FEDERAL MARITIME COMMISSION

No. 65-49

Interconference Agreements United States-Mediterranean Trades

Initial Decision Adopted November 7, 1967

Agreement No. 9413, between the Gulf/Mediterranean Conference and the North Atlantic/Mediterranean Freight Conference, permitting consultation between these Conferences, through their respective chairmen, with respect to freight rates and practices, not found to be unjustly discriminatory or unfair, or detrimental to the commerce of the United States, or contrary to the public interest, in violation of section 15 of the Shipping Act, 1916. Accordingly, Agreement No. 9413 is approved.

Uniformity of rate action by respondent Conferences is insufficient to establish the existence of an unfiled section 15 agreement, where there are 13 carrier lines which are common to both Conferences and which constitute a voting majority in both Conferences.

Burton H. White and *Elliott B. Nixon* for respondent North Atlantic/Mediterranean Freight Conference and its member lines; *Edward S. Bagley* for respondent Gulf/Mediterranean Ports Conference and its member lines.

John A. McWilliam for intervenor International Association of Great Lakes Ports; *Arthur W. Jacocks* for intervenor North Atlantic Ports Association; *Philip J. Kraemer* for intervenor Maryland Port Authority.

Donald J. Brunner, *R. Stanley Harsh*, and *Robert P. Watkins*, Hearing Counsel.

REPORT

By the Commission (John Harllee, *Chairman;* Ashton C. Barrett, James V. Day, and James F. Fanseen, *Commissioners*):

The Commission instituted this investigation on December 17, 1965, to determine: (1) Whether Agreement No. 9413 between the North Atlantic/Mediterranean Freight Conference and the Gulf/Mediterranean Ports Conference, permitting consultation between the two

Conferences with regard to freight rates and practices on common commodities, is a true and complete memorandum of the agreement of the parties, seasonably filed for approval; (2) whether said agreement should be approved, disapproved, or modified pursuant to the provisions of section 15 of the Shipping Act, 1916; or (3) whether there are any unfiled agreements as between the carriers involved, which have been or are being unlawfully carried out. Examiner Walter T. Southworth, in an initial decision served July 14, 1967, found that the evidence presented failed to establish the existence of any unfiled section 15 agreement between the Conferences. He further concluded that proposed Agreement No. 9413 should be approved since it was not unjustly discriminatory or unfair, and would not operate to the detriment of the commerce of the United States or be contrary to the public interest, in violation of section 15 of the Act. Hearing Counsel filed exceptions to the examiner's decision to which respondents replied. Oral argument was heard on October 18, 1967.

Hearing Counsel in their exceptions argued that the examiner erred in not concluding that the proponents of Agreement No. 9413 must demonstrate that the agreement will meet a serious transportation need or secure important public benefits; that he further erred in not finding that the proposed agreement will lessen competition between the competing conferences to the detriment of the commerce and contrary to the public interest; and, finally, that he erred in not finding the existence of an unfiled agreement between the respondents in violation of section 15 of the Act. Upon reviewing Hearing Counsel's exceptions, we conclude that they are but a restatement of the contentions already advanced before the examiner, and that the examiner's findings and conclusions on these contentions were proper and well founded. Accordingly, we hereby adopt the initial decision (a copy of which is attached hereto and made a part hereof) as our own.

Therefore, it is ordered, That Agreement No. 9413 is hereby approved and that this proceeding is hereby discontinued.

VICE CHAIRMAN GEORGE H. HEARN concurring and dissenting:

I concur in the finding of my colleagues that there was no unfiled agreement between the parties.

I dissent from the majority view in that I find approval of Agreement 9413 will be contrary to the public interest and detrimental to the commerce of the United States.

One of the basic pillars of our economy is "the promotion of competition and the fostering of market rivalry as a means of insuring economic freedom."[1] This principle is implemented through a policy which frowns upon undue restrictions on competition.

Section 15 of the Shipping Act, 1916, does not conflict with that policy but rather complements it. Congress authorized the approval of shipping conferences to forestall monopolistic movements that are more anticompetitive than the conference system itself. Thus a Federal court has said:

> The condition on which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute.[2]

It is incumbent upon this Commission to evaluate every proposed agreement in the light of this standard; and it should not be forsaken even though only a simple and innocuous agreement is involved.[3] We are here presented with an agreement which does not qualify for approval under our congressional mandate or under the guidelines we have set heretofore.

The time an agreement is presented for initial approval is when we must evaluate it thoroughly and determine the anticompetitive scope it is to possess. We are not soothsayers. We cannot predict what in fact will happen as a result of approval. We can, however, predict the probable consequences of approval. That is our expertise. When approving an agreement we should understand the gamut of activity inherently concomitant to the specific conduct as set forth in the agreement. We should not grant antitrust immunity to agreements which are overbearing or unnecessary and which thereby might contain latitude for unauthorized actions within the approved area of conduct. It is an undesirable situation when we must call upon hindsight to uncover the pitfalls of an agreement which may trap a conference in violations of the law.

As I said in docket 66–45,[4] "[t]he desire of the parties to enter into agreements alone is not considered sufficient to warrant approval."

> For presumptively all anticompetitive combinations run counter to the public interest in free and open competition and it is incumbent upon those who seek exemption of anticompetitive combinations under section 15 to demonstrate that the combinations seek to eliminate or remedy conditions which preclude or hinder the achievement of the regulatory purpose of the Shipping Act.[5]

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[1] *Mediterranean Pools Investigation*, 9 FMC 264 at 288.

[2] *Isbrandtsen Co., Inc.* v. *United States et al.*, 211 F. 2d 51 at 57.

[3] Transcript, Oral Argument, p. 20.

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

[5] *Mediterranean Pools Investigation*, 9 FMC 264, 290.

While approval of the agreement may redound to the benefit of respondents, they have failed to meet the burden of coming forward with sufficient evidence in support of the agreement.[6] This lack of evidence is fatal because "one prerequisite for approval of an agreement is the actual existence or immediate probability of transportation circumstances in the trade covered by the agreement which warrant approval." [7]

The stated purpose of Agreement 9413 "is to permit consultation between the two Conferences through their respective chairmen" [8] to "discuss transportation conditions and agree to recommend to their respective conference member lines the adoption of ocean freight rates and practices applicable to common commodities." [9]

Counsel for respondent Gulf/Mediterranean Ports Conference described the agreement as a "relatively simple agreement of quite limited scope which will do very little to change all the present facts in these trades and the general operations of the carriers or members of the conferences." [10] Counsel, nonetheless, contended that the need for the agreement lies in the necessity for "correlation of rate action in the two ranges" served by the parties.[11] Other than this—

> . . . respondents failed to advance evidence of economic or other advantages flowing from monopolistic arrangements, sufficient to justify them notwithstanding the evils and detriment to the public interest inherent in monopoly.[12]

That 49 approved conference agreements include the United States Atlantic and Gulf ranges and the Mediterranean range [13] is no basis for concluding that two competing conferences [14] ought to join to further restrict competition. Of those 49 agreements, none is an interconference agreement between conferences serving only the two trades involved here.[15] In fact, there are 30 other conferences which include either the United States Atlantic or Gulf ranges,[16] and not one is party to an interconference agreement serving the two ranges.

In my opinion, this agreement should not be approved without at least a showing that the current conditions in the trade could not be equalized without implementing the anticompetitive and ultramono-

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[6] Ibid., at 290: " . . . it is incumbent upon those in possession of such information to come forward with it."

[7] *Agreement 8765—Order To Show Cause*, 9 FMC 333 at 335–336.

[8] *Brief on behalf of Gulf/Mediterranean Ports Conference*, pp. 1–2.

[9] Agreement 9413, par. 1.

[10] Transcript, Oral Argument, p. 20.

[11] Ibid., p. 21.

[12] *California Stevedore & Ballast Co., et al.* v. *Stockton Port District, et al.*, 7 FMC 75 at 84.

[13] Exhibit 20.

[14] The examiner found that there is competition as to "many commodities." Initial decision, p. 5.

[15] The only interconference agreement involved is dormant; i.e., Agreement 5080.

[16] Exhibit 21.

polistic characteristics of this agreement. There is no evidence of rate instability, deterioration of conditions in the trade, destructive or wasteful competition, or any other circumstances warranting approval of Agreement 9413.

The absence of such evidence is all the more significant in a case which involves an effort to cartelize cartels. Any benefits the respondents suggest are of value only to them and are too insignificant to justify the disadvantages to the public interest and the commerce of the United States.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 65–49

INTERCONFERENCE AGREEMENTS UNITED STATES-MEDITERRANEAN TRADES

Agreement between conference covering trade from North Atlantic ports to Mediterranean ports and conference covering trade from South Atlantic and Gulf ports to same destinations, providing that chairmen of the conferences may discuss transportation conditions and agree to recommend rates to their respective memberships, is an agreement "fixing or regulating" rates notwithstanding reservation of right of independent action by each conference.

Where majority of members of each respondent conference is made up of same carriers, 49 Commission-approved conferences each cover all three of the ranges of U.S. ports covered by the two respondent conferences and use same rates for all those ranges, and Commission has encouraged parity of rates for North Atlantic and South Atlantic ports, uniform rate action by respondent conferences is insufficient to establish existence of unfiled rate-fixing agreement.

Agreement between respondent conferences approved.

Burton H. White and *Elliott B. Nixon* for respondent North Atlantic/Mediterranean Freight Conference and its member lines; *Edward S. Bagley* for respondent Gulf/Mediterranean Ports Conference and its member lines.

John A. McWilliam for intervenor International Association of Great Lakes Ports; *Arthur W. Jacocks* for intervenor North Atlantic Ports Association; *Philip J. Kraemer* for intervenor Maryland Port Authority.

Donald J. Brunner, *R. Stanley Harsh*, and *Robert P. Watkins*, Hearing Counsel.

INITIAL DECISION OF WALTER T. SOUTHWORTH, PRESIDING EXAMINER [1]

By order of investigation and hearing served December 17, 1965, the Commission initiated this proceeding to determine whether an agreement filed for approval pursuant to section 15 of the Shipping Act, 1916 (hereinafter "the Act") by the respondents, two approved conferences of ocean carriers and their members, should be approved, disapproved, or modified.

[1] This decision became the decision of the Commission Nov. 7, 1967.

The respondent conferences are the North Atlantic Mediterranean Freight Conference (hereinafter the North Atlantic Conference), authorized by FMC Agreement No. 9548, and the Gulf/Mediterranean Ports Conference (hereinafter the Gulf Conference), authorized by FMC Agreement No. 134. Both are outbound Conferences to Mediterranean ports, the North Atlantic Conference covering the trade from United States North Atlantic ports (Hampton Roads/Eastport range) and the Gulf Conference covering the trade from U.S. Gulf and South Atlantic ports (Brownsville/Cape Hatteras range). The North Atlantic Conference excludes Spanish Mediterranean and Israeli ports but includes Sea of Marmora, Black Sea, and Moroccan ports; the Gulf Conference covers all Mediterranean ports and likewise includes Moroccan ports.

Following preliminary motions and the first hearing session, proceedings were postponed for several months while respondents substantially revised the subject agreement (No. 9413). The revised agreement, dated September 12, 1966, which by stipulation supersedes the agreement originally filed, does not change the basic purpose or effect of the filed agreement and is within the scope of the original inquiry. Unless otherwise indicated, all references hereinafter to the agreement, sometimes called Agreement No. 9413, are to the revised agreement, the text of which is set forth in appendix A.

The gist of the agreement is that the chairman of the two conferences may, by telephone or letter, discuss "transportation conditions" and "agree to recommend to their respective conference member lines the adoption of ocean freight rates and practices applicable to common commodities." Either conference may reject any recommendation and each retains the right to act independently of the other. A certified report describing all matters discussed and the action taken with respect to each shall be filed with the Commission within 30 days after any discussion within the scope of the agreement, and records shall be kept 2 years. Either conference may terminate the agreement upon 90 days' written notice.

In addition to the matter of approval, the Commission's order directed that the investigation determine whether the filed agreement was a true and complete memorandum of the parties' agreements and had been seasonably filed or had been carried out prior to approval, and whether it set out in adequate detail the procedure to be followed and provided sufficiently for the filing of reports.[2]

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[2] The original inquiry also extended to an agreement (No. 9499) between the North Atlantic Conference and the American Great Lakes-Mediterranean Eastbound Freight Conference, substantially similar to the original No. 9413. During the postponement the parties to No. 9499 moved to withdraw that agreement and dismiss the proceeding insofar as it related thereto. The unopposed motion was granted, and the Great Lakes Conference dismissed as a party.

Hearing Counsel take the position, and the examiner finds, that the issues with respect to procedure and reporting provisions were eliminated with the filing of the revised agreement, which provides adequately for the procedure to be followed thereunder and for reports to the Commission.

Hearing Counsel contend, however, that respondents have been, and now are, parties to an unfiled "agreement, understanding, or arrangement which results in the restriction of competition and the joint fixing and regulating of rates, to the detriment of commerce of the United States and contrary to the public interest." They also contend that Agreement No. 9413 should not be approved because it will "further restrict" competition by allowing them to jointly fix and regulate rates (which they are allegedly doing at present), to the detriment of the commerce of the United States and contrary to the public interest. By "further," Hearing Counsel presumably mean that the unfiled understanding allegedly in effect now would be facilitated by the proposed agreement.

Respondents' contention also is to the effect that the agreement would merely facilitate present procedure by expediting the transmittal of information upon which the conferences act; the big difference, from the legal standpoint, being that Hearing Counsel assert that respondents now act illegally in concert, as proven by uniformity of rate action, while respondents contend that uniform action on identical problems is natural and to be expected under existing circumstances and eventuates without any interconference action as such. With the agreement, respondents say, substantially the same results will come about more speedily and, in the first instance at least, more precisely, to the benefit of all concerned, through direct, approved interconference exchange of information. There is nothing, they say, to support a finding that the agreement would be detrimental to commerce or contrary to the public interest, or would otherwise operate so as to require or permit disapproval under section 15 of the Act.

Three parties intervened: The International Association of Great Lakes Ports; the North Atlantic Ports Association; and the Maryland Port Authority, which is a member of the North Atlantic Ports Association. None of the intervenors filed proposed findings or a brief; however, the North Atlantic Ports Association and Maryland Port Authority offered the testimony, hereinafter referred to, of a common representative who opposed approval.

The two respondent Conferences serve the trade from ports in adjacent U.S. coastal areas to common Mediterranean destinations. There is a very substantial identity of membership; of the 20 members of the

Gulf Conference and 19 members of the North Atlantic Conference, 13 are the same carriers, representing 65 percent of the membership in one case and 68 percent in the other. More than half the common members customarily load in the Gulf and top off at North Atlantic ports, although some of them also have direct sailings from one area or the other. Some of the common members usually sail directly from both areas, but may occasionally top off at either area.

The conferences exchange published tariffs; there is a lag of 5 to 7 days between a rate action and time the tariff sheets come back from the printer, and the other conference gets them when the trade does. Actions of one conference are frequently (but not always) reported to the other conference by the representative of a common member before the tariff showing such action is published. Such reports are sometimes incomplete or otherwise inaccurate. If the common members are alert and efficient, they will normally see to it that their representatives in each conference are promptly informed as to actions of the other conference. Knowledge of action on shippers' requests may come from shippers, who sometimes indicate on their requests that copies are being transmitted to the other conference and sometimes base their requests upon what the other conference has done. A member carrier may likewise request conference action because of the other conference's action, which it has learned about as a common member.

The rate structures and tariff rules and regulations of the two conferences are substantially the same. Although most rates are identical, there are some differences, which may exist because of special circumstances relating to particular commodities. Each conference has a dual-rate contract system pursuant to section 14b of the Act.

Many commodities, referred to as "common commodities," move through both Atlantic and Gulf gateways, usually depending on the place of origin and inland transportation costs; where inland transportation costs are the same or substantially so, a commodity originating at a given point may move through either the Gulf or North Atlantic gateway. To that extent there is competition between the two conferences. Some important commodities (for example, cotton and carbon black) move predominantly or exclusively through only one of the gateways by reason of their point of origin and the resulting difference in inland transportation costs; however, each conference has a commodity rate on almost every item for which the other has such a rate.

Evidence of conference rate action on shipper or carrier requests in particular instances showed that usually, but not always, the conferences eventually reached the same result. There is no pattern of

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leadership; the rate eventually adopted may have been the one initiated by either conference. Sometimes the conferences finally adopted different rates, although the matters had been under discussion by both for some time. Where one conference was the predominant carrier of a commodity, the other conference waited to see what it would do before taking action on a rate request. A 15-percent general rate increase, effective June 10, 1965, was filed by both conferences on March 8, 1965; it had been voted by one conference at a meeting held February 26, 1965, and by the other at a meeting held after March 1, 1965.

There is no evidence of the transmittal of information concerning rates between the conferences by a member other than a common member, or by chairmen or other employees, except through tariffs transmitted at the same time that they were published to the trade.

There are 49 Commission-approved conferences each of which covers the combined United States Atlantic and Gulf ranges; of these 13 are two-way conferences, 15 outbound conferences, and 21 inbound conferences. Each of these conferences maintains the same rates for service to or from (as the case may be) the North Atlantic range as for the South Atlantic and Gulf ranges; a check of the six largest of the 49 conferences disclosed that all had exactly the same rates for all these areas, and the Chief of the Commission's Division of Carrier Agreements testified that he did not know of any instance of a conference covering the Atlantic and Gulf ranges which did not charge the same rates for all three ranges. Of 13 nonconference lines each serving the North Atlantic, South Atlantic, and Gulf ranges, 10 had identical rates from all the ranges.

This condition seems to have come about with the development of stable, nondiscriminatory rates (as between carriers, shippers, exporters, importers, or *ports*) under the Act.[3] Aggressive port competition among ports in different ranges and increasing industrialization of the Southern States (resulting in shipper competition among shippers in different ranges) are probably factors. Respondents call attention to a recent manifestation of current policy in the form of a 1964 news

[3] This has occurred with respect to ports in the North Atlantic range as well as between ranges. In 1877 ocean rates to Philadelphia and Baltimore were higher than to New York and other "northern tier" ports; between the early 1920's and 1935, ocean rates to and from the different ports gradually were equalized. *Boston & Maine RR* v. *United States*, 202 F. Supp. 830 (1962). Similarly, in a 1925 decision the Interstate Commerce Commission noted that "(o)ne of the serious disadvantages under which the southern ports are said to labor is that ocean rates are 7.5 cents higher from the South Atlantic ports and 15 cents higher from the Gulf ports than from the North Atlantic ports. They are in many other ways at a disadvantage as compared with the port of New York." *Maritime Assoc., Boston Chamber of Commerce* v. *Ann Arbor R.R. Co.*, 95 ICC 539, 562. See also, *New Orleans Bd. of Trade* v. *Illinois Central R.R. Co.*, 23 ICC 465, 467 (1912). The record herein shows that such differentials no longer exist.

release of the Commission, which reported that following complaints from the Governors of three Southern States, the Commission had confronted the South Atlantic Steamship Conference with the fact that its rates were generally higher than those of the North Atlantic Continental Freight Conference, and had urged consideration of the complaints. As a result of its efforts, the Commission noted with approbation, "rate equality in the area complained of (was) restored" when the South Atlantic Conference lowered most rates from South Atlantic ports "to a position of parity with the Northern ports."

The purpose of the instant agreement, according to respondents, is to facilitate the exchange of information concerning rates and practices—proposed as well as existing—and other matters of mutual concern relating to transportation conditions, while retaining each conference's right of independent action with respect to its own rates and practices. Hearing Counsel contend that the agreement will allow the conferences jointly to fix and regulate rates, and it obviously will. *Unapproved Section 15 Agreements—S. African Trade*, 7 FMC 159, 186–191 (1962); *Morton Salt Co.* v. *United States*, 235 F. 2d 573, p. 576 et seq. (10th Cir. 1956); *United States* v. *American Linseed Oil Co.*, 262 U.S. 371 (1923).[4] Respondents readily concede that the information to be exchanged will be used in ratemaking, and do not deny that similar rates for particular commodities, and similar practices, will usually result. But section 15 of the Act was of course enacted primarily for the purpose of permitting agreements fixing and regulating rates among competing carriers, through filing with and approval by the Commission unless, after notice and hearing, it finds that they 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*, 10 FMC 134; *Aktiebolaget Svenska Amerika L.* v. *F.M.C.*, 351 F. 2d 756, 758 (D.C. Cir. 1965). If, as here, the agreement is between conferences of carriers serving different trades that would otherwise be naturally competitive, section 15 requires that each conference retain the right of independent action, as the instant agreement provides.

The conference system of fixing and regulating rates, when fairly and honestly conducted, was determined to be in the public interest

[4] At the prehearing conference respondents' counsel took the position (which they have never completely renounced) that the agreement is not one for joint conference agreement upon rates because the right of independent action is reserved. A rate-fixing agreement, understanding, or arrangment within the meaning of sec. 15 of the Act is not necessarily a legally binding contract, of course.

by a Congress fully aware, when it passed the Act, that such arrangements might run counter to the policy of the antitrust laws. *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 487–491. In connection with subsequent amendments, Congress considered and rejected contentions that no such arrangements should be permitted among conferences of carriers; the Senate committee stating: "your committee certainly cannot subscribe to such a blanket indictment of long-established, board-approved policy, founded apparently on the same sound economic base which underlies the conference system itself." [5] The 1961 amendment (Public Law 87–346) required retention of the right of independent action in agreements among competing conferences, but did not otherwise distinguish such agreements from conference agreements among carriers.

In the light of the surrounding circumstances, the proposed agreement is found not to be contrary to the public interest as reflected in the policy of the antitrust laws reconciled, as it must be, with the policy of the Act. There is no showing of any reasonable probability of detriment to the commerce of the United States. It appears, rather that the agreement will benefit commerce by assisting in the maintenance of nondiscriminatory rates applicable to ports in the different ranges. Uniformity with respect to such ports is the general rule today and is in accord with Commission policy as evidenced by its approval of many inclusive conference agreements and otherwise. The record herein contains nothing in derogation of that policy. In particular, it does not appear from the record that the maintenance of port differentials generally, between the relevant ranges of ports, is desirable, or even permissible under the Act in the case of carriers serving more than one range.

One of the two witnesses who testified in opposition to the agreement had no objection to uniformity of rates. A representative of the North Atlantic Ports Association and the Maryland Port Authority testified that in opposing the agreement he was not concerned with whether or not the rates from the three ranges were the same or different, although "because I work for the North Atlantic ports, naturally my own preference would be that the North Atlantic ports would have lower ocean rates than the South Atlantic and Gulf ports. But realizing that this is not practical or fair, and it would be preferential in many cases, I realize that we can't have that. So my preference thus would be that the ocean rates be identical or not, so long as there are no preferential situations created for the ports based on

[5] S. Rept. 860, 87th Cong. 1st sess., Aug. 31, 1961, p. 16; reprinted in "Index to the Legislative History of the Steamship Conference/Dual Rate Law" (S. Doc. 100, 87th Cong. 2d sess.), p. 200, 215.

the fact that inland rates and port charges have been considered by the ocean carriers in making rates." There is no reason, upon the record herein, to expect that the proposed agreement would have any tendency whatever to create "preferential situations" such as the witness professed to fear. The uniformity of rate action which the agreement would facilitate would tend rather to eliminate such situations—particularly the temporary preferences which may result when a shipper is able to induce one conference to confer a rate reduction without, or before, a corresponding adjustment by the other conference, to the obvious detriment of any competitive shippers located adjacent to a port covered by the latter conference.

The other opposing witness was an employee of the Commerce and Industry Association of New York, whose membership includes many firms located in New York State and the New York metropolitan area. He stated that the Association's opposition was based upon a policy established about 10 years ago through a survey of shippers, one of whose aspects was the range of ports which should be covered by a single conference or dual-rate agreement. The Association anticipated, he said, that "if uniform rates are established they will be based on the highest operating costs in both ranges and be influenced by the least efficient and highest cost operators. Uniform rates therefore would drastically affect established industries in the respective areas, especially in the Gulf area." Considering that rates are for the most part uniform today, that they were formerly higher in the Gulf, that no Gulf interest appeared in opposition to the agreement,[6] and that the memberships of the two conferences are largely congruent, the argument is not impressive. Upon the facts shown herein, it cannot fairly be concluded that the agreement would tend to increase the level of rates in the relevant trades.

Hearing Counsel argue that the agreement will eliminate "whipsawing" by shippers, which they state is the essence of competition and the only protection shippers have for the prevention of exorbitant rates. Whipsawing apparently means the process of playing one conference against the other by getting one to quote a lower rate, then trying to get the other to meet or beat that rate. There was no evidence that shippers have been successful in carrying this procedure beyond the first stage—i.e., getting a lower rate from one conference which was eventually matched by the other. With the existing flow of

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[6] Hearing Counsel stated that the South Atlantic Ports Association was unwilling to testify, and that the Port of New Orleans (which has not intervened or otherwise taken any position) had planned to appear but was unable to do so because of the illness of its witness. There are many other organizations representating Gulf port interests, of course. The National Industrial Traffic League was approached by Hearing Counsel but did not desire to participate in the proceeding.

information among respondents—which Hearing Counsel concede is perfectly legal—one would not expect to find, and the record does not show, any proof of successful whipsawing, despite suggestions of the possibility thereof (as a justification for the agreement) on the part of the conference chairmen. There was no showing that any shippers' requests granted in the past would not have been granted but for the shippers' alleged ability to whipsaw the conferences. It is not claimed that the 49 conferences which cover all three ranges have imposed exorbitant rates, although there is no possibility of whipsawing against them in the manner apparently advocated by Hearing Counsel.

Hearing Counsel assert that the agreement would create a "super conference" which would "negate the geographical advantages of industry and eliminate competition." In the first place, the agreement would create no more of a super conference, in any meaningful sense of that rather imprecise expression, than any of the 49 all-inclusive conferences already existing. As for the negation of geographical advantages, the allegation is simply not supported by the record. That the agreement would permit the elimination of such rate competition as exists—and there is obviously not much—is a charge that can be made, with considerably more force, about any conference rate agreement. It is rather late to have to point out that Congress has seen fit to authorize the Commission to allow carriers to agree upon terms of rate competition among themselves, subject to limitations which are not established simply by the fact of their agreement to do so. *Isbrandtsen*, supra, p. 491. Once we accept, as we must, the proposition that agreements among carriers to fix and regulate rates (subject, of course, to the Act's protections against abuses) are not per se unapprovable under the Act, Hearing Counsel's main argument becomes untenable in the absence of proof of facts establishing actual or reasonably probable detriment to the commerce of the United States or the public interest. There is no such proof here.

Hearing Counsel's assertion of an existing unapproved agreement to fix rates is based entirely upon inferences from instances of identical or parallel rate actions of the two conferences following the conveyance of information from one to the other. Disregarding such actions as could result from merely following each other's published tariffs or from the transmittal of information by shippers, there would be sufficient evidence to support the finding proposed by Hearing Counsel if this were the classical case of identical action by competitors or by combinations of competitors, such as was found in *United States* v. *U.S. Steel Corp.*, 251 U.S. 417, 439. We have two conferences or "combinations," it is true; but each of them is legally authorized to fix and regulate rates under a Commission-approved section 15 agreement, and most of the individual carriers making up the Commission-approved combinations are common to both. A combination of groups with a predominating overlap of competitors legally authorized to agree upon rates in each group could exist only under a statute such as section 15 of the Act, of course, and tends to weaken if not destroy the usual inferences from mere uniformity of conduct.

The common members of each conference necessarily know everything that has occurred in the other conference, in theory and usually in practice; and it would be absurd to expect any one of them knowingly and intentionally to compete with itself. Add to these considerations the fact that transportation conditions as between the ranges do not appear to differ substantially (several carriers frequently or routinely serve both ranges of ports on the same voyage), the pressures of port and shipper competition, the fact that most conferences serving one of the relevant ranges serve all of them and use identical rates for all ranges, the statutory inhibition against unfair port discrimination and the Commission's expressed desire for rate parity, and it is not surprising that there is a notable correlation of action between the two conferences. Under the circumstances, it would be surprising to find anything else. Such correlation does not necessarily depend upon an agreement, arrangement, or understanding between two groups; it requires only consistency of action on the part of the individual carriers which are common members. The correlation may be immediate or not, as the record herein shows, depending on the speed and accuracy of intracompany communication (which communication is subject, of course, to no legal inhibition); but eventually it is inevitable in the absence of special circumstances applicable to particular commodities.

