "blanketing" as putting sailings ahead of or coincidental with competitive sailings; and while he asserted that blanketing would not necessarily be intentional, and that he was "not suggesting that it would be done or wouldn't," he made it clear that he was concerned about the combined respondents' ability to do it.

Deliberate "blanketing" as defined by Matson might very possibly violate the "fighting ship" prohibition of section 14 of the Act. Mr. Scott was probably right in his contention that the ability to blanket deliberately, while making it appear to be the result of normal scheduling, increases with the number of sailings under the scheduler's control. The suspicion that a company might resort to illegal activity because of the difficulty of detection does not, however, permit the conclusion that it would probably do so.[14] With the large number of sailings on TR 29—851 outbound and 785 inbound between California and the Far East in 1964 (Appendix D)—it cannot be assumed that respondents would find it worthwhile to compound their normal scheduling problems to give special attention to Matson. Assumption is no substitute for reasonable probability as a measure of illegality. *FTC* v. *Proctor & Gamble Co.*, 386 U.S. 568 (1967), concurring opinion of Mr. Justice Harlan, at 584; citing *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 (1962).

The record shows that Matson's proposal to enter the TR 29 market with a container service has been planned carefully with due regard for competitive conditions in the trade and without any real anxiety by reason of the proposed merger. It will apparently be the only service designed to take full advantage of the containerization technique; to do so it will not attempt to provide an "across the board" service, but will depend on "containerizable" cargo in the concentrated United States-Japan portion of the trade route (with a "feeder service," later, from other areas), turning its vessels much faster than other operators. It foresees a proportionally greater share of the available containerizable cargo per sailing because of the special attractions of its operation. In undertaking what may be called a "specialty service", it will exploit its containership experience without committing itself to a "full line" service such as respondents and States offer. By using foreign-built

[14] See Turner, Conglomerate Mergers and section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1344; and *Cf. Stockton Port District* v. *Pacific Westbound Con.*, 9 FMC 12, 30 (1965).

ships, it will avoid the governmental control to which subsidized operations are subject, and so be able to serve only such ports and offer only such schedules as it deems profitable. As Matson says, it is a bold and far-sighted venture, although it does not exactly fulfill the purposes of the Merchant Marine Act, 1936, as contended. It will offer a special kind of competition whose success will quite clearly depend upon factors other than the proposed merger. Despite Matson's saturnine generalizations about the "potentiality for destructive competition" from "further consolidation of respondents' subsidized assets", the record does not establish any probability whatever that the proposed merger will have any injurious, much less crippling, impact upon the service Matson plans to inaugurate.

The Standards for Decision; Discussion and Conclusions

Section 15 of the Act authorizes carriers subject to the Act to enter into agreements of the kind described therein subject to the approval of the Commission.

When such an agreement is filed, the Commission must approve unless, after notice and hearing, it finds that it would be unjustly discriminatory or unfair, operate to the detriment of the foreign commerce of the United States, be contrary to the public interest or be in violation of the Act. *Agreement No. 9431, Hong Kong Tonnage Ceiling Agreement*, FMC Docket No. 66–29, 10 FMC 134; and see *Aktiebolaget Svenska Amerika L. v. Federal Maritime Com'n*, 351 F 2d 756, 758 (D.C. Cir. 1965).

States and Matson contend that respondents have the burden of "justifying" their proposed merger by showing that it is necessary to produce important public benefits and is based upon a serious transportation need; citing *Mediterranean Pools Investigation*, 9 FMC 264 (1966) and *Investigation of Passenger Steamship Conferences Regarding Travel Agents* (the "*Travel Agents*" case), Docket No. 873 (10 FMC 27). This is inconsistent with the plain words of section 15, as well as such Commission and court decisions as *Hong Kong Tonnage Ceiling Agreement*, quoted above, and *Aktiebologet Svenska Amerika* (which was the *Travel Agents* case on appeal from the Commission's original report). In *Mediterranean Pools* and *Travel Agents*, the Commission was talking about the burden of going forward which falls upon respondents who propose an agreement that is on its face a per se violation of the antitrust laws, in itself contrary to the public interest and detrimental to the commerce of the United States. Where such a prima facie case for disapproval is presented to the Commission, it is for the respondents to come forward with the necessary facts (which are "[a]lmost uniformly * * * in the hands of those seeking approval of the agreement," *Mediterranean Pools*, *supra* at 290), to show that, on balance, the agreement is not contrary to public policy or detrimental to commerce. What respondents may have to show to establish this depends, of course, upon the nature of the prima facie case which standing alone would require disapproval. *Mediterranean Pools* was concerned with revenue pools among the members of rate-setting conferences, comprising all or nearly all the carriers in a trade, with "rationalization" of sailings and penalties for overcarriage; such arrangements, substantially eliminating competition in an entire trade, are about as completely anticompetitive as one can readily imagine. The "tieing agreement" in the *Travel Agents* case, admittedly designed to eliminate outside competition, was of the same nature. In those cases, the Commission found that some serious transportation need or important public benefits must be shown to overcome the prima facie invasion of the public interest in competition. Those cases must not be read, however, to mean that such a showing is necessary where it does not appear that an agreement would otherwise be contrary to the public interest or detrimental to commerce. The latter standards (together with the others mentioned in section 15) are the ultimate and only bases for disapproval.

The Commission is not to measure proposed agreements by the standards of the antitrust laws, and in fact cannot decide definitely whether a contemplated transaction is forbidden under any of the ramifications of those laws; nevertheless, it may not ignore their policy. *Isbrandtsen Co.* v. *United States*, 211 F. 2d, 51, 57 (D.C. Cir. 1954); *McLean Trucking Co.* v. *U.S.*, 321 U.S. 68, 79, 85, 86 (1944); *Minneapolis & St. Louis R. Co.* v. *U.S.*, 361 U.S. 173, 186 (1959). The "public interest" within the meaning of section 15 includes the national policy embodied in the antitrust laws. The problem is one of accommodation of section 15 and the antitrust laws. *Mediterranean Pools*, *supra*, at 289, 290; and *Cf. Minneapolis & St. Louis R.*, *supra*, at 186.

The policy of the antitrust laws concerning mergers is set forth in section 7 of the Clayton Act (15 U.S.C. 18). Under the Sherman Act of 1890, a merger violated the antitrust laws only if it constituted a substantial restraint of trade. The Clayton Act, enacted in 1914, sought to reach agreements and practices substantially lessening competition in their incipiency, when they merely "may" become substantial restraints. Section 7 was originally directed to acquisitions of the stock of competing corporations where the effect might be substantially to lessen competition between the competing corporations. In 1950, section 7 was amended to cover the entire range of corporate amalgamations, from pure stock acquisitions to pure asset acquisitions, including mergers although they are not specifically mentioned. *U.S.* v. *Phil-*

adelphia Nat. Bank, 374 U.S. 321, 342 (1963). Reference to the effect on competition between the acquiring and acquired firms was deleted lest it be "so construed as to prevent all acquisitions between competitors." Senate Report 1775, 81st Cong., 2d Sess., p. 4.

The present section 7, with some exceptions, prohibits the acquisition by a corporation, in interstate or foreign commerce, unless solely for investment of:

> The whole or any part of the stock or * * * assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Although it has been said that the dominant theme pervading congressional consideration of the 1950 amendments was "a fear of what was considered to be a rising tide of economic concentration in the American economy," section 7 is not an anticoncentration statute as such; concentration is to be viewed in the context of a particular industry in making a determination under the tests set forth in the statute: whether the merger substantially lessens competition or tends to create a monopoly. *Brown Shoe Co.*, v. *United States*, 370 U.S. 294, 315, 321–322, n. 36 (1962). Monopoly power is the power to control prices or exclude competition; and price and competition "are so intimately entwined that any discussion of theory must treat them as one." *United States* v. *du Pont & Co.*, 351 U.S. 377, 391–392 (1956). "Taken as a whole, the legislative history [of section 7] illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." *Brown Shoe*, *supra*, p. 320.

The courts have developed market analysis principles for determining the probable effect of a merger to lessen competition or tend to create a monopoly. Under the antitrust laws, this effect must be measured within a definite area of effective competition, or "relevant market," as to product or services, and also as to geographical boundaries—the "section of the country."

As to geographical market, the question:

> * * * is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger or competition will be direct and immediate. *United States* v. *Phila. Nat. Bank*, *supra*, at 357.

Thus, if this were an antitrust proceeding (as the parties' briefs would sometimes suggest), the relevant geographical market would appropriately be that portion of the United States which utilizes ocean transportation of freight between California and the Far East, that being the service upon which the effect of the merger would be direct and immediate.

As to the product or services market:

> * * * no more definite rule can be declared than that commodities [or services] reasonably interchangeable by consumers for the same purpose make up that "part of the trade or commerce," monopolization of which may be illegal. *United States* v. *du Pont & Co.*, *supra*, at 395.
>
> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes, *Brown Shoe*, *supra*, at 325; citing *du Pont*, *supra*, at 593–595.
>
> But the boundaries of the relevant market must be drawn with sufficient breadth to * * * recognize competition where, in fact, competition exists. *Brown Shoe*, at 326.

Under these principles, the outer boundary of the relevant service market would be transportation (between the Far East and California) in dry cargo vessels. The parties contend, variously, that the relevant service market should be further restricted to such transportation by liners only; or by U.S.-flag liners only; or even by subsidized U.S.-flag liners only. The last-mentioned subdivision is clearly artificial, arbitrarily tailored to the dimensions of respondents; it is not based upon the needs or settled consumer preferences of the market. *Cf. United States* v. *Grinnell Corp.*, 384 U.S. 563 (dissenting opinion of Mr. Justice Fortas), 590–591 (1966). The slightly broader classification of all U.S.-flag liners is subject to similar criticism. U.S.-flag liners on TR 29, subsidized or not, are in direct competition with foreign-flag liners. A division of types of service to exclude this competition would be unrealistic. *Cf. Brown Shoe*, *supra*, at 326.

In this connection, the argument is advanced that U.S.-flag liners are a relevant market because of the priority given by law to U.S.-flag vessels with respect to MSTS [15] and other government or "preference" cargo, which practically excludes the competition of foreign-flag lines. Most of such cargo moves or in future will move under MSTS auspices. This basis for designating U.S.-flag liners as the relevant market thus takes into account, in substantial effect, only one customer,[16] the U.S. Government; a customer not noted for its subservience to noncompetitive pricing or other attributes of monopoly. At the time of the hearing, a new system of competitive bidding—decreed by MSTS—had just been inaugurated for MSTS cargoes, to take the place of the former MSTS system of allocation based upon number of sailings; and it appears that the Government will continue to determine condi-

[15] Military Sea Transportation Service, Department of the Navy.

[16] *Cf. United States v Philadelphia Nat Bank*, *supra*, 374 U.S. 361.

tions of competition with respect to Government cargoes beyond any power of the merged respondents to do so. The record does not disclose a "settled consumer preference" for U.S.-flag liners among commercial customers sufficient to insulate such carriers from foreign-flag competition. As a "relevant market" for antitrust purposes, the market for U.S.-flag liners alone, in the California-Far East service, is not "sufficiently inclusive to be meaningful in terms of trade realities." *United States* v. *Phila. Nat. Bank*, *supra*, at 357; quoting *Crown Zellerbach Corporation* v. *FTC*, 296 F. 2d 800, 811 (9th Cir. 1961).

Perhaps the most important "relevant market" question is whether the services of nonliner vessels should be considered. Respondents do not urge that nonliners and liners are interchangeable vessels, nor do they deny that their liners are in closer competition with other liners than with nonliners. Nevertheless, the record indicates a substantial "cross-elasticity of demand" between liners and nonliners.

Appendix F shows that in 1964, in the California-Far East trade, nonliners carried about one-half as much commercial general cargo (package as opposed to bulk cargo) as did liners; inbound they carried over 80 percent of the amount carried by liners. Liners carried nearly 15 percent as much bulk cargo as did nonliners, the traditional bulk cargo carriers; inbound liners carried over 95 percent as much bulk cargo as nonliners. Nonliner rates are lower than liner rates as a rule, while liners provide greater speed, generally, with regularly scheduled service. The record shows that the services are interchangeable to a very substantial extent. The decrease since 1954 in the U.S.-flag share of all cargo from 56 to 10 percent versus a decrease from 74 to 43 percent in the case of liner cargo only, suggests that interchangeability has increased since 1954, since U.S.-flag liners, which are the principal U.S.-flag vessels, have evidently lost increasing amounts of cargo to nonliners (Appendix H).

Appendix G shows percentages of both markets—liner and nonliner in the California-Far East trade—carried by respondents in 1964. APL and PFEL together carried about 26.1 percent of liner commercial cargo and 7.8 percent of all (liner plus nonliner) cargo; AML's carryings were negligible. Appendix G also shows percentages of commercial and commercial plus defense cargo, liner and nonliner, carried by protestant States and by all other U.S.-flag liners, by Japanese and by other foreign-flag liners, and by U.S.-flag and foreign-flag nonliners (the figures for U.S.-flag nonliners being negligible).

An aggregate market share of 26.1 percent of the liner business represents a high degree of concentration, although the liner trades are basically oligopolistic market structures; i.e. there are, normally, relatively few liner operators in each trade.[17] A 7.8-percent share of the liner-plus-nonliner market is quite another matter; it gives no cause for concern, particularly in the light of the tremendous continuing decline in U.S.-flag participation in this market since 1954 (Appendix H). However, whether the "relevant market," for antitrust purposes, should be the liner market only, or liners plus nonliners, market share is by no means controlling as to the public interest, which is the ultimate test in this proceeding as in merger cases before the Interstate Commerce Commission ("ICC").[18] Thus, the ICC approved the merger of Seaboard Air Line Railway and Atlantic Coast Line Railroad as consistent with the public interest although it recognized that the merger would eliminate competition and create a rail monopoly in parts of Florida. *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 ICC 122 (1963). Upon review, the court remarked that "[a]ll too much time has been consumed in showing a violation of the antitrust laws and too little time devoted to assessing the 'public interest' as expressed in the Interstate Commerce Act." It noted that the market analysis techniques of the antitrust laws are useful to discover the "danger areas" where monopoly or substantial lessening of competition in a given line of commerce may be found; but that they do not tell us whether it is good or bad, since Congress has determined that not all restraints and monopolies which violate the antitrust laws are bad for the purposes of the national transportation policy.

> Our task is at an end when we satisfy ourselves that the (Interstate Commerce) Commission has * * * perceived the danger areas, and judging by the statutory standards has concluded that the public interest is best served by allowing the merger. *Florida East Coast Ry. Co.* v. *United States*, 259 F. Supp. 993, 1002 (M.D. Fla., 1966).

So, although the court had "absolutely no doubt that, judged by the standards of the antitrust laws, the instant merger would fail at least as to Florida," it sustained the merger, since the ICC had recognized and considered the "danger areas" in finding it consistent with the public interest. The ICC had found that sufficient outside competition (intermodal or intramodal) would remain, and that economies and efficiencies would result from combined administration, from the

[17] See Marx, *International Shipping Cartels* (1953), p. 10. "Oligopoly" is an economic term denoting a relatively small number of sellers. Id. p 10, n. 6.

[18] Section 5(2) of the Interstate Commerce Act directs the ICC to approve voluntary rail mergers which it finds to be "consistent with the public interest"; a test which is substantially the same as the public interest test applicable to agreements under section 15 of the Shipping Act, 1916. Like section 15, the Interstate Commerce Act does not expressly require that the antitrust laws be considered a factor in the public interest, but since it exempts parties to an approved merger from the antitrust laws, the ICC, like this Commission with respect to section 15 agreements, has long been required to give weight to the antitrust laws in approving mergers.

elimination of wasteful duplicative facilities, and from an overall improvement in operations. The fact that two healthy, stable railroads were involved was brushed aside, citing the merger approved in *McLean Trucking Co.* v. *United States*, 321 U.S. 67, of "probably seven of the most healthy trucking companies in the United States." The Supreme Court affirmed. *Florida East Coast Ry. Co.* v. *United States*, 386 U.S. 544 (April 10, 1967).[19]

A merger must be functionally viewed in the context of its particular industry (*Brown Shoe*, *supra*, 321–322). The significance of respondents' aggregate share of the market is considerably diminished by the nature of the shipping industry. Although rates charged the public in the foreign commerce of the United States are not as strictly regulated and supervised as in domestic transportation, ocean carriers in our foreign commerce are subject to regulation by the Commission and the Act provides an effective safeguard against the evils attending monopoly. *Cf. McLean Trucking Co.* v. *United States*, *supra*, at 85. Concerted rate fixing exists, legally, through Commission-approved conference rate agreements, so that control of cargo rates and practices by a single carrier, no matter how large, is virtually impossible. No one has suggested the possibility here. Respondents are members of the conference covering each trade which they serve in common; and in the five conferences of which two or more of the respondents are members, there are 9, 19, 20, 23, and 30 members, respectively. In the small-

[19] Upon suit to enjoin the merger after it had been approved by the ICC, the District Court first set aside the ICC's order and remanded the case to the ICC, concluding that the ICC's analysis of the competitive effect of the merger was fatally defective because it had not determined whether the merger violated section 7 of the Clayton Act The Supreme Court vacated the District Court's order (*Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154), and remanded the case to the District Court for "a full review of the administrative order and findings pursuant to the standards enumerated by this Court," saying (pp. 156, 157):

We believe that the District Court erred in its interpretation of the directions this Court set forth in *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944), and *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173 (1959). As we said in *Minneapolis*, at 186

Although § 5(11) does not authorize the Commission to "ignore" the antitrust laws, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80, there can be "little doubt that the Commission is not to measure proposals for [acquisitions] by the standards of the antitrust laws." 321 U.S., at 85–86. The problem is one of accommodation of § 5(2) and the antitrust legislation. The Commission remains obligated to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service (and other matters in the public interest) to determine whether the [acquisition] will assist in effectuating the overall transportation policy." 321 U.S. at 87.

The same criteria should be applied here to the proposed merger. It matters not that the merger might otherwise violate the antitrust laws; the Commission has been authorized by the Congress to approve the merger of railroads if it makes adequate findings in accordance with the criteria quoted above that such a merger would be "consistent with the public interest." 49 U.S.C. § 5(2)(b) (1964 ed.).

Upon full review pursuant to the Supreme Court's order, the District Court sustained the ICC's order approving the merger and denied an injunction. *Florida East Coast Ry. Co.* v. *United States*, 259 F. Supp. 993 (M.D. Fla., 1966); and the Supreme Court granted a motion to affirm. 386 U.S. 8 (1967).

est conference (Pacific/Straits Conference, outbound to Singapore and Malaysia), the merged company would have one out of seven memberships; in the smallest TR 29 conference, one out of 18 memberships. On bulk commodities, upon which rates are frequently "open" as opposed to conference-controlled, the nonliner competition (which is the cause of the open rates) controls rates and is clearly sufficient to prevent the merged respondents from ever attaining the power of rate control.

In its report dated August 31, 1961, on amendments to the Shipping Act, 1916, the Senate Committee on Commerce listed ease of market entry as the number one economic factor among those most often cited in support of the steamship conference system: [20]

> Freedom of the seas permits any ship to enter any trade at any time, subject only to minimal limitations imposed by certain nations as safety requirements or military precautions. In ocean shipping no certificate of convenience and necessity need be obtained. The mobility and interchangeability of dry-cargo vessels is of great competitive significance. A tramp carrying bulk grain today, may be on the liner berth the next day carrying many types of packaged cargo. Whereas it costs a great deal to set up and operate a regularly scheduled liner service, in comparison it costs very little to charter a vessel, advertise in the port's trade paper, hire a broker or agent on a commission basis and, when business is good, operate a regular service.

Add to such considerations the existence of interflag competition and it is apparent that for a single ocean carrier, even with what might be considered in some industries a disproportionate share of the market, to control prices or exclude competition, is not practically possible, at least in a trade such as TR 29.

No substantial increase in economic concentration will result from the merger of APL and its 93-percent-owned subsidiary, AML. The concentration resulting from the merger of PFEL is somewhat diluted by the affiliation, through common ownership of stock, which has existed for more than 10 years. In any event, "Congress has not mandated the [Interstate Commerce] Commission or the courts 'to campaign against super concentration in the absence of harm to competition.'" *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, April 11, 1967, concurring opinion of Mr. Justice Harlan, p. 3 of slip opinion, citing Turner, 78 Harv. L. Rev. 1313, at 1395.