Hearing Counsel recognize the problem, at least in part. They state that in the absence of a common membership, any continuous flow of information, such as "naturally" occurs here, would be clear grounds for finding an unfiled agreement. That would be true if substantial rate identity or other coordination of activity followed, as in fact it has here. *Morton Salt*, supra, pp. 576, 577, and cases there cited. Such results are usually a "natural consequence" of the continuous or systematic exchange of rate information. *Unapproved Section 15 Agreement—S. African Trade*, supra, at p. 188. Hearing Counsel say that while the exchange of information is not "odious," the use to which it is put is. But under all the circumstances here, the use to which the information is put—whether it be received via published tariff, shippers' communications, or the equally innocuous route of the common members—is just as "natural" as the transmittal of the information.

The record shows that the respondent conferences have discreetly refrained from communication with each other as such, concerning rate matters, except for the exchanges of tariff pages at the same time that they are published to the trade. The manner in which they have acted upon the information received through this and other concededly proper channels is not sufficient in the premises to require a finding of an unapproved rate-fixing agreement, understanding, or arrangement; that is not, as Hearing Counsel contend, the "one realistic explanation" of the conferences' action, however compelling that conclusion might be but for the peculiar facts of the case.

It seems fair to say that if the facts herein were deemed to require a finding of an unfiled rate-fixing agreement, respondent carriers could not safely operate under two conferences without an approved agreement such as they proposed, unless they deliberately adopted arbitrarily different rates and practices as between the conferences—which might itself constitute a sort of section 15 arrangement as well as a discriminatory practice. Separate conferences local to the Gulf and Atlantic coasts presumably provide some extra benefit from the standpoint of shipper, port, and carrier. At any rate, the record herein does not support Commission action calculated to bring about consolidation of the respondent conferences, notwithstanding its approval of conferences of similar scope voluntarily established in other trades.

Findings and conclusions proposed by the parties have been incorporated herein to the extent that they are found to be material and supported by the record, and are otherwise denied.

Upon the record in this proceeding it is concluded and found that Agreement No. 9413, in the form attached as appendix A—

1. is a true copy of the agreement of the parties, has been seasonably filed for approval, and has not been carried out in whole or part, directly or indirectly, prior to approval;

2. sets out in adequate detail the procedures and arrangements under which the concerted activity authorized therein is to take place, and provides adequately for the filing of reports to the Commission;

3. 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, or be contrary to the public interest, or be in violation of the Shipping Act, 1916; and

4. should be, and it hereby is, approved.

An appropriate order will be entered.

WALTER T. SOUTHWORTH,
Presiding Examiner.

WASHINGTON, D.C.
July 14, 1967.

APPENDIX A

AGREEMENT BETWEEN THE MEMBER LINES OF NORTH ATLANTIC MEDITERRANEAN FREIGHT CONFERENCE and of GULF/MEDITERRANEAN PORTS CONFERENCE

Whereas each of said Conferences operates under a separate agreement which has been duly approved pursuant to section 15 of the Shipping Act, 1916; and

Whereas the Conferences wish to provide machinery for discussing and coordinating their ocean freight rates and practices in respect of those commodities moving to common Mediterranean destination areas which, because of comparable inland transportation costs and other economic factors, are susceptible of being exported either through U.S. North Atlantic ports served by member lines of the North Atlantic Mediterranean Freight Conference or through U.S. South Atlantic and Gulf ports served by the member lines of the Gulf/Mediterranean Ports Conference (hereinafter referred to as common commodities);

Now, therefore, It is mutually agreed as follows:

1. The Chairmen of the two Conferences may, by written or telephonic communication between them, discuss transportation conditions and agree to recommend to their respective Conference member lines the adoption of ocean freight rates and practices applicable to common commodities. If, as the result of such discussions and recommendations, either Conference, voting and operating within the framework of its particular Conference Agreement, should adopt such recommendations, the action so taken shall be reflected in the tariffs of each such Conference, which shall be filed in accordance with the rules of the Federal Maritime Commission.

2. Nothing herein shall affect or prejudice the right of either Conference to reject any recommendation made by its Chairman or its right to act independently of the other in adopting ocean freight rates and practices applicable to common commodities.

3. Within 30 days after any discussions within the scope of this Agreement, a report, certified as to accuracy and completeness, describing all matters which were taken up or discussed on that occasion and specifying the action taken with respect to each such matter, shall be filed with the Federal Maritime Commission by one of the Chairmen participating therein. All correspondence and reports or circulars in whatever form relating to matters within the scope of this Agreement shall be retained for 2 years.

4. Any carrier which may hereafter become a member of either Conference shall automatically become a party to this Agreement for so long as its membership in such Conference shall continue.

5. Either Conference may withdraw from this Agreement by giving 90 days' prior written notice to the other and shall promptly advise the Federal Maritime Commission thereof.

6. This Agreement and any amendment or modification thereof are subject to, and shall not be carried out prior to, approval by the Federal Maritime Commission. When so approved, this Agreement shall supersede and cancel the Agreement between the parties filed with the Federal Maritime Commission on or about January 4, 1965.

Dated: September 12, 1966. (Executed by each of the Members of North Atlantic Mediterranean Freight Conference; and by Gulf/Mediterranean Ports Conference (and its member lines) by John T. Crook, *chairman.*)

FEDERAL MARITIME COMMISSION

Docket No. 66-49

North Atlantic Mediterranean Freight Conference—Rates on Household Goods

Decided November 7, 1967

Unjust discrimination under section 17 of the Shipping Act arises when two shippers of like traffic between the same ports over the same line under substantially similar circumstances and conditions are charged different rates and no competitive relationship between shippers is necessary in such a case.

Rates of American Export and Prudential on certain household goods shipments of the State Department found unjustly discriminatory in violation of section 17 but not unduly or unreasonably prejudicial or preferential under section 16 of the Shipping Act, 1916.

Conference found to have failed to promptly and fairly hear request for shipper for rate reduction contrary to requirements of section 15, but single instance in this case does not warrant disapproval of agreement.

Conference agreement which makes possible control over rates on cargo reserved to American-flag carriers by law found contrary to the public interest, conference ordered to relinquish such control.

Conference rate on household goods not found so unreasonably high as to be detrimental to the commerce of the United States under section 18(b) (5).

Burton H. White for respondents.

Wilbur L. Morse, *Howard A. Levy*, and *Milton W. Stickles*, for intervener, Military Sea Transportation Service.

Donald J. Brunner and *Samuel B. Nemirow*, 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 by an order of investigation served August 23, 1966. Hearings were held before Examiner Benjamin A. Theeman in New York, December 19, 20, and 21, 1966, and an initial decision was issued June 30, 1967. The proceeding is before us on exceptions to that decision. We heard oral argument on the exceptions on October 2, 1967.

FACTS

The North Atlantic Mediterranean Freight Conference (the Conference),[1] serves the trade from North Atlantic ports in the United States to ports in the Mediterranean (except Spanish and Israeli ports). The Conference, by published traiff, fixed the rate on household goods at $81.50 per ton (w/m) except for household goods shipped "to Italian base ports" where the rate is $1.50 per cubic foot or $60 per measurement ton.[2] The Conference tariff specifically excluded cargo shipped by the Military Sea Transportation Service (MSTS) on behalf of the U.S. military departments. These shipments are required to move on U.S.-flag carriers, where available, by section 901, Merchant Marine Act of 1936 (46 U.S.C. 1241) and the Cargo Preference Act (10 U.S.C. 2631). The military household goods rate was established by negotiations between U.S.-flag carriers and MSTS.[3] The negotiation of a separate household goods rate for the military departments was made possible by the exemption of military cargoes from the Conference tariff. The rates negotiated under this agreement are published in a separate tariff.[4]

During the period of record, the calendar year of 1965, and the first 6 months of 1966, American Export Isbrandtsen Line, Blue Sea Line, Prudential Lines, Concordia Line, Fresco Lines, and Thorm Lines all carried State Department household goods under the Conference tariff at $60 per ton to Italian ports and $81.50 to other Mediterranean ports. Of these lines, however, only American Export and Prudential carried military household goods to the same ports under the AGAFBO

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[1] The Conference and its members are respondents in this proceeding. Named respondents in the order were : American flag—American Export Isbrandtsen Lines Inc. ; Isthmian Lines, Inc. ; Prudential Lines, Inc. ; States Marine Lines ; and Foreign flag—Blue Sea Line ; Concordia Line ; Constellation Line ; Fabre Line ; Compagnie Generale Transatlantique ; Fresco Line ; Hansa Lines ; Hellenic Lines, Ltd. ; Hoegh Line ; Italian Line ; (Perusahaan Negara (P.N.)) "Djakarta" Lloyd ; National Hellenic American Line, S.A. ; Orient Mid-East Lines ; Dampskibsselskabet Torm A/S ; and Zim Israel Navigation Co., Ltd.

[2] This rate was established because of competition. Cargoes were being shipped from U.S. North Atlantic ports to Rotterdam, Antwerp, Amsterdam, and other European ports and then shipped overland to Italian consignees causing a diversion of traffic from the conference.

[3] These concerted negotiations were conducted under the aegis of Agreement No. 8086, establishing a group called the Atlantic and Gulf American Flag Berth Operators (AGAFBO) which operates inter alia between the same Mediterranean ports as the conference except that Spanish and Israeli ports are included.

[4] That particular rates in issue here were the result of negotiations in which MSTS at first refused the AGAFBO request for a general increase on all rates for the military departments because commercial rates had not been increased. Later, however, the rate on household goods was reduced and the rates on other military items increased.

tariff at $36.20 a ton. The record shows no carriage of military household goods by the foreign-flag members of the conference.

There is no essential difference in transportation characteristics between the shipment of household goods whether carried for the State Department or MSTS. Household goods of Government personnel are shipped abroad in containers and there were occasions where the same container had seen use in the transportation of household goods of both the Department of State and the military departments. There were instances where the household goods of both shippers were aboard the same vessel of Export or Prudential but different rates were assessed, and there were of course other times where household goods of both shippers moved on different vessels of these two lines but at different rates.

On March 10, 1966, the Department of State wrote the Chairman of the Conference requesting that its rate on household goods be reduced to $36.20 per measurement ton. While the Chairman acknowledged receipt of the request on March 15, 1966, no other action was taken execpt to continue the matter on the docket from meeting to meeting. Even discussion ceased after July 1966. The members of AGAFBO, including American Export and Prudential, who were also members of the Conference knew of State's request.

Discussions and Conclusion

The issues presented are (1) whether the exaction of the higher rate on State Department shipments violated sections 16 or 17 of the Shipping Act, 1916, and (2) whether the conference had violated section 15 of the Shipping Act by its handling of the State Department's request for a rate reduction and by allowing foreign-flag lines to participate in the fixing of rates on U.S. Government cargoes; and (3) whether the rate on State Department household goods was so unreasonably high as to be detrimental to the commerce of the United States under section 18(b) (5) of the Shipping Act.

The examiner concluded that of the members of the Conference, only American-Export Isbrandtsen Lines and Prudential Lines had violated sections 16 and 17 of the act in that they were the only lines that had carried household goods for both the Department of State and the military departments. He found no violations of sections 15 or 18(b) (5). Export and Prudential excepted to the examiner's conclusions that they had violated sections 16 and 17, while Hearing Counsel excepted to the examiner's failure to find violations of sections 15 and 18(b) (5). The Military Sea Transportation Service was granted permission to intervene subsequent to the issuance of the initial decision for the purpose of excepting to the examiner's conclusion that the military departments had been granted an undue or unreasonable preference in violation of section 16 of the act.

Our conclusions differ somewhat from those of the examiner. Any exception not specifically treated or rejected by the context of our discussion and conclusions here has been considered and found not justified.

Respondents [5] raise a threshold objection to our jurisdiction in this case. It is their contention that the carriage of Government household goods is not that "commerce of the United States" which is regulated by the Shipping Act, since these cargoes are not commercial in nature. It seems to be respondents' position that we are without power under the Shipping Act to regulate the practices of carriers, no matter how unlawful, just so long as the shippers involved are Government agencies or for that matter, any noncommercial enterprise. Just why Congress would prohibit the evil of say "discrimination" as between "commercial" shippers and at the same time leave carriers free to treat noncommercial shippers in any way they may choose is not explained by respondents. We need not pause to speculate on any possibilities behind such an anomalous result since the statute itself dictates an opposite conclusion.

The relevant jurisdictional provisions are in section 1 of the act which defines a "common carrier by water in foreign commerce" as:

> A common carrier, except ferryboats running on regular routes, engaged in the *transportation by water of passengers or property* between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade * * *.[6] [Emphasis ours.]

while a "common carrier by water in interstate commerce" is defined as:

> * * * a common carrier engaged in the *transportation of persons or property* on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District or possession of the United States and any other State, Territory, District or possession of the United States, or between places in the same Territory, District or Possession.[7] [Emphasis ours.]

and finally, a "common carrier by water" means "a common carrier by water in foreign commerce or a common carrier by water in interstate commerce * * *."

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[5] The only respondents taking exception to the initial decision are American Export-Isbrandtsen Lines and Prudential Lines, and unless otherwise specifically indicated or required by the context, "respondents" will refer to those two lines only.

[6] A proviso excludes "ocean tramps" from the definition of common carrier.

[7] The Transportation Act of 1940 placed common carriers by water in interstate commerce under the jurisdiction of the Interstate Commerce Commission except insofar as they engaged in the so-called offshore domestic commerce.

Thus, the act applies to any common carrier transporting property between ports in the United States and a foreign country and that carrier is by the terms of the statute itself engaged in the "commerce of the United States." It is not the type of the property transported by the act of transportation itself that subjects a common carrier to the act's jurisdiction.[8]

In contending the contrary, respondents confuse the jurisdictional scope of the act with criteria for finding violations of its provisions. Thus, they state:

> The intent of the Shipping Act in relation to commerce is abundantly clear from the Commission's own decisions * * *. In order to find discrimination or preference, it is necessary to show prejudice to the movement of goods (*a*) entering the stream of commerce; (*b*) shipped by *two* shippers and not *one;* (*c*) where the two shippers are in competition with one another and (*d*) whereby one of them is substantially injured. [Emphasis respondents.]

The scope of an entire statute is not measured by the circumstances or requirements necessary to a violation of one of its provisions. A violation of one provision of the Shipping Act for instance might require that the movement in question be commercial in nature and the shippers involved be in competition with each other, but it does not follow that these conditions must attend all other situations regulated by the act.[9] The transportation involved here is the "commerce of the United States" and, as such, is subject to the Shipping Act.[10]

Still, respondents urge that they have violated neither section 16 nor section 17. Again, it is the absence of any competitive relationship between shippers, which they contend is a prerequisite to finding any unlawful discrimination or prejudice under sections 16 and 17. Respondents refer us to *West Indies Fruit Co.* v. *Flota Mercante*, 7 F.M.C. 66 (1962); *Phila. Ocean Traffic Bureau* v. *Export S.S. Corp.*, 1 U.S.S.B.B. 538 (1936); *Atl. Refining Co.* v. *Ellerman & Bucknall S.S. Co.*, 1 U.S.S.B. 242 (1932); and *Boston Wool Trade Association* v. *M. and M. T. Co.*, 1 U.S.S.B. 24 (1921). To respondents, this doc-

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[8] That the application of the act to the transportation of Government cargoes is not a novel construction; see e.g., *Alaskan Rates*, 2 U.S.M.C. 558, 576 (1941); *Alaskan Rates*, 2 U.S.M.C. 639, 651 (1942); *General Increases in Rates (1961)*, 7 F.M.C. 260, 274 (1962); *In the Matter of the Carriage of Military Cargo*, 10 FMC 69 *American Export Isbrandtsen Lines* v. *F.M.C.*, 380 F. 2d 609 (1967).

[9] We do not read the initial decision in Rates on Government Cargoes, 11 FMC 263, or *Dept. of State, A.I.D.* v. *Lykes Bros. S.S. Co., Inc.*, 8 F.M.C. 153 (1964), as imposing any such qualification.

[10] Absent some such specific qualification, "commerce" as used in the Constitution and laws of the United States, is broad enough to encompass any type of movement of persons or things whether for profit or not. See *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How 421 (1856); *County of Mobile* v. *Kimball*, 102 U.S. 691 (1880); *Covington &c. Bridge Co.* v. *Kentucky*, 154 U.S. 204 (1894); *Kelley* v. *Rhoads*, 188 U.S. 1 (1903); *Edwards* v. *California*, 314 U.S. 160 (1941). As we have said, the Shipping Act affords no ground for restricting its meaning when applied to ocean transportation.

trine of shipper competition is not, as they think the examiner "intimated," a "novel interpretation of the Commission's predecessors which the Commission is free to disown," but rather it derives from Supreme Court decisions construing the comparable provisions of section 3 of the Interstate Commerce Act. It is pointed out that shipper competition as a prerequisite to a violation was adopted in the first reported case of alleged preference and prejudice under the Shipping Act. *Boston Wool Trade Association* v. *M. and M. T. Co.*, 1 U.S.S.B. 24 (1921). This position that competition between shippers is necessary to a finding of a violation of both sections 16 and 17 has found expression in the *West Indies* case, supra, quoted from by respondents:

> The manifest purpose of the sections, 16 and 17, is to require common carriers subject to the act to accord like treatment to all shippers who apply for and receive the same service. *American Tobacco Co.* v. *Compagnie Generale Transatlantique*, 1 U.S.S.B. 53, 56 (1923). Prejudice to one shipper to be unjust must ordinarily be such that it constitutes a source of positive advantage to another *Port of Philadelphia Ocean Traffic Bureau* v. *The Export S.S. Corp., et al.*, 1 U.S.S.B.B. 538 (1936). There must be at least two interests involved in any case of preference, prejudice, or discrimination, and it is essential that there be established an existing and effective competitive relationship between the two interests. *Huber Mfg. Co.* v. *N.V. Stoomvaart Maatschappij "Nederland" et al.*, 4 F.M.B. 343 (1953), *American Peanut Corp.* v. *M. & M. T. Co.*, 1 U.S.S.B. 78 (1925), *Boston Wool Trade Assn.* v. *M. & M. T. Co.*, 1 U.S.S.B. 24 (1921), *Eagle-Ottawa Leather Co.* v. *Goodrich Transit Co.*, 1 U.S.S.B. 101 (1926). This competitive relationship is necessary not only to show the extent to which the complaining shipper was damaged by the alleged preference, prejudice, or discrimination; its establishment is necessary to prove the violation itself. *American Peanut Corp.* v. *M. & M. T. Co.*, supra, *Boston Wool Trade Assn.* v. *M. & M. T. Co.*, supra (7 F.M.C. at 69, 70).

Hearing Counsel, on the other hand, relying on *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41 (1922), urge that a competitive relationship between shippers is not necessary to a finding of a violation of either section 16 or 17. Pointing out that the transportation services furnished by respondents to the Department of State and the military departments were identical, Hearing Counsel quote from page 45 of the *Eden* decision:

> It is evident that the purpose of Congress in enacting these provisions of the statute was to impose upon common carriers within the purview thereof the duty of charging uniform rates to all shippers receiving a similar transportation service. The duty of the respondent under these sections was to serve the public impartially, and we think the language used in *W. U. Tel. Co.* v. *Call Pub. Co.*, 181 U.S. 92, in dealing with a similar statute, is entirely applicable to the case in hand. The court there said: "All individuals have equal rights both in respect to service and charges. Of course such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. But that principle of equality does forbid any difference in charge which is not based upon

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difference in service, and even when based upon difference of service must have some reasonable relation to the amount of difference and cannot be so great as to produce an unjust discrimination."

Hearing Counsel also find an analogy in cases of discrimination in passenger fares where no competitive relationship between passengers can or need be shown. See, e.g., *Hawaiian Common Fares Case*, 10 C.A.B. 921 (1949). Our attention is invited to the fact that "respondents' new standard would result in a holding that any commodity shipped by a nonmerchant private or public shipper could be subjected to the most severe preference, prejudice, or discrimination without the benefit of the safeguards of sections 16 or 17"; a result which Hearing Counsel decry.

Finally, the examiner himself would seem to encounter some difficulty with the absence of any competitive relationship shippers. His conclusion that sections 16 and 17 have been violated rests upon the "special circumstances in this case [which] do not require a finding of effective shipper competitive relationship as a prerequisite to a finding that a violation of sections 16 and 17 of the act has occurred." The "special circumstance" would appear to be the fact that no competitive relationship can possibly arise in this case because the shippers involved here are who they are—governmental agencies.[11] But this, it seems to us, begs the question. The impossibility of a competitive relationship arising between particular shippers may just as well be an indication that the act was not designed to protect those shippers, and this, as we understand it, is precisely the contention of respondents.[12] Finally, after finding a violation in the absence of shipper competition, the examiner suggests that in view of his findings, we "may wish to reconsider the question whether effective shipper competition is a prerequisite to a finding of a section 16 and 17 violation." [13]

We cannot agree that this case presents special circumstances which of themselves warrant the elimination of a competitive relationship between shippers under sections 16 and 17 of the act. The difficulties experienced by the parties in this case and the examiner are due to the fact that they have treated sections 16 and 17 as if the one or the other was the product of a meaningless redundancy on the part of Congress; i.e. that the two sections are different ways of saying pre-

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[11] Presumably, the examiner would apply this rationale to any case involving shippers who, because they are not engaged in a commercial enterprise cannot give rise to a competitive relationship for he states: "It is immaterial for the purposes of the Shipping Act, that the shippers are governmental agencies and not private parties."

[12] The examiner admits that his study of the cases both before and after *West Indies* failed to produce a single case in which the goods transported "did not enter the market place," thereby making possible a competitive relationship.

[13] The examiner offers certain comments to assist us in this reconsideration which will be discussed wherever relevant to our decision herein.

cisely the same thing. To do so not only fills the statute with excess verbiage, but also ignores a considerable body of law on discrimination, preference, and prejudice laid down by the Supreme Court and the Interstate Commerce Commission under the Commerce Act. [14]

It is well settled that the provisions of the Shipping Act which confer upon the Commission authority over the rates and practices of water carriers and prescribe its mode of exercise closely parallel those of the Interstate Commerce Act establishing the corresponding relations of the Interstate Commerce Commission to carriers by rail. *Swayne & Hoyt, Ltd.* v. *U.S.*, 300 U.S. 297 (1937); *U.S. Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932); and where dissimilarities in the respective modes of transportation do not warrant a different construction, the Shipping Act should be construed in the light of the similar provisions of the Commerce Act. *Far East Conf.* v. *United States*, 342 U.S. 570 (1952). *Cf. Atl. Refining Co.* v. *Ellerman & Bucknall S.S. Co.*, 1 U.S.S.B., 242, 243 (1932), and *J. G. Boswell Co.* v. *American-Hawaiian S.S. Co.*, 2 U.S.M.C. 95, 102 (1939).

As respondents point out, "section 16 of the Shipping Act is substantially identical with section 3(1) of the Interstate Commerce Act * * *." *State of California* v. *United States*, 46 F. Supp. 474 (D.C.N.D. Cal. S.D. 1942) affd. 320 U.S. 577. At the time section 16 was passed, section 3(1) provided:

> That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality or any particular description of traffic whatsoever or to subject any particular person, company, firm, corporation, or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

This prohibition against undue or unreasonable preference or prejudice is designed to deal with two or more competing shippers or localities receiving different treatment which is not justified by differences in competitive or transportation conditions. The classic case would be where the shippers at A and B are competitive in a common market at C, the line hauls from A and B to C are the same and the same competitive influences apply to both. *Liberty Cooperage & Lumber Co.* v. *Michigan Central R.R. Co.*, 109 I.C.C. 1 (1926). See also *Texas & Pac. Railway* v. *I.C.C.*, 162 U.S. 197 (1896). The section is aimed at that favoritism by carriers which enables a shipper to reach a market and

[14] This treatment is, however, understandable just on the basis of the Shipping Act precedents already referred to, but it is even more readily understood in view of even the Supreme Court's penchant for using discrimination on the one hand, and preference and prejudice on the other as if they were interchangeable when discussing them under the Commerce Act. See e.g. *Wight* v. *U.S.*, 167 U.S. 512 (1897); and *Texas & Pac. Railway* v. *ICC.*, 162 U.S. 197 (1896).

sell his goods therein at a lower rate than his competitors. *I.C.C.* v. *B. & O. Railroad*, 145 U.S. 263 (1892). Shippers are entitled to all the benefit to be derived from their natural or acquired advantages of geographical location and carriers may not by a difference in rates destroy those advantages unless the difference is justified by the cost of the respective services, by their values, or by other transportation conditions. *United States* v. *Illinois Central Railroad*, 263 U.S. 515 (1924). Since the section is intended to prevent unlawful favoritism among competitors in the same marketplace, the allegedly preferred shipper must ordinarily be in competition with the allegedly prejudiced shipper. *Texas & Pac. Railway* v. *I.C.C.*, supra; *New Haven R.R.* v. *I.C.C.*, 200 U.S. 361 (1906); *United States* v. *Illinois Cent. R.R.*, 263 U.S. 515 (1924); *United States* v. *Great Northern Ry. Co.*, 301 I.C.C. 21 (1957); *Rheem Mfg. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 273, I.C.C. 185 (1948).

Normally, and because the aim is at eliminating arbitrarily different treatment between competitors, a prejudice to one to be unlawful under section 3 must ordinarily be such that the preference arising out of it is a source of advantage to the other allegedly favored. *California Walnut Growers Asso.* v. *A. & R.R.R. Co.*, 50 I.C.C. 558 (1918); *Colgate & Co.* v. *T. & J. Ry. Co.*, 144 I.C.C. 253 (1928). All this, however, is not to say that a case of undue prejudice is made out by a mere showing of lower rates between competing shippers. Other factors may work to make a preference or prejudice reasonable or due. For instance, competition from another carrier at the allegedly preferred point of destination or of origin may justify the difference in rates. *Texas & Pac. Railway* v. *I.C.C.*, 162 U.S. 197 (1896); *East Tenn. &c. Ry. Co.* v. *I.C.C*, 181 U.S. 1 (1901).

Among the other factors to be considered are the convenience of the public, the fair interest of the carrier, the relative quantities of the traffic moved, the relative cost of the service and profit to the carrier, and the situation and circumstances of the respective customers, as competitive or otherwise. *I.C.C.* v. *Baltimore & O. R. Co.*, 43 Fed. 37, 53 (1890). Not only should relative distances and transportation conditions be considered, but so should all matters which carriers, apart from any question arising under the statute, would treat as calling for a preference or advantage. *American Sugar Refining Co.* v. *Chicago B. & Q. R. Co.*, 169 I.C.C. 557, 564–565 (1930); *Michigan Fertilizer Co.* v. *Louisville & N. R. Co.*, 214 I.C.C 585, 587 (1936). It is even said that there should be consideration of:

> * * * all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers,

and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act (*Texas & Pac. Railway* v. *I.C.C.*, 162 U.S. at 219).

Thus, if we apply the construction given section 3(1) of the Commerce Act to section 16 of the Shipping Act, we can agree with respondents that the presence of a competitive relationship is required to prove a case of undue preference or prejudice.

We have already said that the difficulty encountered by everyone in this case stemmed from their treating sections 16 and 17 as one and the same thing. Are we here again faced with the requirement of showing competition between shippers under section 17 of the act with its terse prohibition against unjust discrimination? That section simply declares it unlawful for "any common carrier by water" to "demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports * * *." The act offers no clue as to the meaning of the words "unjustly discriminatory," but again, the intent of Congress was to apply to common carriers by water those regulatory principles already applied to railroads under the Commerce Act. *Swayne & Hoyt* v. *U.S.*, supra; *State of California* v. *United States*, *supra*.[15] The Commerce Act counterpart of section 17 is section 2 which provides in relevant part:

> That if any common carrier subject to the provisions of this part shall * * * receive from any person * * * a greater or less compensation for any service rendered * * * in the transportation of passengers or property subject to the provisions of this part than it receives from any other person * * * for doing for him * * * a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions such common carrier shall be * * * guilty of unjust discrimination.

An early case under section 2, *Wight* v. *United States*, 167 U.S. 512 (1897), involved two consignees of beer shipments at the same terminal. The railroad absorbed the terminal to warehouse delivery charge for one consignee but not the other. The railroad pointed out that the favored consignee's warehouse was situated right on the line of a competing road which therefore had no delivery charge and that unless it [the defendant would] absorbed the delivery charge from its terminal to the favored consignee's warehouse, the business would be lost to the competing road. The presence of carrier competition, it was argued, made the circumstances and conditions surrounding the transportation service rendered such consignee dissimilar. The court declared that section 2 was designed "to enforce equality

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[15] In fact, the recommendation of the Alexander report (House Committee on Merchant Marine and Fisheries, Report on Steamship Agreements and Affiliations in the Foreign and Domestic Trades, 63d Cong., pp. 415–417) originally recommended that the ICC administer the shipping statute.

between shippers and it prohibits any rebate or other device by which two shippers shipping over the same line, the same distances, under the same circumstances of carriage, are compelled to pay different prices therefor," and rejected the argument that carrier competition rendered the circumstances and conditions dissimilar. The term "under substantially similar circumstances and conditions" refers to the matter of carriage and does not include competition.

In further describing the purpose of section 2, the court said:

> The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another (167 U.S. at 517).

Thus, under section 2 of the Commerce Act, discrimination arises when two shippers of like traffic, shipping over the same road between the same points under substantially similar circumstances and conditions, are charged different rates. *Wight* v. *United States*, supra; *I.C.C.* v. *Alabama Midland R'y.*, 168 U.S. 144 (1897); *United States* v. *Great Northern Ry. Co.*, 301 I.C.C. 21 (1957); *Whiterock Quarries, Inc.* v. *Pittsburgh & L. E. R. Co.*, 280 I.C.C. 143 (1951).

While it is also the purpose of section 2 to insure against favoritism among competing shippers, unlike section 3, the equality required under section 2 is not dependent upon any showing that the shippers or consignees involved compete in the marketplace. *Union Tanning Co.* v. *S. Ry. Co.*, 25 I.C.C. 112 (1912); *Barber Asphalt Co.* v. *L. & N. R. R. Co.*, 88 I.C.C. 307 (1924); *Chamber of Commerce, Macon* v. *C., N. O. & T. P. Ry. Co.*, 27 I.C.C. 263 (1913). Where the conditions of section 2 are met, a carrier may not make a difference in rates because of differences in circumstances arising either before the service of the carrier began, or after it was terminated. *I.C.C.* v. *Del., L. & W. R. R.*, 220 U.S. 235 (1911); nor may a carrier make a difference in rates based upon the identity of the shippers and this is so whether the unfavored shipper is injured or not. *I.C.C.* v. *United States*, 289 U.S. 385 (1933); *Mitchell* v. *United States*, 313 U.S. 80, 94 (1941), and such discrimination may be restrained for the future. *I.C.C.* v. *Campbell*, supra.[16]

[16] For one statement of the possible reasons for such a sweeping prohibition even where no injury is shown, see "Lake, Discrimination by Railroads and Other Public Utilities" (1947), where the author speculates that (1) though the competing patron may not be hurt, it was thought the public, the consumers, might be; or (2) it was thought too difficult for the complainant to prove that he had been hurt; or (3) the legislature had a passion for equality. That discrimination even though it does not affect competition in the market should not throw the burden of cost from the favored shipper onto other consumers, see *Nor. Pac. Ry.* v. *North Dakota*, 236 U.S. 585 (1915).

This brief consideration of the law under the Commerce Act shows that a very real distinction exists between unjust discrimination on the one hand and undue or unreasonable preference or prejudice on the other. To constitute unjust discrimination, there must be two shippers of like traffic over the same line between the same points under the same circumstances and conditions but who are paying different rates. In such a case, it is immaterial that the shippers are not in competition with each other. Where the service is different—e.g., different commodities—or the transportation is between different localities, it is a case of undue or unreasonable preference or prejudice unless the many relevant considerations render the different rates reasonable. Ordinarily, the shippers involved must be competitors. But will we, by applying this construction of the terms to sections 16 and 17 of the Shipping Act, be engaging in a wholesale destruction of all Shipping Act precedent on the subject? We think not.

A number of the cases clearly indicate that our predecessors were aware of the difference between the two sections of the Shipping Act. Of course, the limitations of this opinion will not permit an exhaustive survey of all the cases and, even if such a piece of scholarship were material to our decision here, it would doubtless uncover some of the many anomalies which are bound to have crept into 50 years of administering the statute and this might further becloud rather than clarify the issue here. This task of reconciliation we will leave to academic scholarship and future cases. It is sufficient here to unravel a short length of the thread, admittedly thin, which runs through our cases on discrimination and preference or prejudice.

Setting aside the *West Indies* case for consideration later, we begin with *Boston Wool Trade Association* v. *M. and M. T. Co.*, 1 U.S.S.B. 24 (1921), the first reported case under section 16, where the complainant alleged only that the rates on wool were prejudicial as compared to the rates on boots and shoes, cotton piece goods, and iron and steel articles. No violation of section 17 was alleged.[17] In dismissing the charge, the Shipping Board said at page 30:

> It is manifest of record that no competition exists between wool and boots and shoes, cotton piece goods, and iron and steel articles. It is therefore recognized that the rates on wool cannot be prejudiced by the rates on the latter commodities. Prejudice to shippers and receivers of wool cannot be predicated upon the charges for transporting other products which differ essentially in character from wool and supply widely dissimilar demands.[18]

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[17] Sec. 17 is by its terms applicable only to common carriers by water in foreign commerce. Further, discrimination, it will be remembered, requires different rates on a like kind of traffic, a requirement not met in this case.

[18] As respondents note, the Shipping Board there merely echoed what the ICC had said that same year in *Pioneer Pole & Shaft Co.* v. *Director General*, 64 I.C.C. 744, 746 (1921), "to constitute undue prejudice under section 3 a competitive relationship between persons, localities, or discriptions of traffic * * * must * * * appear."

Although no precedent was cited, the above was clearly in harmony with the Supreme Court decisions interpreting preference and prejudice under section 3 of the Commerce Act where shipper competition was ordinarily a requirement for preference or prejudice but not discrimination. See for example, *Texas & Pac. Railway* v. *I.C.C.*, 162 U.S. 197 (1896).[19] In *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41 (1922), the first reported case in which a violation of section 17 was alleged, the complainant charged that the exaction of higher rates from him than from those shippers who agreed to give respondent their exclusive patronage was not only unduly and unreasonably prejudicial but also unjustly discriminatory. The Shipping Board propounded the question presented as:

> Can the defendants lawfully require the complainants to pay more for carrying the same kind of merchandise under like conditions to the same places than they charge to others because the complainants refuse to patronize the defendants exclusively, while other shippers do not? (p. 43)

The Shipping Board found that "from the facts of record * * * it is manifest that the transportation service furnished the complainants and contract shippers was in all respects identical." The Board then concluded and decided that "the exaction of higher rates from the complainants than from other shippers for like service under the circumstances involved in this case subjected the complainants to undue and unreasonable prejudice and disadvantage and constituted unjust discrimination between shippers, in violation of sections 16 and 17 of the act."[20] Significantly, the opinion contains not a word concerning the presence or absence of a competitive relationship between shippers, nor need there have been since the services for which different rates were charged were identical and unjustly discriminatory.

In *Am. Tobacco Co.* v. *Compagnie Generale Transatlantique*, 1 U.S.S.B. 53 (1923), the shippers involved shipped like traffic over the same line between the same ports yet, because of respondents' regulations on collect freight and currency exchange, complainant paid a higher rate. The Shipping Board said at page 56:

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[19] See also *Boston Wool Trade Asso.* v. *Eastern Steamship Lines, Inc.*, 1 U.S.S.B. 36 (1922) where absorption of delivery charges on some traffic but not on other traffic was justified by carrier comeptition on the former but not the latter. Again, this was in line with the construction placed on section 3. *Texas & Pac. Railway* v. *I.C.C.*, *supra*; *East Tenn. &c. Ry. Co.* v. *I.C.C.*, *supra*.

[20] This, of course, raises the question of whether unjust discrimination under sec. 17 also constitutes undue or unreasonable preference or prejudice under sec. 16. We do not need to decide that question here. We note, however, that sec. 17 applies only to common carriers by water in foreign commerce and that if the circumstances and conditions constituting unjust discrimination under sec. 17 are not encompassed within the scope of sec. 16, then it may be possible to argue that unjust discrimination is not prohbited in our offshore domestic trades, a highly dubious construction of the act.

The evidence of record indicates that, from a transportation standpoint, the shipments of the complainant were similar in every respect to those of shippers of cigarette paper who prepaid their freight. Insofar as their actual physical handling and transportation were concerned, the record is conclusive that the service rendered by the respondent in connection with the consignments of each class of shippers was in every particular identical. It follows that unless conditions incident to the handling and transportation of the complainant's collect shipments existed which warranted the higher charges exacted, discrimination within the contemplation of the statute is established.

Again, there was no mention of competition between shippers.[21] The line of cases beginning with *Eden* and extending through *Isbrandtsen Co.* v. *U.S.*, 96 F. Supp. 883 (1951) aff'd. Sup. Ct. 342 U.S. 9 (1952) involving the validity of dual rate contracts do not turn upon the presence or absence of competition,[22] and this is consonant with a proper interpretation of the law since different rates would be applicable to shipments of the same commodity over the same line between the same ports under the same transportation conditions, depending on whether the shipper was a contract signatory or not. Thus, the cases involved unjust discrimination and no competitive relationship need be shown.[23] The *American Tobacco* case and *Rates, Charges, and Practices of L. & A. Garcia & Co.*, 2 U.S.M.C. 615 (1941) are yet other instances where discrimination was involved and no competitive relationship was found necessary.

On the other hand, the line of cases beginning with *Boston Wool* and culminating in the *West Indies* case, involved situations of preference or prejudice and not discrimination. The cases cited in *West Indies* involved situations in which either services were different or the rates between different points were involved or there was no evidence of prejudice or discrimination.[24] Thus, in *Phila. Ocean Traffic Bureau* v. *Export S. S. Corp.*, 1 U.S.S.B. 538 (1936), the rates compared were from a common origin to Philadelphia on the one hand and New York on the other, while *American Peanut Corp.* v. *M. & M. T. Co.*, 1 U.S.S.B. 78 (1925), involved different ports of ori-

[21] Competition was considered in the further hearing on reparations (see 1 U.S.S.B. 97).

[22] See e.g. *Gulf Intercoastal Contract Rates*, 1 U.S.S.B.B. 524 (1936); *Contract Routing Restrictions*, 2 U.S.M.C. 220 (1939); *Contract Rates—Port of Redwood City*, 2 U.S.M.C. 727 (1945); *Secretary of Agriculture* v. *N. Atlantic Cont'l Frt. Conf.*, 5 F.M.B. 20 (1956).

[23] The question of whether an agreement to exclusively patronize a carrier is a transportation condition within the meaning of *Wight* v. *U.S.*, supra, which justifies discrimination has been mooted by Public Law 87–346 which added sec. 14b to the act. Compare the *Eden Mining* case, supra, with *Swayne & Hoyt*, supra

[24] Except, of course, the *American Tobacco* case, supra, which is omitted by respondents from the quotation as cited to us.

gin while *Boston Wool Trade Association* v. *M. and M. T. Co.*, 1 U.S.S.B. 24 (1921) involved unlike traffic.[25]

Thus, while the discussions in many precedents often use "preference or prejudice" and "discrimination" interchangeably, the actual conclusions in a great many, if not all of them, are based upon the distinction between the two. The failure to make the distinction does not, of course, make the actual holding in a case wrong. For example, in the *West Indies* case, the failure to find a violation of both sections 16 and 17 turned upon the lack of competition between shippers. This was proper for section 16 but not for section 17. However, no violation of section 17 could have been found anyway since the rates complained were not for transportation between the same points.

We are, of course, aware that section 17 also prohibits rates, fares, or charges which are unjustly discriminatory between ports; and that, in such a case, it is difficult to envision a situation where the transportation involved would be "between the same points." But whatever the criteria for measuring or judging unjust discrimination between ports may be, we find no differences in transportation conditions between land carriage under the Commerce Act and ocean carriage under the Shipping Act which would warrant the continuation of an unfortunate departure from the long-established principles governing unjust discrimination as between shippers. Indeed, these principles are such that a difference in the mode of carriage would of itself have little, if any, bearing upon them. We are unaware of any difference inherent in water carriage vis-a-vis land carriage which would justify the water carrier in charging different rates to two shippers of like traffic over the same line between the same points under substantially similar circumstances. Thus, under the doctrine of *California* v. *U.S.*, supra, and the related cases, the principles we have discussed above in connection with sections 2 and 3 of the Commerce Act are properly applicable generally to sections 17 and 16 of the Shipping Act, leaving specific departures to particular future cases.

It is clear then that what is involved here is discrimination and that section 17 has been violated if the discrimination is unjust. But respondents argue that there is no discrimination at all here, much less unjust discrimination. How can there be discrimination, ask respondents, when there is only one shipper involved—the U.S. Government—and you cannot have discrimination "between" a single shipper. *United*

[25] *Huber Mfg. Co.* v. *N. V. Stoomvart Maatschappij "Nederland"*, 4 F.M.B. 343 (1953) turned on the point that it had not been shown that anyone else ever paid the higher rate complained of, and in *Eagle-Ottawa Leather Co.* v. *Goodrich Transit Co.*, 1 U.S.S.B. 101 (1926), there was no violation of sec. 16 found, but nowhere in the opinion is this failure to find a violation expressly grounded on the lack of an effective competitive relationship.

States v. *Tozer*, 39 Fed. 369 (DCECMO 1889). We might be inclined to accept this argument if, among other things, respondents' past actions didn't speak louder than their present words. After a long history of in fact treating the Department of State and the military departments as separate shippers and thereby exacting different rates from each, respondents would now in theory merge the separate identities and justify the discriminatory exactions. Respondents have, at least since 1950, consistently conceived of and treated with the State Department on the one hand and the military departments on the other as distinct and separate entities each shipping cargoes in his own right. Thus, the rates applied to State were fixed by the Conference, while those applied to the military were negotiated by AGAFBO with MSTS. In cases of shipments for the military, the particular department appeared on the bill of lading as the shipper, while the State Department appeared on the bill of lading as shipper of its cargoes. Indeed, it was this treatment by respondents of State and the military as separate individual shippers that made possible the discrimination at issue here. Respondents' past conduct estops them from now arguing that the two shippers are one. Further, it seems to us that the very difference in rates establishes the individuality of the shippers, no single shipper would stand the exaction of such disparate rates on his shipments. We will not ignore the actualities of this case and substitute for them a conceptualistic argument which would allow respondents to perpetuate the discrimination clearly established on this record, and we conclude that on the facts of this record, that the Department of State and the military departments are not the same shipper.

Respondents charge that the examiner ignored "transportation conditions" which prompted the establishment of the lower rate to the military departments and which justify the discrimination, and they argue that, if these transportation conditions are considered and given their due weight, discrimination there may be, but it is not, unjust. It is respondents' contention that the lower rate on household goods was granted to MSTS in return for an increase in rates on other commodities which move in considerable volume, and that this volume movement justifies this discrimination. The difficulty here is that the record in no way gears the difference in rate to the difference in the two movements, even if volume would justify otherwise unjust discrimination.[26] Moreover, it would not seem the rate on one commodity, if discriminatory, can be justified by the volume of movement of other commodities.

[26] "That one shipper furnishes a much greater volume of traffic than another does not create dissimilarity of circumstances and conditions." *U.S.* v. *Tozer*, 39 Fed. 369 (D.C.E.D. Mo. N.D. 1889).

Finally, respondents argue that the discrimination if it exists and even if it is unjust, was beyond their control and therefore since they could not have corrected the discrimination by their own rate action, they cannot be held responsible. *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627 (1933).[27] The Conference, on the other hand, in defense to another charge of unlawful conduct under the act, is quick to point that the vote on the State Department rate was unanimous, which means of course that Export and Prudential voted in favor of the discriminatory rate. Respondents' argument would have more appeal had they made just one attempt to alleviate the situation. But the record is devoid of such attempt. If the respondents anticipated difficulties with the Conference over the State Department, they gave no indication of it. They sought help neither from the Conference nor this Commission. Even after the complaint of the State Department, respondents made no move to bring the matter up for consideration; instead, the request was laid over at meeting after meeting.[28]

A plea of compulsion or lack of control over a discriminatory rate cannot rest upon an unbroken history of cooperation or acquiescence in the establishment and maintenance of that rate or the mere possibility that any attempt to correct the discrimination would be blocked by the foreign-flag lines of the Conference.[29] See *In the Matter of the Carriage of Military Cargo*, supra. This brings us to the question of whether the Conference has violated section 15. But before considering it, we shall state our conclusion respecting the charge of unjust discrimination. On the basis of the foregoing, we conclude that respondents Export and Prudential by charging different rates to the Department of State and the military departments for transporting the household goods of each over their lines, between the same ports under substantially identical circumstances and conditions have unjustly discriminated as between them in violation of section 17 of

[27] The court said at 650:

"A carrier or group of carriers must be the common source of the discrimination—must effectively participate in both rates, if an order for correction of the disparity is to run against it or them. Where an order is made under sec. 3 [of the Commerce Act] an alternative must be afforded. The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both * * *. The situation must be such that the carrier or carriers if given an option have an actual alternative."

[28] It is clear from the record that respondents' concern was not with the conference but rather with the new competitive bidding system for fixing rates then under consideration and the impact it would have on military rates. See *In the Matter of the Carriage of Military Cargo*, 10 FMC 69, affd. *American Export-Isbrandtsen Lines, Inc.* v. *Federal Maritime Commission*, 380 F. 2d 609 (1967).

[29] Respondents charge the examiner with yet another error, asserting that he improperly shifted the burden of proof onto them. A difference in rates for substantially identical services is prima facie discriminatory. *Contract Routing Restrictions*, supra. Hearing Counsel, having established this prima facie case, it was then up to respondents to go forward and show that the discrimination was justified by some bona fide transportation condition.

the act. Having found a violation of section 17, it is unnecessary to determine whether the same activity constitutes a violation of section 16. This disposes of the exceptions of the Military Sea Transportation Service.

Perhaps, had there not existed two ratemaking bodies with jurisdiction over the rates applicable (the Conference over the State Department rate and AGAFBO over the rate for the military), the discrimination would probably never have occurred. Though they voted for the higher State Department rate, respondents point out that even if they had been opposed to the rate, they could not have compelled the fixing of a lower rate since their numbers are insufficent to carry the vote. (As Hearing Counsel points out, ratio is about 4 to 1 in favor of the foreign-flag line.) While admittedly, no attempt of record was made by respondents Export, Prudential or, for that matter any American-flag line, to establish a lower rate, and there is no showing in the record that the foreign-flag lines would flatly oppose a lower rate, we nevertheless are of the opinion that the public interest demands that the Conference relinquish control over the rates on cargoes reserved by law for carriage aboard American-flag vessels. The rates on these cargoes should be fixed by the American carriers free from actual or potential veto by foreign-flag carriers who may only carry the cargo if and when space is not available on an American-flag vessel. What we said in *In the Matter of the Carriage of Military Cargo*, *supra*, is equally pertinent here:

> Whatever petitioners' precise position may be, the implications are quite clear: That the foreign-flag segment of the Conference may restrict or refuse to sanction a particular method by which its U.S.-flag member lines may deal with the U.S. Government on the terms under which cargo reserved by law to those U.S.-flag lines is to be carried. We think it patently clear that any agreement or any rule promulgated under it * * * would be contrary to the public interest within the meaning of section 15.

The examiner failed to find that the inclusion of Government cargoes within the scope of the Conference's ratemaking power was contrary to the public interest because Hearing Counsel "refers to no specific act of the foreign-flag operators that shows they have dictated or intend to dictate [Conference] action in this regard." This conclusion does not seem to square with a prior statement of the examiner that:

> The difficulty in this case stems from the fact that the U.S. lines are parties to two tariffs each containing an approved but different rate for household goods to be transported over the same range. In the future, the Commission may wish

to question the advisability of approving tariffs, or their underlying agreements, to avoid similar occurrences.[30]

The examiner does not indicate on what ground we should question the advisability of approving such agreements in the future and, since apparently some indication of actual or intended dictation or control is required in the examiner's view, we would appear without the means to accomplish what the examiner suggests.

However, we do not hold with the view that we must await actual, or an expression of intended, domination on the part of the foreign-flag segment before we can act.[31] We will not await an actual attempt by the foreign-flag segment of the Conference to block a rate desired by the American-flag carriers. For so long as a portion of the discriminatory rates remain under the potential control of the Conference, any attempt to remove the discrimination by Export and Prudential would be subject to the approval of the membership. And if, as respondents say, the rate for the military departments was fixed with an eye on the increase granted on other commodities which move in such volume, the foreign-flag lines who do not participate in this movement to the same extent as the American-flag carriers, may not with good reason see fit to go as low as the Americans. To prevent the forseeable conflict, we will grant the Conference a period within which they may choose one of two alternatives which are either the exclusion of Government cargoes reserved by law to carriage by American-flag lines from the coverage of the Conference tariff, or the opening of all rates on such cargoes.

The examiner concluded that the record was insufficient to establish that the Conference rate on household goods was so unreasonably high as to be detrimental to the commerce of the United States within the meaning of 18(b) (5) and we agree. The fact that the Conference rate may have been one of the factors which contributed to the State Department's decision to provide its overseas employees with furnished living quarters does not justify a conclusion that the rate is bad under section 18(b) (5), nor does the fact standing alone justify a conclusion that a lower rate is in force in a reciprocal trade. It is not entirely unlikely that a reduction in that rate will come about as a result of the removal of the discrimination found herein. An order will be issued directing respondents to comply with our conclusions in this proceeding.

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[30] While the two agreements under which the rates in question were fixed were approved under sec. 15, no approval of the rates themselves was granted. The requirement in sec. 18(b) that common carriers by water in foreign commerce file their rates with the Commission does not mean that each rate filed with the Commission is approved. The mere act of filing a rate raises no inference one way or the other concerning the lawfulness of that rate.

[31] It would have been further surprising if Hearing Counsel had been able to do so since the U.S.-flag lines were obviously in favor of the higher Conference rate.

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 respondents American Export Isbrandtsen Lines, Inc., and Prudential Lines, Inc., cease and desist from the violation of section 17 of the Shipping Act, 1916, found herein, and within 30 days from the date of service of this order notify the Commission whether they have complied herewith and, if so, the manner in which parity of rates between shipments of household goods by the State Department and by the military departments has been achieved; and

It is further ordered, That the North Atlantic Mediterranean Freight Conference relinquish control over the rates on cargoes, the carriage of which is reserved by law to U.S.-flag carriers, and notify the Commission within 30 days from the date of service of this order of the manner in which compliance herewith has been achieved.

(Signed) THOMAS LISI, *Secretary*.

FEDERAL MARITIME COMMISSION

Docket No. 66–43

INVESTIGATION OF MINIMUM CHARGES AND TERMINAL DELIVERY SERVICES—ATLANTIC-GULF/PUERTO RICO TRADES

Decided December 1, 1967

In a nonsuspended rate increase investigation where hearing counsel has not shown the increase to be unreasonable, section 3 of the Intercoastal Shipping Act, 1933, and rule 10(o) of the Commission's rules of practice and procedure require a finding of reasonableness.

A tariff rule requiring mandatory store-door delivery by the carrier of minimum bill of lading shipments while not requiring same of other LTL shipments is not undue or unreasonable preference and prejudice in violation of section 16 first of the act.

A tariff rule requiring mandatory store-door delivery by the carrier of minimum bill of lading shipments while not requiring it of other LTL shipments is not unreasonable tariff rule in violation of section 18(a) of the act even though it may work a slight hardship on a small number of consignees.

Hugh H. Shull, Jr., *J. Scot Provan*, and *Warren Price, Jr.*, for Sea-Land Service, Inc., and Gulf-Puerto Rico Lines Inc., respondents.

Donald J. Brunner, *Thomas Christensen*, *E. Duncan Hamner, Jr.*, and *G. Edward Borst, Jr.*, 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 by order of investigation dated July 25, 1966, to determine the lawfulness of certain rates and regulations of respondents Sea-Land Service, Inc. (Sea-Land), and Gulf-Puerto Rico Lines, Inc. (GPRL).

The investigation featured two tariff changes of the respondent carriers. Sea-Land and GPRL increased their ocean freight charge on minimum shipments from $7.50 to $10, and also eliminated terminal delivery of minimum shipments by requiring consignees to accept store-door delivery provided by respondents.[1]

[1] Respondents also increased their minimum shipment store-door delivery rates in Puerto Rico, but this increase was not included in the investigation.

The Commission decided to investigate the reasonableness of the increased minimum rate in view of the fact that it constituted a $33\frac{1}{3}$-percent increase. The mandatory delivery rule was ordered investigated because it was believed that to require store-door delivery for minimum shipments while allowing terminal delivery of other less than trailer load (LTL) shipments might be an unlawful practice in violation of sections 16 and 18 of the act.

Hearings were held before Examiner Paul D. Page, Jr., who issued his initial decision August 1, 1967. Oral argument was held September 27, 1967.

Facts

Sea-Land's Operations

Sea-Land is a fully containerized common carrier by water in the trade between the U.S. Atlantic coast ports and Puerto Rico ports for the transportation of cargo.

Sea-Land has LTL facilities at its General Cargo Terminal at the port authority piers, Elizabeth, N.J., and at its truck terminal at 19th Street, New York City. Nineteenth Street is primarily an LTL terminal, staffed by ILA labor. Twenty to twenty-five percent of the shipments passing through this terminal are minimum bill of lading shipments. Sea-Land receives about 25 trailer loads per week of LTL cargo at Port Elizabeth from the 19th Street terminal, and it handles approximately 275 trailers per week of LTL and volume cargo at Port Elizabeth.

Sea-Land carries about 800 shipments of minimum charge cargo a week in its Puerto Rican trade accounting for 29 percent of its LTL traffic. Minimum bill of lading shipments carried by Sea-Land have been increasing in proportion to its increased handling of freight.

Each minimum bill of lading shipment when received at 19th Street (New York City), or at Port Elizabeth, is placed on a single pallet and is either floored awaiting consignment to a particular LTL trailer or is taken directly across the terminal platform into an awaiting LTL trailer. The primary problems of planning and moving LTL cargo are space, stowage, and handling. Sea-Land must get the maximum cube out of its trailers, therefore, the loading of LTL cargo into these trailers is a time-consuming, exacting job.

At San Juan, P.R., Sea-Land has three facilities for unloading LTL cargo; i.e., the Buchanan Terminal, the Puerto Nuevo Truck Terminal, and shed D. At San Juan, Sea-Land has had as many as nine vessels arrive within 1 week, but the average is five vessels per week.

One of the circumstances which led Sea-Land to institute its required delivery rule on minimum bill of lading shipments was the space and truck congestion which occurred at the above-named terminals because of the volume of LTL cargo and minimum bill of lading cargo. This congestion problem was actually affecting Sea-Land's overall service.

There is a 5-day free time period in Puerto Rico, in order to give shippers time to pick up their cargo. As a result of the increased volume of cargo coming into Puerto Rico and the fact that these minimum bill of lading shipments are unloaded onto single pallets and placed in these LTL terminals, the minimum bill of lading shipments have taken up more and more internal terminal space. This growing use of space for the minimum bill of lading shipments has detrimentally affected the efficient and effective movement of cargo through the terminals to delivery trucks. It has also evolved into a massive external congestion problem due to the small pickup trucks which come to these terminals to receive the small LTL minimum bill of lading shipments.

Additional warehouse space in Puerto Rico is almost nonexistent. Therefore, there is a need by Sea-Land to move as much of its LTL cargo through these terminals as quickly as possible. Sea-Land strips all the LTL containers within 48 hours after the vessel has commenced stevedoring in San Juan.

The problem of congestion at San Juan is twofold; i.e., the limited amount of warehouse or terminal space and the congestion of the large number of trucks that come to pick up cargo at the three terminals of Sea-Land. Usually LTL cargo waits in the terminals for the fifth day.

Since the institution of the mandatory express delivery service of minimum bill of lading shipments in July 1966, there has been an improvement in the operations of the Puerto Rican terminals of Sea-Land and in its overall service to the trade. One basic improvement since the inauguration of the delivery rule has been Sea-Land's facility to strip the incoming containers from the vessels much faster because there is more space. The minimum bill of lading shipments are stripped at night and loaded into trucks and delivered the following day, thus leaving that space available the following day for stripping of other LTL cargo. There has also been an improvement in the rapidity with which Sea-Land is now able to move LTL shipments other than minimum shipments.

Sea-Land, in its constant review of its rate levels, determined that the rate levels on minimum bill of lading shipments were not compensatory and thus instituted the increased charges from $7.50 to $10.

As justification for the increase, Sea-Land points out that the cost of cutting a Puerto Rican waybill averages between $1 and $1.70 per waybill. However, not included in this cost is the expense of handling the paperwork in the General Cargo Terminal; the fringe benefit paid to documentation employees; capitalization of office equipment (e.g., billing machines, desks, typewriters, computers, etc.); rental; office supplies (e.g., waybill forms, bill of lading forms and container manifest forms); postage or mailing of freight bills; helicopter service; cost of Sea-Land's Customer Service Division; the cost of paperwork on the piers, paperwork for Customs, sales, interline, wharfage collection; handling of the delivery of the cargo destination; tax collector, etc. The cost of cutting a bill of lading on a minimum shipment is the same as it is for a trailer load shipment.

Sea-Land points out that minimum shippers cause certain other problems which produce greater costs for Sea-Land. These problems are attributed to the fact that minimum shippers, who only occasionally use Sea-Land's services, are ignorant of the paperwork connected with the movement. Types of problems are failure to have dock receipts, lack of measurement of the cargo, and tracing of the shipment for the shipper, all of which costs Sea-Land and additional amount of time, money, and labor.