Nevertheless, it is appropriate, in view of protestant Matson's stress on concentration, to point out that Congress's concern with concentration as such is directed to economic concentration *in the American economy. Brown Shoe, supra*, at 315; *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 274–277 (1966). U.S.-owned carriers in foreign com-

[20] 87th Cong., 1st Sess., Report No. 860, p. 5 (Reprinted at 200 of the Index to the Legislative History of the Steamship Conference/Dual Rate Law, 87th Congress 2d Sess., Senate Document No. 100).

merce are a part of the American economy but foreign-owned carriers are not. No application of our antitrust laws based upon our desire to avoid concentration in our economy could rationally be directed against foreign carriers; [21] they are free to pursue the efficiencies of concentration without regard to that, as witness the recent mergers of Japanese carriers under Japanese government pressure if not compulsion. This must be considered in weighing the merger of U.S.-flag carriers, which definitely are a part of the American economy and a substantial factor in our balance-of-payments position, since our carriers must compete directly with the foreign carriers.[22]

In this connection, the declining share of cargoes carried by U.S.-flag vessels on TR 29 cannot be ignored (Appendix H). From 1954 through 1964, the percentage of liner commercial cargo carried by U.S.-flag vessels between California and the foreign area of TR 29 decreased steadily from 74 to 43 percent outbound and from 60 of 37 percent inbound. Of total commercial cargo carried in dry cargo vessels between the same areas, the share carried by U.S.-flag vessels decreased steadily from 56 percent in 1954 to 10 percent in 1964, outbound and from 59 percent in 1954 to 20 percent in 1964, inbound. Under such circumstances, it would serve the public interest of the United States to permit a merger that would improve the efficiency and ability to compete of U.S.-flag vessels serving this as well as less profitable trades, without stifling or excluding either U.S.-flag or foreign-flag competition; just as the merger of the Japanese lines has evidently served the public interest of Japan. It is recognized that the Commission has no promotional responsibility under the law, and that its aim is and should be to administer the regulatory provisions of the Act without discrimination among carriers regardless of flag. The immediate discussion is not inconsistent with the scope of the Commission's responsibility, however; it is concerned solely with the weight to be given a facet of domestic antitrust policy which has been invoked against U.S.-flag carriers and would not logically apply to foreign carriers, in determining whether the merger of such U.S.-flag carriers is contrary to the public interest.

The record establishes that substantial economies and efficiencies of scale will result from the proposed merger, as they appear to have

[21] This is not to suggest that the policy of the antitrust laws is not required to be considered by the Commission in matters involving foreign flag carriers to the same extent as in the case of U.S.-flag carriers.

[22] In number of vessels and deadweight tonnage, the merged line would rank 15th among major steamship lines of the world and 3d among U.S.-flag carriers (Appendix I). One or more of respondents compete on one trade route or more with all but one (Argentine Government Line) of the 11 foreign-flag lines all of which greatly exceed the combined respondents in number of vessels and tonnage.

resulted from the Japanese mergers. It is not material that the stockholders of the merging companies will benefit from such economies, as States and Matson ominously predict; that is what brings mergers about.[23] "In the view of the Supreme Court, 'The public interest is served by economy and efficiency in operation.'" *Florida East Coast Ry. Co.*, *supra*, 259 F. Supp. at 1008, quoting *N.Y. Central Securities Co.* v. *U.S.*, 287 U.S. 12, 23 (1932); and see the *AEIL* case, *supra*, p. 129, n. 8. The improvements to be expected here are discussed above under "Benefits of the Merger"; they include administrative economies, strengthened financial and management structures, improved operational efficiency and economy, and improved transportation service, to minor ports in particular, through coordination of sailings.

On the other hand, the merger will not tend to create a monopoly, or lessen competition except for the elimination of such service competition as exists among APL and PFEL and AML in the California-Far East portion of TR 29. Ample competition will remain in this service, however, as appears from Appendices D, F, and G. Liner competition in TR 29 is about to be increased by the entry of Matson with a new kind of operation which, as Matson proudly (and with some justification) says, "promises to be an inspiring example of the application of American know-how and resourcefulness to the hazardous business of ocean-borne commerce."

The presence of AML as a separate party to the merger agreement is of little practical significance under the Act. APL has owned a substantial majority for more than 12 years, and over 90 percent for more than 10 years, of AML's outstanding stock, all acquired by APL with prior MARAD approval. The minority interest is so small that under Delaware law it could be eliminated, by unilateral action of APL, at any time; therefore a section 15 agreement would not be necessary to accomplish a merger, between APL and AML alone. Competition between AML and PFEL, however, while not extensive is deemed sufficient to make AML a proper party to Agreement No. 9551 under section 15 of the Act, since AML is in fact a separate corporation and it is desired to consolidate the operations of the three corporations simultaneously. It is not necessary to decide whether, under certain circumstances, a merger agreement between a parent and its wholly-owned (or nearly so) subsidiary might be rejected by the Commission as not constituting a genuine section 15 agreement and, perhaps, stultifying the function of the Commission.

[23] The Federal Trade Commission spelled out this fact of life in its Report on Corporate Mergers and Acquisitions (May 1955), stating (p. 5): "The first step in a corporate acquisition is discovery by an enterpriser of an opportunity whereby an apparent advantage may be gained if one firm joins with or acquires all or part of another."

The proposed merger is in no sense discriminatory as between respondents and any other carriers, or, of course, shippers or any of the other classes referred to in section 15. Neither is it unfair as to any of these. The elimination of competition among respondents will have no injurious effect upon shippers or ports but on the contrary, they will be benefitted by improvements in service. The record does not establish the probability of any destructive or stifling effect upon competition or any competitor; at most there may be added pressure on other carriers to improve their competitive performance. Under the conference system such pressure will be limited to service improvement principally if not entirely, and will be neither unfair nor anti-competitive in nature. In this connection, it should be borne in mind that APL operates extensively outside TR 29, in services which are substantially less profitable than the trans-Pacific service and one of which operates at a loss.

The contractual and legal obligations of respondents as subsidized carriers, and resulting control through MARAD over respondents' maximum and minimum sailings and their trading areas, have been considered. It is not found necessary to rely upon these and thus to pass on to MARAD the responsibility for preventing any injurious effects of the merger; nevertheless, it is recognized that as among subsidized U.S.-flag carriers, the existing power of government control would make destructive competition impossible in practice, even if there were any theoretical probability thereof.

It is by no means certain that the proposed transaction, under all the circumstances set forth above, would violate the antitrust laws; but under the Supreme Court's decisions cited above, the Commission need not determine whether it would or not, and in fact cannot definitively do so. To the extent that it does touch upon the policy of the antitrust laws, however, it is found that the benefits of the merger will outweigh any potential injury. After giving full consideration to the policy of the antitrust laws, as well as the record herein, it is concluded that Agreement No. 9551 is not, and the consummation of the transactions contemplated thereby will not be contrary to the public interest, detrimental to the commerce of the United States, or in violation of any provision of the Act.

Ultimate Conclusion

Upon the record in this proceeding, it is concluded and found that:

Agreement No. 9551 is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, and would not operate to the detriment of the commerce of the United

States, and is not contrary to the public interest, or in violation of the said Act; and it is therefore approved pursuant to section 15 of said Act.

Commissioner JAMES F. FANSEEN, *concurring:*

The instant case presents two questions for decision, the first being:

> * * * whether an agreement to merge among carriers covered by the Act is an agreement with respect to a subject mentioned in section 15 of the Act, which the statute authorizes and directs the Commission to approve or disapprove depending on its findings with respect to certain matters specified therein.[24]

The second question, which reaches the merits of the case, is whether or not to approve the merger agreement.

In answer to the first question, the Commission by majority vote held section 15 of the Shipping Act to be sufficiently definite to allow our jurisdiction to encompass the subject agreement.

The question on the merits was considered in our initial Report by those Commissioners voting in the majority on the threshold question (Chairman Harllee, Vice Chairman Hearn, Commissioner Barrett).

Subsequent to the issuance of our decision, the Commission received a petition for reconsideration. Although there is no legal requirement to reconsider this case, the unusual posture of the decision compels my reexamination of the matter.

Preliminary indications point to a substantially more involved proceeding on remand than I had originally envisioned. My initial observation was that further taking of evidence would involve neither a great imposition on the parties nor an unreasonable length of time. However, this does not seem to be the case. Because of this change in circumstances, I am impelled to participate at this point in order to express my views.

This involves no retreat from or qualification of my position on the threshold question. My participation at this point is an expression of my opinion solely on the merits.

Since the Commission by majority vote has resolved the question of jurisdiction, thus placing the question on the merits before the Commission as an entity and not just those voting in the majority, my reconsideration and participation at this point is not improper. Moreover, my participation in a decision on the merits after the jurisdictional question has been affirmatively decided enhances the effectiveness of the administrative process.

In addition, Congress has charged me as a Commissioner with specific duties, and my participation in a case raising important questions

[24] Report of the Commission in Docket No. 66-45, 11 FMC 65.

such as the instant case is at least partial performance of these Congressionally delegated duties.

My reconsideration of the first Commission decision leads me now to the view that it would needlessly prolong the litigation. Extended litigation causes a tremendous expenditure of time, money, and effort.

Further evidentiary hearings could possibly uncover conduct contrary to the public interest. However, prior to the instigation of any such proceeding, there should be a substantial likelihood of such conduct.[25] It see no such likelihood here. Further delay in the instant proceeding is an unnecessary burden on the administrative process.

It is in the interest of maintaining the integrity of the administrative process that the litigation before us now be terminated. The initial Commission decision would not have produced such a result. Our reconsideration and resulting opinion will produce the best course of action.

Although Chairman Harllee and Commissioner Barrett joined in the remand decision, it was their stated position that "the record in this proceeding now affords a sufficient basis upon which to take action * * *".[26] I agree.[27]

Therefore, and for the reasons set forth in the foregoing opinion of Chairman Harllee and Commissioner Barrett, I would approve Agreement No. 9551.

Commissioner JAMES V. DAY *dissenting:*

I would deny the petition for reconsideration.

With reference to my prior opinion in this case wherein I decided that the Commission does not have jurisdiction, I noted that the Alexander Report which Congress considered and relied upon in passing section 15 stated that rate fixing and pooling agreements should be regulated to deter mergers. Congress then would hardly have encouraged merger agreements by including them within those agreements which could be granted immunity from the antitrust laws, pursuant to section 15. I further noted that Congress in granting

[25] In *In the Matter of Agreement No. 134–21, Gulf/Mediterranean Ports Conference*, 8 FMC 459, 460 (1965), which involved the question of *approval or disapproval* of a section 15 agreement, we said:

"Were possible contrariness to the statute alone sufficient reason for disapproval of an agreement under section 15, it would be hard to conceive of an approvable agreement. For as we said in Agreement 8492—*T. F. Kollmar, Inc.* and *Wagner Tug Boat Co.*, 7 FMC 511 (1963): 'We should not disapprove the agreement on the bare possibility that [the parties to it] could violate the Act. At least there ought to be a substantial likelihood of such conduct.'"

[26] Report of the Commission in Docket No. 66–45, 11 FMC 53.

[27] Although I stand firm on the issue of jurisdiction, I nevertheless have stated that "I do not think that the merger agreement before us now in any way offends the Shipping Act": Id. at p. 35.

merger jurisdiction to our sister agencies, the CAB and ICC, set forth specific criteria or guide lines to be followed by those agencies.[28]

Further I would note that the threshold question of jurisdiction has not been resolved. The administrative process provides for final court interpretation of the statutory directions of Congress. In observing the administrative process interpretation or discretion cannot fully be equated with desire.[29]

Vice Chairman GEORGE H. HEARN *dissenting:*

I dissent from the majority opinion in that I do not believe reconsideration of our prior report in this case is warranted. Little new evidence [30] has been brought to our attention, and no new light has been cast on the record already before us. Consequently, in my opinion no intelligent determination can be made on the merits of the merger.

I wish to emphasize that last point because I have not prejudged this case. The request for further evidence was not "the practical equivalent of a decision disapproving the merger agreement." [31] My request for additional information is not inspired by a wish to frustrate the merger by indecision. When a member of the Commission deems it necessary that the record be expanded, no motive should be imputed other than a desire for an adequate record from which to draw conclusions.

In this case the jurisdiction issue overshadowed that of the merits; consequently the record is not full enough on the merger issue. If, therefore, the respondents would wish to rest their case on the present record, the conclusion would be compelling that there is insufficient evidence to warrant approval. If, however, the respondents would be willing to present some further evidence and sufficient justification why more is unavailable or unnecessary, the Commission might then be able to give the merits of the case their deserved evaluation. I am, therefore, taken somewhat aback by the seeming equivocality of respondents' petition. At first we are told that of the evidence sought most is difficult or impossible to produce, irrelevant or immaterial; [32] yet in the next breath respondents seem to concur in my view that the

[28] The pertinence of this is underscored by President Kennedy's message in 1962 before Congress asked that an interagency committee be established to prescribe additional criteria that CAB and ICC might utilize in merger cases and the committee issued later a release specifying these additional criteria.

[29] While I cannot pass upon the merits of the subject merger agreement, it would not appear to violate the actual language of section 15 insofar as this is determined under present circumstances.

[30] The only new matter presented by respondents is the final status of AML (Petition, p. 8) and information as to subsidy (Petition, p. 7).

[31] Petition for Reconsideration, p. 1.

[32] *Ibid.*, pp. 5–6. It is not the parties, but the Commission which decides what needs to be filed; and it is for us to decide what can "reasonably be expected to influence * * * [our] decision one way or the other." (Petition, p. 5).

Commission is confronted with an agreement far more final in its results than those ordinarily considered by us; and they acknowledge my difficulty in giving probably "irreversible approval to a merger which has not been completely formulated and presented to the Commission."[33] This comment by respondents partakes of an admission that either the record is inadequate or the agreement was prematurely filed. This is fortified by the contents of petitioners' "Suggestion."[34] Prior to approving the merger the shareholders will receive extensive information via an SEC approved proxy statement; and this Commission should have at least as much information *prior* to its decision. It may be noted further that no corporate consolidation, acquisition or other large scale measure can be taken without exhaustive presentations to underwriters, banks, etc. Thus should it be in this case before the Federal Maritime Commission. The public interest in common carriage should receive no less attention than commercial or economic institutions.

Agreement 9551 is not of the same genre as most section 15 agreements. Its primary distinguishing characteristic is the relative finality of possible Commission approval. It would be very difficult for the Commission to subsequently dissolve a merged company or even to require changes in its structure in the same manner as it continually re-evaluates other approved section 15 agreements.

In view of the respondents' "startled" reply to our order of remand, I will make it plainer as to the type of record which should be developed in this case. It is well put by Hearing Counsel, in opposing reconsideration and supporting our remand order, that the Commission must "be able to fully determine the optimum effect of the proposed merger."[35] After the decision herein there will be little latitude for revaluation; and it is incumbent upon the parties to present the Commission with a completely formulated and thoroughly analyzed merger agreement. The Commission has always required all section 15 agreements to include specifics sufficient for a thorough analysis of the agreement and any lesser requirement is particularly undesirable in this case.[36]

We have before us an agreement the approval of which will immunize the respondents from the reach of the anti-trust laws. We also must consider that it is no ordinary agreement as is usually filed for approval. It is thus hardly fitting that we should demand a lesser production of supporting evidence than in other cases.[37] In fact it is a

[33] *Ibid.*, Petition, p. 11.
[34] *Ibid.*, Petition, pp. 11–12.
[35] Hearing Counsel's Reply to Petition for Reconsideration, p. 4.
[36] See, e.g., *Joint Agreement-Far East Conf. and Pacific W.B. Conf.*, 8 FMC 553, 558.
[37] *Ibid.*, 8 FMC 553.

derogation of our responsibilities not to demand more in this case. Yet in these circumstances the parties seek anti-trust immunity on the basis of a record giving little evidence helpful under anti-trust principles or which would be required by other agencies which pass upon similar problems.[38]

As to this, the majority injects comment on the ability of AML and APL to merge under Delaware law without further ado. The fact that a merger may be approvable in respect of intrastate commerce does not prevent the merger from being declared invalid under Federal antitrust laws;[39] and a state is barred from burdening or in any way interfering with interstate or foreign commerce.[40] Thus, under section 5(11) of the Interstate Commerce Act, the jurisdiction of the Interstate Commerce Commision with respect to combinations is exclusive and plenary.[41] Similarly, the Federal Maritime Commission cannot be ousted from its jurisdiction nor the exercise thereof usurped.

It is not sufficient for approval that the parties willingly and purposefully enter into an agreement; nor does it suffice that there will be great benefits to the parties. Proponents of an agreement must show more.[42]

More specifically, the parties decided to merge because, *inter alia*, "sizeable administrative economies could be realized"; sailing coordination could be achieved; "expensive terminals and shore facilities * * * are more effectively used by joint * * * operations";[43] there are "economies inherent in large-scale operation";[44] and, in sum, because the merging companies can do better through bigness.

Congress saw fit to permit one form of anti-competitive measure: the conference system, to forestall another: mergers.[45] It is not, then, for us to gainsay Congress by condoning restrictions on competition without sufficient reason.

True, it might have been thought adequate to condemn only those monopolies which could not show that they had exercised the highest possible ingenuity, had adopted every possible economy, had anticipated every conceivable improvement, stimulated every possible demand. No doubt, that would be one way of dealing with the matter * * * [but] that was not the way Congress chose; it did not condone "good trusts" and condemn "bad" ones; it forbad all. *U.S. v. Aluminum Co. of America*, 148 F. 2d 416, 427.

---

[38] See, e.g., 49 U.S.C. preceding § 1, § 5, 49 CFR §§ 52.2–52 3.

[39] *U.S. v. Food & Grocery Bureau of S. Calif.*, 43 F. Supp. 974, aff'd. 139 F. 2d 973.

[40] *Sancho v Bacardi Corp. of America*, 109 F. 2d 57, rev'd on other grounds *Bacardi Corp. of America v. Domench*, 342 U.S. 415.

[41] *Schwabcher v. U.S.*, 334 U.S. 182.

[42] *Mediterranean Pools Investigation*, 9 FMC 264, 290; *California Stevedore & Ballast Co., et al. v Stockton Port District, et al.*, 7 FMC 75, 84.

[43] A substantial number of such arrangements exist between port facilities and single carriers. See *Terminal Agreements Catalog*, March 1967, American Association of Port Authorities.

[44] Proposed Findings of Fact & Opening Brief for Respondents, pp. 29–31.

[45] H.R. Doc. 805, 63d Cong., 2d Sess., p. 416.

I say again that I am passing no judgement on the merits of this case, nor do I suggest that I might condemn the merger because of a concentration of power. What I do say is that this Commission cannot ignore our Nation's basic economic policy and must integrate it with the statutory pronouncements of the Shipping Act, 1916.[46]

Further as to benefits of the merger, respondents state, e.g., that correlation of APL's "California sailing dates with those of the trans-pacific service" would be almost impossible; that the same applies to APL's Atlantic/Straits service; that the APL and AML outbound/in-bound trades of California/Ceylon-West Coast of India-West Pakistan "cannot feasibly be coordinated"; that APL and AML service from Malaysia and Singapore to California is impossible of coordination; and that "This leaves, as susceptible to close sailing coordination, only the trans-Pacific Freighter service of APL and PFEL."[47]

As to those services it is stated that PFEL and APL sail inbound with free space available, and that by coordinating the services more voyages can be made full and down. It is agreed to by States that their vessels also have free space available.[48] The conclusion suggested, therefore, is that all competition in a trade should be eliminated if the availability of free space can be prevented.

It cannot be overemphasized that the agreement was presented to us with no view as to its final form and substance.[49] There is no commitment to a type of merger plan, final corporate structure or any of the other necessary components of a corporate agglomeration. Certain events add force to this conclusion: as to LASH operations APL has now foregone its plans for new LASH ships; APL has decided to add a new liner service to the picture by resuming its monthly Indonesia service after a three-year lapse; and even respondents' Coordinating Committee was unable to propose anything in regard to containerization.[50] The doubts and fears of my previous opinion have materialized; and my queries have, for the most part, gone unanswered. They are:[51]

What measures will the parties to the merger and the merged company take to prevent an adverse effect of the merger on subsidy recapture? This question cannot be avoided by saying the effect "would depend upon speculative factors."[*]

Also, will the proposed merger result in greater value for the subsidy dollar?