The record shows that Sea-Land showed a profit for its operations in 1965 and for the first half of 1966. In the first half of 1966, Sea-Land realized a net profit in their Puerto Rican operations of $1,873,000.

GPRL Operations

GPRL, an affiliate of Sea-Land, is a breakbulk common carrier by water between ports in Puerto Rico and the U.S. gulf coast ports of New Orleans, La., and Mobile, Ala.

GPRL has only two vessels in operation, with one vessel arriving each week at the Port of San Juan. GPRL handles an average of 150 to 165 minimum shipments a vessel. GPRL berths at pier 11, Puerta de Tierra, and has preferential berthing rights on pier 12 extension. These facilities are located on the other side of the harbor from Sea-Land's berthing facilities. It takes GPRL 2 full days to normally discharge approximately 3,700 tons of cargo at San Juan and the vessel then proceeds to Ponce and Mayaguez.

GPRL has an agreement with truckers who deliver cargo from GPRL's pier. GPRL uses approximately 38 truckers for LTL delivery service in Puerto Rico and it has been the experience of GPRL that the rates charged in the delivery service by GPRL are less than a consignee would pay if he engaged a private trucker.

All shipments that move via GPRL are prepaid shipments and the payment for delivery service on delivery cargo (including minimum bill of lading shipments) is made in the United States.

Although congestion at the docks is definitely a problem, it is not the primary cause of instituting the express delivery rule. GPRL instituted its express delivery service to increase its LTL service and as a loss prevention method. It has been the experience of GPRL that the minimum ocean bills of lading shipments are high value commodities, and that GPRL's claim exposure was many times the freight moneys which it had earned for carrying cargo from the point of origin in the United States to its facilities in Puerto Rico.

Express delivery charges on the minimum charge shipments are paid directly to the truckers. GPRL does not make any revenue from the rates under this rule, yet the rule is a cost reducing action in that it cuts down on handling at the destination terminal, the shipments move faster, there is less congestion inside and outside the warehouse facilities and there is less exposure to theft and pilferage.

The reason given by GPRL for raising its minimum bill of lading charge from $7.50 to $10 was the fact that GPRL was losing money and seeking new revenue sources. GPRL's witness had no specific cost studies to indicate that GPRL lost money on a particular $7.50 minimum charge shipment.

GPRL did not show a net profit in 1965, and during the first 6 months of 1966, there was a loss of $360,000; and although the final figures for the 12 months of 1966 were not completed, it is estimated that the loss will be somewhere in the vicinity of $450,000.

The $10 figure was chosen because certain GPRL competitors in the trade (South Atlantic & Caribbean Line, Inc., TMT Trailer Ferry, Inc., and Alcoa Steamship Co.) have a similar $10 minimum charge. Other carriers in the trade, including AUT, Lykes Bros., Seatrain, and Motorships, have a minimum charge of $7.50.

GPRL asserts that its cost for handling the paperwork on a particular shipment is in the vicinity of $4 for each shipment. This includes the paper handling, both in the United States and in Puerto Rico.

Since 1962, when GPRL's minimum bill of lading of $7.50 was instituted, there has been a definite increase in the cost of doing business and in labor costs, both at the ports of Mobile and New Orleans, and in Puerto Rico.

In Puerto Rico, GPRL has received no protests in reference to the increased minimum bill of lading charge, but it has received some protests regarding its express delivery service and charges therefor. For instance, a department store might receive shipments via various lines and have a contract with a trucker to go to the docks and pick up whatever cargo was there. GPRL would not surrender minimum charge shipments to such truckers.

Hearing counsel attempted to develop shipper reaction to respondent's proposed tariff changes by sending a questionnaire to some 900 shippers, whose names were obtained from respondents' manifests evidencing shipments after the tariff changes went into effect. Approximately 325 responses were received of which approximately 50 indicated some sort of opposition to the changes. Fifty-two such letters were offered in evidence by hearing counsel and were received.

Respondents vigorously objected to the admission of these letters, but twice offered to stipulate that "50 out of 900 letters sent out and 325 responses expressed some opposition to the proposed minimum charge increase and/or mandatory delivery."

The remainder of the 325 responses not admitted into evidence were furnished to respondents, and it was agreed that further hearings would be held should respondents wish to rebut the 52 letters offered in evidence. By letter of March 7, 1967, respondents advised the examiner they had decided not to request a further hearing. By letter of March 9, 1967, the examiner allowed respondents, pursuant to their request, until March 17, 1967, to offer late filed exhibits compiled from the remaining letters. No such exhibit was offered.

Discussion

There are two separate issues before us in this proceeding. We must decide whether respondents' increased rate on minimum shipments is just and reasonable, and we must decide whether respondents' mandatory delivery rule is unjust, unreasonable, or unduly or unreasonably preferential or prejudicial to any description of traffic.

Increased Rate

The examiner determined that respondents' rate increase from $7.50 to $10 on minimum shipments is not unjust, unreasonable, or otherwise in violation of the law. He determined that respondents have introduced relevant and substantial evidence requiring a finding that the increased rates are just and reasonable. On the basis of this finding, the examiner deemed it unnecessary to rule on the question of which party has the burden of proving the reasonablenes or unreasonableness of the rates. We reach the same result as the examiner that the rate increase must be adjudged to be reasonable. However, we feel compelled, on the basis of the record, to take a different route toward reaching that result.

Respondents have maintained that various facts of record support the proposition that the $10 minimum charge is at least no greater than the actual costs to respondents of handling minimum charge shipments. The examiner agreed that the rate was reasonable but did not specify which facts supported that proposition. Hearing counsel have excepted to this finding by the examiner and seek to show that the facts upon which respondents rely do not support a conclusion of reasonableness.

Respondents rely on the following facts of record to support their argument that the rate is reasonable:

1. Minimum charge shippers who ship only occasionally and who may be ignorant of the rules and regulations or the necessary paperwork with respect to the movement of their traffic to Puerto Rico tend to create three major problems:

a. Lack of dock receipts.
b. Lack of measurement of the cargo.
c. The tracing of the shipment for the shipper.

These problems produce costs to Sea-Land in time, money, and labor.

2. The loading and handling of LTL cargo (which includes minimum charge cargo) by Sea-Land is a time-consuming, exacting job.

3. Minimum charge shipments via both Sea-Land and GPRL are high value shipments.

4. LTL shipments, including minimum shipments, are subjected to more than normal surveillance by the Loss Prevention and Claims Department of GPRL. Additional paperwork for these type shipments is necessary.

5. GPRL and Sea-Land compete with South Atlantic & Caribbean Line, Inc., and TMT Trailer-Ferry, Inc., out of Florida, both of which maintain a minimum charge of $10. Alcoa, who was formerly in the trade from the gulf, also had a minimum charge of $10.

6. The freight forwarder charges in New Orleans for documentation alone are $15.

7. Freight forwarders who handle Sea-Land traffic charge for paperwork from $10 to $20 per shipment.

8. GPRL increased its minimum charge as a means of reducing its losses, which amounted to $360,000 in the first 6 months of 1966 and are estimated to be in the vicinity of $450,000 for the entire year.

9. GPRL has sought other ways to increase its revenues; as for example, an increase of $1 per thousand board feet on lumber.

10. The cost to GPRL for necessary processing of papers for each minimum shipment is approximately $4.

11. Sea-Land's cost of cutting a Puerto Rico waybill averages between $1 and $1.70, but this does not include expense of: the paperwork in the general cargo terminal, the fringe benefit paid to docu-

mentation employees, capitalization of office equipment, rental, office supplies, postage and mailing of freight bills, helicopter services, customer service division, paperwork on the piers, paperwork for Customs sales, interline, wharfage collection, handling of the delivery of the cargo at destination, tax collector, etc.

12. Since 1962, when GPRL minimum bill of lading charge of $7.50 was instituted, there has been a definite increase in the cost of doing business and in labor costs at the Ports of Mobile, New Orleans, and in Puerto Rico.

13. The revenue increase to GPRL represented by the increased minimum charge is estimated at $25,000 per year.

14. The average weight of Sea-Land's minimum shipments is 210 pounds, although this could range to as much as 800–900 pounds.

15. Shipping documents used by Sea-Land include: a 15-part waybill, a five-part container manifest, a short form or long form bill of lading, a standard dock receipt, a through bill of lading which is a combined inland/ocean bill of lading.

16. GPRL has received no protests in Puerto Rico in reference to the increased minimum bill of lading charge.

While respondents and the examiner feel that these facts conclusively support the finding of reasonableness of the rate, we are not so convinced. The only conclusion supported by the enumerated facts is that there are many factors and related expenses involved in carrying even a minimum shipment from the United States to Puerto Rico. However, none of the enumerated facts shows what it costs to ship any specified amount of cargo by either carrier. To conclude that the facts of record support a finding of reasonableness would be a mere gratuitous finding.

In view of our disagreement with the examiner's conclusion in this respect, we are required to deal with the burden of proof question raised by hearing counsel.

Hearing counsel are of the opinion that respondents should have the burden of proving the rate increases to be reasonable, and that respondents have failed to do so.

Respondents argue that the burden of proof is on the carrier only in suspension cases and since the rates in question were not suspended the burden of proof is not theirs.

Hearing counsel have not shown the rates to be unreasonable and they admit that if they have the burden of proving the increase unjust and unreasonable, a finding that it is just, reasonable, and lawful must be made.

Section 3 of the Intercoastal Shipping Act, 1933, provides for hearings concerning the lawfulness of new rates filed with the Commission.

The second paragraph of that section provides for the suspension of such rates pending such hearing and decision thereon. The second paragraph further provides:

> At any hearing under this paragraph the burden of proof to show that the rate, fare, charge, classification, regulation or practice is just and reasonable shall be upon the carrier or carriers.

While the "paragraph" referred to in the quoted sentence refers only to suspension rate cases, hearing counsel argue that Congress could not have intended to place the burden of proof on the carrier only in suspension cases.

Hearing counsel argue that nonsuspension rate cases were neither mentioned nor alluded to in the legislative history of section 3. Further, that no nonsuspension rate case was decided by the Commission's predecessors prior to the above-mentioned amendment. Hearing counsel feel that this compels a conclusion that Congress did not consider nonsuspension rate cases, and the only distinction they intended to make was between suspension cases and ordinary complaint cases, not between suspension and nonsuspension cases.

Hearing counsel quote legislative history passages [2] indicating that in suspension cases the carrier has the burden of proof for if the rule were otherwise, the carrier might remain mute and require the Commission to present evidence, the bulk of which may be in the possession of the carrier. Hearing counsel submit that the same logic should apply in nonsuspension cases, since Congress intended no distinction between the two.

Hearing counsel further state that rule 10(o) of the Commission's rules of practice and procedure, which also would place the burden

[2] Hearing counsel quote the following passages:

(1) From the H. Rept. 824, of June 12, 1939, and the S. Rept. 724 of July 5, 1939, both titled "Amending Certain Provisions of the Merchant Marine and Shipping Acts":

"Section 2 clarifies section 3, Interconstal Shipping Act, 1933, to establish in so many words the rule believed to be applicable under existing law, that in cases involving the suspension of rates the burden of proof is on the carrier to show that the rates, practices etc., are just and reasonable. If the rule were otherwise, the carrier might remain silent and require the complainant or the Maritime Commission to present evidence, though in most situations the bulk of such evidence is in the possession of the carrier. It is evident that Congress when it established the existing law, did not intend to permit such a result."

"Under the section as amended, the burden of proof will not be placed on the carrier in ordinary complaint proceedings, but only in suspension proceedings."

(2) From the H. Doc. 208, "Letter from the Chairman of the United States Maritime Commission Transmitting the Maritime Commission Recommendation for Legislation":

"It is suggested that section 3, Intercoastal Shipping Act, 1933, be amended to provide that in cases involving the suspension of rates the burden of proof is on the carrier. The Commission believes this to be the case under present law, as has been inferred in many decisions of the Commission's predecessors. If the rule was otherwise the carrier might remain mute and require the Commission or the complainant to present evidence, the bulk of which may be in the possession of the carrier, a situation evidently not intended by Congress when it established the law."

of proof on carriers only in suspension cases, is void inasmuch as it does not reflect the intention of section 3 of the Intercoastal Act.

Rule 10(o) reads:

(o) *Burden of proof* (*46 CFR 502.155*). At any hearing in a suspension proceeding under section 3 of the Intercoastal Shipping Act, 1933 Rule 5(g), the burden of proof to show that the suspended rate, fare, charge, classification, regulation or parctice is just and reasonable shall be upon the respondent carrier or carriers. In all other cases, the burden shall be on the proponent of the rule or order.

Respondents feel that section 3 of the Intercoastal Act and rule 10(o) of the rules of practice and procedure are quite clear in requiring that the carrier sustain the burden of proof *only* in suspension rate cases. Respondents submit that it is absurd to think, as hearing counsel suggests, that Congress in 1939, envisioned that all investigated rates must be suspended.

Respondents submit that rule 10(o) cannot, as hearing counsel would wish, be altered in this proceeding and that the Commission would have to follow its normal rulemaking procedures to effect any such amendment.

Finally, respondents suggest that when the language of a statute expresses an intention that is reasonably intelligible and plain, it may not be modified by resort to construction or conjecture. Resort to extrinsic aids in construction of clear statutory language is unnecessary. Respondents feel that section 3 of the Intercoastal Act is as clear as any statutory language can be and does not permit a conclusion that the carrier has the burden of proof in nonsuspension cases.

As respondents have indicated, both section 3 of the Intercoastal Act and rule 10(o) of our rules of practice and procedure quite clearly place the burden of proof on the carriers only in suspension rate cases. The many arguments of hearing counsel as to how the rule should read or how it was meant to be interpreted do not change this fact. Neither are we convinced that the legislative history passages cited by hearing counsel support their position that section 3 is meant to apply to all rate cases, whether suspended or not. Both quoted passages specifically state that in cases involving *suspension* of rates the burden of proof is on the carrier. We cannot impute to Congress an intention which is not clearly established by a reading of the statute and its legislative history.

Hearing counsel also rely on our statements in docket 1182, *Rates from Jacksonville, Florida to Puerto Rico* (*10 FMC 376*), to support their position that the carrier should have the burden of proof. In docket 1182, we required the carrier to show that cost or other transportation conditions justify a rate policy which on its face worked a preference to a particular port served by that carrier. The rate in question had not been suspended. In 1182, the rate policy was preferential on its face and therefore can be differentiated from the instant proceeding. In such a case we require the carrier to go forward and show why the prima facie preference should not be fatal to the approval of the rate policy in question.

The instant proceeding does not involve a rate change which is on its face preferential, prejudicial, or unreasonable. It involves a rate increase. The increased rate was investigated, but was not suspended. Section 3 of the Intercoastal Act and rule 10(o) of FMC rules of practice and procedure place the burden of proof on hearing counsel. Hearing counsel have not demonstrated the increase to be unreasonable. We can only conclude that it is not.

Delivery Rule

Respondents' mandatory delivery rule on minimum shipments provides that consignees must accept delivery at their store door. Respondents have an agreement with truckers in Puerto Rico who furnish delivery of the cargo. The rule does not permit consignees of minimum shipments to pick up cargo at the terminal.

Respondents feel the mandatory delivery is necessary and is justified because it relieves the congestion at the terminals and greatly adds to the general operating efficiency of the terminals.

Hearing counsel opposed the rule. They feel that the gain in operational efficiency does not justify violations of the Shipping Act. Hearing counsel maintained the rule was violative of sections 16 and 18 of the act in that it denies free time and an option to have terminal pickup on minimum shipments.

The examiner concluded that the mandatory delivery rule is an unjust and unreasonable practice in violation of section 18(a) of the act and subjects cargo moving at minimum rates to undue and unreasonable prejudice and disadvantage in violation of section 16 of the act. The examiner's conclusions are based on his finding that the rule strips minimum shipments of 5 days' free storage to which they are entitled, and also strips them of the option to pick up the cargo at the dock, while allowing other LTL shipments to continue to receive these two advantages. The examiner states that before the advent of this rule minimum shipments paid for these two items in their charges and that they continue to pay for them now in view of the tariff increase, but do not receive them.

Respondents have excepted to the examiners' findings, both that the mandatory delivery rules constitute unjust and unreasonable practices in violation of section 18(a) of the act, and that such rules violate section 16 of the act.

We are compelled to agree with respondents and reverse the examiner on these points.

The record is abundant with evidence indicating that congestion was a problem at the terminals in Puerto Rico and that the congestion was actually affecting Sea-Land's overall service. The congestion problems are largely due to the restricted space available at these terminals.

Respondents instituted the mandatory delivery rule in an attempt to alleviate the congestion. Under the rule, respondents effect store-door delivery of minimum shipments.

Minimum shipments were selected for the mandatory delivery rule for several reasons. Minimum shipments are loaded onto space-consuming, pallets and since the number of minimum shipments to Puerto Rico is quite large (800 per week for Sea-Land), they make a sizable contribution to congestion. Congestion is further caused by the large number of trucks required to pick up the minimum shipments. A large number of trucks is required, since an individual consignee is generally picking up either a single or just a few minimum shipment parcels. There is the further matter of loss and damage claims. Minimum shipments are generally relatively high-valued shipments, and are particularly susceptible to theft when stored in the terminals. The loss and damage problem was the primary reason GPRL instituted the delivery rule. While congestion is also a problem for GPRL, the extent of congestion at its terminals is not as great as at Sea-Land's.

Respondents have indicated that the reason all LTL consignees were not similarly made subject to these delivery rules was simply that there is not enough LTL equipment available to respondents to permit them to perform delivery for all this class of traffic.

The record also shows that the mandatory delivery rule has produced highly satisfactory results. This was conceded by hearing counsel and by the examiner.

It becomes apparent that respondents' reasons for instituting the rule are valid. The rule is shown to accomplish the purpose for which it was instituted. It will also be shown that the rule does not result in the violations of the Shipping Act, alleged by hearing counsel and found by the examiner.

The examiner found that the rule violated sections 16 and 18 of the act in that it denied minimum shipments a reasonable amount of free time which carriers have always been required to furnish to cargo.

It cannot be denied that respondents' rule deprives minimum shipments of free time. Nevertheless, it will be shown that the rule eliminates the need for free time and thereby results in no loss for minimum shipments.

Our predecessor and the courts have had occasion to consider free time and have, as the examiner here found, recognized that water carriers:

> * * * are required by their transportation obligation, absent a special contract, to unload the cargo onto the dock; segregate it by bill of lading and count, put it in a place of rest on the pier so it is accessible to the consignee, and afford the consignee a reasonable opportunity to come and get it. *American President Lines Ltd.* v. *FMB*, 317 F. 2d 887 (D.C. Cir., 1962).

The purpose of free time, however, is to offer consignees a reasonable time to pick up cargo without being assessed demurrage charges. Free time is not designed to allow free storage of cargo. In *Storage of Import Property*, 1 U.S.M.C. 676 at 682 (1937), our predecessor stated that:

> As a proper part of their transportation service respondents should allow only such free time as may be reasonably required for the removal of import property from their premises, based on transportation necessity and not on commercial convenience.

Under respondents' mandatory delivery rule there is no need for free time. Delivery is made by respondents. They need allow no time for the removal of property when they take it upon themselves to make delivery. And as previously indicated, since free time is not designed to permit free storage, minimum shipments are denied nothing which the concept of free time typically includes. No finding of a violation of either sections 16 or 18 of the act can be based on this denial of free time.

The second basis for the examiner's finding of section 16 and section 18 violations is the fact that respondents' delivery rule does not afford minimum shipment consignees an option to pick up the cargo.

Hearing counsel suggest that the delivery rule is violative of the act for the same reason. Hearing counsel point out that a number of shippers have expressed a desire to perform their own pickup and aver that they could perform it at a cost less than that which respondents charge, and further that they often have to come to the terminal to make other LTL pick ups and could pick up the minimum shipments at the same time.[3] Hearing counsel feel it is unreasonable, therefore, to refuse a pickup option.

[3] The shipper sentiment was received by hearing counsel by means of a questionnaire sent by hearing counsel to approximately 900 shippers. Respondents have objected to the use of this evidence inasmuch as it is largely heresay and respondents could not cross

On its face, the rule appears to constitute a prejudice to minimum shipment cargo and a preference to all other LTL cargo inasmuch as other LTL cargo is afforded a pickup option and minimums are not. The examiner found that it did constitute a preference and was, therefore, violative of section 16 first of the act which forbids undue or unreasonable preference or prejudice to any description of traffic. The examiner also based his finding that the rule constituted an unreasonable tariff regulation under section 18(a) of the act on the same failure to afford a pickup option.

In reference to the section 16 violation, we have often held that all preference, prejudice, or discrimination is not necessarily undue, unjust, or unreasonable. In *Philadelphia Ocean Traffic Bureau* v. *Export Steamship Corp.*, 1 U.S.S.B. 538 at page 541 (1936), it was stated:

> It is well settled that the existence of unjust discrimination and undue prejudice and preference is a question of fact which must be clearly demonstrated by substantial proof. As a general rule there must be a definite showing that the difference in rates complained of is undue and unjust in that it actually operates to the *real disadvantage* of the complainant. [Emphasis added.]

Our closer scrutiny of the rule and its effects has disclosed that the apparent preference or prejudice here is not undue, unjust or unreasonable inasmuch as it does not operate to any real disadvantage to minimum shipments. We have shown how minimum cargo has lost nothing by being denied free time. It is also true that respondents' delivery service is performed at a rate less than a consignee would pay if he engaged a private trucker. The only disadvantage then is to those few consignees who choose to perform their own pickup. Only a very small number of those to whom the pickup option was denied have expressed dissatisfaction with the situation. Furthermore, not a single shipper or consignee appeared at the hearings to testify in opposition to the rule after the rule had been in operation for almost 9 months. Most importantly, any inconvenience or additional cost burden imposed on minimum shipment consignees will necessarily be slight and will be far outweighed by the attendant benefits of the rule which are manifested in the form of terminal operating efficiency and elimination of loss and damage claims.

The same reasoning is applicable to a determination of whether the delivery rule is an unreasonable tariff practice in violation of section 18(a) of the act.

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examine. An analysis of the replies to hearing counsel's questionnaire discloses that of 00 shippers contacted only 50 expressions of opposition, either to the increased minimum charge or the delivery rule were received. Of the 50 objections only 22 expressed disapproval with the delivery rule. It is shown infra how the use of this evidence does not prejudice respondents.

Numerous ICC cases have recognized a carrier's right to make reasonable regulations as to points at which it will deliver various classes of property especially in the case of congested terminals. *Nutile Fruit Co.* v. *Boston & M.R.*, 155 I.C.C. 221 (1929); *Bahrenburg Br. & Co.* v. *A.C.L.R.R. Co.*, 24 I.C.C. 560 (1912); *Kriel* v. *B & O R.R. Co.*, 41 I.C.C. 434 (1916).

Hearing counsel have contended and the examiner has found, however, that this is not a reasonable regulation. As indicated above, we think it is a reasonable rule even though a very few may suffer a hardship therefrom. In *Blackman* v. *Southern R. Co.*, 10 I.C.C. Rep. 352 (1904), it was averred that a particular storage charge was unreasonable in that it was higher than the usual public warehouse charge in the same area. The charge was ultimately determined to be reasonable, and it was observed that:

> * * * any rule which in its general application is beneficial may in particular instances work a hardship, but this does not afford a sufficient reason for declaring the rule, in itself, unreasonable.

This principle is applicable here. Although respondents' delivery rule may work a slight hardship on a few who are denied their preference of performing their own pickup, the rule is nevertheless a reasonable one in that it goes a long way toward eliminating a problem of congestion and of eliminating loss and damage claims at respondents' various terminals in Puerto Rico.

For the above reasons, we feel the rule neither works an unreasonable preference or prejudice under section 16 of the act nor constitutes an unreasonable tariff rule under section 18(a) of the act.

s/ THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

Docket No. 66–43

INVESTIGATION OF MINIMUM CHARGES AND TERMINAL DELIVERY SERVICES—ATLANTIC-GULF/PUERTO RICO TRADES

ORDER

Full investigation of the matters involved in this proceeding have been had, and the Commission on this date has made and entered on record a report stating its conclusions and decision thereon. Said report is hereby referred to and made a part hereof, in which it is found that the increased rates of respondents Sea-Land Service, Inc., and Gulf-Puerto Rico Lines, Inc., here under investigation are not unjust or unreasonable, and in which it is found that respondents' mandatory store door delivery rule on minimum shipments is neither unreasonable nor unduly or unreasonably preferential or prejudicial;

It is ordered, That this proceeding is discontinued.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65–14

IN THE MATTER OF FREE TIME AND DEMURRAGE PRACTICES ON INBOUND CARGO AT NEW YORK HARBOR

Decided December 4, 1967

Free time and demurrage rules, regulations and practices on import cargo at the Port of New York found not shown to be unjust and unreasonable within the meaning of section 17, Shipping Act, 1916, or contrary to General Order 8, Part I. Such rules, regulations and practices will be unlawful in the future unless modified in certain respects and General Order 8, Part I is amended to provide for:

(1) Insertion of words "longshoremen's strikes" in section 526.1(d) as a factor preventing consignee's removal of cargo.

(2) Free time or first period demurrage as specified in the appropriate tariff, in case of carrier inability or refusal to tender cargo for delivery under section 526.1(c) arising after expiration of free time.

(3) Assessment of first period demurrage charges, after expiration of free time, when consignee is prevented from removing his cargo, within the meaning of section 526.1(d), by a longshoremen's strike which affects only one pier or less than a substantial portion of the port area.

(4) A new section 526.1(f) requiring, following a longshoremen's strike of five days or more, extension of free time for a period not less than five days, exclusive of Saturdays, Sundays, and legal holidays, or first period demurrage for five calendar days beyond the time at which they would normally terminate, depending upon position of cargo at commencement of strike. Such extensions shall apply only if cargo is actually picked up within such extended time or, if an appointment system acceptable to both carriers and consignees is adopted, within 24 hours of advance notification that cargo is available for pickup and readily accessible; provided, however, that time not be extended more than 24 hours beyond the additional free time or demurrage period.

Elkan Turk, Jr. for respondents, parties to FMC Agreement No. 6015.

Burton H. White, *Elliott B. Nixon*, and *Henry F. Minnerop* for respondents, West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference (WINAC), Continental North Atlantic Westbound Freight Conference, French North Atlantic Westbound

Freight Conference, Swiss North Atlantic Freight Conference, Marseilles/North Atlantic U.S.A. Freight Conference, member lines of these Conferences as named in the orders of investigation, and Hamburg-American Line, North German Lloyd, Scandinavian American Line, and Northeast Marine Terminal Co., Inc.

John R. Mahoney, *John G. McGarrahan*, *Richard Nicoletti*, and *Edmund C. Smith* for respondents, parties to Free Time and Demurrage agreement 7115 and East Coast South American/New York Free Time Agreement (FMC No. 7525).

Ronald A. Capone and *Robert H. Binder* for respondents, North Atlantic Westbound Freight Association and its member lines.

Elmer C. Maddy and *Baldvin Einarson* for respondents, Calcutta, East Coast of India & East Pakistan/U.S.A. Conference, FMC Agreement No. 7555, and the West Coast of India & Pakistan/U.S.A. Conference, and member lines as named in the orders of investigation.

Joseph Hodgson, Jr. and *Harvey M. Flitter* for respondent, Seatrain Lines, Inc.

Seymour H. Kligler for respondent, South African Marine Corp.

Robert L. Dausend for respondent, Sea-Land Service, Inc.

Sterling Stoudenmire for respondent, Waterman Steamship Corporation.

Joseph A. Byrne for respondents, New York Terminal Conference and constituent members.

James A. Flynn for Atlantic Cargo Inspection Corporation.

Henry E. Foley and *Chester H. Gourley* for intervener, the Massachusetts Port Authority.

William L. Marbury, *Frederick H. N. Heeman*, and *Philip G. Kraemer* for intervener, the Maryland Port Authority.

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

Morris Duane, *George F. Mohr*, and *Warren Price, Jr.* for intervener, the Delaware River Port Authority.

Aaron H. Glickman for intervener, the California Association of Port Authorities.

Thomas L. Whipple for intervener, the Boston Marine Terminal Association.

Bryce Rea, Jr. and *Thomas M. Knebel* for intervener, the Middle Atlantic Conference (of motor carriers certificated as common carriers by the Interstate Commerce Commission).

Seymour Graubard and *Michael H. Greenberg* for intervener, the American Institute for Imported Steel, Inc.

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Thomas D. Wilcox for interveners, Toyomenka, Inc. and CAP Sales Corporation.

T. P. H. Aitken for intervener, the Cocoa Merchants Association of America, Inc.

J. Elliott Burt for intervener, the Green Coffee Association of New York City, Inc.

Gerald H. O'Brien for intervener, the National Council of American Importers.

Harold Bruce for intervener, the Association of Food Distributors, Inc.

Stephen E. Estroff for intervener, the American Spice Trade Association, Inc.

Donald J. Brunner, *Norman D. Kline*, *David N. Nissenberg*, and *Samuel B. Nemirow*, as Hearing Counsel.

REPORT

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

We instituted this investigation, by orders served May 12, June 11, and August 18, 1965, to resolve certain free time and demurrage problems in the Port of New York on inbound cargo. One hundred and sixty-eight parties were made respondents to the proceeding, including ocean common carriers, both conference and independent, members of the Free Time and Demurrage Agreement, stevedoring and terminal companies, and a terminal conference operating in the Port of New York. Numerous parties intervened, including certain port authorities, a port terminal association, a motor common carrier conference and importers and import trade associations. Extensive hearings were held in New York City before Examiner Charles E. Morgan who, on October 17, 1966, issued an Initial Decision to which exceptions and replies to exceptions were filed. We heard oral argument on March 15, 1967.

THE SITUATION AT NEW YORK

There was a strike of longshoremen commencing January 11, 1965, which rendered New York Harbor, among others on the East and Gulf Coasts, inoperative. At the end of this strike, an abnormally large number of ships discharged their cargoes quickly, and this, added to the inbound cargoes left on the piers prior to the strike, caused greater than normal congestion on the shore side of the piers in the Port of

*Commissioner Fanseen did not participate.

New York. Protests had been received by the Commission, from importers as to the demurrage charges applicable during and subsequent to this longshoremen's strike, and from truckers with respect to the shore-side congestion of the piers subsequent to the strike.

Free time on import cargo at the Port of New York in most trades is five days, but in some trades six days are allowed. This free time commences on the first day following that day on which a ship is fully discharged, and is based on working days, excluding Saturdays, Sundays, and holidays. The purpose of free time is to give a reasonable period during which an importer-consignee can pick up his cargo after it has been unloaded from the ship onto the dock.

Some importer-consignees may receive more than the usual five days of free time to pick up their cargoes even in normal times. This can occur when a particular consignee's cargo is available for pickup prior to the day that the ship is fully discharged, e.g., a ship might take four days to be fully discharged whereas some of its cargo may be available for pickup on the first day of discharge.

Demurrage on import cargo commences after free time expires. Demurrage is the charge assessed for the use of the pier facilities, for watchmen, fire protection, etc., on the cargo not picked up during free time. Demurrage is based on calendar days and includes Saturdays, Sundays and holidays. The daily rates of demurrage on import cargo apply for five-day periods, and increase with each succeeding period. Second and third period demurrage rates include penal elements which are designed to encourage the prompt movement of cargoes off the piers.[1]

Some consignees tend to wait until the last day of free time or until nearly the last day of free time to pick up their cargoes while other consignees will pick up their cargoes as soon as they are unloaded from the ships and are available for delivery. The latter often have paid for their goods before they left foreign ports, and are desirous of delivering their goods to the ultimate user as promptly as possible so as to recoup their invested monies.

Because some of the importer-consignees operate on small margins of profit, and because public warehouse charges are generally higher

[1] In 1960, at the Port of New York, a beneficial change was made in the rules for assessing demurrage charges, and demurrage was assessed on a daily basis, rather than in blocks of five days, as had been the earlier practice. In other words, if prior to 1960 a consignee picked up his cargo on the first day of the third demurrage period, for example, he would be charged for the full third period of five days. Since 1960, this same consignee in the same circumstances would pay demurrage for only the one day of the third period. This change gives the consignee an incentive to remove his cargo before the last day of any demurrage period, whereas prior to 1960, with no such incentive, many consignees were disposed to pick up their cargoes on the last day of a demurrage period.

than demurrage charges, some consignees tend to use the piers as warehouses.

The 1965 longshoremen's strike commenced on Monday, January 11, 1965, and terminated in the Port of New York on Friday, February 12, 1965. Some of the New York piers resumed work on Saturday, February 13, and continued to work on Sunday, February 14, 1965. The strike affected practically the entire East and Gulf Coasts of the United States, including all ports from Searsport, Maine, to Brownsville, Texas, with the exception of Panama City, Florida. Termination of the strike varied widely from February 12 at New Orleans, Louisiana, to March 13, at Miami, Florida. There have been numerous strikes at the ports since the end of World War II, but the 1965 strike was unusual inasmuch as the longshoremen's union negotiators had reached an agreement with the representatives of the terminal operators on December 16, 1964, and the longshoremen continued to work after December 20, 1964, the expiration date of the Taft-Hartley injunction issued in October 1964.

The agreement of the negotiators was rejected by the rank and file members of the longshoremen's union on Friday, January 8, 1965, and the strike commenced on the following Monday. As there had been no advance warning that the strike was a certainty, no general alert was given to the terminals, truckers and importers that they should make extra efforts to remove cargoes from the piers. On the occasions of strikes in the past there has been sufficient advance warning to allow the importers to pick up their cargoes before the strikes began.

The ocean carriers did not follow their usual course before a strike of minimizing cargo loaded in foreign ports and of scheduling their vessels so that at the end of the strike approximately half of their vessels would be in United States ports and half would be in foreign ports. The ocean carriers believed that the strike would terminate promptly because of the negotiators' agreement reached beforehand. As a result, ships continued to load and sail for the United States. Grace Line, for example, had its entire general cargo fleet in United States Atlantic ports at the end of the strike. The International Longshoremen's Association took the position even after the New York workmen had ratified the agreement that there would be no work in New York until there was work on the entire Atlantic and Gulf Coasts. The New York longshoremen returned to work only after the President of the United States used his persuasion. Because the longshoremen at South Atlantic and West Gulf ports did not return to work until three or four weeks after those at New York and other ports, cargo was diverted to New York, adding to the already heavy congestion.

Immediately after the January–February 1965 longshoremen's strike, certain piers in the Port of New York had opened on Saturday and Sunday and on evenings in an attempt to sort and make cargo available for delivery. Consignees were telephoned, but failed to pick up their cargo. Subsequently, additional vessels came into port and unloaded additional cargoes, with the result that piers became more congested and ran into problems of making cargoes available for delivery.

The Atlantic Cargo Inspection Corporation (ACIC), besides other duties, administers a demurrage collection service for most of the major steamship conferences in the import trade at the Port of New York. ACIC collects about $1,000,000 of demurrage charges a year, with the bulk of such charges under $50 per unit. ACIC does not insist always upon documentary evidence when a complaint is received of inability to pickup cargo because of pier congestion or other factors, and some complaints are received by telephone and acted upon by telephone, and a consignee is advised within a few hours that demurrage relief has been provided. Nevertheless, as a general rule some written proof is required of a truck's presence at a pier at the time of an unsuccessful attempt to pick up cargo. This proof could be a gate pass or logging-in at the pier. ACIC requires as a minimum in giving demurrage relief that it be given the description of the truck, its license number, and the cargo which the truckman has attempted to pick up.

A trucker may tell a consignee that he made an unsuccessful attempt or attempts on a certain date or dates to pick up the consignee's cargo, but when the written proof is lacking the demurrage relief claim generally is denied. ACIC insists that it cannot fairly administer the demurrage rules in any other manner.

The trucker serving the importer pays a truck-loading charge to the marine terminal or to the ocean carrier, whichever provides the labor for loading the trucks, and the loading of his truck is the trucker's responsibility. Nevertheless, the ocean carriers, through or with the marine terminals, have assumed the responsibility of providing sufficient labor to accomplish the truck loading, and use this responsibility as a determining factor in their ability or disability to make the cargo available for pickup, or in other words, in their (the ocean carriers') ability or disability to tender the cargo for delivery to the consignees during the free time period.

The principal dissatisfaction of the consignees and of their truckers results from the time required by the truckers in picking up cargo at the piers, particularly the time required on unsuccessful attempts to pick up cargo. ACIC believes that some truckers tell their consignees that they attempted to pick up the cargo when in fact the trucker did not go near the piers. The consignees and truckers believe that the method of obtaining proof of an attempted pickup is unduly onerous, because when a trucker makes an unsuccessful attempt to pick up cargo on one day, he can obtain proof only for that one day, and the truckman must come down to the piers on the next day, and the next day, if there is to be demurrage relief for each of the successive days. ACIC can offer no other administrative solution which is equally fair to the trucker who makes bona fide attempts to pick up cargo and to the trucker who fails to make such attempts. ACIC is firmly convinced that any relaxation of its rules will result in greater congestion at the piers.

Problems can vary from day to day at the piers, and problems can vary from pier to pier. One pier can be working with a minimum number of men in the morning, and when other piers finish their jobs in the morning making extra labor available for the afternoon, the first pier could obtain that extra labor in the afternoon and then handle more trucks than it handled in the morning. Therefore, the decision that one pier cannot handle a truck that arrives toward the end of a long line of trucks in the morning is not easy to make.

While some pier personnel will say off the record to a particular trucker that he will not be served on a particular day, officially these same pier personnel will not admit that a pier is congested. ACIC has field inspectors who are authorized to make the decisions which will waive demurrage in the event that these inspectors consider the pier or piers to be too congested to handle a trucker. It takes time for these inspectors to go to the piers where they must observe conditions and make their decisions. The truckers and consignees quarrel with this system because it is in their opinion too slow.

Generally a trucker in the New York Harbor area can make only one pickup and one delivery of cargo per day when utilizing one truck and its driver, principally because of the time which must be spent at the pier. One knowledgeable trucker, very familiar with the piers in the Port of New York, insists that a fair time for holding a truck outside of a dock waiting for a pickup is no more than one hour or two. On three occasions he telephoned the office of ACIC giving the truck number, cargo, pier, ship, etc., asking for extension of free time or relief from demurrage and was told that ACIC would send its field investigator to check out the problem of long lines of trucks and congestion at the piers. It took three or four hours of waiting in each instance before relief was granted, but after losing four hours of time there was "no place to go" for the truck, and the truck owner was "stuck" with the truckman's wages.

In other instances, both before and following the 1965 strike when a truck was "chased" from one pier as early as 10 a.m. because no loads could be made available to it, this truck would go to another pier. It was not unusual for a trucking company to have its trucks try two or three piers, and at the end of the day be unable to obtain any loads. The truckers consider it most unreasonable to have to go to a pier at 5 a.m. or 6 a.m. when the pier opens at 8 a.m., and then have to wait until 2 p.m., 3 p.m., or 4 p.m. to obtain cargo, and very often leave the pier without obtaining any cargo, or with only part of the cargo.

The Issues for Resolution

In 1948, the Commission's predecessor, the United States Maritime Commission, pursuant to a similar investigation of conditions in 1947 in the Port of New York respecting free time and demurrage practices, promulgated the following regulations now contained in Commision General Order 8: [2]

1. Free time of five days (exclusive of Saturdays, Sundays, and legal holidays), computed from the start of business on the first day after complete discharge of the vessel, is adequate free time on import property at New York under present conditions.
2. Free time on import property at New York shall not be less than five days, except on property of such a special nature as to require earlier removal because of local ordinances or other governmental regulations, or because piers are not equipped to care for such property for such period, or except as the Commission may hereafter direct.
3. Where a carrier is for any reason unable, or refuses, to tender cargo for delivery, free time must be extended for a period equal to the duration of the carrier's disability or refusal.
4. Where a consignee is prevented from removing his cargo by factors beyond his control (such as, but not limited to, trucking strikes or weather conditions) which affect an entire port area or a substantial portion thereof, carriers shall (after expiration of free time) assess demurrage against imports at the rate applicable to the first demurrage period, for such time as the inability to remove the cargo may continue. Every departure from the regular demurrage charges shall be reported to the Commission.

The issues for resolution in this proceeding as framed by the Orders of Investigation are whether:

1. Free time and demurrage practices in the Port of New York applicable to periods when a strike of longshoremen is in progress or

[2] *Free Time and Demurrage Charges–New York,* 3 U.S.M.C. 89 (1948).

some other extraordinary circumstances interfere with the efforts of receivers of cargo to call for same at terminals and take delivery thereof, are unjust and unreasonable under section 17 of the Shipping Act, 1916;

2. General Order 8, Part I has been lawfully interpreted and enforced during the periods of abnormal shore-side pier congestion following the strike of longshoremen, terminating Februray 13, 1965;

3. General Order 8, Part I should be amended to deal more adequately in the future with periods of general pier congestion;

4. General Order 8, Part I should be amended to prescribe assessment of any pier demurrage against cargo during maritime strikes; and

5. General Order 8, Part I should be amended to delete the words "which affect an entire port area or a substantial portion thereof."

The Initial Decision

The Examiner in his Initial Decision determined that the practices at the Port of New York respecting free time and demurrage during and immediately after the strike of 1965 were not unjust and unreasonable particularly in light of the fact that the strike appeared to have been settled in advance and the then existing free time and demurrage rules generally had worked well in the past including post-strike situations. He also found that the practices engaged in by the carriers during this period could not be said to have been unlawful under General Order 8, Part I. He did determine, however, that in the future, certain practices would, if engaged in by the carriers at the Port of New York, be unjust and unreasonable and that pursuant to section 17, General Order 8, Part I should be amended as follows:

1. Section 526.1(d), the paragraph dealing with those factors which prevent a consignee from removing his cargo because of conditions beyond his control, should be amended and clarified by adding the words "longshoremen's strikes." This modification did not result in a change in the present interpretation of the section, but would be merely a specific enumeration of a factor already acknowledge to be covered by section 526.1(d).

2. Section 526.1(c), the paragraph dealing with a carrier's refusal or inability to tender cargo for delivery, should be amended to read "free time must be *granted* for a period equal to the duration of a carrier's disability or refusal, including those situations where free time previously was granted and had expired." Section 526.1(c) now requires that free time be "extended" when a carrier is unable or refuses to tender cargo for delivery. As the Examiner correctly observed, the

word "extend" could be reasonably interpreted as requiring free time after the period when it would normally expire only when the inability or refusal arose during free time, or it could be interpreted as requiring the application of free time whenever the carrier's refusal or inability arose. Both interpretations have been followed by the conferences.[3] Thus, this suggested modification would involve a change for some conferences and would merely be a codification of present practices for other conferences. The Examiner grounded this proposed modification on the "obligation of the ocean carriers to continuously work to unblock blocked-in cargoes and their duties to tender such cargoes for delivery, that is, make them accessible for pickup." It should be noted, however, that inasmuch as the inability to tender cargo covered by this section refers only to inability which can be imputed to a carrier because of its failure to fulfill its obligation, the inability of a carrier to make cargo available for pickup for the duration of a longshoremen's strike is not one imputed to the carrier, if a carrier has completed his obligation of tendering cargo for delivery for the full free time period. If, however, a longshoremen's strike occurs while cargo is in a period of demurrage, and following the strike the carrier is unable to tender the cargo for delivery because of a mixup with other cargoes, this would, according to the Examiner, be a carrier disability to perform its obligation, and in such situation under the Examiner's recommendation for a revision of section 526.1 (c), free time would be granted.

3. Section 526.1(d) should be amended by providing that where consignee disability caused by a longshoremen's strike affects only one pier or less than a substantial portion of the entire port area of New York, demurrage charges for the duration of that strike shall be limited to the first-period rate of demurrage. This modification is a partial adoption of the removal of the port area limitation which paragraph 5 of the Order of Investigation suggested might be desirable. It applies, however, only in situations of a consignee disability caused by a longshoremen's strike. The Examiner felt that a wider adoption of a port area exclusion would involve the possibility "of discrimination as between consignee importers."

[3] For example, the tariff of *East Coast South Atlantic/New York Free Time Agreement*, FMC No. 7525, provides, "when a carrier is for any reason unable or refuses to tender import property for delivery, free time will be extended or if the cargo be on demurrage, no demurrage will be charged for a period equal to the duration of the carrier's disability or refusal to deliver", while the tariff of Agreement No. 6015 provides that when a carrier is unable to tender cargo for delivery, if application is made while cargo is in a period of demurrage, first period demurrage shall apply for a period equal to the duration of the carrier's inability to deliver. Demurrage is waived by all respondents during the duration of a longshoremen's strike with respect to cargo which was still on free time at the commencement of the strike and demurrage at the first period level is collected on other cargo for the duration of such strike by all respondents.

4. A change should be made in the section 526.1(d) situation, that is, the situation involving consignee disability, either by a modification of that section or the addition of a new section, providing that in any port-wide strike of longshoremen for 25 calendar days or more, the normal first period demurrage of five days will be changed to ten days. This provision would only apply to import cargo already unloaded on the piers prior to the strike or unloaded on the piers during the five days after termination of the strike. The Examiner felt this modification would have the advantage of helping to clear the piers after a strike while at the same time compensating carriers for the use of the pier. The importer who was diligent and removed his cargo promptly would not be subjected to penalty demurrage charges at as early a time as a consignee who was less diligent. The Examiner picked 25 days as the minimum time period for the application of his modification because he felt a strike of that length would cause serious congestion, and he picked five extra days as the amount for the extension of first-period demurrage because he felt consignees who made a sincere effort could remove their cargo during that extra time period. The Examiner excluded Seatrain Lines from his recommendations inasmuch as he found that Seatrain's container operations in the domestic offshore trades were not within the scope of this proceeding. The Examiner found that no special relief should be granted the importers of tea, spices, coffee, food and other products whose cargoes are subject to United States Government inspection, inasmuch as conditions had not changed since 1948, when these importers' special requests were considered and rejected in *Free Time and Demurrage Charges—New York*, *supra*. Finally, the Examiner stressed the need for cooperative efforts by all concerned and voluntary adoption of improved procedures relating to free time and demurrage practices on inbound cargo at New York.

Discussion and Conclusions

1. *The Lawfulness of Free Time and Demurrage Practices During and Immediately After the Strike Under Section 17 and General Order 8, Part I.*

Only AIIS [4] excepts to the Examiner's conclusion that there has been no demonstration of unlawfulness with respect to the free time and demurrage practices during and after the strike. It asks that the Commission rule that the practices of the carriers during the period of abnormal pier congestion following the longshoremen's strike were unreasonable within the meaning of section 17 as unlawful interpretations or enforcements of General Order 8, Part I, to the extent they resulted in the assessment of penalty demurrage in situations in which

[4] American Institute for Imported Steel, Inc.

consignees were unable to pick up cargo because of factors beyond their control. It also asks that if such findings of unlawfulness are made, they be applied retroactively to allow cancellation of such penalty charges.

Although the record in this proceeding is replete with references to the difficulty truckers experienced in picking up cargo after termination of the strike, there are of record no instances of the assessment of penalty demurrage in situations in which proof was submitted to ACIC or the carriers that a trucker had appeared at a pier but was unsuccessful in attempting to pickup cargo. Furthermore, there is evidence of record that trucks were logged in as soon as they got in line at the piers. In other words, the record does not contain evidence that cargo was actually assessed penalty demurrage in situations in which a bona fide attempt was made to pick up cargo.

We agree with the Examiner that the practices engaged in at the Port of New York respecting free time and demurrage during and immediately after the strike of 1965 were not unjust and unreasonable within the meaning of section 17 in light of the facts that the strike appeared to have been settled in advance and the then existing free time practices had worked well in the past, including post-strike situations. We also agree that the various free time and demurrage practices were in compliance with reasonable interpretations of General Order 8, Part I, as it was then worded.

However, knowing through the benefit of hindsight of the difficulties experienced during and after longshoremen's strikes like the one involved in this proceeding, we are in accord with the Examiner that certain practices will be unjust and unreasonable (though we differ to some extent as to what those practices are) if engaged in in the future and that certain amendments are necessary to General Order 8, Part I, to insure that reasonable practices are observed.

2. *Amendments to General Order 8, Part I, Ordered for the Future.*

(a) *The inclusion of the words "longshoremen's strikes" in section 526.1(d).*

The parties to Calcutta, East Coast of India & East Pakistan/USA Conference, Agreement No. 7555, and the West Coast of India & Pakistan/USA Conference urge that the words "longshoremen's strikes" are "unnecessary" and should not be added, contending that "if General Order No. 8 is amended to include all events to which it is applicable it will soon resemble a laundry list rather than the *General* Order it is intended to be." No other party excepts to this suggested modification, and Hearing Counsel and Port of New York Authority maintain that it is a necessary clarification. As the Examiner found, this modification would not result in a change in the present interpretation of section 526.1(d), but would be merely a specific enumeration of a factor already acknowledged to be covered by that section. However, the addition of these words would not merely, as the exceptors contend, add another event to which 526.1(d) is applicable. It will add a factor which was not specifically considered at the time of the promulgation of General Order 8, Part I, which is, as the Examiner found, "the most common form of difficulty under which section 526.1(d) becomes applicable", and was, as indicated by the Orders of Investigation in this proceeding, the primary reason for the institution of this proceeding. We agree with the Examiner that the inclusion of the words "longshoremen's strikes" in section 526.1(d) as a factor beyond a consignee's control preventing the removal of his cargo is just and reasonable and should be made.

(b) *The problem under section 526.1(c) of the granting of free time with respect to cargo which a carrier refuses or is unable to tender for delivery after free time previously granted had expired.*

Some respondents object to the Examiner's recommendation that free time be granted to cargo on which such time has expired when the carrier is unable to make it available for pickup. To require the granting of free time in such a situation would, they maintain, penalize a carrier for the consignee's failure to pick up his cargo during the period when the carrier was performing his duty of making it available (i.e., the free time period). The Commission's predecessor has recognized the propriety of assessing first-period demurrage with respect to such cargo, they point out, citing *Free Time and Demurrage Charges—New York*, *supra*, at 106–7. The carriers allege that an attempt to force the granting of additional free time when carrier disability does not arise during free time would result in confiscation of property and be unconstitutional, citing *American President Lines et al.* v. *F.M.B.*, 317 F. 2d 887 (D.C. Cir. 1962). In addition to the legal difficulties inherent in the suggested modification, they suggest, as a practical matter, congestion is made worse in post-strike situations by the granting of free time after its expiration.

Other respondents have no objection to the Examiner's proposed modification because, as noted in footnote 2, *supra*, their practices under present tariffs provide for the granting of free time whenever cargo cannot be made available for pickup due to carrier disability.

Hearing Counsel agree with the Examiner that free time should be made available to cargo already on demurrage when it cannot be picked up because of carrier disability and propose language to accomplish this objective. They maintain that there is legal authority for requiring that free time be made available to cargo already on demurrage when it cannot be picked up because of carrier disability,[5] and contend that once free time has expired carriers become warehousemen with respect to property in their keeping and have a duty to make it available for delivery when demand is made within a reasonable time. The Interstate Commerce Commission, they point out, allows or prohibits demurrage on an individual case-by-case basis, denying it in cases where shippers had exercised due diligence and allowing it in cases where they had not.

Finally, Hearing Counsel contend that *American President Lines et al.* v. *F.M.B.*, *supra*, does not stand for the proposition that it would be confiscatory and unconstitutional to require free time when a carrier refusual or disability arose after the expiration of the normal free time period. In that case the Commission (then Board) had attempted by publication of an "interpretation", to amend what is now General Order 8, Part I, to forbid the assessment of any demurrage during pendency of a longshoremen's strike. That case, they maintain, merely held that the Commission could not amend General Order 8 without complying with certain procedural requirements, including a statement of the amendment's basis and purpose as required by the Administrative Procedure Act. Although the Court's opinion did contain language indicating that a carrier's duty with respect to cargo had been fulfilled after the expiration of free time and that to deny demurrage once free time had expired would be unlawful, this language they argue, is not relevant to the present proceeding because of the different applications of the proposed amendment in that proceeding and Hearing Counsel's suggested modification. In the *American President Lines* case, the Commission had amended the General Order to prohibit carriers from assessing any demurrage during a longshoremen's strike, regardless of whether cargo was in free time or a demurrage period at the commencement of the strike. Hearing Counsel point out that their proposal, on the other hand, does not deprive carriers of demurrage during a longshoremen's strike if free time has expired. The carrier is still entitled to first-period demurrage during that period with respect to cargo on which free time had expired at the commencement of the strike. The proposed modification in the *American President Line* case is also distinguishable, Hearing Counsel allege, from that suggested by them in the instant proceeding in that the free time extension in the *American President Line* case applied to all

[5] As noted above, a longshoremen's strike occurring after the expiration of free time is not viewed as a carrier disability.

cargo alike, whereas the proposed modification in this proceeding would allow the granting of additional free time once the obligatory period had expired only in those situations where cargo could not be made available because of carrier disability.

Hearing Counsel are correct insofar as they maintain that the *American President Line* case is not dispositive of the problem of the propriety of the collection of demurrage at first period (compensatory) rates when a carrier disability arises after termination of free time. As Hearing Counsel point out, the regulation involved in that case dealt with the assessment of demurrage during a consignee, rather than a carrier, disability, and would have forbidden just compensation to a carrier during a time when free time had expired and consignees, through no fault of the carrier, could not pick up their cargo. Hearing Counsel would require an extension of free time after it would normally have expired only during periods other than those of consignee disability, and only when in fact a carrier was unable to make the cargo available for pickup.

Here we are faced squarely with the problem of precisely what a carrier's duty is with respect to cargo once free time has expired, and it is in this regard that both Hearing Counsel and the Examiner appear to be in error. A carrier has certain obligations originating in his status as a carrier for the performance of which he may collect no greater compensation than that required by his contract of carriage. These obligations are correctly identified in *America President Lines et al.* v. *F.M.B.*, *supra*, at 888. The carrier must "unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee, and afford the consignee a reasonable opportunity to come and get it." The Court further observed (at 889) that the carrier "tenders for delivery; it does not deliver. It makes a valid and complete tender when it puts the cargo on the dock, reasonably accessible, properly segregated and marked, and leaves it there for five days; with notice, of course." The "reasonable opportunity" was translated into "five days" because the Commission, in General Order 8, Part I, had, as the Court observed, determined "that under conditions prevailing in New York, 'five days is the shortest time that affords to consignees a reasonable opportunity to take delivery of imports,' " and had "held a tariff which failed 'to assure to consignees a minimum of five days of free time' would be unjust and unreasonable."

A carrier has certain duties with respect to cargo not picked up within the free time period, such as the duty to exercise reasonable care, but, the Commission having defined the minimum period of reasonable time as five days, it cannot be said that a carrier has a duty, as a matter of law, to extend free time if his disability occurs after expiration of the free time period. A distinction must be made between the liability of a carrier arising after the expiration of free time because of a carrier's negligent treatment of cargo in his custody and the requirement that relief from demurrage be given whenever a carrier cannot tender cargo for delivery. The duty to treat cargo in one's custody with due care arises by status-the carrier is a bailee as long as the cargo is in its custody and as such must treat the cargo with reasonable care for the whole of such time. The carrier, as a bailee, also has a duty to tender cargo in his custody for delivery. The obligation to tender for delivery free of assessments of any demurrage, however, is as we have noted, one that ends after a "reasonable time", or under normal circumstances five days. This is not to say, as we will demonstrate later, that under some circumstances a carrier may not be required to tender cargo for delivery free of assessment of any demurrage for a time period exceeding five days.[6] Nor do we mean to imply a carrier may not grant free time whenever it can not tender cargo for delivery, as is the present practice of many of the carriers. Indeed, this appears to be the more equitable approach and should be encouraged inasmuch as an assessment of demurrage after the expiration of free time when the consignee does present himself for pickup of his cargo and the carrier refuses or is unable to tender it acts to require payment from a consignee for a service he no longer needs or desires.

Accordingly, we will allow carriers to retain their present practices with respect to free time after the time at which it would normally have terminated so long as these practices are clearly spelled out in the applicable tariffs so that consignees will be in a position to know the extent of the obligations assumed by respective carriers. Section 526.1(c) will be amended by adding a sentence to the section so that it will read as follows:

> 526.1(c) Where a carrier is for any reason unable, or refuses, to tender cargo for delivery, free time must be extended for a period equal to the duration of the carrier's disability or refusal. If such condition arises after the expiration of free time, an additional period during which no demurrage is charged or first period demurrage shall be applicable, whichever is specified in the appropriate tariff.

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[6] Cf. "The question whether a consignee must start paying additional charges to the proprietor of the pier for allowing goods to remain there has nothing whatever to do with the question whether a carrier has used reasonable care in discharging goods from his ship." *North American Smelting Co.* v. *Moller S.S. Co.*, 204 F.2d 384, 386 (1953); see also *Calcot Ltd.* v. *Isbrandtsen Company*, 318 F.2d 669, 673 (1963): "Rules and customs concerning storage charges have no relevance to the question of what constitutes a proper delivery of the cargo."