---

[46] The Shipping Act was designed to do "a minimum of violence to the well-established American antitrust concept." H. Rep. No. 498, 87th Cong., 1st Sess.

[47] Proposed Findings of Fact and Opening Brief for Respondents, pp. 35–37.

[48] *Ibid.*, pp. 38–40.

[49] See footnote 4, *supra*.

[50] Exhibit 50.

[51] For an exposition of these points see my separate opinion in the Commission's prior report in this case 11 FMC 72–73.

[*] 11 FMC 91.

Will the obvious immediate benefits to the parties be paralleled by concomitant overall service benefits to the public?

What adequate safeguards will be provided for affected employees and potential local labor problems?

How will shippers be advantaged by greater berth coverage if at the same time their choice of carrier could be severely reduced by near blanketing? It is no answer that there will be merely tougher competition.

There should be greater exposition of benefits to container operations, especially as to acquisition of shore facilities.

The service description of the merged company should be presented, especially as to the effect on itineraries due to LASH operations; and including for example, any proposed change in AML's "short-run" service.

On what basis will the merged company have greater access to shore facilities in Japan? Bigness of the new company does not seem enough.

What specifically will be the benefits to commerce to be derived from decreased competition for MSTS cargo? The record admittedly fails to prove this point.

How will LASH operations be integrated into the merged company, and what will be the benefits therefrom?

In my opinion the Commission is no further along in seeing, e.g., the final form of the merger, the new operational structure or the procedures by which these and other ends will be reached.

As to the matter of the merger's effect on subsidy and recapture, I fail to understand the worry over conflicting jurisdiction. The parties went to no mean effort on this point to make it part of the record and must indeed have considered it relevant to the Commission's decision.[52] I, therefore, repeat that we are bound to consider the effect on our Shipping Act responsibilities of all the ramifications of the merger. I am also constrained to say again that it is for this commission to decide what is relevant to the issues posed for our decision; and it is within the realm of propriety to request those who we think possess such information to come forward with it.

There is no intended incursion on the jurisdiction of the Maritime Administration or possible conflict of policy. In fact it is unfortunate that the agency did not intervene in this case. The Commission would thus have been aided in considering the merger's effect on the subsidy issue. The Commission is well aware of the issues properly before it;

[52] See opinion of Chairman Harllee and Commissioner Barrett in the previous report in this case, 11 FMC 67, wherein my fellow Commissioners concurred in my view in this. They now consider the matter entirely beyond the scope of this proceeding.

and it is also well aware of its responsibilities under the Shipping Act. We will not blind ourselves to relevant considerations because we are jurisdictionally barred from making a decision as to them alone.

There is one further matter which warrants comment. I do not believe that our prior report was a meaningless action on the part of the Commission.[53] Our decision did not produce an extraordinary result or place the Commission in an unusual posture. The only result was that the Commission was in the posture of desiring the fullest possible record in a proceeding of great moment. I do not believe, therefore, in terminating a proceeding for the sake of abbreviation.[54] The integrity of the administrative process is not necessarily coincident with brevity; an unnecessary burden on the administrative process is not necessarily the result of delay. That a proceeding may become more involved or cause an imposition on the parties are not reasons for closing a case and avoiding our responsibility to reach decisions based on all the facts. Speedy action is no substitute for reasoned decisions.

Only with a more complete record in this case can the Commission decide whether the results forecast can be attained by alternatives more readily revocable and of comparable effectiveness; and only then could we judge whether the benefits of the merger and its cost will be evident in benefits to the public.

For the aforestated reasons I would not reconsider our original decision herein and would not alter our decision to remand the case to the Examiner.

---

[53] Petition to Reconsider, p. 4: "* * * that the Court takes meaningful action, is applicable here with doubled force."

[54] See concurring opinion of Commissioner Fanseen herein.

FEDERAL MARITIME COMMISSION

DOCKET No. 66-45

AGREEMENT FOR CONSOLIDATION OR MERGER BETWEEN AMERICAN MAIL LINE, LTD., AMERICAN PRESIDENT LINES LTD., AND PACIFIC FAR EAST LINE, INC.

ORDER

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

It is ordered, That Agreement No. 9551 is hereby approved, and this proceeding is hereby discontinued.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

APPENDIX A

AGREEMENT FOR CONSOLIDATION OR MERGER [FMC No. 9551]

(Matter in parentheses is condensation of text. Abbreviations of parties' names, as defined in recitals, are same as those used in initial decision.)

(Recitals: Each party operates two or more common carrier ocean services between U.S. Pacific Coast and the Far East; there is substantial common ownership of their stock; pressures of competition, especially from merged Japanese lines, have made integration and reduction of duplicated expense imperative; shipping industry is on threshold of major modernization, requiring maximum financial strength and operational flexibility; coordination contemplated by Agreement No. 8485 is not fully effective to eliminate unnecessary expense and wasteful competition; necessary that U.S.-flag lines in trans-Pacific trades do everything feasible to improve efficiency, etc.; this Agreement has been approved by parties' boards of directors).

Now, therefore, It is, as of May 20, 1966, agreed by and between AML, APL, and PFEL as follows:

A. Agreements

1. *Conditions.*—(Paragraphs 2, 5 and 6 are subject to conditions in Part B, and are of no force or effect if any applicable condition fails.)

2. *Merger or Consolidation.*—AML, APL and PFEL recognize that a large variety of corporate, financial and governmental issues remain to be resolved, but do not consider those to affect their basic conclusion that their steamship operations should be unified into a single operation of APL and PFEL with such integration of AML operations as is consistent with its separate routes. AML, APL and PFEL, accordingly, hereby agree either to merge or consolidate into a single corporation, of which at least AML would be a separate division for steamship operations, or to merge or consolidate APL and PFEL into a single corporation with AML as a subsidiary, in the form and by the procedures as the directors and stockholders of the three companies should approve. Simply for purposes of identification in this agreement, the merged or consolidated company, or such company and its subsidiary, shall herein be described as APFEML.

3. *Planning Group.*—(a) Mr. Raymond W. Ickes shall be director of interim planning. He shall designate a group or groups drawn from the three lines to consult with him in the development of organizational and operational plans for APFEML.

(b) Mr. Chandler Ide shall be director of interim corporate reorganization. He shall designate a group drawn from the three lines to consult with him in the development of reorganization and financial procedures for the formation of APFEML, which shall be consistent with the organizational and operational plans developed under subparagraph (a) above. He shall develop data indicating the book value and the earning records of the three companies and shall recommend to APL, PFEL and, if appropriate, to AML, the basis for the exchange of stock or assets involved in the formation of APFEML.

(c) Messrs. Ickes and Ide may engage counsel and other experts. Every agreement reorganization or operation of APFEML subject to completion of all conditions of part B.

4. *Reports and Submissions.*—(a) Messrs. Ickes and Ide shall propose any amendments to this agreement which they consider appropriate, and any change agreed by the three lines shall be filed with Commission to become effective on or after approval.

(b) Prompt reports shall be made for their information to the Federal Maritime Commission and/or Maritime Administration of all steps in the implementation of this agreement as they shall have been agreed by the directors or stockholders of AML, APL and PFEL and which are appropriate to the jurisdiction of and the issues before the respective agencies.

5. *Interim Operations.*—After approval of this Agreement by the Federal Maritime Commission and by the Maritime Administration under Article II–18 of the respective operating-differential subsidy contracts, the Presidents of AML, APL and PFEL or their designees shall meet and promptly develop procedures by which to accomplish the maximum degree of coordination of sailings and joint traffic solicitation which may immediately be feasible in the trades which are served by APL and PFEL and to the extent appropriate by AML. These procedures shall be put into effect upon their approval by each of the three lines and shall govern until the formation and activation of APFEML. If APFEML, should not, because of the failure of any of the conditions of Part B hereof, be formed and activated, the coordination of sailings and joint solicitation herein provided shall terminate within 90 days after the failure of such condition.

6. *Agreement No. 8485.*—The agreement of AML. APL and PFEL of April 11, 1960, approved as Agreement No. FMB 8485 on August 11, 1960, is upon the accomplishment of all the conditions specified in Part B hereof, thereupon cancelled.

B. Conditions

No part of Agreement shall be effective (except as noted) until after:

(Par. 7)—Section 15 approval by FMC (except par. 3. 4).

(Par. 8)—Stockholder approval of appropriate plan of merger (except par. 3, 4, 5).

(Par. 9)—MARAD approval (except par. 3. 4) under sec. 608 of Merchant Marine Act, 1936 and parties' subsidy contracts, including requisite permissions satisfactory assignment of subsidy rights to the surviving corporation. Par. 5 to be effective after approval under contracts and FMC approval.

(Par. 10)—Satisfactory arrangement of certain tax matters ("closing agreements") by Treasury Department (except par. 3, 4, 5).

(Par. 11)—Conditions may be accomplished in any sequence.

(Par. 12)—Agreement terminable after two years on 30 days' notice, if all conditions have not been accomplished.

(Par. 13)—Any amendment, supplement or cancellation to be filed immediately with FMC.

(Signed for each party by its president, attested by its secretary)

APPENDIX B

Income statements, 1965

	APL [1] (Exh. 16)	AML (Exh. 5)	APL and subsidiaries (including AML) [3] (Exh. 7)	PFEL (Exh. 6)	APL, AML, and PFEL combined [4]	States steamship Co. (Exh. 106b)	Matson Navigation Co. and subsidiaries (Exh. 160)
Voyage revenue	$72, 639, 962	$24, 705, 314	$97, 345, 276	$45, 976, 778	$143, 322, 054	$36, 408, 598	$122, 284, 684
Vessel and cargo handling expense	76, 123, 511	22, 585, 270	98, 646, 471	36, 325, 636	134, 972, 107	32, 039, 743	[5] 106, 101, 566
	(3, 483, 549)	2, 120, 044	(1, 301, 195)	9, 651, 142	8, 349, 947	4, 368, 855	16, 183, 118
Operating differential subsidy	24, 927, 756	6, 578, 387	31, 506, 142	4, 599, 522	36, 105, 664	7, 292, 938	6, 000, 000
Interest and other income—Net	[2] 1, 019, 029	443, 884	952, 059	490, 759	1, 442, 818	295, 052	1, 060, 642
	22, 463, 236	9, 142, 315	31, 157, 006	14, 741, 423	45, 898, 429	11, 956, 845	23, 243, 760
Administrative and general and other expense—Net	17, 036, 427	4, 067, 345	21, 331, 297	7, 992, 624	29, 323, 921	6, 876, 116	[6] 8, 808, 024
	5, 426, 809	5, 074, 970	9, 825, 709	6, 748, 799	16, 574, 508	5, 080, 729	14, 435, 736
Federal income tax	1, 247, 087	1, 599, 726	2, 866, 642	2, 130, 575	4, 997, 217	1, 841, 862	7, 200, 000
	4, 179, 722	3, 475, 244	6, 959, 067	4, 618, 224	11, 577, 291	3, 238, 867	7, 235, 736
Gain on disposition of vessels	1, 022, 453		1, 022, 453		1, 022, 453		
Other	269, 012	(256, 103)	(222, 811)	224, 482	1, 671	(84, 722)	
Net income	5, 471, 187	3, 219, 141	7, 758, 709	4, 842, 706	12, 061, 415	3, 154, 145	7, 235, 736

[1] Excludes wholly owned Magellan Corp. and Shanghai Wharf & Warehouse Co., as well as 93-percent-owned American Mail Line.

[2] Includes dividends of $717,379 paid by American Mail Lines, Ltd., to American President Lines, Ltd.

[3] Includes wholly owned Magellan Corp. and Shanghai Wharf & Warehouse Co., as well as 93-percent-owned American Mail Line.

[4] Combines income statement of American President Lines, Ltd., and subsidiaries (including American Mail Line) and income statement of Pacific Far East Line.

[5] Includes administrative and general expense.

[6] Other expense only—administrative and general included in vessel and cargo handling expense, above.

APPENDIX C

Balance sheets, December 31, 1965

	APL [1] (Exh. 16)	AML (Exh. 5)	APL and subsidiaries (including AML) [2] (Exh. 7)	PFEL (Exh. 6)	APL, AML, and PFEL combined [3]	States steamship Co. (Exh. 106a)	Matson Navigation Co. and subsidiaries (Exh. 160)
ASSETS							
Current assets:							
Cash	$2,113,443	$2,290,080	$4,406,329	$1,200,138	$5,606,467	$7,093,356	$3,562,491
Operating differential subsidy	19,791,119	4,566,385	24,357,504	3,130,201	27,487,705	[4] 4,017,934	3,838,884
Other	12,972,315	6,123,155	19,097,479	12,844,639	31,942,118	6,807,365	30,324,620
	34,876,877	12,979,620	47,861,312	17,174,978	65,036,290	17,918,655	37,725,995
Less deposits to be made in statutory reserve funds	11,265,747	1,286,473	12,552,220	6,265,490	18,817,710	3,380,917	2,430,000
Total current assets	23,611,130	11,693,147	35,309,092	10,909,488	46,218,580	14,537,738	35,295,995
Statutory reserve and related funds	19,106,513	5,875,969	24,982,482	12,898,478	37,880,960	9,756,329	9,478,071
Special funds and deposits							
Investments	9,575,733					23,432	
Property and equipment—net:							
Vessels—net	57,486,147	27,590,833	87,459,204	38,741,627	126,200,831	40,160,528	46,697,194
Other property and equipment—net	3,977,461	456,634	2,928,938	862,121	3,791,059	1,045,309	17,508,587
Construction in progress	17,121,911	231,868	17,353,779		17,353,779	275,714	
	78,585,519	28,279,335	107,741,921	39,603,748	147,345,669	41,481,551	64,205,781

Contingent subsidy receivable (contra)				3, 465, 000	3, 465, 000	1, 268, 916	
Other assets	2, 624, 255	1, 033, 203	3, 526, 878	879, 825	4, 406, 703	674, 321	656, 025
Total assets	133, 503, 150	46, 881, 654	171, 560, 373	67, 756, 539	239, 316, 912	67, 742, 287	109, 635, 872
LIABILITIES AND CAPITAL							
Current liabilities	14, 240, 039	3, 933, 669	18, 297, 411	6, 300, 106	24, 597, 517	5, 447, 344	26, 917, 322
Net unterminated voyage revenue	5, 196, 506	2, 402, 174	7, 542, 760	2, 039, 077	9, 581, 837	2, 631, 001	2, 653, 679
Debt secured by mortgage on vessels	46, 783, 750	10, 600, 000	57, 383, 750	22, 874, 738	80, 258, 488	28, 949, 860	13, 334, 967
Recapture of operating-differential subsidy (contra)				3, 465, 000	3, 465, 000	1, 268, 916	
Other	4, 967, 050	575, 587	4, 408, 679	1, 775, 813	6, 184, 492	746, 286	2, 454, 000
Total liabilities	71, 187, 345	17, 511, 430	87, 632, 600	36, 454, 734	124, 087, 334	39, 043, 407	45, 359, 968
Minority interest in capital and retained earnings of subsidiary			2, 093, 531		2, 093, 531		
Stockholders' equity:							
Capital stock	6, 784, 300	3, 614, 313	6, 784, 300	4, 631, 950	11, 416, 250	7, 675, 000	20, 255, 375
Capital surplus		307, 315	6, 286, 093	3, 544, 471	9, 830, 564	1, 343, 156	1, 042, 266
Retained earnings	55, 531, 505	25, 448, 596	68, 763, 849	23, 125, 384	91, 889, 233	19, 680, 724	42, 978, 263
	62, 315, 805	29, 370, 224	81, 834, 242	31, 301, 805	113, 136, 047	28, 698, 880	64, 275, 904
Total liabilities and capital	133, 503, 150	46, 881, 654	171, 560, 373	67, 756, 539	239, 316, 912	67, 742, 287	109, 635, 872

[1] Excludes wholly owned Magellan Corp. and Shanghai Wharf and Warehouse Co., as well as 93-percent-owned American Mail Line.

[2] Includes wholly owned Magellan Corp. and Shanghai Wharf and Warehouse Co., as well as 93-percent-owned American Mail Line.

[3] Combines balance sheet of American President Lines and subsidiaries (including American Mail Line) and balance sheet of Pacific Far East Line.

[4] Total amounts due from Maritime Administration; details not available.

APPENDIX D

Sailings by line in the Pacific/Far East (TR 29) trade—1964

	Between U.S. Pacific coast and Far East		Between California and Far East [1]	
	Out	In	Out	In
U.S.-flag lines—total	444	363	385	302
American Mail Line, Ltd	36	30		4
American President Lines, Ltd	106	79	106	79
Pacific Far East Line, Inc	53	50	53	50
American Export & Isbrandtsen Lines		25		25
Isthmian Lines	24	1	24	1
Pacific Navigation System	5	6	4	5
States Line	66	68	53	46
States Marine Lines [2]	118	72	110	63
Waterman Steamship Corp	36	32	35	29
Foreign-flag lines—total	547	603	466	483
Japanese-flag lines	308	364	236	285
Japan Line	46	69	37	59
"K" Line	42	72	42	64
Mitsui-O.S.K. Lines, Ltd	81	88	61	56
N.Y.K. Line	64	72	57	59
Showa Line	12	12		
Yamashita-Shinnihon Line	63	71	39	47
Other foreign-flag Lines	239	219	230	198
Barber Line	44		44	
Barber-Wilhelmsen Line		25		25
Fernville Line	24	24	24	24
China Merchants Steam Navigation Co	9	1	9	1
Klaveness Line	12	12	12	12
Knutsen Line	18	20	18	7
Maersk Line	51	33	51	33
Maritime Co of the Philippines	21	19	20	19
Nedlloyd & Hoegh Lines	10	12	10	12
P. & O. Orient Lines	4	5	4	5
Philippine National Lines	7	7	7	7
Scandia Pacific Line	8	8	8	8
United Philippine Lines	31	32	23	32
Splosna Plovba		12		12
Taiwan Navigation Co, Ltd		9		1
Total sailings	991	966	851	785
AML, APL, & PFEL sailings	195	159	159	133
AML, APL, & PFEL as percent U.S.-flag	44	44	41	44
AML, APL, & PFEL as percent total	20	16	19	17

[1] Sailings in the California-Far East column are included in the Pacific Coast-Far East column.
[2] Used U S.- and foreign-flag ships.

NOTE. Includes APL passenger vessels (about 24 sailings), which averaged about 15 percent as much cargo per sailing as cargo vessels in APL trans-Pacific service; also sailings in round-the-world and Atlantic/Straits services, which averaged about 25 percent as much TR 29 cargo as cargo vessels in APL trans-Pacific service. Excludes ballast sailings.

APPENDIX E

Trade route 29: All cargo, including defense cargo, 1964

	Outbound tons	Percent of all outbound cargo	Inbound tons	Percent of all inbound cargo	Total outbound and inbound tons	Percent of total inbound and outbound cargo
Liner cargo:						
U.S.-flag:						
APL	301,492	2.17	77,316	2.99	378,808	2.30
PFEL	272,508	1.96	196,677	7.61	469,185	2.84
AML	257,789	1.85	82,068	3.17	339,857	2.06
States	439,127	3.16	139,795	5.41	578,922	3.51
Other	602,476	4.33	62,014	2.40	664,490	4.03
Total U.S.-flag liner	1,873,392	13.47	557,870	21.58	2,431,262	14.74
Foreign-flag:						
Japanese	715,263	5.14	495,736	19.17	1,210,999	7.34
Other	439,254	3.16	445,803	17.24	885,057	5.37
Total foreign-flag liner	1,154,517	8.30	941,539	36.41	2,096,056	12.71
Total liner cargo	3,027,909	21.77	1,499,409	57.99	4,527,318	27.45
Nonliner cargo:						
U.S.-flag	69,754	.50	0	0	69,754	.42
Foreign flag	10,809,495	77.73	1,086,350	42.01	11,895,845	72.13
Total non-liner	10,879,249	78.23	1,086,350	42.01	11,965,599	72.55
Total cargo	13,907,158	100.00	2,585,759	100.00	16,492,917	100.00

APPENDIX F

Trade route 29: Between California and Far East only, long tons of general, bulk, and defense cargo carried by liners and nonliners, 1964

	Commercial general long tons	Commercial bulk long tons	Total commercial long tons	Total defense long tons	Total all cargo long tons
Liner outbound	871,943	595,828	1,467,771	476,742	1,944,513
Liner inbound	879,238	161,019	1,040,257	16,021	1,056,278
Total liner	1,751,181	756,847	2,508,028	492,763	3,000,791
Nonliner outbound	159,231	4,848,939	5,008,170		5,008,170
Nonliner inbound	717,172	166,930	884,102		884,102
Total nonliner	876,403	5,015,869	5,892,272		5,892,272
Total liner and nonliner	2,627,584	5,772,716	8,400,300	492,863	8,893,063

APPENDIX G

Trade route 29: Between California and Far East only, percentage of cargo (long tons) in various classifications carried by Respondents, States Lines, other U.S.-flag carriers and by foreign-flag carriers, 1964

Carried by—	Percent of liner commercial cargo carried (excludes defense cargo)			Percent of all liner cargo carried (includes defense cargo)			Percent of all commercial cargo (liner and nonliner) carried (excludes defense cargo)			Percent of all cargo (liner and nonliner) carried (includes defense cargo)		
	Outbound	Inbound	Total	Outbound	Inbound	Total	Outbound	Inbound	Total	Outbound	Inbound	Total
Liners:												
U.S.-flag:												
APL	14.60	6.95	11.43	15.50	7.32	12.62	3.31	3.75	3.41	4.34	3.98	4.26
AML		.07	.03		.07	.03		.04	.01		.04	.01
PFEL	11.97	18.58	14.71	14.02	18.62	15.63	2.71	10.04	4.39	3.92	10.14	5.27
All respondents	26.57	25.60	26.17	29.52	26.01	28.28	6.02	13.83	7.81	8.28	14.16	9.54
States	7.40	5.95	6.80	9.62	6.08	8.38	1.68	3.22	2.03	2.69	3.31	2.83
Others	8.54	5.06	7.09	17.46	5.48	13.24	1.93	2.74	2.12	4.88	2.99	4.47
All U.S.-flag liners	42.51	36.61	40.06	56.60	37.57	49.90	9.63	19.79	11.96	15.83	20.46	16.84
Foreign-flag:												
Japanese	38.48	34.00	36.63	29.05	33.49	30.61	8.72	18.38	10.94	8.13	18.23	10.32
Other	19.01	29.39	23.31	14.35	28.94	19.49	4.31	15.89	6.96	4.01	15.75	6.58
All foreign-flag liners	57.49	63.39	59.94	43.40	62.43	50.10	13.03	34.27	17.90	12.14	33.98	16.90
All liners	100.00	100.00	100.00	100.00	100.00	100.00	22.66	54.06	29.86	27.97	54.44	33.74
Nonliners:												
U.S.-flag							.27		.21	.25		.20
Foreign-flag							77.07	45.94	69.93	71.78	45.56	66.06
All nonliners							77.34	45.94	70.14	72.03	45.56	66.26
All liners and nonliners							100.00	100.00	100.00	100.00	100.00	100.00

APPENDIX H

U.S.-FLAG CARRIAGE VS. ALL-FLAGS COMMERCIAL CARGO CARRIED IN DRY CARGO VESSELS BETWEEN CALIFORNIA AND FOREIGN AREA TR 29, YEARS 1954–1964 (IN THOUSANDS OF LONG TONS)

I. Liner commercial cargo

Year	From California			To California		
	Total tons	U.S.-flag tons	Percent	Total tons	U.S.-flag tons	Percent
1954	1,265	932	74	591	354	60
1955	1,360	1,039	76	705	476	68
1956	1,663	1,228	74	801	518	65
1957	1,844	1,370	74	732	407	56
1958	1,610	921	61	892	437	49
1959	1,360	613	45	1,000	532	53
1960	1,648	723	44	960	464	48
1961	1,627	744	46	884	328	37
1962	1,464	502	34	1,105	365	33
1963	1,653	732	44	1,188	431	36
1964	1,468	624	43	1,040	381	37

II. Total (liner plus nonliner) commercial cargo

Year	From California			To California		
	Total tons	U.S.-flag tons	Percent	Total tons	U.S.-flag tons	Percent
1954	1,735	964	56	599	356	59
1955	2,254	1,110	49	740	482	65
1956	3,561	1,550	44	840	518	62
1957	3,947	1,480	38	807	407	50
1958	2,690	970	36	967	437	45
1959	2,878	623	22	1,167	542	46
1960	4,341	723	17	1,155	474	41
1961	5,169	714	14	1,178	329	28
1962	4,033	502	12	1,502	365	24
1963	5,933	753	13	1,692	434	26
1964	6,476	642	10	1,924	381	20

APPENDIX I

Major steamship lines of the world

Line or group	Flag	Vessels	Deadweight tons
1. P&O	British	297	3,045,000
2. NYK	Japanese	110	2,079,000
3. Barber	Norwegian	130	1,754,000
4. Maersk	Danish	88	1,732,000
5. Kawasaki	Japanese	73	1,649,000
6. Japan	Japanese	65	1,418,000
7. Nedlloyd & Hoegh	Dutch, Norwegian	80	1,232,000
8. Mitsui-OSK	Japanese	96	1,114,000
9. Yamashita-Shinnihon	Japanese	56	1,102,000
10. Argentine Government	Argentine	113	963,000
11. Showa	Japanese	37	916,000
12. British & Commonwealth	British	75	851,000
13. Lykes	United States	56	650,000
14. States Marine and affiliates	United States	53	642,000
15. APL-PFEL-AML (25-14-9)	United States	48	622,000
16. United States Lines	United States	46	560,000
17. American Export Isbrandtsen	United States	46	504,000
18. Moore-McCormack	United States	42	508,000

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 1 (I)

R. A. EASTMAN & COMPANY

v.

MATSON NAVIGATION COMPANY

N.O.S. rate on furniture in containers resulting in charge of $1,861.20 found unreasonable under section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933, where the charges would only have been $1,430 had the shipper not brought the containers to the carrier's assembly point.

David F. Anderson appeared for respondent and claimant appeared *pro se.*

DECISION AND ORDER OF E. ROBERT SEAVER, HEARING EXAMINER [1]

R. A. Eastman and Company makes claim against Matson Navigation Company, employing the Commission's new Small Claims Procedure, Rule 19(a), (46 C.F.R. 502.301), under section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933, for excessive freight charges in the amount of $480.67 [2] arising out of the following transaction:

On or about April 28, 1967, Eastman caused two containers loaded with furniture to be delivered to Matson by rail to the latter's Container Freight Station (C.F.S.) at Los Angeles for ocean shipment to Hawaii. Matson is a common carrier by water subject to section 18(a) of the Shipping Act, 1916, and to the Intercoastal Shipping Act, 1933, as amended. It is engaged in the transportation of property between the United States mainland and the State of Hawaii. The said furniture was transported by Matson under bill of lading dated

[1] Both parties having consented to the informal procedure under Rule 19(a). (C.F.R. 502.301). notice is given that the Commission, on October 17, 1967, determined not to review the Decision and Order of the Examiner in this proceeding

[2] The claim includes an item of $49.47 for car unloading under the Matson tariff. It cannot be considered as part of the excess charge because it is payable on shipments such as claimant's.

April 28, 1967, at a freight charge of $1,861.20 based on a tariff rate of 72 cents per cubic foot.

The said rate was the Cargo, N.O.S. rate appearing in Matson's Tariff No. 14–A, F.M.C.-F. No. 137, published and filed so as to be effective March 30, 1967. The rate per container that would have applied to the Eastman shipment prior to that revision was $715. Matson concedes that in publishing the new tariff (14–A) it failed to anticipate that containerload shipments of furniture would be delivered to its C.F.S. by rail and that it inadvertently failed to include such shipments in the containerload rate, which remained at the $715 level. Therefore Matson applied the Cargo, N.O.S. rate of 72 cents per cubic foot to claimant's shipment.

A rate of $715 per container was applicable at the time of the Eastman shipment where Matson itself picked up the containers within a prescribed pick-up area. The charges for claimant's shipment would have been $1,430 at that rate, if Matson had been required to pick up the containers anywhere within the area. It is readily seen that the total carrier service is no greater when the shipper delivers the containers to the C.F.S. by rail than when Matson picks up the containers and brings them to the C.F.S. When it learned of this situation, Matson corrected its oversight by revising its tariff, on April 17, 1967 (effective May 20, 1967), so that the $715 container rate now applies when the shipper delivers the container by rail at the Matson C.F.S.

The circumstances of this case fall squarely within the rule of *Sea-Land Service, Inc.—Application to Waive Undercharges*, 8 F.M.C. 641, where relief in a situation like the present one was granted. As stated in the decision in that case, and cases cited therein, the long-standing rate of $715 per container must be presumed to be a reasonable rate. Similarly, the higher rate of 72 cents per cubic foot charged claimant is patently unreasonable within the meaning of section 18(a) of the Shipping Act and section 4 of the Intercoastal Shipping Act, 1933, because of the lesser service provided under that rate and for the further reason that the rate was deleted after being in effect for only a very short period of time. For these reasons the rate is hereby disapproved. It is further determined that the $715 per container rate would have been reasonable where the containers were delivered to the C.F.S. by rail, as was done by Eastman. The charge of $1,861.20 for the Eastman shipment resulted in an excessive charge of $431.20. Matson does not object to refunding the excess and even desires to do so if so directed or authorized. The decision in *Ludwig Mueller Co. v. Peralta Shipping Corp.*, 8 F.M.C. 361, does not require a different result. That case involved the foreign commerce and was governed by a different provision of the statute. The Commission stated expressly and pointedly that its decision therein, to no longer entertain applications for rate relief based on inadvertence or mistake, did not apply to the offshore domestic commerce. It recognized that where the rate charged in the domestic commerce is found to be unreasonable, relief can be granted.

The correction of this rate will not result in any discrimination between shippers because no other shippers are similarly situated. No other shipments such as claimant's were brought to the Matson C.F.S. by rail during the time the rate collected from claimant was in effect.

For the foregoing reasons it is hereby:

ORDERED; that Matson Navigation Company refund to R. A. Eastman and Company the sum of Four Hundred and Thirty One Dollars and Twenty Cents ($431.20), representing excess freight charges found herein to have been made for shipments covered by Matson's bill of lading number R4065268, dated April 28, 1967.

(Signed) E. ROBERT SEAVER,
Hearing Examiner.

WASHINGTON, D.C., *October 10, 1967.*

FEDERAL MARITIME COMMISSION

DOCKET No. 67-43

SEA-LAND SERVICE, INC.—CANCELLATION OF FMC PORT-TO-PORT RATES—WEST COAST/ALASKA TRADE

DECIDED OCTOBER 20, 1967

Under section 18(a) of the Shipping Act, 1916, and under the Intercoastal Shipping Act, 1933, Congress vested in the Federal Maritime Commission jurisdiction over common carriers by water in the Alaska trade. The Alaska Statehood Act specifically reserved this jurisdiction to the Federal Maritime Commission. Congress enacted an exception to this regulatory scheme in Public Law 87-595 in which it granted to the Interstate Commerce Commission jurisdiction over through routes and joint rates. Congress intended Public Law 87-595 to apply to a combination of line haul rates, not to a local pickup and delivery service included in a port-to-port rate.

Sea-Land Service, which has not changed the physical elements of its port-to-port service including local pickup and delivery but has merely changed certain tariff nomenclature, has not converted its service to a through route and joint rate arrangement contemplated by Public Law 87-595. Consequently, the service remains subject to the jurisdiction of the Federal Maritime Commission.

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

Stanley B. Long, *Arthur G. Grunke*, and *John Robert Ewers* for intervener Alaska Steamship Co.

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

REPORT

BY THE COMMISSION (JOHN HARLLEE, *Chairman;* GEORGE H. HEARN, *Vice Chairman;* JAMES V. DAY, JAMES F. FANSEEN, *Commissioners*) :[1]

The Commission instituted this proceeding on July 21, 1967, in order to resolve the question of jurisdiction over the rates of Sea-Land's operation between west coast ports and Alaska. Since no factual is-

[1] Commissioner Barrett did not participate.

sues were involved, the Commission dispensed with an initial decision and limited the record to affidavits and legal memoranda filed by respondent Sea-Land Service, Inc., intervener Alaska Steamship Co., and Hearing Counsel. The Commission heard oral argument on September 6, 1967.

BACKGROUND

In April 1964, Sea-Land inaugurated a service between Seattle and Anchorage. The rates for this service included pickup and delivery of cargo within the Anchorage area. These rates were contained in Freight Tariff No. 116, FMC–F No. 5 and ICC No. 23. The format of this tariff has not changed substantially since initial publication. Item 101 of the tariff provides:

> * * * the rates between points in Oregon and Washington making reference to this Item and points in Alaska taking Rate Group A are port-to-port rates subject to the jurisdiction of the Federal Maritime Commission.

Item 102 provides that other rates, covering movements to and from interior points, are subject to the jurisdiction of the Interstate Commerce Commission.[2] Rate group A, referred to in item 101, contains single-factor rates between Seattle and Anchorage. These rates include store-door pickup and delivery service.[3] The remainder of the rates in Freight Tariff No. 116 are joint water and motor rates which are filed with the Interstate Commerce Commission.

In the past, Sea-Land filed the rates for the Seattle/Anchorage service with the Federal Maritime Commission on their assumption that these rates were under FMC jurisdiction even though store-door pickup and delivery service was included in the rates. This was in accordance with the official position of the FMC staff, as expressed in a notice circularized by the FMC Bureau of Domestic Regulation in February 1966 to all carriers in the domestic offshore trades.[4]

Sea-Land also assumed that FMC jurisdiction attached to local port-to-port rates applying between Seattle and other ports in Alaska served by Sea-Land's competitors in direct-vessel service. On this

---

[2] Item 102 reads:

> Except as otherwise provided in Item 101 rates published in this tariff are joint rates subject to the jurisdiction of the Interstate Commerce Commission

[3] Rate group A also includes: Anchorage International Airport, Elmendorf Air Force Base, Ft. Richardson, Mountain View and Spenard, Alaska, Bellevue, Kirkland, Renton, Tukevila, Andover Industrial Park, and Tacoma, Wash., and Portland, Oreg (via direct water service of Sea-Land only).

[4] The notice provided in part.

> Water carriers may publish single-factor rates which include services (such as pickup and delivery services) in port terminal areas, even though the carrier performing such services is not subject to the shipping acts. Such tariffs, however, must be filed with the Federal Maritime Commission in accordance with the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933.

assumption, Sea-Land notified the FMC's Bureau of Domestic Regulation of the filing with the ICC of a rate which appeared to be subject to FMC jurisdiction. Sea-Land also submitted to the Interstate Commerce Commission a telegraphic objection to the acceptance for filing of the rate. This rate was published by the Alaska Railroad as a joint rate with Puget Sound Alaska Van Lines (PSAVL) in Alaska Railroad Tariff ICC No. F–34, which was filed with the Interstate Commerce Commission to become effective August 27, 1965. However, the ICC accepted the rate for filing. Subsequently, the joint rate of PSAVL and the Alaska Railroad to Valdez was transferred to Alaska Railroad Freight Tariff No. 67–A, ICC No. F–35. Again, Sea-Land wrote to the Interstate Commerce Commission on May 2, 1967, pointing out that the Alaska Railroad, in connection with PSAVL had filed with the ICC a rate from Seattle to Valdez, Alaska, which included no rail "line haul" movement but only rail switching limits at Valdez. However, the Interstate Commerce Commission again accepted the rate for filing and the reasons for this acceptance were explained in a letter to Sea-Land from the Director of the Bureau of Traffic.

The Interstate Commerce Commission had enunciated this position earlier, not only by their original acceptance of the PSAVL Valdez rate, but also by acceptance of Alaska R.R. Tariff No. 74, ICC No. F–40, which became effective March 1, 1966, over protest of Sea-Land. This tariff, covering Alaska Steam's Seattle-Alaska Van Express Service, publishes joint rates of Alaska Steam and the Alaska Railroad from Seattle to points in Alaska over joint routes via Whittier, Alaska. This tariff contains rates to the port of Whittier with delivery by the Alaska Railroad. Sea-Land argued that the rates to Whittier cover a port-to-port service and should be filed with the FMC. Nevertheless, the ICC accepted the entire tariff for filing.

Subsequently, upon review of the entire situation, Sea-Land decided to convert its pickup and delivery rates to and from Anchorage to joint through rates. Accordingly, Sea-Land filed a notice of cancellation of its pickup and delivery rates to become effective July 30, 1967. The Commission suspended the cancellation and instituted this proceeding to determine if the cancellation were lawful.

THE ISSUES

In the order instituting this proceeding, the Commission sought to determine:

1. The lawfulness of the removal of port-to-port rates from FMC jurisdiction where such rates embody incidental pickup and delivery

services performed by or on behalf of a common carrier by water within the port area in which it holds itself out to perform such incidental pickup and delivery services in connection with its line-haul water carrier operation, according to its applicable tariffs; and

2. The lawfulness of Sea-Land's practices with respect to its application of its proposed tariff device which would permit a change in regulatory forum by redesignating a "local" port-to-port service as a "joint" port-to-port service.

CONTENTIONS OF THE PARTIES

Sea-Land argues that, as a matter of law, the rates in question are solely within the jurisdiction of the ICC. Although the Alaska Statehood Act (48 U.S.C. 21–488), July 7, 1958, reserved to the FMC the jurisdiction over Alaska trades which had existed before statehood, Congress subsequently granted jurisdiction over the establishment of through routes and joint rates to the ICC through Public Law 87–595 (49 U.S.C. 316(c)). Since Sea-Land has changed its pickup and delivery rates to joint rates, Sea-Land asserts that jurisdiction over such rates is vested in the ICC as provided in Public Law 87–595.

Alaska Steam which has on file with the ICC tariffs containing joint rates, some of which cover local store-door delivery as is the case of Sea-Land, supports the position of Sea-Land. Alaska Steam argues that the FMC jurisdiction in the Alaska trade is an exception to the general pattern established by Congress which provides for regulation of rail, motor, and water transportation in interstate commerce. When Alaska statehood was enacted, Congress reserved the question of jurisdiction over water carriers pending further study and legislation. Public Law 87–595 followed. In enacting Public Law 87–595, Congress intended to grant to shippers and consignees in Alaska the same transportation advantages available in the other States, and to restore jurisdiction which had been previously excepted. Therefore, Alaska Steam argues that joint rates comprising a line-haul movement and pickup and delivery were vested in the ICC.

Hearing Counsel argue that Public Law 87–595 was never intended to divorce the FMC from jurisdiction over the type of operation involved here. Hearing Counsel contend that the legislative history of Public Law 87–595 shows that the law was limited to a combination of motor line-haul and water line-haul routes. The statute was designed to allow shippers to deal with a single carrier, consult a single tariff, and enjoy the benefits of joint rates which are generally lower than a combination of local rates. Thus, Sea-Land, under the tariff rates it now wishes to cancel, was already achieving the benefits of the statute. Public Law 87–595 was not designed to alleviate any problem in this area. Thus, the statute should not be construed to extend to an area where it is not needed. In fact, the language of the Alaska Statehood Act, which reserved FMC jurisdiction, is still the paramount congressional pronouncement of how water transportation shall be regulated, i.e. by the FMC except where two line-haul services are combined.

DISCUSSION

The case turns upon the meaning of Public Law 87–595 which provides:

> Subsection (c) of section 216 of the Interstate Commerce Act, as amended (49 U.S.C. 316(c)), [dealing with intermodal through routes and joint rates] is amended by adding at the end thereof the following new sentence: "As used in this subsection, the term 'common carriers by water' includes water common carriers subject to the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act of 1933, as amended (including persons who hold themselves out to transport goods by water but who do not own or operate vessels) engaged in the transportation of property in interstate or foreign commerce between Alaska or Hawaii on the one hand, and, on the other, the other States of the Union, and through routes and joint rates so established and all classifications, regulations, and practices in connection therewith shall be subject to the provisions of this part."