(c) *The requirement that consignee disability under section 526.1 (d) be "port wide" or affect a "substantial portion of the entire port area" before demurrage is limited to first-period rate.*

The Examiner, as noted above, recommended that section 526.1(d) be revised to limit demurrage to first-period rates during longshoremen's strikes affecting one pier or less than a substantial portion of the entire port area. Some conferences contend that such strikes are rare and that no need has been demonstrated that present procedures cannot properly handle them. Hearing Counsel and AIIS contend that the Examiner was correct in his partial removal of the "port area requirement" but erred in not removing it altogether so that, at most, first-period demurrage would apply in any situation in which a consignee is prevented from removing his cargo by factors beyond his control. They would, however, require that the disability be one "affecting all consignees at any pier or piers" to prevent the possibility of discrimination by those administering demurrage charges, finding disability in some cases and denying it in others without the benefit of a definitive yardstick.

We agree with the Examiner that the "port area requirement" should be removed with reference to longshoremen's strikes. While it may be true that localized strikes are rather rare, there is, nevertheless, evidence of record that they do occur, and such strikes, like the strikes affecting a wider area, disable consignees from removing cargo from the struck piers. Generally, carriers waive demurrage, or at least penal demurrage, in all strike situations. To this extent, it is true that "present procedures can properly handle" all strike situations. However, under the present rule a simple tariff amendment could change such "procedures". Such result must not be allowed to happen. Strikes over which a consignee has no control are not limited to those affecting all or a substantial portion of the entire port area. During longshoremen's strikes affecting even a single pier, the penalty element of demurrage affords no incentive to remove cargo from the pier because the consignee cannot do so for reasons entirely beyond his control. Therefore, it would be an unreasonable practice to allow the assessment of penal demurrage during any longshoremen's strike affecting a consignee's ability to remove his cargo. We also agree, however, with the Examiner that the removal of the "port area requirement" should be limited to longshoremen's strikes inasmuch as the record is devoid of evidence of factors other than a longshoremen's strike which would effect less than a substantial portion of the port area and disable a consignee from removing his cargo.[7]

[7] The Delaware River Port Authority (Philadelphia) excepted to the "longshoremen's strike" exception to the "entire port area" requirement, alleging that it will result in

Therefore, section 526.1(d) should be amended to read as follows (new language in italic):

Where a consignee is prevented from removing his cargo by factors beyond his control (such as, but not limited to, *longshoremen's strikes*, trucking strikes or weather conditions) which affect an entire port area or a substantial portion thereof, *and when a consignee is prevented from removing his cargo by a longshoremen's strike which affects only one pier or less than a substantial portion of the port area*, carriers shall (after expiration of free time) assess demurrage against imports at the rate applicable to the first demurrage period, for such time as the inability to remove the cargo may continue. Every departure from the regular demurrage charges shall be reported to the Commission.

(d) *The requirement of the extension of first-period demurrage following port-wide strikes of longshoremen for 25 calendar days or more.*

Most of the parties actively participating in this proceeding object to some extent to the Examiner's recommendation that first-period demurrage be automatically extended following longshoremen's strikes exceeding 24 days.

Generally, the conferences contend that any extension of first-period demurrage or free time following termination of a strike would only aggravate congestion by removing the incentive (penal demurrage) to remove cargo at a time when it is most urgently needed. Hearing Counsel and AIIS, on the other hand, also argue that the Examiner's recommendation is faulty because it fails to solve the post-strike congestion problem, but maintain that the proper solution would be to extend free time or first-period demurrage following a major strike (depending upon the position of the cargo when the strike began) and to couple such extension with a truck appointment system, the free time (but not first-period demurrage) to be tolled on the day that a carrier or terminal operator notifies a consignee or his agent of a specific time at which the cargo may be picked up if the cargo is actually available for pickup at the time specified.

Additionally, one conference maintains that if an extension is granted, the amendment to the General Order should be so worded as not to allow the application of first period demurrage to cargo already on penal demurrage when a strike begins and insure that the present

more liberal rules and regulations governing free time and demurrage at New York than at Philadelphia and thus unjustly discriminate against Philadelphia and increase its already present service disadvantage in its competition with the Port of New York. We have found that the failure to relieve consignees at New York from penalty demurrage during any strike is an unreasonable practice. The simple answer to Philadelphia's contention is that nothing prevents it from voluntarily adopting a rule removing the port area requirement with respect to longshoremen's strikes. As the Port of New York indicates on brief, there is no general Commission order respecting free time and demurrage practices at any port other than the Port of New York, yet no penal demurrage is assessed during any longshoremen's strikes at several North Atlantic ports.

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practice of free time running from the date of discharge of entire vessel rather than discharge of particular cargo from that vessel may be retained.

Hearing Counsel also criticize the Examiner's recommendation on grounds that the automatic extension of first period demurrage with respect to all cargo on the pier at the commencement of the strike would cause cargo that was still on free time when a strike ended to go directly into first-period demurrage even though the carrier had not fulfilled his obligation of tendering such cargo for delivery for the required free time period and might in fact refuse or be unable to tender for delivery.

The problem of what to do to encourage prompt and efficient removal of cargo following a major longshoremen's strike is not one that lends itself to a simple solution that will impress all parties with its undisputed fairness. The carriers understandably want the cargo off the piers as soon as possible to make way for new cargo. They consider the early application of penal demurrage a good way to accomplish this objective. Just as understandably, the consignees do not want to be assessed penal demurrage charges in situations in which, as we have noted in our review of the situation in the Port of New York, it is extremely difficult for consignees to pick up cargo. We wish to make it abundantly clear that we are not placing the blame for the post-strike congestion at the doorstep of any single interest. It is a problem which was caused in the first place by factors for which neither carriers nor consignees was directly responsible. However, all interests should utilize their best efforts to see that the public interest is served by prompt and efficient cargo removal so that the piers of the New York port area may return to normal as soon as possible following a major strike.

The solution suggested by the Examiner, although an important step in the right direction, does have its problems, some of which have been indicated by the parties. Any automatic extension of free time or nonpenalty demurrage may well tend to encourage consignees to leave cargo on piers for the duration of the extended periods and thus increase congestion. On the other hand, it seems unfair to assess penal demurrage against consignees who, through no fault of their own, have been unable to pick up their cargo.

At the outset one thing seems clear. As pointed out by one conference and noted above, if extensions of free time or first period demurrage are granted following a major longshoremen's strike, they should not be granted to cargo that was already on penal demurrage when the strike began. No one during the course of this proceeding has maintained such a position, and in fact, in oral argument counsel for AIIS stated that he did not contend that an extension following a strike should apply to cargo which was in a period of penal demurrage prior to the strike.[8] It seems indeed unfair to relieve one of penal demurrage who has contributed to the congestion by failing to pick up his cargo during the free time period or prior to the period when penal charges were levied to force its removal.

The solution seems to be an extension of free time or first period demurrage following a major longshoremen's strike that is conditioned upon the removal of the cargo within the extended period. The need for some extension of time following a major strike is plain. Although we have found no violations of the present regulations governing free time and demurrage, such regulations are just not realistic during such periods. Carriers experienced much difficulty in tendering cargo for delivery. As noted above, many of them worked their piers evenings and weekends to make cargo available for pickup and many consignees still experienced difficulty in obtaining their cargoes. There was a chronic labor shortage during this period due to the abnormally great volume of cargo that had to be handled by the same number of longshoremen normally available. Although the record does not indicate that penalty demurrage was actually assessed against consignees who were unable to pick up cargo, it does indicate that trucks were often forced to wait for many hours in long lines, often unsuccessfully, in attempts to pick up cargo and that periods of time running into three or four hours were necessary before waivers of penal demurrage could be obtained from the ACIC. In such instances it was often impossible for truckers to call at other less congested piers to pick up other cargo because of the lack of remaining work time.

There is nothing sacrosanct about the number "five." It is used to measure the minimum free time which must be granted under normal circumstances merely because it is a reasonable amount of time for carriers to tender and consignees to receive cargo.[9] In 1946, our predecessor promulgated rules to cover "the conditions currently prevailing in the Port of New York." These "conditions" included strikes of seafaring personnel and truck drivers; they do not appear to have included longshoremen's strikes, and the whole problem of pier congestion following, as distinguished from during, a strike was left unexplored. However, it was said that "reasonable time" was to be deter-

[8] AIIS would make an exception for cargo on penalty demurrage which a carrier is unable or refuses to tender for delivery. We have discussed this problem under "(b)" above.

[9] The fact that the number is not immutable is emphasized by the fact that prior to 1938, there were no requirements as to amount of free time, and that between 1938 and 1941, our predecessor had fixed ten days as the maximum free time period.

mined "with due regard . . . especially for the public interest, which requires that congestion of ports be minimized in the interest of efficient water transportation." *Free Time and Demurrage Charges—New York, supra*, at 103.

After a strike of major proportions, the prevailing free time and first period demurrage rules are not reasonable. Therefore, following a major strike, free time should be extended for five days, exclusive of Saturdays, Sundays, and legal holidays, coupled with a requirement that cargo actually be picked up within such extended period. Likewise, first period demurrage, which under normal circumstances is equal to five calendar days, should be extended for an additional five calendar-day period, with a smiliar requirement for actually picking up the cargo. For example, a consignee, whose cargo was on free time at the commencement of the strike, would not be assessed demurrage if he picked up his cargo within five days (excluding Saturdays, Sundays, and legal holidays) after the time free time would normally terminate, but if he picked it up on the sixth day, he would be assessed for six, rather than one day at the compensatory demurrage rate. If a consignee picked up his cargo on the fifth calendar day after first period demurrage would normally terminate, he would be assessed demurrage at the compensatory demurrage rate. However, if he picked it up on the sixth day, he would be assessed penal demurrage for the last six days. Of course, if cargo is not actually available for pickup during the extended free time period, free time must be extended until it is. If such cargo cannot be tendered for delivery during the extended first demurrage period, free time or first period demurrage would apply as specified in the applicable tariff. Such additional periods appear adequate to allow diligent consignees an opportunity to remove their cargo. They would also supply an incentive to remove such cargo, which an automatic extension would not, and will allow only diligent consignees to take advantage of their benefits.[10]

As suggested by some respondents, the modification will be worded to indicate that no departure from the present practice of starting the running of free time from discharge of the vessel rather than any particular cargo from the vessel is intended.

[10] Hearing Counsel had formerly proposed an alternative plan whereby free time would be extended in all situations in which carriers could not tender for delivery and first period demurrage rates would apply after the expiration of free time, in all situations in which consignees as a class are unable to pick up their cargo at any pier. This plan presents difficulties in the post-strike situation. Questions of fact might arise as to whether particular post-strike congestion had actually made it impossible for consignees to pick up cargo while all the while congestion got worse. More important, however, the plan gives no incentive to consignees to remove their cargo.

It is regrettable that we are unable to adopt the suggestion of AIIS and Hearing Counsel that the extension of free time be coupled to a truck appointment system, free time terminating with the making of an appointment for a specific time at which a truck is to call for cargo. However, the difficulties in establishing a workable and fair truck appointment system are numerous indeed. The Examiner mentioned some of them: The possibility of discrimination in the granting of appointments, and the hardships which occur in individual cases even if a mechanical method for the fixing of appointments could be established. It is undeniable that the establishment of some sort of system for the orderly removal of cargo from the piers is a desirable, perhaps even necessary, objective, but at this juncture no one is able to state just what kind of procedure should be set up or how it should be administered. We can only hopefully provide that, if a workable appointment system acceptable to both carriers and consignees is adopted, the extension of free time or first period demurrage will terminate within 24 hours (a reasonable time for a consignee to arrange for pickup) of advance notification that cargo is available for pickup and readily accessible.[11]

In other words, General Order 8, Part I, is revised by the insertion of a new section, 526.1(f), providing as follows:

> Following a longshoremen's strike of five days or more,[12] free time or first period demurrage, depending upon the status of the cargo at the commencement of the strike, shall be extended for a period not less than 5 days (exclusive of Saturdays, Sundays, and legal holidays) and 5 calendar days, respectively, beyond the time at which they would normally terminate; *Provided, however*, that such extensions shall apply only if cargo is actually picked up within such extended time or, if an appointment system acceptable to both carriers and consignees is adopted, within 24 hours of advance notification that cargo is available for pickup and readily accessible, subject to the requirement that time not be extended more than 24 hours beyond the additional free time or demurrage period.

We agree with the Examiner's conclusion that carriers are entitled to compensation for the use of their piers during longshoremen's strikes by cargo on which free time had expired before commencement of the strike. We also agree that no special relief need be granted the importers of tea, coffee, spices, food and other products whose cargo is subject to United States Government inspection. As our predecessor indicated in *Free Time and Demurrage Charges—New York*, *supra*,

[11] In attempting to establishing such a system, attention might well be given to the expressed willingness of the New York Terminal Conference to participate in administering free time and demurrage regulations.

[12] Five days was chosen because congestion problems caused by strikes of less duration should be adequately handled by the tolling of free time and the first demurrage period for the duration of the strike and the consequent free time or first period demurrage days remaining after the strike. Strikes of less than five days have not appeared to cause major problems in the past.

inspection delays are occasioned by factors other than those relating to the obligation of the carrier. No party indicated that free time should be extended because of the delays occasioned by Government inspectors. Several conferences, moreover, grant six rather than the five days' free time to allow for delays occasioned by Governmental inspections.

Sea-Land Service, Inc. (Sea-Land) urges that all containerized operations be excluded from the effect of any order issued in the proceeding, alleging that with the exception of one witness of Seatrain no evidence or testimony was received relating to containerized operations. It further alleges that, inasmuch as the Examiner excluded Seatrain's operations from his Initial Decision, consistency requires that Sea-Land and other carriers be similarly excluded from any order or rule issued pursuant to this proceeding to the extent they utilize containerized operations. The record in this proceeding does not indicate that problems have arisen with respect to cargo shipped in containers. To the extent that carriers engage in the transportation and tendering for delivery of containerized freight, rather than breakbulk cargo, there appears no necessity to require changes in these carriers' practices pursuant to our amendments to General Order 8, Part I.

An appropriate order will be issued and General Order 8, Part I, as revised herein, will be published in the Federal Register.

By the Commission.

FEDERAL MARITIME COMMISSION

In the Matter of Free Time and Demurrage Practices on Inbound Cargo at New York Harbor

ORDER

This proceeding was instituted by orders served upon respondents and published in the Federal Register and hearings were held before an Examiner pursuant to which briefs were filed and an Initial Decision issued. Exceptions and replies to this Initial Decision have been considered and oral argument held before and supplemental papers filed with the Commission. The Commission has this day issued its report in this proceeding, which is hereby incorporated herein by reference, in which it determined that certain practices of the respondents with respect to free time and demurrage on inbound cargo at New York Harbor would if continued in the future be unjust and unreasonable within the meaning of section 17 of the Shipping Act, and determined that its General Order 8, Part I, which regulates the free time and demurrage practices here under investigation should be amended in certain respects to insure just and reasonable practices in the future.

Therefore, it is ordered, That section 526.1(c) is amended by adding a new sentence at the end thereof. As amended, section 526.1(c) reads as follows:

(c) Where a carrier is for any reason unable, or refuses, to tender cargo for delivery, free time must be extended for a period equal to the duration of the carrier's disability or refusal. If such condition arises after the expiration of free time, an additional period during which no demurrage is charged or first period demurrage shall be applicable, whichever is specified in the appropriate tariff.

It is further ordered, That section 526.1(d) is amended by inserting the words "longshoremen's strikes" before the words "trucking strikes" and inserting the clause "and when a consignee is prevented from removing his cargo by a longshoremen's strike which affects only one pier or less than a substantial portion of the port area", before the words "carriers shall". As thus amended, section 526.1(d) reads as follows:

(d) Where a consignee is prevented from removing his cargo by factors beyond his control (such as, but not limited to, longshoremen's strikes, trucking strikes or weather conditions) which affect an entire port area or a substantial portion thereof, and when a consignee is prevented from removing his cargo by a longshoremen's strike which affects only one pier or less than a substantial portion of the port area, carriers shall (after expiration of free time) assess demurrage against imports at the rate applicable to the first demurrage period, for such time as the inability to remove the cargo may continue. Every departure from the regular demurrage charges shall be reported to the Commission.

It is further ordered, That a new part (f) be added to 526.1 to read as follows:

(f) Following a longshoremen's strike of five days or more, free time or first period demurrage, depending upon the position of the cargo at the commencement of the strike, shall be extended for a period not less than five days (exclusive of Saturdays, Sundays and legal holidays) and five calendar days, respectively, beyond the time at which they would normally terminate: *Provided, however*, that such extensions shall apply only if cargo is actually picked up within such extended time or, if an appointment system acceptable to both carriers and consignees is adopted, within 24 hours of advance notification that cargo is available for pickup and readily accessible, subject to the requirement that time not be extended more than 24 hours beyond the additional free time or demurrage period.

It is further ordered, That such amendments shall be binding upon all common carriers of noncontainerized cargo by water in foreign commerce with respect to regulations and practices affecting free time and demurrage on import property at the Port of New York; and

It is further ordered, That on or before the effective date of this order, all tariffs of such carriers relative to free time and demurrage on import property at the Port of New York be conformed to the findings and rules herein set forth; and

It is further ordered, That this order become effective February 15, 1968.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 65-13

RATES ON U.S. GOVERNMENT CARGOES

Decided December 8, 1967

Rates which are admittedly noncompensatory and which are reduced in order to unfairly attempt to drive a competitor from the trade are contrary to section 18(b)(5).

Rates which are no longer effective and which were promulgated pursuant to an outdated system of rate negotiations are not amenable to section 18(b)(5).

A conference of carriers, by reducing its rates to an admittedly unreasonable and noncompensatory level in order to drive another carrier from a trade, violates section 15 and the terms of the conference agreement.

Failure of a carrier to abide by its tariff provisions is contrary to section 18 (b)(1).

Under section 15, a dormant agreement may not remain approved but must be canceled or modified to reflect its present purpose.

Elmer C. Maddy and *John Williams* for respondent conference Atlantic & Gulf American-Flag Berth Operators and certain of its member lines.

Warner W. Gardner, *Robert T. Basseches*, and *James B. Goodbody* for respondent conferences West Coast American-Flag Berth Operators and Trans-Pacific American-Flag Berth Operators and certain of their member lines.

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

Sterling F. Stoudenmire, *Jr.* for respondent Waterman Steamship Corporation.

William B. Ewers and *Ira L. Ewers* for respondent Moore-McCormack Lines, Inc.

Joseph A. Klausner and *Mitchell W. Rabbino* for respondent Sapphire Steamship Lines, Inc., Liberty-Pac International Corp., and Pioneer Overseas Service Corp.

Wilbur L. Morse and *Howard A. Levy* for Department of Defense; *Harry R. Van Cleve*, *Thomas J. O'Reilly*, and *Paul J. Fitzpatrick* for General Service Administration; *John A. McWilliam* for Toledo-Lucas County Port Authority; *Alan F. Wohlstetter* for Household Goods Forwarders Association of America, Inc.; *William L. Marbury* and *Philip G. Kraemer* for Maryland Port Authority; and *Chas. R. Seal* for Virginia State Ports Authority, interveners.

Donald J. Brunner, *R. Stanley Harsh*, and *Samuel B. Nemirow*, Hearing Counsel.

REPORT

By the Commission: (John Harllee, *Chairman;* George H. Hearn, *Vice Chairman;* Ashton C. Barrett, James V. Day, *Commissioners*)*

The Proceedings

On May 6, 1965, the Commission, on its own motion, instituted this investigation of virtually the entire spectrum of practices surrounding the procurement of ocean transportation of U.S. military cargoes. The Commission named as respondents AGAFBO (Atlantic and Gulf American-Flag Berth Operators), TPAFBO (Trans-Pacific American-Flag Berth Operators), WCAFBO (West Coast American-Flag Berth Operators), their respective member lines and Sapphire Lines, Inc., Liberty-Pac International Corp., and Pioneer Sapphire Lines, Corp. The Military Sea Transportation Service (MSTS), General Services Administration, Household Goods Forwarders Assn. of America, Inc., and Toledo-Lucas County Port Authority intervened. Beginning September 28, 1965, Examiner C. W. Robinson held hearings totaling 61 days in Washington, San Francisco, and New York and served an initial decision on December 15, 1966. The Commission heard oral argument on exceptions and replies to exceptions on May 3, 1967.

The Respondents

AGAFBO [1] and WCAFBO [2] are conferences or associations of U.S. flag carriers, which have been approved under section 15 of the Ship-

*Commissioner James F. Fanseen did not participate.

[1] FMC Agreement No. 8086–2, Atlantic and Gulf American-Flag Berth Operators (AGAFBO): Alcoa Steamship Company, Inc., American Export Isbrandtsen Lines, Inc., American President Lines, Ltd., American Union Transport, Inc., Bloomfield Steamship Company, Central Gulf Steamship Corporation, Farrell Lines Incorporated, Grace Line Inc.. Great Lakes Bengal Lines, Inc., Isthmian Lines, Inc., Lykes Bros Steamship Co., Inc., Matson Navigation Company, Moore-McCormack Lines, Inc., Pacific Seafarers, Inc., Prudential Steamship Corporation, States Marine Lines (joint service of States Marine Lines, Inc., and Global Bulk Transport, Inc.), T. J. Stevenson & Co., Inc. (Stevenson Lines), United States Lines Company, Waterman Steamship Corporation.

[2] FMC Agreement No. 8186, West Coast American-Flag Berth Operators (WCAFBO):

ping Act, 1916 (46 U.S.C. § 814). Through AGAFBO and WCAFBO, carriers may discuss and agree upon rates, terms, conditions, and related services to be used as a basis for discussion and negotiation with various military shipper services for the transportation of military cargoes. TPAFBO [3] is an approved conference of U.S. flag carriers designed to permit carriers to discuss and agree upon rates, terms, and conditions, principally credit arrangements between the ocean carrier and the van line, for cargoes moving on through Government bills of lading (TGBL) under rate and service tenders approved by the Department of Defense (DOD).

Sapphire Steamship Lines, Inc. operates a liner service between United States North Atlantic ports and ports in the United Kingdom and the Bordeaux-Hamburg range.

Liberty-Pac International Corp., a New York corporation formed in 1960, is a forwarder of household goods on TGBLs between points in the United States and points throughout the world and is an approved tender holder for the transportation of such goods. Liberty-Pac ceased activity on November 11, 1966.

Pioneer Overseas Service Corporation, a New York corporation formed in 1963 and wholly owned by Marshall P. Safir, chairman of Sapphire, is a traffic management agency which performs many if not all of the services, for a fee, of household-goods movers. Pioneer does not represent tender holders at present.

FACTS

Movement of Defense Cargoes

The Cargo Preference Act of 1904, provides as follows:

> Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons. (10 U.S.C. § 2631)

On October 20, 1954, DOD and the Department of Commerce in the Wilson-Weeks Agreement agreed that the merchant shipping required by DOD, exclusive of the MSTS nucleus fleet and consistent with military requirements and prudent management, would be obtained in the

American Export Isbrandtsen Lines, Inc., American Mail Line Ltd., American President Lines, Ltd., Isthmian Lines, Inc., Matson Navigation Company, Pacific Far East Line. Inc., States Marine Lines (joint service of States Marine Lines, Inc., and Global Bulk Transport, Inc.), States Steamship Company, Waterman Steamship Corporation.

[3] FMC Agreement No. 8493, Trans-Pacific American-Flag Berth Operators (TPAFBO): same membership as WCAFBO, note 2 *supra*.

following order: berth-line operators, time or voyage charters, vessels under general agency agreement with National Shipping Agency, and foreign-flag vessels.

After the termination of World War II, the Army and the Air Force secured ocean commercial transportation for their cargoes through Army Transportation Corps (ATC) contracts. The first contract was executed in October 1946. The rates and conditions for this transportation were the same for all lines in a given trade. The contracts were of a space-charter variety, and the rates were on a FAS basis.

The transportation of Navy cargoes during the same period was performed under Navy contracts, which were generally similar to those of ATC.

The procedure for obtaining ocean transportation for military cargoes was changed in 1950 when this responsiblity was given to MSTS. Inasmuch as the stevedoring of cargo at military terminals was performed by the military, the contract rate was quoted FIO, to be adjusted where the cargo might move over commercial terminals. Since the space-contract system employed by ATC had proved unsatisfactory in that there was a tendency toward poor stowage, the MSTS contract was revised so that the payment of freight would be on the basis of the measurement of cargo on dock, with allowance for broken stowage. MSTS allocated cargo among the U.S. flag carriers based on the number of liner sailings, a system which generally was satisfactory to the lines. Under this system, an effort was made to provide a balanced load for each vessel.

In their discussions with MSTS, as with ATC previously, the lines presented their costs and other data in support of rates. The rates could be revised upon demand by either party for renegotiation, and failure to agree within 60 days automatically canceled the contract. Subsequently, in 1957, MSTS prescribed a formula for the submission of requests for increases. The formula required the submission of cost data limited to wages, subsistance, repairs and maintenance, stores, supplies, insurance, and fuel. In due time MSTS would announce its decision as to the rate. If the lines were dissatisfied with the decision, they could present their objections; sometimes MSTS would agree to changes. MSTS had the final say in these matters. When negotiations were concluded, the rates were filed with the Commission. Although AGAFBO and WCAFBO acted collectively for their member lines during the negotiations, the contracts were executed by the individual lines. To areas not covered by shipping contracts, military cargoes moved on berth terms on Government bills of lading at commercial rates.

On April 4, 1966, the Deputy Assistant Secretary of Defense for Transportation and Logistics announced that DOD's practice of procuring ocean freight services would be altered so that procurement, to the maximum extent possible, would be obtained through price competition. The new policy was implemented by MSTS's Request for Proposals No. 100, issued on June 16, 1966.

Carriers of military household goods moving on TGBLS at through rates previously filed rate proposals with MTMTS,[3(a)] which coordinates the shipment of such goods. The ocean-rate segment, after having been negotiated by MSTS, was supplied to MTMTS, and was then transmitted by that agency to the carriers for inclusion in their tenders. The tenders were filed semiannually for periods of six months. The tenders submitted were made available to other carriers. Prior to the effective date of the rates, carriers were allowed to meet the lowest rates, but they could not go below such rates. This was known as the "me too" system. After the rates became effective there were three me-too cycles available in a given six-months' period; new carriers could come in for the first time in these subsequent cycles and file competitive rates. MTMTS divided the available tonnage among the carriers having comparable rates.

Ocean Rates on Military Cargoes

The original ATC contracts provided for payment to the lines of 44½ cents per cubic foot of space reserved, whether used or not. However, when MSTS took over in 1950, after making allowances for the FIO factors, the rate arrived at was about 15 percent lower than the commercial rate on similar commodities. This envisaged a broken-stowage allowance of 20 percent. In 1961, the difference between the berth and FIO rates was set at 22.5 cents.

The contracts contained a schedule of rates for certain general descriptions of cargo (depending to some extent upon the trade); e.g. general, household goods, unboxed vehicles, unusual size, unboxed guns, refrigerated, explosives, hazardous, bulk, lumber, poles and piling, and empty Conex containers (inbound). The first five categories had three kinds of rates: basic, reduced A, and reduced B, the latter two being applicable to cargo when shipped in larger volume. The rates for on-deck cargo were 10 percent lower. In the trans-Pacific trade in fiscal year 1965, about 78 percent of the MSTS cargo moved at the basic rates and about 11 percent each at the reduced rates; the corresponding figures for the AGAFBO lines do not appear of record. Between 1950 and 1964, the WCAFBO lines received five rate increases

[3(a)] Military Traffic Management and Terminal Service.

totaling 44.3 percent. Rate increases granted to the AGAFBO lines in the same period approximated 30 percent; increased costs of operation do not appear of record. Comparing six principal commercial commodities moving via WCAFBO lines with comparable MSTS commodities moving in volume, for the years 1950–1965, the rates on the former increased an average of 66 percent as compared with 44 percent for the latter; the corresponding figures for the AGAFBO lines do not appear of record.

As illustrative of the rate picture just prior to the advent of Sapphire upon the scene, the AGAFBO rates, FIO per cubic foot, on five representative commodities from Atlantic and Gulf Ports to Ports in the Bordeaux-Hamburg range, were as follows:

	Basic	A	B
General cargo	54½	43½	38
Household goods	58½	47	41
Unboxed vehicles (up to 8,960 pounds)	66½	53	46½
Unusual size	69	55	48½
Unboxed guns	87	69½	61

The rates of the WCAFBO lines, on the same commodities, were somewhat higher to basic Far East countries, and even higher to more distant trans-Pacific areas.