Specifically, we must decide whether Sea-Land's service is a through route and joint rate within the meaning of the statute. We read the statute as not explicitly including, or excluding, the service in question. Consequently, it is necessary to examine the congressional purpose in enacting the section as well as the regulatory framework of which it is a part.

Under section 18(a) of the Shipping Act, 1916 (46 U.S.C. 817), the FMC originally regulated common carriers by water in interstate commerce in the Alaska trade. This authority was expanded under the Intercoastal Shipping Act, 1933 (46 U.S.C. 843–48). With the admission of Alaska and Hawaii into the Union, jurisdiction over water transportation between those States and the contiguous 48 States would have automatically devolved upon the ICC but for a specific provision in the statehood acts which preserved jurisdiction in the FMC. Thus, section 27(b) of the Alaska Statehood Act provides:

> (b) Nothing contained in this or any other act shall be construed as depriving the Federal Maritime Board of the exclusive jurisdiction heretofore conferred on it over common carriers engaged in transportation by water between any port in the State of Alaska and other ports in the United States, its territories or possessions, or as conferring upon the Interstate Commerce Commission jurisdiction over transportation by water between any such ports.

Subsequently, a motor carrier, Consolidated Freightways, attempted to file a joint tariff between itself as a motor carrier and a water carrier regulated by the FMC. Consolidated Freightways' tariff named six participating carriers, five by motor vehicles, and one, a water carrier, Hawaiian Marine Freightways, Inc. The tariff named specific rates on commodities between points to Utah, Idaho, and Montana and Honolulu, Hawaii. Both the FMC and the ICC rejected the tariff.[5] The FMC rejected the tariff because neither the Shipping Act, 1916, nor the Intercoastal Shipping Act, 1933, granted the FMC authority to accept a rate publication naming single-factor joint motor-water freight rates from or to interior points in the United States and Hawaii. The long line-haul transportation overland was clearly subject to ICC jurisdiction. However, it was impossible to determine from the single-factor rates in the tariff where FMC or ICC jurisdiction began and ended.[6]

Following rejecting of its tariffs, Consolidated republished them in a form acceptable to the FMC. The carrier deleted the joint rates from inland points and replaced them with rates between the San Francisco Bay port area and points in Hawaiian port area, which rates included pickup and delivery service. The tariffs published in this fashion were kept on file with the Commission until the service was discontinued on November 24, 1961.

Meanwhile, Consolidated cited the rejection of its joint tariff to Congress as proof that remedial legislation was needed in order to establish the type of joint motor-water rates which the carrier had attempted to create originally. In pursuing this objective, the vice president of Consolidated testified before the House committee with respect to the rejection of the joint tariff and stated that the pending bills, which led to final enactment of Public Law 87–595, "would, if enacted into law, not only permit joint rates between points such as Seattle and points within Alaska, but would also permit joint rates between points within the contiguous 48 States and points within Alaska." [7] The proponents of Public Law 87–595 several times referred to Consolidated's dilemma.[8] Congress could not have contemplated the Sea-Land-type operation since Public Law 87–595 was designed to

[5] See hearing before a subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 7297 and H R 7343, 87th Congress, 2d sess , p 19 (1962).

[6] The position of the FMC in rejecting the tariff was sound. Although section 2 of the Intercoastal Shipping Act. 1933, requires carriers to file with the FMC all its rates in connection with the establishment of a through route, the provision applies only if the other carrier to the arrangement is a water carrier. There is no provision in the act giving the FMC jurisdiction over motor carriers such as Consolidated operating from inland U.S. points to Hawaii in conjunction with water carriers.

[7] See note 4, supra

[8] See H. Rept. No. 1769, 87th Cong., 2d sess. (1962) 2; 108 Cong. Rec., House, pp. 11419–21 (1962).

authorize a type of transportation which neither the FMC nor the ICC would permit. Congress did not intend to repeal section 27(b) of the Statehood Act or overturn the long-standing Commission practices in accepting Sea-Land-type tariffs. In this connection, we mention pertinent remarks of Congressman Rivers, the author of the legislation, who stated:

> This bill does not detract from the authority presently exercised by the Federal Maritime Commission over the Alaska waterborne carriers * * * only to the extent that through routes and joint rates are involved would the ICC attain any jurisdiction over the vessels plying in the Alaskan trade. 108 Cong. Rec., House, p. 11420 (1962).[9]

Thus, it is the Consolidated, not the Sea-Land type of operation which Public Law 87-595 contemplated. Moreover, Congressman Rivers corroborated this view, stating as follows on the floor of the House:

> * * * [This bill] * * * merely enables all surface carriers involved in the transportation of cargo *to Alaska from points of origin in the 48 States* to enter into the through route and joint rate agreements I have mentioned and only to the extent that through routes and joint rates are involved would the ICC attain any jurisdiction over the vessels plying in the Alaskan trade. (Emphasis added.) 108 Cong. Rec., House, p. 11420 (1962).

We, therefore, conclude that Congress intended Public Law 87-595 to apply to a combination of line-haul motor and water routes such as had appeared in the rejected Consolidated tariff and not to a pickup and delivery service included in a port-to-port rate such as Sea-Land's.

The purpose of the legislation was to confer the benefits of through routes and joint rates on the users of motor-water services between Alaska and Hawaii and the other 48 States. Under such a through route and joint rate, shippers would enjoy considerable benefits; shippers would be able to make one contract with the originating carrier, ascertain the rate by consulting a single tariff instead of many, and enjoy the economy of joint rates.[10] Sea-Land's customers presently enjoy these benefits.

---

[9] Additional statements of Congressman Rivers show that he could not have had in mind the Sea-Land-type operation when proposing his bill because he again referred to the different situation such as Consolidated's where no agency would accept regulation. Thus, he stated:

"By virtue of the general rule carried out under existing law, common carriers subject to the jurisdiction of different Federal regulatory agencies, respectively, may not, in the absence of specific statutory authority, establish through routes and joint rates with each other." 108 Cong. Rec., House, p. 11420 (1962).

[10] As the House Report states:

The purpose of this bill is exceedingly simple; it is merely to clarify the Interstate Commerce Act so that the users of motor-water services between Alaska and Hawaii and the other 48 States may have the same benefits of through routes and joint rates which are enjoyed by users of motor-water services among the other 48 States, and by users of rail-water services or of any combinations of service with air services among all of the 50 States H. Rept. No. 1769, 87th Cong., 2d sess., p. 1. See also: S. Rept No. 1799, 87th Cong., 2d sess., p. 1 and H Rept. No. 1769 at 2, 3.

Even without these indications of limited congressional intent described above, it would be somewhat amazing to interpret Public Law 87–595 in the manner suggested by respondent and Alaska Steam. If the contentions of Sea-Land and Alaska Steam are correct, one would have to conclude that Congress intended to repeal section 27(b) of the Alaska Statehood Act, and to upset longstanding FMC interpretations of section 2 of the Intercoastal Act, 1933, although Congress made no mention of such intentions.

Under section 27(b) of the Alaska Statehood Act jurisdiction over water transportation between Alaska and the other States was explicitly preserved in the FMC. A principle of statutory construction directs that past legislation shall not be repealed by implication. Before such an intention can be imputed to the legislature, clear and manifest language indicating such an objective must appear. *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939).

But there is no "clear and manifest" language in Public Law 87–595 that serves to indicate an intention to repeal section 27(b) of the Alaska Statehood Act. Indeed, Public Law 87–595 is actually an amendment to two sections of the Interstate Commerce Act (secs. 216(c) and 305(b)), and makes no mention whatsoever of the Alaska Act.

Pursuant to section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844), the FMC has authority to accept filings of port-to-port rates which include incidental pickup and delivery services. Section 2 requires that tariffs to be filed "shall also state separately each terminal or other charge, privilege, or facility, granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, or charges * * *." Under this provision, the FMC has long accepted tariffs which include pickup and delivery service which water carriers frequently provide and publish in their tariffs.

Thus, in *Bernhard Ulmann Co. Inc.* v. *Porto Rican Express Co.*, 3 F.M.B. 771 (1952), the Commission ordered the filing pursuant to section 2 of the 1933 act of rates, fares, and charges which included motor pickup and delivery service and in some instances, segments of rail transportation surrounding the line-haul ocean movement.[11] In *North Carolina Line—Rates to and From Charleston, S.C.*, 2 U.S.M.C. 83 (1939), *J. G. Boswell Co.* v. *American-Hawaiian S.S. Co.*, 2 U.S.M.C. 95 (1939), and *Increased Rates, Kuskokwim River, Alaska*,

[11] This service was in contrast to the Consolidated-type tariff which established a combination of motor and water line-haul segments of transportation, each segment embracing long distances.

4 F.M.B. 124, 125 (1952); the Commission exercised its jurisdiction over single-factor rates which included pickup and delivery services covering varying distances from portside. Since enactment of Public Law 87–595, on August 27, 1962, the Commission has continued to accept tariffs containing single-factor rates which include pickup and delivery services. *Matson Navigation Co.—Container Freight Tariffs*, 7 F.M.C. 480, 491 (1963); *Certain Tariff Practices of Sea-Land Service*, 7 F.M.C. 504 (1963).[12]

We may presume that in the enactment of a statute, Congress was aware of prior applicable decisions of the courts or agencies, *Texaco, Inc.* v. *Federal Power Commission*, 317 F. 2d 796 (10th cir. 1963) *cert. denied*, 377 U.S. 922. Therefore, in the enactment of Public Law 87–595, Congress knew of the many FMC decisions under section 2 of the 1933 act whereby single-factor rates including pickup and delivery services such as provided by Sea-Land had been for many years filed with the FMC. We, therefore, conclude that Congress intended to leave the Sea-Land-type operation under the jurisdiction of the FMC, where it has always been, and apply Public Law 87–595 to a bona fide through route and joint rate situation such as that attempted by Consolidated Freightways.

The scheme of regulation which Sea-Land and Alaska Steam advocate in mistaken reliance on Public Law 87–595 is contrary to traditional principles of transportation regulation. If their contentions were correct, then Congress intended that transportation covering over 1,000 miles by water, in connection with an incidental motor portion in a port area, is no longer water transportation insofar as regulation is concerned. In other words, the relatively minute motor pickup and delivery service is the sole determinant in establishing regulatory jurisdiction. This amounts to the tail wagging the dog.

Congress and the courts, as well as regulatory agencies, have long considered incidental transportation service rendered in conjunction with the major line-haul to be part of the overall dominant service, even if the dominant service were provided by a different mode of conveyance. The ICC, for instance, regulated motor carrier pickup transportation as a terminal service rendered in conjunction with rail carriage, even before the Commission had been granted jurisdiction over motor carriers as such. *Tariffs Embracing Motor-Truck or Wagon Transfer Service*, 91 I.C.C. 539 (1924). In that case, the ICC said:

> While motor-truck or wagon transfer companies are not common carriers subject to the Act, truck or wagon transfer services performed in connection with terminal services of a common carrier subject to the Act, or with transfer of

[12] We also take official notice of Consolidated Freightways Local and Joint Container Freight Tariff No. 1, FMC–F No. 2.

freight in transit at an intermediate point by such common carriers, are subject to our jurisdiction. Such service is a part of a transportation service by a carrier over which we have jurisdiction. The term terminal service may also include accessorial services in the nature of the collection and delivery of freight commonly referred to as store-door delivery. 91 I.C.C. at 547.

After the passage of the Motor Carrier Act of 1935, which gave the ICC specific jurisdiction over motor carriers, it nevertheless continued to regulate pickup and delivery services as part of the major rail line-haul carriage. *Scott Bros. Inc., Collection and Delivery Service*, 4 M.C.C. 551 (1938); *Pick-up and Delivery in Official Territory*, 218 I.C.C. 441 (1936).

The Transportation Act of 1940 further emphasized the congressional scheme to confer jurisdiction over incidental modes of transportation on the agency regulating the line-haul carriage to which the other mode is ancillary. Thus, section 202(c)(2) of the Interstate Commerce Act added by the 1940 act exempted certain terminal services, including pickup and delivery, from otherwise applicable regulation and directed that these incidental services should be regulated in conjunction with the regulation of the line-haul carrier.[13]

A similar pattern of congressional intent, that incidental motor services are to be regulated as part of the dominant line-haul transportation, appears in the Civil Aeronautics Act of 1938, 52 Stat. 973. Section 1107(j) of that act (49 U.S.C. 303(b)(7a)) amended the Interstate Commerce Act so as to oust the ICC from jurisdiction over motor transportation when incidental to air transportation. The Federal Aviation Act also authorizes air carriers to enter into joint rates with land carriers and defines air transport to include carriage partly by air and partly by some other mode (49 U.S.C. 1483). Pursuant to this legislative scheme and the analysis of incidental transportation segments on which it is based, the ICC has relinquished regulation of subsidiary motor carriage to the Civil Aeronautics Board which now exercises full economic regulation as an incidental service performed in conjunction with line-haul air carriage. See *Golembiewski Common Carrier Application*, 48 M.C.C. 1 (1948).

The fact that the motor segment incidental to the air transportation is itself sizable does not thereby change its incidental nature. In *City of Philadelphia v. Civil Aeronautics Board*, 289 F. 2d 770 (D.C. Cir., 1961), the court ruled that a pickup and delivery service between Philadelphia and Newark Airport, 90 miles away, in connection with a transcontinental air freight service, was air transportation within the

[13] The ICC considered sec. 202(c)(2) to be essentially a codification of its past jurisdictional policy with respect to regulation of incidental terminal operations. See *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, 102 (1954).

meaning of the Federal Aviation Act and, consequently, was to be regulated by the CAB.

It is clear, then, that respondent's contention that its motor pickup and delivery service should cause a change in traditional regulatory jurisdiction is in drastic violation of the entire pattern of regulatory law in this area. Certainly, Congress has not manifested any intention of causing such a radical alteration in regulation by the enactment of Public Law 87–595.

Respondent contends that motor carriers servicing terminal areas may enter into through routes and joint rates with water carriers operating to and from Alaska and that the ICC has recognized that such arrangements fall under Public Law 87–595.[14] Likewise, Sea-Land points out that the ICC accepts for filing tariffs similar to its own.[15] Certainly, a motor carrier in Alaska may enter into a true through route and joint rate arrangement such as contemplated by Public Law 87–595. The cases cited by Sea-Land, especially the *Lindstrom* case, supra, relied upon so heavily, establish this, nothing more. These cases are not even pertinent to this inquiry: whether Sea-Land's port-to-port service with pickup and delivery is a through route and joint rate.

As the Interstate Commerce Commission said in *Lindstrom:*

> There is also the possibility that the port-to-port service of the Alaska State Ferry System, or of applicants [motor common carriers], or both, may be found by the Federal Maritime Commission, which is responsible for administering the Shipping Acts, to be those of a common carrier subject to the Shipping Act, 1916. Although such a finding might result in some duplication of regulation, we do not perceive any conflict arising therefrom. 98 M.C.C. at 653.

We conclude, therefore, that our interpretation of Public Law 87–595 and our decision here is not inconsistent with *Lindstrom.*

The ICC recognizes that through routes and joint rates could be established between motor and water carriers. However, prior to the time Sea-Land changed the nomenclature in its tariff and transmitted the newly styled document to the ICC, that Commission had specifically considered the Sea-Land operation not to be subject to its jurisdiction. Thus, on April 3, 1967, the ICC stated:

> On May 3, 1964, Sea-Land Service inaugurated a water carrier service between Seattle and Anchorage and Kodiak, Alaska, which is not an operation subject to this Commission's jurisdiction. *Sea-Land Freight Service, Inc.—Purchase—Alaska Freight Lines, Inc.*, 104 M.C.C. 28, 31 (1967).

---

[14] Citing: *Trucking L.C.L. Freight in Lieu of Rail Service*, 185 I.C.C. 71 (1932); *Lindstrom Extension—Southeast Alaska*, 98 M.C.C. 647 (1965).

[15] According to Sea-Land, the ICC's construction is entitled to great weight, *I.C.C. v. Memphis Union Station Co.*, 360 F. 2d 44 (6th Cir. 1966).

CONCLUSION

Respondent Sea-Land has not changed the physical elements of its service from the Seattle area to the Anchorage area. Sea-Land has merely changed certain nomenclature in its tariff. Such a change does not divest this Commission of jurisdiction because Sea-Land's service remains one contemplated by the Intercoastal Act, 1933, not a joint service as contemplated by Public Law 87–595. Accordingly, Sea-Land's tariff for this service must be filed with this Commission. An appropriate order accomplishing this will be entered.

ORDER

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

Therefore, it is ordered, That, pursuant to the Commission's authority under section 18(a) of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, respondent Sea-Land Service shall, within 30 days of the date of this order or November 30, 1967, whichever is sooner, strike from its tariff a publication designated Supplement No. 9 to Freight Tariff No. 116, FMC–No. 5.

It is further ordered, That respondent Sea-Land Service, Inc., shall continue to meet the requirements of section 18(a) and the Intercoastal Shipping Act with respect to the service which was found in the report herein to be subject to the jurisdiction of the Federal Maritime Commission.

It is further ordered, That the consecutively numbered supplement to the aforesaid tariff, filed by Sea-Land Service as required by our Order of Suspension and Investigation of July 21, 1967, may be removed from said tariff.

By the Commission.

(S) FRANCIS C. HURNEY,
Assistant Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 67–6

AMERICAN UNION TRANSPORT, INC.—INCREASED RATES AND CHARGES ON IRON AND STEEL, NEW YORK TO PUERTO RICO

DECIDED OCTOBER 23, 1967

The following rates and charges of American Union Transport, Inc. on iron and steel found just and reasonable:

1. Extra-length charge of $0.65 per foot, per ton, weight or measurement, justified because of difficulty and expense in loading extra-length steel.
2. Late-delivery charge of $5 a ton, weight or measurment, justified because it assures compliance with prearranged delivery time and partially compensates carrier for costs resulting from delay.
3. Rates of $26 a ton, weight or measurement, on piling shells, nested, and $30 a ton, weight or measurement, on iron and steel, N.O.S., fall within zone of reasonableness and no reason appears for requiring change in these rates.
4. Rate $3 above N.O.S. rate ($33 a ton, weight or measurement) on cast iron justified because frailty of commodity subjects it to higher claim potential.

Method of computation of "stevedoring extras" expense as a percentage of stevedoring contract rate on general cargo found not unreasonable.

Amy Scupi for respondent.

Howard L. Cassard for Raymond International, Inc., and *Paul V. Miller* for Bethlehem Steel Export Corporation, Steamship Service Corporation, interveners.

Donald J. Brunner and *Robert P. Watkins* as Hearing Counsel.

REPORT

BY THE COMMISSION: (JOHN HARLLEE, *Chairman;* GEORGE H. HEARN, *Vice Chairman;* ASHTON C. BARRETT, JAMES V. DAY, JAMES F. FANSEEN, *Commissioners.*)

This proceeding was instituted on our own motion on January 20, 1967, to determine the lawfulness of "new rates and charges [of respondent American Union Transport, Inc. (AUT)], on iron and steel products and/or new rules, regulations, and practices affecting such rates and charges, to become effective January 19, 1967." Bethlehem Steel Export Corp., Steamship Service Corp. (Bethlehem), and Raymond International Corp. (Raymond), intervened, but Bethlehem did not participate further in the proceeding. Hearings were held before Examiner C. W. Robinson. Raymond participated in the hearings but thereafter withdrew from the proceeding. On August 8, 1967, the Examiner issued an initial decision. There was no oral argument.

The New Rates and Charges

In General

Respondent has furnished the only regular breakbulk service from the North Atlantic to Puerto Rico since September 1966. Prior to the publication of the rates, rules, and regulations underlying this investigation, respondent's tariff contained 105 commodity rates for and 125 commodity descriptions of iron and steel products. The rates thereon ranged from 96 cents a 100 pounds for bolts to \$2.98 a 100 pounds for piling shells, most of the rates ranging between \$1.25 and \$1.61.

The tariff revision effective January 19, 1967, lumped all iron and steel into two classifications; namely, (1) cast iron, and (2) iron and steel, N.O.S. (Not Otherwise Specified). The rate for the former \$33 a ton, weight (2,000 pounds) or measurement (40 cubic feet), and the rate for the latter was \$30, weight or measurement (W/M).[1] Tied to the rates were two qualifications: first, heavy-lift cargoes were required to be delivered to respondent at a prearranged place and time and, if not, were subject to an extra charge of \$5 a ton, W/M, and second, pieces in excess of 30 feet long were to be charged an additional \$1 a foot per ton, W/M. Just before the hearing, the late-delivery charge was changed to make it applicable to all iron and steel instead of heavy-lift cargo only. In addition, instead of assessing the late-delivery charge where cargo was not loaded on the vessel for which it was booked, demurrage charges were to be assessed against the cargo pending arrival of the next vessel.

Effective in early June, the extra-length charge was reduced from \$1 to 65 cents a foot per ton, W/M, and a rate of \$26.00 a ton, W/M, was published for piling shells, nested, which had previously been included in the category of iron and steel, N.O.S.[2]

---

1 Prior to this, iron and steel had moved on a weight basis of 2,240 pounds.

2 The order of investigation provides that "In the event the matter hereby placed under investigation is changed or amended before this investigation has been concluded, such changed or amended matter will be included in this investigation."

According to respondent's exhibits, its fully distributed costs for handling general cargo in 1966 were $31.88 per payable ton or $28.46 a ton of 2,000 pounds. On this basis, only four iron and steel commodities yielded a profit; these four were rated at $1.61 per 100 pounds, or $36.06 a long ton. The new rate of $30 per short ton ($33.60 per long ton) is a reduction for those four commodities, although one of them is now rated on a measurement basis. The fully distributed costs for general cargo are expected by AUT to increase about 95 cents in 1967, raising the total costs to $32.83. It is anticipated by AUT that under the new rates there will be a loss of $2.83 on cargo shipped on a measurement basis and a profit of 69 cents where freighted on a weight basis.

AUT's tariff modification represents a rate increase on about 90 percent of all items that will continue to move on a weight basis, and the rates on over half of the iron and steel tonnage carried for the periods of record have been increased. Of the iron and steel commodities carried by AUT in the latter half of 1966, only four have stowage factors substantially in excess of 40 cubic feet (one measurement ton) and, of these, only one moved in a volume exceeding 500 tons.

The Stevedoring Problem

The contract rate for AUT's New York stevedores is $9.25 per payable ton. On December 8, 1966, AUT's New York stevedores wrote AUT that the rate of $9.25 received for handling steel products, freighted on a weight basis of 2,240 pounds, cost the stevedore $12.82 per ton for stevedoring only, and that expenses for wharfage and other items brought the total gross cost to $16.72 per weight ton.[3] Relief from this situation was requested. This letter was followed by another dated January 3, 1967, informing AUT that the stevedore could no longer continue to handle steel cargoes under the then present procedure as the loss "has been far too exorbitant for us to absorb"; it was agreed, however, to continue the existing rate on steel not over 30 feet in length, with the exception of hollow steel piling.

The contract rate for the stevedore in Puerto Rico is $4.50 per payable ton. A letter from AUT's Puerto Rican stevedores dated December 30, 1966, stated that they were losing $63.24 per hour on hollow steel pipe; they also agreed to handle steel in lengths not over 30 feet at the existing rate, with the exception of hollow steel pipe.

[3] It is uncertain whether these figures relate to all iron and steel or just certain commodities. It is clear that they refer at least to extra-length steel and piling shells, nested.

Discussion and Conclusions

No exceptions have been taken with respect to the Examiner's conclusions pertaining to the extra-length charge, the late-delivery charge, and the rate on piling shells, nested. We find these rates and charges to be just and reasonable for the following reasons:

1. *Extra-Length Charge*—The difficulty and expense involved in loading extra-length iron and steel aboard AUT's vessels justify this charge. The size of the hatch openings on AUT's vessels is either 29′ 3″ or 31′ 6″, which makes it difficult and expensive to load extra-length iron and steel. Inasmuch as, as noted above, the New York and the Puerto Rican stevedores served notice on AUT that they would no longer handle steel over 30 feet in length at the then current contract rates, stevedoring contract rates for all extra-length steel will be renegotiated. Respondent has been unable to verify its exact cost for handling extra-length iron and steel. It estimates, however, based upon evidence of the cost to the stevedores of handling extra-length steel and estimates of the revenue which would have been earned if the $0.65 charge had been in effect, that the $0.65 charge will be sufficient to enable AUT to compensate the stevedores for the cost of handling this cargo.

2. *Late-Delivery Charge*—Because steel must be loaded in the bottom of the ship for reasons of stability, failure to have it delivered on time would either hold up loading of other cargo or result in the shutting out of the steel after the other cargo is loaded. Steel comes to the terminal in rail cars and frequently does not arrive at the appointed time—between December 1966 and April 1967, 21 shipments (2,355,728 pounds) were late-delivered and loaded on subsequent ships; there were other late shipments which held up loading. The late-delivery charge is justified as it more nearly assures compliance by the shipper with prearranged delivery time and partially compensates AUT for costs resulting from the delay in delivery and loading. The reasonableness of the charge is further supported because it is not assessed if the ship is not held for cargo, but rather demurrage is assessed against the cargo pending arrival of the next ship.

3. *Piling Shells, Nested*—This commodity has a stowage factor of 90 (ratio of one weight ton to 2.18 measurement tons). For this reason, it is expensive to handle. The New York stevedore estimates loading at the rate of 12.3 long tons an hour. Of the iron and steel commodities handled by AUT in the second half of 1966, only piling shells exceeded 500 tons; furthermore, this commodity was one of only four whose stowage factors exceeded, to any great extent, 40 cubic feet to the ton. During that period, piling shells totaled about 42 percent of all steel

moving via AUT in the trade. Intervener Raymond has been the only shipper of the commodity, but there was no movement between early 1967 and the time of hearing. However, inasmuch as the stevedores are paid as the cargo is freighted, the shift to a W/M basis for this commodity should allow the stevedores to recover expenses should the commodity begin to move again, since they will earn 2.18 times their previous amount. The return to AUT is slightly less than the total of fully-distributed costs but well in excess of its total stevedoring costs on this commodity.[4]

The only ultimate conclusion of the Examiner to which Hearing Counsel except is his finding with respect to the justness and reasonableness of the $30 rate for iron and steel, N.O.S., contending that all iron and steel rates should be $26 per short ton. Hearing Counsel do not except to a $3 differential above these rates for cast iron because of the susceptibility of this commodity to breakage and increased claims.[5]

In support of its $26 figure, Hearing Counsel contend that fully distributed costs, when properly computed, should not exceed $30. AUT's costs, they contend, have been overstated because one of the items of expense, the so-called stevedoring "extras"[6] was improperly computed. AUT had computed this extra charge, which experience had shown to be 36.39 percent of the stevedoring contract in New York, and 99.97 percent of the stevedoring contract rate in San Juan, as a percentage of the stevedore contract rate on general cargo. Hearing Counsel contend that because the contract rate on general cargo is higher than the contract rate on vehicles, which are the highest revenue producers for AUT and account for its greatest tonnage,[7] the use of a percentage of the contract rate on general cargo to compute the extra charges inflates and distorts the dollar amount of extras. They contend that the proper method of determining the figure for extras per payable ton would be to divide the total dollar amount of extras by the

[4] Hearing Counsel except to the Examiner's quotation from a letter from Raymond's counsel stating that Raymond was "constrained to withdraw from the proceedings, with regret that the applicable law does not lend support to our grounds for intervention", arguing that the letter was not subject to cross-examination and argument to discover the soundness of the basis for its opinion. The letter is a part of this proceeding, but only for the purpose of showing the opinion of its writer It appears that the Examiner's quotation was intended only for this purpose. At any rate, the letter is neither competent evidence nor testimony on the propriety of the rate on piling shells, nested, and no reliance is placed on it herein.

[5] The differential, of course, should establish a rate of $29 rather than $33, insofar as Hearing Counsel are concerned

[6] This item includes overtime, extra labor, detention, penalty time, carpentry and dunnage, lashing and unlashing in New York, and clerks, checkers and watchmen, in addition to the factors just enumerated at San Juan.

[7] Hearing Counsel ask the Commission to take official notice of these facts which are contained in AUT's General Order 11 submission for 1966.

total number of tons carried by AUT. The extras generally must be attributed evenly to all cargo and not only the general cargo, Hearing Counsel maintain, either because they do not relate directly to the commodity involved or there is no way to determine their relationship to the commodity. Although Hearing Counsel contend that a proper calculation of extra expense will reduce the dollar amount of respondent's fully-distributed costs substantially below \$30 per ton, they admit that "the exact amount of the reduction cannot be calculated from the record," which lacks the figure for the total dollar amount of extras.[8]

We agree with the Examiner that the \$30 rate on iron and steel, N.O.S., is just and reasonable. We cannot say that the method of calculating the "extras" employed by AUT is unreasonable. The computation of extras as a percentage of the stevedoring rate on the commodity under investigation is supported by the record in this proceeding, which indicates that at least some of the extra expense items have a relation to the commodities involved inasmuch as they are functions of productivity and the contract rate paid the stevedore depends upon his productivity.

Most iron and steel commodities transported at the lesser \$26 rate contended for by Hearing Counsel would not realize a return above AUT's fully-distributed costs. Revenue on iron and steel stowing 40 cubic feet per ton would fall short of fully-distributed costs by \$6.83. Nearly 58 percent of all iron and steel carried during the second half of 1966 was other than piling shells and, with the exception of three commodities, all stowed less than 40 cubic feet to the ton. There are no protests extant to the \$30 rate, and no reason appears which would require a \$26 rate. Indeed, as noted above, AUT anticipates that under its \$30 rate, there will be a loss of \$2.83 on cargo shipped on a measurement basis.

We concur with the Examiner and the parties that the rate on cast iron, \$3 higher than the rate on iron and steel, N.O.S., is justified by the frailty of this commodity, which subjects it to a higher claim potential.

Hearing Counsel except to the Examiner's statement that, inasmuch as the subject rates and charges had not been suspended, the burden of

---

[8] A mathematical representation of the methods of computing extras is:

Hearing Counsel

$$\frac{\text{Total \$ amount of extras}}{\text{Total number of payable tons}} = \text{extras/per payable ton}$$

AUT

$$\frac{\text{Total extras}}{\text{Total straight time}} (\%) \times \text{stevedoring contract rate on general cargo} = \text{extras/per payable ton}$$

proof was upon Hearing Counsel to show that they are unjust or unreasonable rather than upon AUT to show that these rates and charges are just and reasonable. We agree with AUT that this question is not determinative of this proceeding inasmuch as AUT has justified its rates and charges on the basis of sufficient evidence of record.

This proceeding is discontinued.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 66–68

In the Matter of:

Agreements Nos. T–1953 and T–1953–A:

Terminal Lease Agreements Between the City of Oakland and Matson Navigation Company

Initial Decision Adopted October 27, 1967

A lease of land from a port for a marine terminal and freight station to a common carrier by water at a fixed term and rent may be approved without the inclusion of review provisions since section 15 of the Shipping Act, 1916, requires continuing agency scrutiny of such agreements.

J. Kerwin Rooney for the Port of Oakland.

David F. Anderson for Matson Navigation Co.

Roger Arnebergh, Edward C. Farrell, and *Walter C. Foster* for city of Los Angeles.

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

Report

By the Commission (John Harllee, *Chairman;* George H. Hearn, *Vice Chairman;* Ashton C. Barrett, James V. Day, James F. Fanseen, *Commissioners*):

The Commission instituted this proceeding on December 14, 1966, to determine whether Agreement No. T–1953, a lease of land for use as a terminal from the city of Oakland to Matson Navigation Co., and agreement No. T–1953–A, a lease of land between the same parties for use as a freight station, should be approved pursuant to section 15 of the Shipping Act, 1916. Examiner Herbert K. Greer served an initial decision on July 24, 1967. We heard oral argument on October 11, 1967.

Only Hearing Counsel excepted to the Examiner's initial decision. Hearing Counsel argue that the Examiner erred in recommending approval of the terminal lease agreements without modifying them to incorporate rent review provisions under which the parties would periodically recalculate the amount of rent to assure that this amount would remain at a compensatory level. Hearing Counsel also contend that the Examiner should not have found that the proposed rent was compensatory, since the costs upon which the rent is based are estimated costs rather than costs which will actually be experienced. Hearing Counsel made these same arguments to the Examiner. Upon reviewing these exceptions, we concluded that the Examiner's findings and conclusions on the issues presented are correct. Accordingly, we hereby adopt the Examiner's decision, as amended (a copy of which is attached hereto and made a part hereof), as our own and for reasons set forth in the decision,

It is ordered, That agreements Nos. T–1953 and T–1953–A are hereby approved and this proceeding is discontinued.

By the Commission.

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 66–68

In the Matter of:

Agreements Nos. T–1953 and T–1953–A:
Terminal Lease Agreements Between the City of Oakland and Matson Navigation Company

Agreement No. T–1953, a terminal lease, and Agreement No. T–1953–A, a lease of land for use as a freight station, between the Port of Oakland and Matson Navigation Co. for a period of 20 years at a fixed monthly rental found compensatory and not prejudicial to any particular port or terminal.

J. Kerwin Rooney for the Port of Oakland.

David F. Anderson for Matson Navigation Company.

Roger Arnebergh, *Edward C. Farrell*, and *Walter C. Foster* for city of Los Angeles.

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

Initial Decision of Herbert K. Greer, Presiding Examiner [1]

The city of Oakland, acting by and through its board of port commissioners (hereinafter Oakland or the port) entered into two agreements whereby it leased to Matson Navigation Co. (hereinafter Matson) for a term of 20 years at a fixed rental, a marine terminal upon which the port is to construct a wharf and related facilities, and land for a freight station upon which Matson is to construct the buildings and facilities necessary to its operation. These lease agreements were filed with the Federal Maritime Commission pursuant to section 15 of the Shipping Act, 1916 (the act). Encinal Terminals and the city of Los Angeles protested approval thereof. After considering the protests which in part raised issued already decided by the Commission in its recent reports, the agreements were approved to avoid delay in the construction program then in progress, but this proceeding was instituted for the limited purpose of determining whether the rentals

[1] This decision, as amended, became the decision of the Commission on Oct. 27, 1967.

agreed upon by Oakland and Matson are noncompensatory resulting in prejudice to any particular port or terminal.

Encinal terminals did not participate in this proceeding.

THE FACTS

1. Oakland, a municipal corporation of the State of California, owns port and terminal facilities as well as land and water areas capable of development for use as terminals and related activities.

2. Oakland and Matson, a carrier subject to the act, entered into negotiations for the lease of a terminal and a freight station. Various arrangements were considered including an arrangement whereby Oakland would construct all facilities necessary for the operation of the terminal and freight station and Maston would pay rental under a maximum-minimum provision. The arrangement ultimately agreed upon was that Oakland would construct the wharf and related terminal facilities and Matson would construct all the facilities necessary for the operation of the freight station. The parties agreed on a fixed monthly rental for a lease term of 20 years.

3. At the time negotiations were completed, 7.7 acres of the total of approximately 42 acres involved was filled land, the balance being submerged land.

4. On May 2, 1966, Oakland and Matson executed and filed with the Commission pursuant to section 15 of the Act a lease and agreement for the marine terminal, designated by the Commission as agreement No. T–1953, and simultaneously executed and filed a lease and agreement for land to be used for the freight station, designated by the Commission as agreement No. T–1953–A.

5. Agreement No. T–1953 grants to Matson a leasehold interest for a term of 20 years in 30.858 acres of wharf area and 2.324 acres of berth area to be used for docking and mooring vessels and for the receipt, handling, storage, delivery, and transportation of cargo and passengers and uses incidental thereto. Oakland is to bear the cost of constructing the wharf and related structures and the cost of filling the submerged land. Agreement No. T–1953–A grants to Matson a leasehold interest for a term of 20 years in 11.223 acres of land upon which Matson is to construct all facilities necessary for the operation of the freight station at a cost estimated to be $3,750,000. Oakland agrees to bear the cost of filling the submerged land involved in both leases and to bring utility lines and roads to the boundary of the tracts, the work mainly consisting of a short extension of a sewerline.

6. Agreement No. T–1953 provides for payment to Oakland of a monthly rental of $26,000 which is computed as one-twelfth of the sum of the following items:

(1) 7 percent of the value at $60,000 per acre of an area of 6.33 acres of filled land; the amount agreed to be $26,586.

(2) 7 percent of the value at 25 cents per square foot of an area of 1,068,400 square feet of submerged land; the amount agreed to be $18,697.

(3) 7 percent of the value at 25 cents per square foot of 101,250 square feet of berthing area; the amount agreed to be $1,772.

(4) $2,160, the agreed amount for maintenance dredging.

(5) 7 percent of the cost of improvements which are described in paragraph 6(a)I of the agreement as:

Land development

Fill all land area so that the average elevation at the top of the fill will be at least plus ten (10) feet above Mean Lower Low Water when the predicted fill settlement for the first twenty-five (25), years has occurred

plus annual charges for overhead at 0.5 percent of the cost of such improvements; the amount agreed to be $72,355.

(6) 7 percent of the cost of improvements which are described in paragraph 6(a)II of the agreement as:

Wharf, Related Structures and Other Development

A. Construct a concrete wharf one thousand two hundred eighty-two (1,282) feet long.

B. Structures for mooring lines at each end of the wharf.

C. Fender system suitable for Matson ships in service or under construction at the date of the execution of this lease and agreement.

D. Crane rails.

E. Mooring bitts and cleats.

F. Utility and other lines described in paragraph 5 as: Install sewerage, gas, water, telephone, electrical lines, and street and rail lines to a point on the boundary of the premises.

G. Dredging described in paragraph 12 as: Maintain berthing space alongside the wharf to a depth of 53 feet Mean Lower Low Water.

plus annual charges for overhead at 0.5 percent of such cost, for maintenance at 0.5 percent of such cost, and for depreciation at 2 percent of such cost; the amount agreed to be $157,430.

(7) An agreed amount of $33,000 representing a contingency to cover increased financing of the port.

Matson has an option to renew the lease for two 10-year periods, and in event the option is exercised the rental is to be:

(1) Seven percent of the appraised fair market value of the land and berthing space demised, and

(2) Seven and one-half percent of the original cost of the wharf and related improvements constructed by Oakland under paragraph 6(a) of the lease plus annual charges for depreciation, maintenance, maintenance dredging, and insurance.

7. Agreement No. T-1953-A grants to Matson a leasehold interest for a term of 20 years in 11.223 acres of land to be used by Matson for the receipt, handling, storage, delivery, and transportation of cargo and passengers and for uses incidental thereto. Matson agrees to pay Oakland a monthly rental of $3,333.33 which is computed as one-twelfth of the sum of the following items:

(1) Seven percent of the value at $60,000 per acre of an area of 59,500 square feet of filled land; the amount agreed to be $5,740.

(2) Seven percent of the value at 25 cents per square foot of an area of 429,370 square feet of submerged land; the amount agreed to be $7,514.

(3) Seven percent of the cost of improvements (fill) plus annual charges for overhead at 0.5 percent of such cost; the amount agreed to be $26,746.

Matson has the option to renew the lease for two 10-year periods at a rental based on seven percent of the then appraised market value of the land.

8. Both leases are to become effective upon approval by the Commission; however, rental is not payable until January 1, 1969, which is the date the 20-year terms commence. Should Matson use any portion of the premises before that date and proceed to install Matson improvements, an interim rent of $0.007 per square foot of the area used is to be paid.

9. To finance the improvements to the leased land for which Oakland is responsible, and for other improvements planned by Oakland but not concerned in these leases, revenue bonds in the total sum of $6 million were authorized by the port authorities. Of the total received from the sale of the bonds, approximately $3 million will be used for improvements and facilities involved in the Matson leases. The official statement issued by Oakland preliminary to the sale of the bonds contained the information that leases had been executed with Matson which assured the port a fixed return, which information contributed to the salability of the bonds.

10. Upon termination of the lease Oakland retains title to all improvements and facilities provided at its expense, and to improvements and facilities provided at Matson's expense if Matson does not remove them within 6 months after termination.

11. Oakland's appraisal of the land represents the fair value thereof as of the time the agreements were executed.

12. A substantial portion of the fill on submerged land has been completed at a cost below Oakland's estimate.

13. The estimate for the cost of constructing the wharf and related facilities was $1,442,250. The low bid received for performance of the construction was $1,750,612.