Sapphire's first tariff was issued on February 12, 1965, effective March 14, containing rates on "general cargo", and excepted MSTS cargoes and personal property of military personnel and Government employees. Effective March 14, the tariff was broadened slightly by adding specific rates on farm machinery and on household goods and personal effects NOS, the rate on the last-named being 81 cents per cubic foot. Effective March 31, Sapphire published a rate of $7 per net 100 pounds or 45½ cents per cubic foot on household goods shipped by any Government agency and moving on through Government bills of lading. The household-goods rates were effective for six months. Also effective March 31, Sapphire published an FIO rate of $16 a measurement ton (40 cents per cubic foot) on military cargo. There was no FIO rate for household goods shipped by MSTS, and any such goods would have moved at the 40-cent rate applicable to MSTS general cargo. Effective April 9, Sapphire extended the area coverage to Gulf ports. A westbound rate of 38 cents per cubic foot on POVs,[4] effective March 31, also was published, but just prior to the arrival in port of Sapphire's first vessel qualified to carry MSTS cargo from Europe, U.S. Lines filed a rate on POVs slightly lower than the Sapphire rates; Sapphire then filed a rate of 35 cents for foreign made

[4] Privately-owned vehicles.

POVs, effective April 19, which was lower than the rate of U.S. Lines, but retained the rate of 38 cents on other POVs.

Effective March 29, 1965, AGAFBO reduced its through-bill household goods rate from 81 cents (which it had negotiated with MSTS at the latter's request) to 45½ cents per cubic foot. The rate was quoted for a 30-day period unless further extended, and it eventually expired on March 1, 1966, and reverted to 81 cents. To maintain the 22½-cent stevedoring differential between its berth rate (45½ cents) and its FIO contract rate of 58½ cents, AGAFBO published an FIO rate of 23 cents per cubic foot on military household goods, effective March 29, for a period of 30 days, at which time it reverted to the 58½-cent level. By letter to MSTS of March 29, AGAFBO stated that it did not believe the reduced rates were fair, reasonable, or compensatory and that the reductions were made strictly as a temporary competitive action.

Waterman withdrew from AGAFBO on May 22, 1965, and immediately filed its own tariff containing negotiated military rates, generally comparable to those of AGAFBO. It also filed a tariff for military household goods moving under through Government bills of lading, naming a rate of 45½ cents per cubic foot. In addition, effective July 28, in its regular commercial tariff, Waterman published an FIO rate of 40 cents per cubic foot on MSTS general cargo NOS which would apply to household goods. Waterman rejoined AGAFBO in March 1966 and canceled these tariffs.

Operating Margin of AGAFBO–WCAFBO

AGAFBO and WCAFBO have made a comprehensive cost study of about $100,000,000 of steamship operations in the fourth quarter of 1964. The study shows that inbound cargoes were carried at a loss and this loss should be borne by outbound cargoes. Since MSTS accounted for 48 percent of all space used outbound, MSTS cargoes should bear 48 percent of all inbound losses. In the Atlantic Gulf/United Kingdom trade, MSTS cargo produced revenue of $8,500,000, a profit of $580,000 before replacement allowances, subsidy, and income tax. There was an operating loss on all incoming cargo of $3,000,000. Allocating 48 percent of the loss to MSTS cargo ($1,440,000), MSTS cargo shows an overall loss of $860,000.

As to the U.S. Pacific Coast/Far East trade, MSTS produced revenue of $11,000,000 and profit of $1,575,000 before replacement allowance, subsidy, and income tax. There was an operating loss on all incoming cargoes of $955,000. Allocating 48 percent of this loss to MSTS cargo, the operating profit is reduced to $1,135,000.

World-wide in this period, MSTS outbound cargo via AGAFBO and WCAFBO carriers occupied about 66,000,000 cubic feet, producing revenue of about $26,000,000. The operating profit before replacement allowance, subsidy, and income tax was about $2,900,000, or .044 per cubic foot. There was an operating loss of about $6,300,000 on all inbound cargo, or .93 per cubic foot. Allocating 48 percent of the incoming loss to MSTS cargo, the operating loss on MSTS cargo would be about $3,000,000. Subtracting this amount from the outbound profit of $2,900,000, the operating loss would be about $100,000.[5]

Sapphire's Operating Margin

Sapphire's principal interest from the beginning was the carriage of military household goods, with a build-up of commercial cargo, and it planned a shuttle berth liner service with three vessels, with a turn-around of 35 days, between Baltimore and Antwerp. At this time, Sapphire felt it had in hand about 32,000,000 pounds of household goods for its ships. The outbound rate was not to be so high as to support the costs of the round voyage, and two-way movement was necessary, with the anticipated profit to come from the inbound household goods movement.

The three vessels originally chartered were C–2's, each with a bale cubic capacity of 540,000 to 550,000 feet. After applying a broken-stowage factor for a combination of household goods and military and commerical cargo, it was estimated that there would be about 800,000 cubic feet of usable space of a round voyage for each vessel; about 300,000 cubic feet was allocated for household goods, the balance to be available for MSTS general cargo, on an allocation basis, and commercial cargo. The preponderance of the household-goods movement is inbound and the volume of MSTS general cargo is predominantly outbound.

Since the over-all costs of a round voyage exclusive of some administrative salaries were estimated at about $140,000, or about $4,000 a day, it was felt that a profit would be possible with a 40 percent utilization of space. Furthermore, with an ocean rate lower than the AGAFBO rate, it was anticipated that there would be a diversion of some cargo from New Orleans to Baltimore. About 65 percent of the household-goods movement at that time from the Atlantic and the Gulf used New Orleans because of its location and lower rates.

With a shipping contract and the receipt of cargo on an allocation basis, Sapphire believed that it would be entitled to 3/61 of the avail-

[5] Another study based on measurement tons showed that MSTS was receiving from WCAFBO a discount of about 21 percent of the commercial rate before any adjustment for broken stowage.

able traffic, or about 1,600 measurement tons, a sailing. Sapphire did not believe that AGAFBO would meet its rates since the volume to be carried by Sapphire would be quite small compared to the loss of revenue to the AGAFBO lines if they carried the remainder at reduced rates. This same feeling was held by some of the members of AGAFBO in the early stages.

The then-existing AGAFBO rate for the movement of military household goods from the United States to the Bordeaux-Hamburg range and the United Kingdom was 81¢ per cubic foot. However, Liberty-Pac had reduced the through rate, including the ocean freight, by $5 per net hundredweight. The reduction was to be absorbed by a reduction of the ocean freight increment from 81¢ per cubic foot to 45½ cents or the $7 per net hundredweight which Sapphire filed. It was anticipated that the difference in ocean freight would be so great that it would be feasible for the household goods carriers to divert much of their cargo to the port served by Sapphire, instead of using New Orleans, which traditionally handled 65 percent or more of the household goods traffic.

At the rate originally contemplated by Sapphire for household goods through Baltimore, it estimated a revenue yield of about $160,000 a voyage. Under the rate eventually filed, the results would be about $5,000 less per voyage.

When it became rather apparent that the anticipated volume of household goods was not to be realized and that all such goods would be taken out of the allocation system, Sapphire had to seek other cargo. New plans were formulated and it was decided not to pursue the matter of a shipping contract. Since the rates finally decided upon were to be lower than the AGAFBO rates and for a longer period of time than the AGAFBO rates, there would be a concentration on through-bill household goods. Instead of infrequent voyages out of the Gulf, eight voyages during the peak season would be serviced by two other chartered vessels calling only at New Orleans and Bremerhaven. About 21,000,000 pounds (3,000,000 cubic feet) of household goods were expected through the Gulf. With a turnaround of 40 days and at a rate of 45¢ per cubic foot, the Gulf revenue for eight round voyages would be about $400,000.

Three of the vessels chartered to Sapphire were purchased by the company around the first of 1966, at a total cost of $1,650,000.

In the first five months of its operation, Sapphire carried only 7.4 percent of the through-bill household goods on the Atlantic-Gulf/Bordeaux-Hamburg route.

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For the 15 completed voyages just referred to, the net loss to Sapphire was about $545,000, or about $36,000 a voyage, the inbound leg bearing the greater burden.

Competition for Military Household Goods

In September 1964, Liberty-Pac brought to the attention of DOD a new mode of moving household goods, by packing them in permanent twenty-and-forty foot aluminum containers. Household goods had been moved, and still are being moved, in smaller plywood containers, which by their nature were disposable. The new containers, unlike the plywood boxes, could be deck stowed and were believed to be less costly for the shipping companies to handle. At the start, it was considered that three dollars per net hundred-weight would be saved.

At the same time, Liberty-Pac approached certain American flag lines for a reduction in ocean freight for containers in the Bordeaux-Hamburg range, which was the area to be served initially by the new Liberty-Pac mode.

Liberty-Pac had made its proposal on the condition that it be permitted to charter its own ships, if necessary. In order to make this offer more effective, it was also requested that military household goods be removed from the allocation system when traveling under a through bill of lading.

The Liberty-Pac proposal would have given the van lines the right to negotiate individually for more advantageous freight rates from the ocean carriers. This would have completely overturned the traditional approach of negotiation with MSTS by AGAFBO on a group basis.

At the time of the original Liberty-Pac proposal to DOD, the AGAFBO carriers began to take action to protect their competitive position. As a result of an AGAFBO meeting of January 7, 1965, the AGAFBO secretary advised a President's committee of possible management level action with DOD, Maritime Administration, Federal Maritime Commission, Department of Commerce, and Congressional committees. When Liberty-Pac went forward with its plans, AGAFBO began to secure information on all phases of the new mode, including chartering attempts, agents, vessel itineraries, shippers, commercial cargoes, and military cargoes.

For some period of time, a large number of major van lines operating as movers of household goods in U.S. foreign commerce were deeply in debt to member lines of AGAFBO. For instance, 80 van lines owed AGAFBO a total of $5,083,826.40 in September 1964 and a total of $4,243,504.51 in October 1964. As AGAFBO itself reckoned, they had become bankers for much of the household moving industry. The build-up of such outstanding debts resulted from a practice of extending credit contrary to the AGAFBO tariff rules then in effect. Rules adopted December 20, 1963, provided that outbound freights were payable within 15 business days from date of arrival at vessel's port of discharge. The rules were amended on November 16, 1964, to provide for an additional 30 calendar days to make payment for shippers who furnished an indemnity bond of $100,000. There were provisions for shippers to be placed strictly on a cash basis in the event of delinquencies of payment.

There had been some limited AGAFBO action with respect to reducing the indebtedness of the van lines. On March 10, 1964, there was a meeting with the largest debtor van line concerning unpaid amounts. By mid-February 1965, AGAFBO had not, however, taken any strict measures to enforce its tariff rules as to payments nor to apply the sanctions provided by tariff against van lines delinquent in their payments.

On February 15, 1965, AGAFBO discussed at length the Liberty-Pac proposal and then passed the following motion:

> Since Liberty-Pac International has submitted a proposal to the Department of Defense for the carriage of all military household goods between the Atlantic Coast and the Bordeaux-Hamburg and United Kingdom ranges, which service will be exclusively available through the Sapphire Steamship Lines, Inc., for which service the Pioneer Overseas Corporation is the FMC filing agent, it was agreed that the new enterprise represented a highly speculative venture and since the participants were indebted to the member lines for a considerable sum of money, the Secretary should by wire notify them as the initial step in collecting delinquent accounts, that unless all amounts due member lines were paid within seven days from date of telegraphic notice, the Secretary should then immediately request MSTS to request * * * [MTMTS] to take agreed action to insure collection of such accounts or suspend the carrier's tender.

Following the meeting, AGAFBO telegraphed the Pioneer group that unless payment of delinquent charges was made within seven days, MSTS would be informed and would be requested to ask MTMTS to take appropriate steps either to insure prompt payment or to suspend the tenders of the lines. MSTS was so notified on March 2.

On March 5, 1965, MSTS passed on the complaint to MTMTS. On March 10, 1965, MTMTS refused to act. On February 15, 1965, at the same time that AGAFBO agreed to take strong action against the Pioneer Overseas Group to collect past debts, AGAFBO agreed that "On amounts delinquent subsequent to November 16, they [the Pioneer Overseas Group] were to be notified that they would be placed on a cash basis." It was further agreed that each member line would immediately issue instructions to make certain that all its offices strictly adhered to this cash basis requirement.

On February 18, 1965, AGAFBO notified the Pioneer Overseas Group that van lines which were delinquent in payment of amounts owed since November 16 "will on February 24 be placed on a cash basis".

On April 5, 1965, AGAFBO amended its cash requirements rule in a manner suggested by certain unnamed van lines whereby those which paid debts owed AGAFBO for services prior to November 16, 1964, would be taken off the cash list "whether or not current delinquencies remain unpaid".

At an AGAFBO meeting of April 13, the carriers agreed that court action should be started against members of the Pioneer group. Such suits were filed.

On February 24, 1965, AGAFBO filed a petition with the Commission requesting an investigation of the legality of the Sapphire/Liberty-Pac operation. The Commission did not act on the petition.

On March 31, the secretary of AGAFBO was instructed to explore with counsel the possibility of legal action to prevent the use of unreasonably low rates by Liberty-Pac. In fact, AGAFBO filed a petition with the Commission asking that Sapphire's tariff be rejected as illegal. No action was taken by the Commission.

On April 1, MSTS instructed its offices to book the maximum quantity to household goods with Sapphire. On the following day, AGAFBO requested MSTS to suspend Sapphire's bookings, referring to the Sapphire operation as "opportunist cut throat competition" and charging that the use of Sapphire was contrary to the Wilson-Weeks agreement and DOD's financial requirements. MSTS, as a result, suspended Sapphire for two days, but MSTS lifted the suspension upon concluding that Sapphire had shown sufficient proof of financial stability and otherwise had met all MSTS requirements.

Thereafter, AGAFBO complained of the MSTS policy of preferring Sapphire because Sapphire's rates had longer effective dates. In addition, AGAFBO communicated and had meetings with various officials of DOD, MSTS, and MTMTS concerning the proposed operations of Liberty-Pac and Sapphire.

On March 29, AGAFBO as a direct reaction to the rates of Sapphire reduced its through bill household goods rate from 81¢ (which it had negotiated with MSTS) to 45½¢ per cubic foot. The rate was quoted for a 30-day period and eventually expired on March 1, 1966. AGAFBO altered its FIO rate in a corresponding manner. AGAFBO notified MSTS that the rates were made as a strictly temporary competitive measure and were not fair, reasonable, or compensatory. AGAFBO also filed competitive rates on other goods in reaction to Sapphire's competition.

Miscellaneous Facts

U.S. Lines had the capacity to carry refrigerated beef for the military. MSTS had used these facilities on berth terms under Government bills of lading, with loading at commercial piers in New York. After MSTS had booked some of this cargo with U.S. Lines in June 1965, the carrier canceled the booking, advising MSTS that at:

> * * * present time in spite of rate equality on principal cargo categories MSTS is holding cargo for competitors with the avowed intent of filling such competitive vessels before considering those of United States Lines. Under circumstances feel unable to continue to perform long range special services to MSTS in this area while such discriminatory situation persists.

The same type of refrigerated facilities possessed by Moore-McCormack also had been used by MSTS. The carrier canceled a booking for refrigerated space in June 1965, advising that the sailing of the particular vessel had been withdrawn because of the limited commercial bookings and the pending maritime strike, plus the fact that MSTS was unable to give the carrier any general cargo, it being:

> * * * understood that very large scale MSTS dry cargo bookings were made with our competition [Sapphire] which did not offer conventional reefer space. * * * Withholding of a dry cargo booking to our ship which would have enabled us to sail on 18 June as scheduled and meet your total requirements is difficult to understand. Respectfully recmd serious reconsideration of present MSTS booking policy.

In May 1965, MSTS booked with Sapphire household goods for loading at St. Nazaire, at a rate of 40 cents per cubic foot. Waterman had a vessel available at that place at the same time and reduced its rate to 31½ cents. The cargo was unbooked in favor of Waterman, but Sapphire immediately filed a rate one/half cent below the Waterman rate, and was then given the cargo.

By letter to DOD of December 11, 1965, Liberty-Pac's attorney confirmed the oral commitment made by Liberty-Pac's representative the previous day, that Liberty-Pac would "move empty Conex boxes from Germany to the United States on its chartered vessels, as space and sailing schedules permit, without charge", if permitted to charter its own vessels. In its approval on December 29 of Liberty-Pac's new-mode proposal, DOD stated that "Any supplementary offer such as your client's offer of free transportation of empty conex containers from Europe to the U.S. should be embodied in the tender." Liberty-

Pac carried no empty Conex boxes from Germany, and it had no specific provision for this transportation in its tariff on file with the Commission.

In its letter of March 11, 1965, to various van lines, Sapphire stated that its tariff filed that day contained a rate of $7 per 100 pounds for through-bill military household goods, and that this rate was a direct saving to the van lines of approximately $1 per 100 pounds. The purpose of this saving was to induce the van lines to divert their shipments from New Orleans to Baltimore since the cost through the two ports would be equalized and transit time via Baltimore would be shorter than via New Orleans.

MSTS tendered 124 POVs to Sapphire at Philadelphia on May 22, 1965, for loading on one of its vessels. As this vessel did not have special gear for handling automobiles, the tender was revoked in favor of a vessel of an AGAFBO member which was available and did have such equipment. Sapphire thereupon agreed to pay the difference in loading costs (about $7.50 per vehicle), and this offer was accepted by MSTS; Sapphire was then billed for the costs. The Sapphire tariff provided at that time that where the cargo required special equipment not on the vessel or the handling of cargo involved other expenses, such equipment should be provided by MSTS, who should also pay the other expenses.

On a voyage in May 1965, one of the Sapphire vessels loaded 59 truck tractors for MSTS. These averaged six tons each, with none weighing less than two tons. Sapphire did not submit to MSTS a bill for heavy-lift charges although its tariff provided that such charges were applicable where the packages or pieces were in excess of two tons.

AGAFBO's rate reductions and later upward revisions were not made after negotiations with MSTS, who did not agree that the former rates should become effective when the temporary reductions expired.

Government civilian cargoes move under commercial tariff rates and not under special Government rates. The AGAFBO and TPAFBO berth rates on military household goods moving on through Government bills of lading are lower than the corresponding rates contained in the tariffs of the commercial conferences of which the AGAFBO and TPAFBO lines are members. This means that household goods shipped by civilian agencies of the Government are assessed rates higher than those paid for military household goods which may be shipped on the same vessel. Furthermore, the commercial conferences do not permit negotiation, by their American-flag member lines, of rates on cargo or property shipped by civilian agencies of the Government.

The AGAFBO and WCAFPO agreements require the carriers to furnish data to the Military Sea Transportation Service and such related Shipper Services as to cargo transportation costs, space availability, sailing schedules, and related matters.

WCAFBO has submitted all cost data requested by MSTS, but MSTS has not been satisfied with the data submitted by AGAFBO and takes the position that the data has been informative but not conclusive as to the reasonableness of AGAFBO's rates.

AGAFBO carried on negotiations with MSTS in several areas served by only one U.S. flag operator.

The Issues

When the Commission instituted this proceeding, it specifically announced the legal questions to be resolved, as follows:

1. Whether the conference agreements have operated in a manner which is unjustly discriminatory or unfair to the U.S. Government or to any of its shipping agencies or between carriers or has operated to the detriment of the commerce of the United States, or is contrary to the public interest, or is in violation of the Shipping Act; and whether the agreements should be modified or canceled pursuant to the standards of section 15.
2. Whether the conferences or member lines have carried out an agreement before it has been filed and approved by the Commission in violation of section 15.
3. Whether the member lines have charged rates on nonmilitary household goods, which rates were not properly on file with the Commission, in violation of section 18(b) (3).
4. Whether any respondent has offered to a U.S. Government agency a rate which was not filed with the Commission as required by section 18(b) (1), and, if so, whether such unfiled rate is so unreasonably low as to be detrimental to the commerce of the United States in violation of section 18(b) (5).
5. Whether any respondent has charged rates which are unjustly discriminatory with respect to goods sponsored by the U.S. Government in violation of sections 16 First or 17.
6. Whether the rates on Government cargo filed by AGAFBO, Waterman, or Sapphire are so unreasonably high or low as to be detrimental to the commerce of the United States contrary to section 18(b) (5).
7. Whether the member lines of AGAFBO have individually or together with other lines acted to exclude any other carrier from the carriage of Government cargo in violation of section 14 Second.
8. Whether any respondent member of AGAFBO has violated section 14 Third by retaliating against any shipper (U.S. Government) by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminatory or unfair methods, because such shipper (U.S. Government) has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

9. Whether there exist unfiled agreements, subject to section 15, regarding the transportation of Government cargo between Sapphire, Liberty-Pac International Corporation, or Pioneer Overseas Corp.

DISCUSSION

In his initial decision, the examiner concluded generally that the question of rates had become moot, that the record disclosed no unfiled agreements or rates or other violations with the exception of a refusal of space to MSTS by U.S. Lines.[6] With respect to the organic agreements of AGAFBO and WCAFBO, the examiner recommended that the agreements be permitted to remain in force until MSTS certifies that it no longer has business with the groups, and at that time the agreements will be canceled or amended to show their present application.

The parties have excepted to numerous findings and conclusions of the examiner. Rather than consider the exceptions seriatim, we will attempt to group them into the following general categories: reasonableness of rates; actions taken against Sapphire; unfiled agreements, unfiled rates, or other violations; and continued approval of the agreements.

Reasonableness of Rates

Our findings as to the operating margin of AGAFBO–WCAFBO carriers are based upon a comprehensive study prepared by the member lines of the costs of carrying military cargo. The examiner, while admitting that the studies were not as accurate or complete as possible, found that the AGAFBO and WCAFBO rates pass muster under the Shipping Act. However, the examiner found that when AGAFBO reduced its rates to deprive Sapphire of cargo, AGAFBO's rates became so low as to be detrimental to commerce contrary to section 18(b)(5).[7] The examiner, although noting Sapphire losses, found this carrier entitled to a reasonable trial period to stabilize its rates. In spite of these findings, the examiner concluded that the rate issues were moot.

Hearing Counsel and DOD challenge the examiner's consideration of the reasonableness of rates at all; they aver simply that the cost

[6] The examiner stated that certain acts of AGAFBO were not authorized by any section 15 agreement, but he made no such ultimate conclusion. He also stated that AGAFBO unlawfully discriminated in pressing claims against some van lines but not others, but again he did not include this in his ultimate conclusions.

[7] Section 18(b)(5) (46 U.S.C. § 817(b)) provides:

(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

data, although not rebutted at the hearing, are unreliable. Both Hearing Counsel and DOD also submit that the entire issue is moot.

In response AGAFBO and WCAFBO assert that the studies were properly introduced with a host of supporting witnesses to attest to the methodology and comparative accuracy; since adverse parties could not impugn the validity of the studies, they must stand.

Granted that the studies are not as accurate or complete as might be, there is no justifiable reason not to accept them as a fair and honest attempt by the lines to come up with a meaningful story. The studies represent a reasonably close approximation of costs. *Increased Rates on Sugar*, 1962, 7 F.M.C. 404 (1962); *Alcoa Steamship Co., Inc.-General Increase in Rates*, 9 F.M.C. 220 (1966); *Iron and Steel Rates, Export-Import*, 9 F.M.C. 180 (1965). Therefore, we agree with the examiner that there has been no showing on this record that the rates in effect prior to the competitive reductions were so unreasonably high as to be detrimental to the commerce of the United States, within the meaning of section 18(b) (5) of the Act.

We consider now the AGAFBO reduced rates which became effective March 29, 1965. As previously seen, MSTS was informed by AGAFBO that the reductions were temporary and for competitive purposes only, and that they were not believed to be fair, reasonable, or compensatory. There can be little doubt that the drastic reductions were designed for but one purpose: namely, the elimination of Sapphire from the carriage of military cargo. Since the rate reductions were admittedly unreasonable and noncompensatory and were justified only in furtherance of the unfair attempt to drive Sapphire from the trade, we agree with the examiner and, under the circumstances, conclude that the reduced rates were so unreasonably low as to be detrimental to the commerce of the United States, and, therefore, contrary to section 18(b) (5) of the Act.

In the final analysis, the issue of whether the AGAFBO and WCAFBO rates met the standards of section 18(b) (5) is moot. Section 18(b) (5) permits the Commission to disapprove rates upon certain findings. Since the rates in question are no longer effective, they are no longer amenable to section 18(b) (5).

There has been no showing on this record that the rates of Waterman, during its nonmembership in AGAFBO, were so unreasonably high or low as to be contrary to section 18(b) (5) of the Act.

With respect to Sapphire's rates, the examiner, although noting losses on the first 15 voyages, held that Sapphire, being a new operator with attendant vicissitudes as evidenced by this record, was entitled to a fair chance to demonstrate whether it can operate in a sound financial manner.

AGAFBO argues that the examiner is logically inconsistent in finding that AGAFBO's rates were so low or unreasonably low as to be detrimental to the commerce of the United States contrary to section 18(b) (5) and yet exonerating Sapphire's identical rates. This, says AGAFBO, is illogical, particularly where Sapphire's losses at these rates were enormous and their expectations of cargo were naively optimistic.

The Commission has not found that Sapphire's rates were contrary to section 18(b) (5).

Actions Taken Against Sapphire

The examiner found that when AGAFBO learned of the Liberty-Pac proposal, AGAFBO generally acted with justification to protect itself; however, when AGAFBO pressed claims against some but not all van lines, AGAFBO violated sections 14 Third and 16 First. Likewise, the examiner found that AGAFBO's communication with various government agencies in an effort to impede Liberty-Pac/Sapphire was not authorized by its section 15 organic agreement and was, therefore, improper.

Hearing Counsel argue that the principal error and the cause of greatest regulatory concern in the initial decision is the failure to find that the joint acts of AGAFBO to eliminate Sapphire were unauthorized by the approved agreement and in violation of section 15. Sapphire, too, argues that the AGAFBO agreement does not include the right to attack a competitor collectively.

The premise of the contentions of Hearing Counsel and Sapphire are that joint actions taken by carriers to control or regulate competition must be authorized by section 15. Thus, Hearing Counsel argue that the examiner failed to recognize that the many actions taken by AGAFBO and its members to eliminate Sapphire from competition were evidence of a larger conspiracy which was in violation of section 15.

AGAFBO excepts to the examiner's decision to the extent of the finding that it acted unlawfully by pressing legal claims against some of the van lines. AGAFBO contends that it was justified in bringing suit on long overdue claims. AGAFBO argues that the lawsuits were based on valid claims and that facts do not show that the van lines were singled out for any reason other than their poor credit standing.

AGAFBO also contends that it was authorized by its agreement to meet with officials of DOD and MTMTS. In fact, there had been a long history of such discussions. Furthermore, petitioning a government agency should not be considered to be illegal under any circumstances. Finally, AGAFBO argues that its unilateral rate action was not beyond the terms of the agreement because it was logical for the AGAFBO lines to assume they had the freedom to meet competition. This worked to the benefit of MSTS. Accordingly, AGAFBO argues that its agreement should not be so narrowly interpreted, particularly in view of the past relationship between AGAFBO and DOD.

Although the secretary of AGAFBO, pursuant to instruction, advised the association's President's Committee of the developing facts for possible management level action with DOD, Maritime Administration, Federal Maritime Commission, Department of Commerce, and congressional and Senate committees, there is no proof that the committee took any positive action. There are other references in the record of meetings between AGAFBO and DOD, MSTS, and/or MTMTS concerning the new proposal, but it does not appear whether any of these were beyond the pale, unless it can be said that meetings with any Government agency other than MSTS were not within the scope or contemplation of AGAFBO's agreement. The agreement provides:

> 1. (a) They may meet from time to time and discuss cargo transportation costs, space availability, sailing schedules, and related matters, and agree as to rates, terms, and conditions of transportation and related services for such cargo, and as to matters relating thereto, which are to be used as a basis for discussion with Military Sea Transportation Service and said related "Shipper Services" for the purpose of negotiating rates, terms, and conditions for the transportation and related services for such cargo in common carriage; they may also negotiate as a body or through committees or selected representative or representatives, rates, terms, and conditions which shall become binding terms, and conditions which shall become binding on all parties hereto.

We find that this language authorized AGAFBO to meet with various DOD officials.

The petitions by AGAFBO requesting the Commission (1) to investigate possible unfiled rates by Sapphire, Liberty-Pac, or a related company, and whether they were unreasonably low, and (2) to reject Sapphire's first tariff because it did not conform to the statute and was the carrying out of an unfiled agreement with Liberty-Pac were also justified. Whereas it is true that the first petition was based on surmises and assumptions, and the association secretary testified that the beliefs turned out to be unfounded, the whole situation at that time was in such a state of turmoil that AGAFBO should not be penalized for filing the petition; good faith does not depend upon eventual results or hindsight. In the case of the petition to reject the tariff, moreover, it has been seen that Sapphire did amend the tariff to remove the objectionable features. Therefore, the filing of the petitions was not unlawful.

The Commission has not found that AGAFBO violated section 15 in requesting MSTS to suspend Sapphire or in complaining that MSTS preferred Sapphire; that AGAFBO, by a series of actions, conspired to drive Sapphire from the trade in violation of section 15; or that AGAFBO violated sections 14 Third and 16 First with respect to the collection of delinquent freight charges.