14. The relationship between Oakland and Matson is that of landlord and tenant; Oakland will have no operational responsibility relating to the premises leased.

DISCUSSION

The issue is whether the leases are noncompensatory resulting in prejudice to any particular port or terminal. The term "compensatory" is given the connotation of fair and reasonable return on investment in accordance with that portion of the so-called Freas formula adopted by the Commission in *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57 (1948), and in other proceedings involving terminal rentals.

Los Angeles contends that the record is insufficient for a determination of whether the rental is compensatory. It seeks disapproval of the method used by Oakland in establishing a rent base, contending that the land should be appraised at its market value after fill has been completed rather than considering the value of submerged land plus the cost of the fill. Los Angeles further contends that the rental should include a factor for general and administrative port expense but that provision is made only for the expense of administering the leases.

Hearing Counsel consider the agreements as only theoretically compensatory because based on Oakland's estimates of its costs for improvements which may not be representative of actual costs. They advocate that actual costs determined after completion of improvements should be used. They also contend that the land should be appraised after fill is completed, such appraisal to be compared to Oakland's original appraisal plus the cost of fill, the greater being determinative. They deem it contrary to the public interest to give estimates the stature of established costs and recommend a requirement for review when fill and other improvements have been completed and a modification of the rent if actual costs exceed estimated costs. They join Los Angeles in recommending that approval be conditioned upon the inclusion in the leases of a provision for a periodic review of the rent during the lease term and modification of the rent based on the value of the land and improvements at the time of such review.

Estimates and actual costs

Hearing Counsel's concern is that a determination of the compensatory nature of the lease on this record would establish a precedent that estimated costs have the stature of actual costs; that such a precedent would precipitate action by all ports competing for carrier patronage to lease terminals at rents based on estimates thus causing instability to the detriment of commerce. This would be a real concern if estimates were accepted without proof of a reasonable relationship to actual costs. The record in this proceeding supports the conclusion that the estimates were realistic.

The port engineer calculated the total cost of the wharf for the purpose of establishing a rent base at $1,442,250. Bids were solicited for this work and received on March 6, 1967. The low bid was $1,750,612, an increase over the estimate of approximately $308,362. Had actual cost been used as the rent base, the rental would have been approximately $2,100 per year more than provided for in the lease. As hereinafter discussed, the port officials were aware that such a situation might arise and included in the rent a contingency factor. As to the cost of the fill, testimony was adduced at the hearing that a substantial portion of the fill had been completed at less than estimated cost; and that the port engineer, experienced in such land improvement, was confident that the cost of the balance of the fill would be within his estimate.

This proceeding is not, as Los Angeles suggests and Hearing Counsel imply, premature. The significant portion of the rent base is land values, the cost of the fill, and the cost of wharf construction. The record provides sufficient evidence relating to all three of these major factors upon which to base a determination of whether the rental is noncompensatory.

The basis for establishing land values

Oakland's computation to establish a rent base includes valuation of the land in two categories: (1) $60,000 per acre for filled land and (2) $10,900 (approximately) per acre for submerged land plus the cost of the fill. Los Angeles contends that the proper land valuation should be $60,000 per acre for the entire tract for the reason that when Matson takes possession, all of the land will have equal value. In support of this concept, it cites the so-called Freas formula and its reference to "present market value." This does not support the argument that future values should be use, that is, values after the negotiations have been consummated. The circumstances existing at the time of the negotiations must be considered. The port owned unimproved land which was not producing a return. An expenditure of large sums was necessary to place the land in revenue producing condition. They deemed it beneficial to contract for an assured income from the land prior to spending the public's money for land improvement. To obtain this assured income, it was necessary to establish a fixed rental. Matson, agreeing to invest $3,750,000 in improvements on port property reasonably required a fixed rental so that it might determine the economic feasibility of its investment.

Los Angeles is protesting Oakland's factual computations. While Oakland's method of computing the value of the land is material to this investigation, the issue is whether the ultimate result of the computations provides for a fair return on the port's investment. As the Commission held in *Agreement T-4; Terminal Lease Agreement, Long Beach, California*, 8 F.M.C. 521, 532 (1965):

> While we believe that factual computations of the amount of rental in a terminal lease are material to the question of whether the agreement is approvable, a determination that the lease of one facility does not return as much as it might do ideally is not in itself determinative.

Further:

> The primary conclusion to be drawn here is that Sea-Land (the lessee) was able to negotiate a favorable rental, and that Oakland and Long Beach in their own judgment voluntarily entered into these arrangements. * * * Since the port as a public body experienced in terminal management was satisfied with the arrangement, the Commission would not dispute the judgment of the port in negotiating with prudent regard for the public's investment.

There is no inflexible rule applicable to establishing land values for the purpose of computing rental for future occupancy. It is a matter addressed to the judgment of the Oakland officials and is to be considered in the light of the circumstances existing. This proceeding is to be distinguished from a rate case; however, the principle announced by the Commission in *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57, 70 (1948), is applicable:

> It is realized that some basis must be used in computing carrying charges and respondents are not foreclosed from using any basis which they are prepared to justify as producing reasonable rates called for by their agreement.

Oakland's justification is that the rental will produce a 7 percent return on its investment in land. "Investment" is a term of varied meanings but it was not unreasonable for Oakland to consider its investment as the value of the land plus the cost of putting it in a productive condition. Whether they might have obtained a higher rental by using another method is speculative. It is noted that even had they employed the method advocated by Los Angeles and added $400,000 to the rent base established for the leases, the present rental would return 6½ percent, not a noncompensatory return. Also to be considered is the fact that the terminal lease includes a charge for depreciation but that the rental remains constant regardless of the depreciated value of the wharf and related structures.

The method of land valuation employed by the port was a reasonable exercise of good business judgment.

Port overhead allocated to the leases

Both leases include a charge of 0.5 percent of the cost of improvements for overhead. Los Angeles contends that this percentage does not include an allocation for indirect and general port costs and that other users of port facilities will be required to bear such costs. Oakland contends that it applies this percentage to all leases as to which it acts only as landlord and that the charge does include a contribution to general and administrative costs of the port.

The record does not clearly establish either contention. It does establish that the 0.5 percent covers the cost of servicing and billing a lease and provides for amortizing the cost of negotiating a lease. It is further established that Oakland has found this percentage fair and reasonable when applied to all landlord-tenant arrangements wherein the port acts solely as landlord. To conclude that the provision for overhead in these leases does not include a fair allocation of general and administrative expense would be to conclude that many other port leases fail to make adequate contribution, thus unfairly burdening operational activities in which the port is involved. Although a fair contribution to general and administrative expense should be included in the rentals, this issue has been over-stressed. A 0.5 percent of the cost of improvements involved in these leases is not an insubstantial amount. The record shows that the cost of servicing and billing the leases will be minor. In any event, the amount involved would not render these leases noncompensatory, that being the major issue to be determined. Also, consideration is to be given to the provision for contingencies included in the rental.

The rental includes $33,000 per annum for contingencies

Matson agreed to invest not less than $3,750,000 on Oakland property and negotiated for a fixed rental. As the negotiations were described by the port engineer:

> Matson requested a firm offer rather than a proposal which was contingent on costs, actual costs. The Port requested in turn that the Port was going to take the risk of the play of the marketplace, if you will; that we would have to have an additional rental to cover the contingencies for this risk, and we determined that an amount of $33,000 of additional rental per year would be an adequate contingency to cover any possible increased cost to the Port.

The record furnishes no basis for even speculation that Oakland's costs will be so far above estimates that the contingency amount will not serve to maintain a fair return on the port's investment. As above discussed, the major elements of port expense have been shown to be within reasonable range of the estimates. The contingency applies only to the terminal lease but Oakland has no obligation to improve the land to be used as a freight station other than to fill it, the cost of which has been determined to be within estimates. The $33,000 per annum is over and above the 7 percent return applied to land values, the cost of land development, the cost of the wharf and related facilities. It is in addition to the amounts provided for maintenance dredging, for general maintenance, for overhead, and for depreciation. It is payable regardless of whether or not costs actually increase. It is sufficient to cover any proven or forseeable increase in port costs and to contribute to the Port's general and administrative expense.

Provision for periodic review and modification of rental

Hearing Counsel and Los Angeles advocate that approval be conditioned upon modification of the leases to include a provision for periodic review and adjustment of the rental in accordance with the then value of land and improvements. Such a provision would not be objectionable had the parties included it in their agreements but mandatory review would require expenditures relating to appraisals and negotiations whether or not changed circumstances justified re-examination of the rental. Any section 15 agreement is subject to review if changed circumstances so require. Section 15 of the act provides 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, * * * or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest * * *.
>
> Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; * * *.

A provision for periodic review is not required.

ULTIMATE CONCLUSIONS

The port's investment was properly calculated for the purpose of fixing the rental as the value of the submerged land and the value of the filled land at the time the lease agreements were entered into plus the estimated cost of all improvements to be made by the port.

The values used for the land, and the estimated cost of improvements, are found to have been reasonably accurate.

The rental agreed upon will provide a 7 percent return on the port's investment, which return is fair and reasonable.

The contingency allowance of $33,000 per annum included in the rental is sufficient to cover any foreseeable costs not included in the rental computation.

There is no evidence to support a finding that any particular port or terminal will be prejudiced as a result of the reserved rental.

"Continued approval should be and hereby is granted Agreements No. T–1953 and No. T–1953–A."

(Signed) HERBERT K. GREER,
Presiding Examiner.

JULY 24, 1967.

FEDERAL MARITIME COMMISSION

Docket No. 1083[1]

INVESTIGATION OF RATES IN THE HONG KONG-UNITED STATES ATLANTIC AND GULF TRADE

Decided November 2, 1967

Investigation of rate war in the inbound Hong Kong-United States Atlantic and Gulf trade to determine whether the rates were so unreasonably low as to be detrimental to the commerce of the United States under the criteria of section 18(b)(5) of the Shipping Act will be discontinued on the ground of mootness where more than 5 years have elapsed since the questioned rates were in effect and where relatively stable conditions have returned to the trade.

A tariff rule which by its own terms restricts the availability of a valuable service to shippers and consignees of Chinese descent is unjust or unreasonable in violation of the second paragraph of section 17 of the Shipping Act.

A group of carriers which did not operate in the Hong Kong-United States Atlantic and Gulf Trade and which had been named as respondents solely on account of the existence of a joint interconference agreement with the New York Freight Bureau (Hong Kong) will be dismissed as respondents where the record contains no evidence of any actual participation in the matters under investigation.

Where violations of section 18(b)(3) of the Shipping Act are found to have occurred the fact that the offenses were isolated incidents or inadvertent are pleas in mitigation and not a legal basis for dismissal of the charge.

Record establishes that Thai Lines, Ltd., engaged in the granting of illegal rebates in violation of sections 16 Second and 18(b)(3) of the Shipping Act.

Thomas K. Roche, *Sanford C. Miller*, and *William F. Faison* for respondents De La Rama Lines, Barber-Wilhelmsen Line, Kawasaki Kisen Kaisha, Ltd., Nippon Yusen Kaisha, Ltd., Yamashita-Shinnihon Line (Yamashita-Shinnihon Steamship Co., Ltd.), and A. P. Moller-Maersk Line.

[1] Docket No. 1122, a complaint proceeding instituted by American Export Lines, Inc., against Thai Lines, Ltd., and 90 special docket applications (Nos. 269–281, 283–289, 291–311, and 314–363) requesting that Thai Lines, Ltd., be authorized to pay reparations for certain overcharges and to waive the collection of certain undercharges, were consolidated with this investigation. Docket No. 1122 was subsequently dismissed by order of the Commission dated May 15, 1964, and the special docket applications were denied by Commission report and order served November 12, 1965.

Seymour H. Kligler, *Elkan Turk, Jr.*, *Thomas A. Liese* and *Herman Goldman* for respondents Japan Line, Ltd. (formerly Daido Kaiun Kaisha, Ltd.); Lykes Bros. Steamship Co., Inc.; Maritime Co. of the Philippines, Inc.; Mitsui O.S.K. Lines Ltd. (formerly Mitsui Steamship Co., Ltd. (Mitsui Line), and Osaka Shosen Kaisha, Ltd.); States Marine Lines-Joint Service; United Philippine Lines, Inc.; and United States Lines Co. (American Pioneer Line).

Warner W. Gardner and *Robert T. Basseches* for respondents American President Lines, Ltd., and Waterman Steamship Corp.

Stanley O. Sher, *John G. Poles*, and *Michael Patestides* for respondent Marchessini Lines.

Charles F. Warren and *John P. Meade* for respondents American Mail Line, Ltd.; Java Pacific & Hoegh Lines, Klaveness Lines—Joint Service; Knutsen Line—Joint Service; National Development Co.; Nissan Kisen Kaisha, Ltd.; P. & O.-Orient Lines—Joint Service, Pacific Far East Line, Inc.; and States Steamship Co.

Richard W. Kurrus, *James N. Jacobi*, and *Donald L. Caldera* for respondent American Export Isbrandtsen Lines, Inc.

George G. Platow and *Edward F. Platow* for respondent China Union Lines, Ltd.

Burton H. White, *Elliott B. Nixon*, and *Henry F. Minnerop* for respondent Orient Overseas Line.

Edwin Longcope, *David I. Gilchrist*, and *Robert W. Mullen* for respondent Zim Israel Navigation Co., Ltd.

Alan F. Wohlstetter for respondent Thai Lines, Ltd., and Motorships, Inc.

Leon Silverman, *Max Kampleman*, and *Keith David*, *pro se*, for respondent Sabre Line.

George A. Michel and *Robert J. Lawton* for respondent Eddie Steamship Company, Ltd.

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

REPORT

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

This investigation was instituted by order of the Commission served on December 10, 1962. The original purpose of the proceeding was to determine whether the Commission should disapprove any rate in the trade from Hong Kong to United States Atlantic and Gulf ports as being so low as to be detrimental to the commerce of the United States under the authority of section 18(b)(5) of the Shipping Act, 1916. The scope of the investigation was subsequently expanded by order served June 20, 1963, to include a determination of whether any respondents had violated sections 14, 16, 17, or 18(b)(3) of the act. Hearings were held before John Marshall, presiding examiner, in January 1963, April, May, June, and July 1964, and November 1966.[2] The examiner's initial decision was served on April 20, 1967. Oral argument on the parties' exceptions was held on August 2, 1967.

FACTS

Prior to 1962, the inbound trade between Hong Kong and United States ports on the Atlantic and Gulf coasts was served by the members of the New York Freight Bureau (Hong Kong) and a single, nonconference carrier, Isbrandtsen Steamship Co.[3] Between 1955 and 1962, the rates in this trade were relatively stable. During this same period, however, the volume of cargo increased by 900 percent.

During 1962, four commodities constituted more than 70 percent of the cargo lifted at Hong Kong. These were: artificial flowers, footwear, toys, and cotton goods (generally classified for tariff purposes as either piece goods or manufactured goods). Most of the cargo in this trade was discharged at New York.

The conference employed an approved dual-rate system and the contract rate on the four commodities under consideration was generally about 15 percent below the noncontract rate. Isbrandtsen's rates were about 13 percent below the conference contract rates.

Late in 1961, Sabre Line entered the trade as an independent carrier and instituted rates which, with the exception of footwear, were equal to or less than Isbrandtsen. Soon thereafter, Zim Israel entered the trade and published rates on artificial flowers, toys, and footwear which were slightly below Sabre's. On January 15, 1962, Isbrandtsen lowered its rates on footwear and a month later on cotton goods.

In March 1962, Orient Overseas Line became the fourth independent line in the trade. It set its rates at about the same level as the other independents.

Successive rate decreases followed both by the independents and by the conference.

During the summer of 1962, three additional independent lines entered the trade. They were Eddie Steamship Co., Ltd., China Union Lines, Ltd., and Thai Lines, Ltd. Waterman Steamship Co. resigned

[2] Conclusion of the hearings was delayed until November of 1966 pending court enforcement of certain subpenas duces tecum. *F.M.C.* v. *Caragher*, 364 F. 2d 709 (2d Cir. 1966).

[3] Isbrandtsen subsequently became a division of American Export Lines, Inc., which has since been renamed American Export Isbrandtsen Lines, Inc.

from the conference and began operations as an independent. (Later it rejoined the conference and several months thereafter withdrew entirely from the trade.)

Rates continued to be lowered successively by both the independent lines and the conference.

The following table shows these reductions for the year 1962 and some of the increases in rates since.

Rate reductions in Hong Kong-United States Atlantic and Gulf trade

1962	Artificial flowers		Cotton manufactured goods		Cotton piece goods		Footwear		Toys	
	NYFB [1]	Independent [2]	NYFB	Independent	NYFB	Independent	NYFB	Indedendent	NYFB	Independent
January	32.25	27.75	45.75	38.00	40.50	28.00	39.50	32.00	35.00	31.50
February	32.25	27 75	45.75	38.00	40.50	22.00	39.50	32.00	35.00	31.50
March	30.00	27.50	45.75	38.00	40.50	21.50	35.50	32.00	32.00	30.00
April	30.00	24.00	45.75	38.00	40.50	21.50	35.50	31.00	32.00	28.00
May	30.00	24.00	45.75	38.00	40.50	21.50	35.50	31.00	32.00	28.00
June	30.00	24.00	45.75	38.00	40.50	21.50	35.50	31.00	32.00	28.00
July	30.00	24.00	45.75	38.00	40.50	21.50	35.50	31.00	32.00	27.50
August	24.00	23.50	37.00	36.00	40.50	21.50	27.00	27.00	28.00	27.50
September	24.00	22.00	37.00	30.00	40.50	20.00	27.00	27.00	28.00	24.00
October	24.00	22.00	37.00	30.00	40.50	20.00	27.00	24.00	28.00	23.50
November	18.00	16.50	25.00	22.50	40.50	20.00	20.00	18.00	20.00	18.00
December	18.00	16.50	25.00	22.50	18.00	18 00	20.00	18.00	20.00	18.00
January 1963	18.00	18.00	25.00	22.50	18.00	18.00	20.00	18.00	20.00	18.00
January 1964	21.00	21.00	32.00	30.00	28.00	22.00	24.00	20.00	24.00	23.00
January 1967	29.50	24.00	41.50	34.00	36.00	26.00	32.00	26.00	31.50	26.00

[1] New York Freight Bureau (Hong Kong).
[2] Independent Lines (lowest nonconference rate shown).

The conference generally attempted to maintain its rate levels through 1962, but as more and more of the cargo carried was lost to the independent lines—especially to Sabre (which at one point carried as much as 15 percent of the total cargo lifted)—it decided to reduce its rates drastically to meet competition.

In the minutes of a meeting of the conference held at Kyoto, Japan, November 1, 1962, the following is recorded:

> Having regard to the conditions of instability brought into the trade by the methods adopted by nonconference lines, and having regard to the obligation of the conference towards contract shippers, it was agreed that the conference rates on the more important commodities moving in the trade should be reduced to the levels quoted by the nonconference lines, due account being taken of the rebates being paid by such carriers.

Following this meeting the conference reduced its rates to a level several dollars below Sabre's rates and approaching the lowest of the published independent rates. Sabre immediately filed a telegraphic protest with the Commission alleging that the rates had become unreasonably low and detrimental to the commerce of the United States. This proceeding was initiated soon thereafter.

By the end of 1962, Sabre left the trade and by the middle of 1963, Eddie and Thai Lines did likewise. In the case of Eddie, it appears that it was motivated as much by an increase in the tramp market as by the reduction in rates in this trade.

Beginning in April 1963, the conference increased its rate on cotton piece goods from $18 to $25 and on January 1, 1964, there was a general increase on all of the commodities involved averaging approximately 21 percent. The remaining four nonconference lines followed suit and raised their respective rates shortly thereafter. By January 1967, the rates—both conference and nonconference—had increased substantially though in no instance to the levels they were in January 1962.

Issues Presented

The primary issue in this case is the status of rates prevailing in 1962–63 under section 18(b)(5) or whether this issue has become moot.

Other issues include: whether a group of carriers whose only connection with the trade in question is through an interconference agreement should be dismissed as respondents, the legality of a tariff rule which provides for a valuable service exclusively to shippers and consignees of Chinese descent, and whether pleas of inadvertence or isolated incident are valid defenses to violations of section 18(b)(3).

Discussion

In his initial decision, presiding Examiner John Marshall concluded that all of the respondent carriers except Sabre, charged rates which were so unreasonably low as to be detrimental to the commerce of the United States in violation of section 18(b)(5) of the Shipping Act, 1916.

He found that all respondent carriers in the trade have tariff provisions relating to "Chinese merchandise" or "Chinese provisions" which provide rates that are unjustly discriminatory to shippers not of Chinese descent and which grant an undue and unreasonable preference and advantage to particular persons and descriptions of traffic.

The examiner found Thai Lines, Ltd., to have granted rebates in violation of sections 16, 17, and 18(b)(3). The examiner also concluded that Thai Lines, Ltd., China Union Lines, Isbrandtsen Steamship Co. and Eddie Steamship Co. had charged and collected rates other than those lawfully on file with the Commission in violation of section 18(b)(3) of the act.

As remedial action, the examiner recommended the deletion of the offending language contained in the tariffs which would grant a preference to shippers and consignees of Chinese descent and directed the collection of undercharges by those found to have violated section 18(b)(3).

This case was the first to be brought under section 18(b)(5) of the act as amended in 1961.[4] It has continued now nearly five years, long since the cessation of the rate war in the Hong Kong-United States Atlantic and Gulf trade. The rate war, which was the occasion of this investigation in the first place, was over almost before this proceeding got underway. The facts of record, the costs, and competitive pressures all pertain to this formerly chaotic situation. The trade has long since regained an element of stability. Because of the protracted delay due in large measure to the necessity for subpena enforcement proceedings in the courts, we conclude that the investigation should be discontinued on the ground that it has become moot.[5]

This is not to say that in an appropriate case the Commission could not consider an 18(b)(5) case simply because the carrier or conference involved chose to increase (or decrease) its rates at the 11th hour. However, some useful purpose must be served before the Commission will undertake to examine a carrier's now-defunct rate structure. Similarly, the Commission will not consider out-dated economic evidence upon which the findings of unreasonableness and detriment to commerce must be based. However, being mindful of the futility in acting with dispatch to regulate the rates under investigation here, it is incumbent upon us to attempt to establish guidelines and procedures for handling such proceedings with dispatch in the future.

In two previous investigations, we have embarked upon a program to establish criteria for findings under section 18(b)(5). In *Iron and Steel Rates, Export-Import*, 9 F.M.C. 180 (1965), we decided that:

> When a rate disparity in reciprocal trades, on similar commodities appears, and when movement of goods under the higher rates has been impaired, the carrier quoting the rates must demonstrate that the disparate rates are reasonable. All facts pertaining to the reasonableness of the rates are uniquely in the possession of the carriers. Unless so interpreted, section 18(b)(5) becomes a nullity and we will not impute to the Congress the enactment of a meaningless statute. The mere existence of a disparity does not necessarily mean that the higher rate is "detrimental to the commerce of the United States." The Commission would still have the burden of proving that the rate has had a detrimental effect on commerce; e.g., that tonnage is handicapped in moving because

---

[4] Public Law 87–346, act of Oct. 3, 1961, 75 Stat. 762.

[5] See, for example, the case of *Cargo to Adriatic, Black Sea and Levant Ports*, 2 U.S.M.C. 342 (1940), which the Commission dismissed for mootness after the offending low rates had been discontinued.

the rate is too high. The carrier would be required to justify the level of the rate by showing that the attendant transportation circumstances require that the rate be set at the level. Subjects of justification may include myriad rate-making factors which might differ between the inbound and outbound rates. These include competition, volume of movement, stowage, stevedoring costs, and others. 9 F.M.C. at 191–192.

In *Outbound Rates Affecting Export High Pressure Boilers*, 9 F.M.C. 441 (1966), we formulated similar reasoning with respect to another section 18(b) (5) situation.

Following these decisions, we will attempt to establish criteria for findings under section 18(b) (5) where one carrier or conference is alleging that the rates of another carrier or conference are so unreasonably low as to be detrimental to the commerce of the United States. The first principle which we will follow is that a rate which fails to meet out-of-pocket costs of the carrier quoting the rate is unreasonably low. By out-of-pocket costs, we mean cost of handling the cargo into and out of the vessel plus any directly assignable costs such as brokerage, etc. The problem is how a complaining carrier would establish the out-of-pocket costs of his competitor. A complaining carrier most certainly can demonstrate its own out-of-pocket costs incurred in carrying a particular commodity. We believe that such a showing establishes a presumption of the prevailing out-of-pocket costs on a particular commodity in a particular trade. It would then be incumbent upon the carrier whose rate has been challenged to rebut the presumption created by showing that his actual out-of-pocket costs and other rate factors vary materially from those developed by the complaining carrier.

This approach takes care of one aspect of such a proceeding. A complaining carrier in order to make out a case under section 18(b) (5) must also establish a prima facie showing of detriment to commerce. If the complaining carrier can demonstrate an adverse economic impact upon itself, the carrier has made out a prima facie case of detriment to commerce. Again, such proof would be subject to rebuttal by the carrier whose rates have been complained of.

In summary, a carrier may, by proving its own out-of-pocket costs, establish a rebuttable presumption of the out-of-pocket costs prevailing generally in the trade. Secondly, a carrier may show detriment to commerce by proof of some measurable adverse economic impact itself. In establishing these standards, we hopefully have avoided the pitfalls of protracted litigation which were demonstrated in this proceeding. This procedure should also place the burdens of proving facts upon those persons most capable and most readily able to prove such facts.

CHINESE MERCHANDISE

The examiner concluded that the respondent carriers—both conference and nonconference—have tariff provisions concerning Chinese merchandise or Chinese provisions which provide "rates which are unjustly discriminatory to shippers not of Chinese descent and which grant undue and unreasonable preference and advantage to particular persons and descriptions of traffic, in violation of sections 16 First and 17 of the Act."

While it is possible that these tariff provisions could be construed in such a way as to permit the giving of a more favorable rate to shippers and consignees of Chinese descent, we find nothing in the record that such a construction was in fact made.

Although we do not hold that actual episodes of discrimination must be shown in all instances in order to find a violation of sections 16 and 17, it seems to us that where a tariff provision is only potentially capable of resulting in discrimination and where not even an allegation of actual resulting discrimination has been made, let alone any evidence of such discrimination presented, the role of the Commission should be remedial and not punitive.

The tariff rule referring to "Chinese merchandise" used by the New York Freight Bureau (Hong Kong) in 1962 provided as follows:

C3 CHINESE MERCHANDISE

(1) Chinese merchandise comprises all commodities essentially used by Chinese which are below ad valorem valuation and which are not specified in the tariff.

(2) On shipments of Chinese merchandise where a freight forwarding service is performed by a Chinese shipper for a Chinese consignee and the carrier is so advised by the shipper, the following fees will be applicable and will be shown on thhe carrier's bill of lading as a separate item:

> Payment of freight and freight forwarding fee will be collected by the carrier in accordance with tariff note B1(2). Payment of freight forwarding fee will be paid to the shipper in local currency at official rate of exchange in effect on date of shipment:
>
> On rates assessed on a tonnage basis—$2 per revenue ton.
>
> On rates assessed on a 100-pound basis on silk piecegoods and spun silk yarn, silk pongee, raw silk—10 cents per 100 pounds.
>
> On lumber and logs—$2 per 1,000 board feet.
>
> On rubber—$2 per 50 cubic feet.
>
> No such fees will be applicable on charges assessed on an ad valorem basis, or on rates assessed on a per package basis, or on minimum bill of lading charges.

Other respondent carriers had substantially similar provisions or rules in their respective tariffs with the exception of China Union Lines, Ltd., which never had such a rule.

355-301 O - 69 - 13

While we find that this rule does not lend itself to discrimination in rates, nevertheless, it is objectionable on the ground that it permits the performance of a special service to shippers and consignees of Chinese descent where such services are not available to non-Chinese shippers and consignees.

There is nothing wrong with a carrier accommodating its shippers and consignees by agreeing to perform extra services for them. A difficulty arises only when these services are not uniformly available to all shippers on an equal basis.

In the instant case the conferences and most of the independent carriers agreed to collect forwarding fees from the consignees for the account of the shipper who, according to time-honored custom among the Chinese, was generally a compradore. This compradore system, according to the somewhat scanty testimony, is used almost exclusively by persons of Chinese descent. Thus, it is not surprising that the rules in the respective tariffs of the parties governing the collection of these fees were written in such a way that the service is available only to Chinese shippers performing a freight forwarding service on behalf of a Chinese consignee. Nevertheless, any privilege, a facility or service which is available only to certain persons based solely upon their race, nationality or ethnic origin constitutes an unjust and unreasonable practice which is forbidden by section 17 of the act. Where such a practice is codified into a rule the existence of the rule itself constitutes the violation. There is no need to show any actual discriminations under it.

Section 17 of the Shipping Act provides in pertinent part that:

> * * * Every carrier and every other person subject to this 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. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

Several respondents argue that there must be a showing of an actual discrimination to support a finding of violation of section 17. The plain language of the second paragraph of section 17 dictates a contrary conclusion. This paragraph of the act is directed at unjust or unreasonable regulations as well as improper practices.

There is no substantial evidence of record to support any finding other than that the terms "Chinese merchandise" or "Chinese provisions" refer to a commodity grouping embracing Chinese-type foodstuffs.

It is a common practice to use a generic term as a commodity item where that term includes a number of related and similar commodities.

However, it was not until the publication of General Order 13 [6] on May 27, 1965, that it became mandatory to list the items included in the generic term.

Since the time of the hearings both the conference and nonconference carriers have amended their tariffs so as to enumerate the particular items which are included under the generic terms "Chinese merchandise" or "Chinese provisions." This is in complete harmony with section 536.5(g) of General Order 13, supra.

Zim Israel has completely deleted its rule relating to the collection of freight forwarding fees on behalf of Chinese shippers and Isbrandtsen has modified its rule by simply eliminating the word "Chinese" wherever it formerly appeared, thus making this service available to all shippers on an equal basis.

We find that rule 10 of the New York Freight Bureau (Hong Kong) and rule 28(a) of Orient Overseas Line are unjust or unreasonable in violation of the second paragraph of section 17 of the act in that they provide for the granting of a valuable service—viz, the collection of freight forwarding fees—only to shippers of Chinese descent when shipping to consignees of Chinese descent.

The Associated Lines

Nine of the carriers which were named parties respondent in this proceeding [7] have never operated in the Hong Kong-United States Atlantic and Gulf trade. All of these carriers are members of the Trans-Pacific Freight Conference [8] which operates from Hong Kong to United States West Coast ports. This conference and the New York Freight Bureau (Hong Kong) are joint signatories to the Hong Kong/North Atlantic and Gulf Joint Agreement, FMB No. 4379. This joint agreement provided inter alia that one conference could veto a rate action of the other and provided for transshipment arrangements among themselves. These nine lines did not participate in the hearings nor were they asked to furnish any witnesses or documentary evidence. There is no record showing of any transactions involving these carriers in the Hong Kong-United States Atlantic and Gulf trade. Thus, while the initial determination to name these carriers as respondents was justified on the basis of their close working relationship through the interconference agreement, supra, clearly there is no reason now why they should not be dismissed as respondents.

---

[6] 46 CFR 536.5(g), 30 Federal Register 7141, May 27, 1965.

[7] American Mail Line, Ltd.; Java Pacific & Hoegh Line; Klaveness Line—Joint Service; Knutsen Line—Joint Service; National Development Co.; Nissan Kisen Kaisha, Ltd.; P. & O.-Orient Lines—Joint Service; Pacific Far East Line, Inc.; and States Steamship Co.

[8] The conference itself was not joined as a party respondent.

SECTION 18(b)(3) VIOLATIONS

In the course of the hearings several instances of charging other than the rate specified in the carriers' tariff came to light. This violates section 18(b)(3) of the act which provides:

> No common carrier by water in foreign commerce or conference of such carriers shall charge, or demand, or collect, or receive a greater, or less, or different compensation for the transportation of property, or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

Only two of the five lines found by the examiner to have violated this section excepted to the findings (Isbrandtsen and China Union Lines) and their exceptions are by way of confession and avoidance; i.e., that the incidents found to have violated section 18(b)(3) were isolated and inadvertent occurrences.

We have no authority under section 18(b)(3) to dismiss a charge simply because it may have been an isolated violation or an honest mistake though we may couple our finding of violation with such other factual determinations as may tend to mitigate the seriousness of the offense. We see no reason to disturb the examiner's finding with respect to the section 18(b)(3) violations and they are, therefore, incorporated below in substantially the same form as found in the examiner's initial decision.

China Union Lines

China Union charged rates less than those on file on three shipments loaded September 5, 1962. Each shipment involved rubber shoes which, due to language difficulties, the carrier misclassified as rubber products. The former was rated at $30 and the latter at $25. The total undercharges amounted to $256.50. While this was clearly an inadvertent mistake it was, nonetheless, a violation of section 18(b)(3) of the act and it is so found.

Eddie Steamship Co.

Eddie charged rates less than those on file with respect to four shipments loaded February 15, 1963. Undercharges totaled $177.17. It is found that these undercharges were in violation of section 18(b)(3) of the act.

Isbrandtsen Steamship Co. (now American Export Isbrandtsen Lines, Inc.)

Isbrandtsen charges rates less than those on file with respect to two shipments, one loaded March 27, 1962, and the other December 24, 1962. Here, again, these misratings were simply honest mistakes which were admitted by the carrier. They were caused by a mistaken interpretation of the carrier's Hong Kong agent as to what rate had been filed and the effective date of filing. Procedures to avoid future miscues of this nature have been adopted by this carrier. However, these must be found to be violations of section 18(b)(3).

Thai Lines, Ltd.

Evidence introduced by Hearing Counsel, not contested by Thai, shows that during the period July 17, 1962–May 27, 1963, Thai charged and collected rates less than those on file with the Commission on 265 shipments in the subject trade with total undercharges amounting to $24,130.31. It is accordingly found that Thai thus violated section 18(b)(3) of the act.

Rebating by Thai Lines, Ltd.[9]

There is conclusive evidence that Thai, as a constant practice, granted rebates on shipments in this trade. On June 28, 1962, Oceanic Lloyd wrote Motorships Inc., Thai's general agent in the United States, requesting appointment as Thai's Hong Kong agent. It enclosed a list of its standard agency fees which included a fee on general cargo of 5 percent. The appointment was agreed to and Oceanic Lloyd prepared a written agreement and sent it to Motorships for execution. This provided that Oceanic Lloyd would receive an agency fee on general cargo of 10 percent. No explanation was offered and the agreement was not executed, but Oceanic Lloyd did thereafter receive a 10-percent fee on general cargo. However, subsequent correspondence from Oceanic Lloyd to Motorships leaves no question as to why the fee was increased. In a letter dated November 3, 1962, Oceanic Lloyd stated:

> To do this (get additional cargo for a lightly loaded vessel), we had to give away 7½ percent of our total commission in the form of rebates.
>
> * * * * * * *
>
> We have a much better canvassing organization and are therefore able to obtain between 800 and 1,000 tons of cargo comprising smaller shipments. We must point out, however, that we cannot substantially exceed this figure with-

[9] This portion of the report substantially adopts the conclusions and language of the examiner's initial decision except as to the sec. 17 violation.

out giving about 10 percent to those shippers who have over 300 tons available for shipment.

From the above you will no doubt gather that under the present arrangements we can obtain about 1,000 tons per sailing, but this figure can be doubled if you are prepared to give us an additional 2-percent commission.

On April 29, 1963, Oceanic Lloyd wrote Motorships requesting that the rate on plastic flowers be increased from $16.50 to $17 and inquiring whether there would be any complications if the increase was put into effect on less than the 30 days' notice required by section 18(b)(2) of the act. The letter further states:

The reason for our requesting this increase at short notice is that other nonconference lines are no longer giving up to 15-percent rebates on this commodity but are only offering 10 percent. Their nett [*sic*] rate is now $16.20 ($18 less 10 percent) and $16.25 ($17 less 5 percent [sic]) is consequently practicable.

In a letter dated September 4, 1963, addressed to the residence of Nils O. Seim, president of Motorships Inc., Oceanic Lloyd stated:

As you probably know, there are a number of conference signatories who ship under names of convenience in order to take advantage of the nonconference rates. You probably also know that our freight agent Mr. L. C. Yew, has on many instances found it necessary to hand back certain percentages of the freight to the actual shipper. These rebates are untraceable and negotiations of this sort are made from hand to hand and there is no possibility of anything being proved as there is nothing in writing. This is the custom of the trade in Hong Kong and applies equally to ourselves as to conference members.

Seim testified as follows with regard to the general subject of rebating:

Q. Getting back to your belief as to what is practiced in the Far East, based upon your own experience, I take it, you made the observation that you would expect that rebates were paid over there as part of this squeeze system which is a way of life?

A. Yes.

Q. Based upon this observation, would it be reasonable to assume that a great many of the Thai Lines shipments had been charged for at a net rate which was less than the rate on file?

A. I think it is reasonable to assume that all shipments to Hong Kong are charged that way, whether it be Thai Lines or any other line. To this part of the world or any part of the world.

It is found that by granting rebates Thai violated sections 16 Second and 18(b)(3) of the act.

Conclusions

In summary we conclude:

1. The nine carriers which are members of the Trans-Pacific Freight Conference and which did not operate in the Hong Kong-

United States Atlantic and Gulf trade should be dismissed as parties respondent.

2. That this proceeding, insofar as it relates to the question of whether certain rates in this trade were so unreasonably low as to be detrimental to the commerce of the United States has become moot and this proceeding, insofar as it relates to this issue, should be discontinued on this ground.

3. That all of the carriers in this trade with the exception of China Union Lines had regulations relating to so-called Chinese merchandise which made available special services to shippers and consignees of Chinese descent in violation of the second paragraph of section 17 of the Shipping Act, 1916.

4. That the members of the New York Freight Bureau (Hong Kong) and Orient Overseas Line still have rules in their respective tariffs which are unjust or unreasonable in violation of the second paragraph of section 17.

5. That the following carriers have violated section 18(b) (3) of the Shipping Act, 1916, by charging a rate less than that legally on file with the Commission: China Union Lines, Eddie Steamship Co., Isbrandtsen Steamship Co. (now American Export Isbrandtsen Lines) and Thai Lines, Ltd.

6. That Thai Lines, Ltd., has violated section 16 Second and 18(b) (3) of the act by making illegal rebates.

An appropriate order will be entered.

ORDER

The Federal Maritime Commission instituted this proceeding to determine whether certain rates in the Hong Kong-United States Atlantic and Gulf trade should be disapproved under the authority of section 18(b) (5) of the Shipping Act, 1916, on the ground that they were so unreasonably low as to be detrimental to the commerce of the United States. The investigation was subsequently expanded to determine whether any of the respondents had violated sections 14, 16, 17, or 18(b) (3) of said act. The Commission having this date made and entered its report stating its findings and conclusions, which report is made a part hereof by reference:

Therefore, it is ordered,

1. That respondents, American Mail Line, Ltd.; Java Pacific & Hoegh Lines; Klaveness Line-Joint Service; Knutsen Line-Joint Service; National Development Co.; Nissan Kisen Kaisha, Ltd.: P. &

O.-Orient Lines-Joint Service; Pacific Far East Line, Inc.; and States Steamship Co. be, and the same hereby are, dismissed as parties respondent.

2. That this proceeding, insofar as it relates to section 18(b)(5) of the Shipping Act, 1916, as amended, be and the same hereby is discontinued.

3. (*a*) That rule 10 of tariff No. 23-FMC-4 of the New York Freight Bureau (Hong Kong) be and the same hereby is modified by deleting the word "Chinese" each time it appears in the first two lines of said rule and that the name of this rule be changed to "Freight Forwarding Service."

(*b*) That rule 28(a) of tariff FMC-12 of Orient Overseas Line be and the same hereby is modified by deleting the word "Chinese" each time it appears in the second line of said rule.

(*c*) That respondents, the members of the New York Freight Bureau (Hong Kong) and Orient Overseas Line, cease and desist from establishing, observing, or enforcing any regulation or practice relating to or connected with the handling, storing, or receiving of property which grants or allows the granting of any preference to any person on the basis of such person's race, nationality, or ethnic origin.

By the Commission.

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