We consider now AGAFBO's ratemaking activities in reaction to Sapphire. AGAFBO reduced its rates to admittedly unreasonable levels with the sole purpose of mitigating any advantage to Sapphire. These rates were used as a predatory device to destroy competition and, as found above, were so unreasonably low as to be detrimental to the commerce of the United States contrary to section 18(b) (5).

Section 15 allows carriers to band together for the purposes of joint ratemaking in order to avoid the chaos which would result from wide-open competition. However, a conference is not permitted to engage in activity which is incompatible with the regulatory purposes of the Act. *States Marine Lines, Inc.* v. *Trans-Pacific Freight Conference*, 7 F.M.C. 204, 210, 215 (1962); aff'd. *sub nom. Trans-Pacific Frgt. Conf. of Japan* v. *Federal Maritime Com'n.*, 314 F.2d 928 (9th Cir. 1963). Furthermore, a conference, no matter what authority its organic agreement may contain, is not authorized to violate other provisions of the Shipping Act nor the general standards of section 15. *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 U.S.M.C. 342, 346–347 (1940).

With respect to rates set by a conference, the Commission has from time to time stated that it may disapprove or modify a conference agreement where a conference rate is so unreasonably high or low as to be detrimental to the commerce of the United States. *Iron and Steel Rates, Export-Import*, 9 F.M.C. 180, 192–93 (1965). See also: *Edmond Weil* v. *Italian Line "Italia"*, 1 U.S.S.B.B. 395, 398 (1935); *Pacific Coast-River Plate Brazil Rates*, 2 U.S.M.C. 28, 30 (1930); *Cargo to Adriatic, Black Sea, and Levant Ports*, 2 U.S.M.C. 342, 347 (1940). In *Outbound Rates Affecting Export High-Pressure Boilers*, 9 F.M.C. 441 (1966), the Commission said:

> Thus, section 15 does not limit the Commission to the formal terms of an organic conference to the exclusion of the viable implementations—joint rates—of approved agreements. Consequently, if circumstances warrant, the Commission can act against rates on boiler parts under section 15.* Such action could be

*Respondents contend that the Commission may scrutinize ratemaking activities only under sections 17 and 18(b) (5). These provisions permit limited rate regulation of ocean carriers, both independent lines and conferences. Section 15, however, has a different role; its impact is against collective action, including ratemaking. 9 F.M.C. at 453–54.

based upon a finding that a section 15 agreement operated in a manner contrary to the public interest or upon one of the other prohibitions of section 15.

Thus, we will consider whether the rate reductions offended the provisions of section 15. AGAFBO itself characterized its reduced rates as unreasonably low. The operating data submitted by AGAFBO show that this admission was accurate. The reduced rates were simply an attempt to deprive Sapphire of some of the cargo which Sapphire expected would be generated by its rates. And AGAFBO, by means of its reduced rates, did in fact deprive Sapphire of the nucleus cargo which was indispensable to Sapphire's profitable operation. Under these circumstances, we find that the AGAFBO agreement, through its ratemaking functions, operated in a manner which was knowingly at odds with the requirements of section 18(b)(5) and which was detrimental to the commerce of the United States and contrary to the public interest as well. AGAFBO's rates were detrimental to commerce because they were designed to and did have a disastrous effect on Sapphire.[8] AGAFBO's rates were contrary to the public interest because they were predatory in nature and in derogation of an important aspect of the public interest, the policy to foster competition to the extent compatible with the regulatory purposes of the Act. *Isbrandtsen Co., Inc. v. United States*, 211 F.2d 51 (D.C. Cir. 1954) cert. denied, 347 U.S. 990 (1954).[9] We, therefore, conclude that the AGAFBO agreement operated in a manner which was in violation of section 15.

AGAFBO argues that its rate reductions were authorized by Agreement No. 8086-2. While we agree with the examiner that the rate reductions filed *ex parte* were contrary to the authorization of the agreement to *negotiate* rates with MSTS, we consider the crux of the issue to be that the rates were reduced to a level which was admittedly unreasonable and which was detrimental to commerce and contrary to the public interest. Therefore, while the agreement does not contemplate *ex parte* reductions, it certainly does not sanction rate reductions which were admittedly and knowingly contrary to section 18(b)(5) and which violated the standards of section 15 as well.

Other Violations

The examiner found no violations with regard to Sapphire's difficulty in obtaining and retaining overseas agents. We agree. The record shows only that the heat of the competitive struggle between AGAFBO

[8] Cf. *Investigation of Rates in the Hong Kong—United States Atlantic and Gulf Trade*, F.M.C. Docket 1083 11 F.M.C. 168.

[9] See also: *Pacific Coast European Conference*, 7 F.M.C. 27, 37 (1961); *Mediterranean Pools Investigation*, 9 F.M.C. 264, 289–90 (1966); *California Stevedore & Ballast Co. v. Stockton Port District*, 7 F.M.C. 75 (1962).

and Sapphire was reflected in the acts of individual carriers and their agents.

The examiner stated that U.S. Lines in unbooking MSTS refrigerated cargo because of its dissatisfaction with MSTS's policy of distributing the carriage of general cargo, violated section 14 Third of the Act. AGAFBO argues that U.S. Lines did not retaliate; it canceled the sailing because of insufficient bookings. However, reference to the telegram in which U.S. Lines canceled the booking convinces us otherwise. It was clearly an unlawful retaliation against a shipper for patronizing a competitor. We sustain the examiner. It is immaterial that U.S. Lines was not in accord with the MSTS policy on general cargo.

Moore-McCormack is in a different position. Its particular vessel had limited commercial bookings, a maritime strike was pending, and MSTS did not provide general cargo in addition to the refrigerated cargo, hence cancellation of the sailing was necessary. The only way the sailing could have been made was to secure sufficient MSTS cargo, which would have made the sailing not subject to the strike. The fact that the carrier chose that time to remonstrate with MSTS on the latter's policy for the use of competitive vessels for general cargo is beside the point; it was not the retaliation proscribed by section 14 Third.

Sapphire contends that the calling of the Waterman vessel at St. Nazaire in an attempt to take household goods away from Sapphire when they already had been booked by MSTS, was a violation of section 14 Second of the Act (46 U.S.C. § 812) which makes it unlawful for a carrier to use a fighting ship for the purpose of excluding, preventing, or reducing competition by driving another carrier out of a trade. Waterman customarily served the various ports in the Bordeaux-Hamburg range, even though all ports were not served on every voyage. The act of putting the particular ship into St. Nazaire to load at rates below those of Sapphire was nothing more than run-of-the-mill competition for a parcel of cargo. There is no proof that the Waterman action was for the purpose of "driving another carrier out of a trade".[10]

The examiner found no unfiled section 15 agreement between Sapphire and Liberty-Pac or other van lines. AGAFBO excepted. We agree with the examiner that something more than a mere inference is needed to find such an agreement.

Sapphire's rates were available to all shippers alike, not just to Liberty-Pac. Mr. Safir testified that there were no agreements between

[10] See *Grace Line, Inc. v. Skips A/S Viking Line, et al.*, 7 F.M.C. 432 (1962).

Sapphire and the van lines—"just expressions of support, yes. Nothing else." His affidavit in reply to AGAFBO's petition for rejection of Sapphire's first tariff (referred to above) is to the same effect. As indicative of the absence of agreements, and as already seen, six of Pioneer's accounts left and other van lines which had promised support to the new operation did not give it.

Since the record shows only an association between Sapphire and its customers, we will not overrule the examiner. There is simply not enough evidence of an agreement contemplated by section 15.

AGAFBO charges that the offer of Liberty-Pac to DOD to carry empty Conex boxes without charge was in violation of sections 16 First and 17. The examiner, stating that our decision in *Carriage of Military Cargo*, Docket No. 66–42 10 F.M.C. 69 aff'd. *sub nom. American Export Isbrandtsen Lines* v. *Federal Mar. Com'n*, 380 F.2d 609 (D.C. Cir. 1967), made those sections inapplicable to the transportation of military cargo, refused to find such a violation. The examiner's reading of the case is in error; we found only that carriers could grant the government reduced rates, not available to private shippers, without violating the Shipping Act. This does not render the Shipping Act inapplicable to government cargo. Nevertheless, we agree with the examiner's conclusion. The offer was part of early negotiations between Sapphire and DOD. The final conditions of this offer were never formulated and we view the matter as tentative and incomplete.[11]

The examiner ruled that AGAFBO's allegation that Sapphire violated section 16 First by the absorption of railroad charges was beyond the order of investigation. While we believe the matter to be an issue, the record will not support a finding that Sapphire diverted cargo unlawfully from one port to another. The cargo attracted by Sapphire came by virtue of its low rates, not by any absorption.

AGAFBO has also alleged that Sapphire violated the Act by failing to abide by its tariff with respect to POV loading costs and heavy lift charges. The examiner found that section 18(b)(3), which prohibits a carrier from deviating from its tariff, was not an issue as to Sapphire. However, the record discloses that in these instances Sapphire did not follow the terms of its tariff. Accordingly, we find that Sapphire violated section 18(b)(1) by failure to file appropriate provisions in its tariff.[12]

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[11] Neither was the proposal violative of section 18(b)(1) since it was not necessary to file such a tentative proposal.

[12] In view of this finding, we do not here consider whether this conduct also was contrary to the provisions of section 18(b)(3).

Hearing Counsel contend that AGFABO was not authorized by the conference agreement to negotiate on behalf of a single member. A literal reading of the agreement shows to the contrary.

With respect to the submission of data by the conferences to MSTS, we find that the carriers complied with the established format in submitting cost information and complied with their agreement in this respect.

The Continued Approval of the Agreements

The examiner found that the predominant function of AGAFBO and WCAFBO terminated upon the commencement of the competitive bidding system of DOD. Rather than ruling that the agreements should be canceled outright, the examiner allowed the agreements to remain in effect pending the conclusion of outstanding business between the carrier groups and the government at which time the agreements would be canceled unless modified to reflect their new role.

Hearing Counsel assert that the agreements should be canceled immediately because of proof that the government has no further need for them. Hearing Counsel would allow no amendment. DOD contends that since it no longer desires to deal with the carrier groups, the groups should be found to be detrimental to commerce and contrary to the public interest and therefore disapproved. AGAFBO and WCAFBO argue that these agreements may be canceled only upon a finding that they are contrary to section 15. The changed attitude of DOD alone does not authorize disapproval. Likewise, the conferences argue that DOD may well have a future need for the carrier groups.

It is the policy of the Commission to withdraw the approval of conference agreements where the agreement has become dormant. This policy depends upon the wording of section 15 itself. Both initial and continued approval of an agreement are dependent upon a determination that the agreement is not contrary to section 15. *Agreement 8765—Order to Show Cause*, 9 F.M.C. 333 (1966). "Thus, one prerequisite for approval of an agreement is the actual existence or immediate probability of transportation circumstances in the trade covered by the agreement which warrant approval." 9 F.M.C. at 335–36.[13]

Where there is no need for or justification for a section 15 agreement the Commission feels that such an agreement remaining on the books to await some future event which was not contemplated by the original approval of the agreement tends to handicap the Commission's

[13] In *Cuban Agreements,* Docket No. 66–14 10 F.M.C. 92, the Commission allowed dormant agreements to remain approved because their dormancy was the result of governmental embargo.

responsibility to see that section 15 agreements operate in a manner consistent with the law. The Commission feels that it is far better to cancel inoperative agreements than to await a future need for an agreement so that that need may be measured against the requirements of section 15. We will follow that policy here.

The agreements under investigation have as their very core the negotiation of rates with MSTS. This fundamental activity cannot be implemented at present. Therefore, we direct that the agreements must be modified to delete authorization to negotiate rates with MSTS. The remainder of the activities contemplated by the agreements have not been completely made obsolete by the competitive bidding system. Therefore, we will allow the continued approval of these activities. In order to bring the agreements in line with the present functions of the carrier groups, we will order that the groups submit within 120 days, appropriate modifications which delete the dormant activities and show the present applicability of the agreements.

The TPAFBO agreement may remain in full force and effect as previously approved.

Ultimate Conclusions

1. The rates of AGAFBO, prior to the entry of Sapphire into the trade, and the rates of WCAFBO were not contrary to section 18 (b)(5).

2. AGAFBO's rates, which were reduced to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire were so unreasonably low as to be detrimental to the commerce of the United States contrary to the provisions of section 18(b)(5).

3. AGAFBO, by reducing its rates to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire, violated section 15 by knowingly setting rates which were contrary to section 18(b)(5) and which were detrimental to commerce and contrary to the public interest.

4. AGAFBO did not otherwise violate the Shipping Act.

5. U.S. Lines, by canceling a booking because MSTS patronized Sapphire retaliated against MSTS in violation of section 14 Third. Moore-McCormack, however, simply remonstrated with MSTS about its policy and did not violate section 14 Third.

6. Waterman did not use a fighting ship in violation of section 14 Second.

7. Sapphire, Liberty-Pac, or other van lines did not enter into or carry out an unfiled agreement subject to section 15.

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8. Sapphire did not violate sections 16 First or 17 by offering to carry empty Conex without charge since the offer was part of early negotiations and never consummated.

9. Sapphire did not violate section 16 First by directing cargo from one port to another.

10. Sapphire violated section 18(b) (1) by failing to file appropriate tariff provisions regarding POV loading costs and heavy lift charges.

11. The agreements of AGAFBO and WCAFBO must be amended to delete authorization concerning dormant functions such as authority to negotiate rates with MSTS and these carrier groups must submit appropriate modifications within 120 days hereof to delete dormant activities and to show the present application of the agreements.

12. The TPAFBO agreement may remain approved.

Chairman Harllee and Commission Barrett, Separate Opinion

We wish to state for the record the following views on which we differ from those set forth above.

The Commission has absolved AGAFBO in the President's Committee episode, condoned the filing of petitions with the Commission, refused to condemn the right of AGAFBO to talk to DOD officials, and denounced AGAFBO's reduced rates. We agree.

However, we are convinced that AGAFBO violated section 15 by conspiring to destroy the competition of Sapphire. In our opinion, our fellow Commissioners, in ignoring the motives behind the AGAFBO intrigue, have failed to recognize that cumulatively all these acts, many with a gloss of legitimacy, were the effectuation of one agreement—to crush Sapphire.

At the time of the original Liberty-Pac proposal, the AGAFBO carriers began an exhaustive campaign to preserve their monopoly position. The first manifestation of this conspiracy was the advice from the AGAFBO secretary to a President's Committee regarding the Liberty-Pac proposal for possible action with Government agencies. Thereafter, AGAFBO began to secure information on all phases of the new mode, including chartering attempts, agents, vessel itineraries, shippers, and potential cargoes.

Following a series of half-hearted attempts to collect back freight charges from all van lines, AGAFBO commenced a series of retaliatory acts against the Pioneer group. These van lines were singled out and informed that unless they paid up in full AGAFBO would request MSTS to ask MTMTS to insure prompt payment or to suspend the tender of the van lines for lack of financial responsibility. AGAFBO followed through on this threat. Subsequently, AGAFBO rewarded those van lines that had left Pioneer under this pressure with renewed credit standing. Finally, the AGAFBO members brought suit against the remaining members of the Pioneer group, although other van lines still owed the AGAFBO carriers for back freight charges.

Also, in furtherance of the concerted campaign to defeat the new competition, AGAFBO filed several petitions with the Commission designed to handicap the Sapphire operation.

As Sapphire began to make progress in its new venture, AGAFBO sought to have MSTS suspend Sapphire from carrying Government cargo. AGAFBO requested MSTS to suspend Sapphire's bookings of through-bill household goods because of its "cut-throat competition and insufficient financial stability", plus the charge that the use of Sapphire by MSTS was contrary to the Wilson-Weeks agreement. AGAFBO also complained to MSTS that the latter was preferring carriers which filed rates which had longer effective dates. The record also reflects AGAFBO communications and meetings with various officials of DOD and MTMTS—in addition to MSTS—in an effort to block and impede the proposed operations of Liberty-Pac/Sapphire. Finally, AGAFBO used its ultimate weapon, cutting rates to rock bottom.

The various AGAFBO activities lead to but one conclusion, that the carriers agreed to take whatever steps were necessary to drive Sapphire from the trade.[14] The cumulative effect of all of these acts was decidedly one to destroy competition; that is, to end the threat of Sapphire and preserve the monopoly of AGAFBO. This concerted undertaking amounted to a new scheme or rate combination and discrimination not embodied in the AGAFBO agreement. Thus, there was no section 15 authorization for such conduct.[15]

It would appear that our fellow Commissioners were impressed by the fact that for the most part AGAFBO utilized legal means to combat Sapphire. However, the legality of the means is immaterial. Under the antitrust laws, the courts have frequently followed a general rule enunciated in *American Tobacco* v. *United States*, 328 U.S. 781 (1946) that:

> It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts, yet, if they are part of the sum of the

[14] We drew a similar inference in *Oranje Line* v. *Anchor Line Ltd.*, 6 F.M.B. 199, 208 (1961).

[15] *N. Atlantic Mediterranean Frt. Conf. and United Arab Co.*, 9 F.M.C 431, 434 (1966); *Isbrandtsen Co., Inc.* v. *United States*, *supra*; *Empire State Highway Transp. Ass'n.* v. *F.M.C.*, 291 F. 2d 336 (D.C. Cir. 1961); *Swift & Co.* v. *Gulf and South Atl. Havana Conf.*, 6 F.M.B. 215 (1961), aff'd. *sub nom. Swift & Company* v. *Federal Maritime Commission*, 306 F. 2d 277 (D.C. Cir. 1962).

> acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibitions. 328 U.S. at 809.

We fail to see why the rule should not apply here.[16]

With regard to pressure that AGAFBO brought to bear against the van line customers of Pioneer for nonpayment of ocean freight, we would find that AGAFBO retaliated against unfaithful shippers in violation of section 14 Third. We also would hold that the pressing of the claims and the instituting of legal proceedings subjected the victims to undue and unreasonable prejudice and disadvantage in violation of section 16 First.

Finally, we believe the examiner correctly decided that Sapphire's rates were not contrary to section 18(b)(5). The record reflects the method by which Sapphire established its rates. We would find that Sapphire did not develop these rates capriciously but promulgated its tariff after a careful analysis of the anticipated cost of operation and consideration of the cargo that might reasonably be expected to be booked on Sapphire's ships. Thus, Sapphire's rates which originally might have proved to be compensatory turned out to be seriously below the cost of operation, principally because AGAFBO deprived it of the nucleus cargo which was indispensable to Sapphire's profitable operation.

[SEAL] (Signed) THOMAS LISI,
Secretary.

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[16] *Eastern R. Conference* v. *Noerr Motors*, 365 U.S. 127 (1961), which guarantees the right freely to engage in political activity, and *Mine Workers* v. *Pennington*, 381 U.S. 657 (1967), which preserves the right to petition the government to take valid governmental action, are exceptions to the rule of *American Tobacco*. Neither *Noerr* nor *Pennington* sanction a pervasive scheme by a group wielding its power in every direction to destroy a single competitor.

FEDERAL MARITIME COMMISSION

No. 67–41

SPECIAL RATES TO ALEXANDRIA AND PORT SAID
NORTH ATLANTIC MEDITERRANEAN FREIGHT CONFERENCE

Decided December 20, 1967

Arrangement between North Atlantic Mediterranean Freight Conference and United Arab Co. for Maritime Transport and Agencies (MARTRANS), whereby Martrans, upon execution of a dual rate contract, became entitled to rates of up to 28 percent lower than the ordinary rates otherwise applicable in the trade, found to be violative of the standards of section 14b of the Shipping Act, 1916.

No violations of section 15 or section 18 of the Shipping Act, 1916 have been found.

Burton H. White and *Elliot B. Nixon* for respondent North Atlantic Mediterranean Freight Conference.

Edward S. Bagley for intervener Gulf/Mediterranean Ports Conference.

Donald J. Brunner and *Samuel B. Nemirow*, Hearing Counsel.

REPORT

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

On December 30, 1966, the North Atlantic Mediterranean Freight Conference (Conference) revised its freight tariff No. 9, FMC–2, so as to provide a schedule of special rates applicable to shipments destined to Alexandria and Port Said, United Arab Republic, for the account of the United Arab Co. for Maritime Transport and Agencies (Martrans). Under the provisions of the newly filed item, Martrans, an agency of the United Arab Republic, would receive certain reductions from the "current tariff commodity rates" to be calculated as follows:

(*a*) Where the rate is over $28 W/M as freighted, a 15-percent reduction shall be allowed therefrom;

(*b*) Where the rate is between $28 W/M and $25.25 W/M as freighted, the freight rate shall be $25.25 W/M as freighted, and a 5-percent reduction shall be allowed therefrom;

(*c*) Where the rate is less than $25.25 W/M as freighted, a 5-percent reduction shall be allowed therefrom;

(*d*) Reduction of 15-percent shall be allowed in respect of extra length and heavy lift charges, but no reduction shall be allowed in respect of any surcharges or rates on container cargoes; and

(*e*) Where the Conference tariff shows the rate for a particular commodity as "open," the rate for such commodity in the individual filing of the carrying line shall apply in the calculation of reductions.

Subsequently, on January 12, 1967, the day the tariff revisions discussed above became permanently filed, Martrans signed the Conference merchant's freight contract, whereby it became obligated "* * * to ship or cause to be shipped [on Conference vessels] all of its ocean shipments * * * moving in the trade."[1] In return for its exclusive patronage, the Conference, under the terms of the contract, agreed to charge Martrans freight rates "* * * 15 percent * * * below the non-contract rates shown in the Conference tariff, which would otherwise be applicable to such goods * * *."

Thereafter, in our order served on June 23, 1967, we directed the Conference to show cause—[2]

1. Why the parties to the Conference have not violated section 14b of the Shipping Act, 1916, by maintaining an unapproved dual-rate system, and/or implementing their presently approved dual-rate system in an unlawful manner.

2. Why the parties, in agreeing to and entering into the subject

[1] Respondents advised that the merchant's freight contract signed by Martrans is the standard contract form, "without deviation or change," approved for use by the Conference in docket No. 1111—*The Dual Rate Cases,* 8 F.M.C. 16 (1964).

[2] The charging portion of the Show Cause Order stated that:

In Docket 66–3, contract between the North Atlantic Mediterranean Freight Conference and the United Arab Co. for Maritime Transport (Martrans), the Commission found that an agreement between the Conference members to enter into a special rate contract with Martrans was not an interstitial or routine operation under Conference Agreement 7980 (now 9548). The subject tariff items seem to be but another method of accomplishing the same objective and may be indicative of the carrying out of an unapproved agreement in violation of sec. 15 of the Shipping Act, 1916. The fixing of special rates by the Conference on open-rated commodities may also be a rate-making action which resulted from an unfiled and unapproved agreement among the Conference members.

The special rates, together with the exclusivity features of the dual-rate contract signed by Martrans, may result in a dual-rate system, otherwise subject to the provisions of sec. 14b of the act, which has not been approved by the Commission and which may be inconsistent with and different from the approved dual-rate system available to all other contract shippers in the Conference trade, in violation of that portion of sec. 14b that requires dual-rate contracts to be "available to all shippers and consignees on equal terms and conditions."

> arrangement with Martrans, have not carried out an unfiled and unapproved agreement in violation of section 15 of the act.

Additionally, the Commission ordered the Conference to show cause why its freight tariff No. 9 should not be rejected as a device for giving rebate or a remission of charges otherwise applicable in violation of section 18(b)(3) of the act.

The Conference has filed its memorandum of law to which hearing counsel have replied. Gulf/Mediterranean Ports Conference has intervened in this proceeding but has filed neither memorandums nor affidavits. We heard oral argument.

Discussion and Conclusion

At the outset, we note that there is some question in this proceeding as to just how the schedule of special rates, outlined in the Conference's freight tariff No. 9, FMC-2, are to be applied. Both respondents and hearing counsel have their own interpretation of the tariff revision and its relation to other tariff rates presently on file. Although it would at first appear that this basic disagreement presents a factual issue for which a show-cause proceeding is not the proper forum, further consideration of the matter convinces us that the interpretations placed on the tariff revision by the parties create distinctions without substantial difference. For, as we shall develop further later, the result is, as a matter of law, the same regardless of whose interpretation we accept.

Hearing counsel are of the impression that the reductions, afforded United Arab Republic shipments made through Martrans, are to be calculated from the contract rate applicable under respondent's tariff, and as such, would create a third level of rates.[3] This, hearing counsel argue, constitutes a violation of section 14b of the act since it places Martrans in the preferred position of being the only Conference shipper entitled to a reduction of up to 15 percent below the rate paid by all other signatories of the exact same contract. Moreover, they view the present arrangement established by the Conference as being violative of section 15 of the act in that it allegedly introduces a new system for the regulation and control of competition which is not embodied in the basic agreement.

[3] In arriving at this conclusion, hearing counsel reason as follows:

These tariff provisions [freight tariff No. 9, FMC-2] allow reductions in accordance with a certain schedule therein outlined from the "current tariff commodity rates." Since Martrans is an agency of the Government of the United Arab Republic it would, even without signing a merchant's freight contract, be entitled to the contract rates applicable under the respondents' tariff; therefore the special rates provided for by respondents actually set up a third tier of rates available under their one tariff. There now exists the noncontract rate, the contract rate, and finally the schedule of reductions from the contract rate available at Port Said and Alexandria on United Arab Republic shipments made through Martrans.

Respondents, on the other hand, deny having entered into any arrangement with Martrans which could be characterized as being violative of either section 14b or section 15 of the act. They explain that what they have done is merely to establish a different rate basis on shipments destined to the United Arab Republic. According to the Conference, there are but two levels of rates applicable to United Arab Republic cargoes under their tariff: the ordinary or noncontract rate which is calculated in accordance with the provisions of freight tariff No. 9, FMC–2, and the contract rate, which is 15 percent below the ordinary rate.

Whatever might have been respondents' intentions with regard to the revised tariff filing, the fact of the matter is that the schedule of special rates outlined in freight tariff No. 9, FMC–2, by their very terms are made applicable only to shipments made through Martrans. Freight tariff No. 9 makes it abundantly clear that the rate reductions from the "current commodity rates" are to be granted only to shipments to Alexandria and Port Said, United Arab Republic account United Arab Co. for Maritime Transport and Agencies (Martrans).

Accordingly, respondents' statement that the revised tariff merely establishes a new rate base on cargoes destined to the United Arab Republic is inaccurate. The United Arab Republic rate base remains unchanged. What does change, however, are the tariff rates to which Martrans becomes entitled by virtue of it being a contract signator. As hearing counsel have pointed out, Martrans is now in the preferred position of being the only Conference shipper receiving a reduction of up to 15 percent below the rate paid by other signatories of the admittedly exact same dual rate contract.[4] Therefore, as we have mentioned earlier, it matters not whether we adopt respondents' or hearing counsel's interpretation as to what rate is applicable to what traffic. The result is the same whether the contract rate forms the basis for the rate reductions or vice versa. In either case, we are left with an arrangement which violates the statutory standards of section 14b of the act.

In the first place, section 14b absolutely precludes approval of any contract which is not "* * * available to all shippers and consignees on equal terms and conditions." This being true, it follows that once a dual-rate contract ceases to be available "on equal terms and conditions," that contract becomes unlawful per se. One of the conditions that attaches to a dual-rate contract is that all signatories to that contract are to be afforded the same reduction from the ordinary rate

[4] Hearing counsel offer the following as illustrative of the mechanics of the new schedule:

Assuming arguendo that there is an ordinary rate in the Conference tariff on any commodity of $35 and that the usual contract reduction of 15 percent is applied, that rate would become $29.75, but for Martrans the applicable rate would be $25.29 or over 27 percent below the ordinary rate.

otherwise applicable in that trade. Article 3(a) of the Conference's contract plainly states that "the freight rates to be charged to the merchant * * * shall be 15 percent * * * below the noncontract rates shown in the Conference tariff * * *." In the circumstances of this case, however, Martrans upon execution of the contract became eligible for rate reductions of up to 28 percent below the ordinary or noncontract rate. This is a clear violation of the "equal terms and conditions" provision.

Likewise, to the extent that the spread between the ordinary rate, applicable in the trade, and the contract rate charged Martrans, by virtue of their arrangement with respondents, exceeds 15 percent of the ordinary rate, the present system is also violative of section 14b(7) of the act. That section provides that the spread between ordinary and contract rate "* * * shall in no event be more than 15 per centum of the ordinary rates." The new schedule of special rates, however, will enable Martrans to receive contract rates in some instances, of 28 percent. Consequently, it is patently evident that the effectuation of a dual rate contract in the manner contemplated by respondents is absolutely in violation of section 14b.

Respondents attempt to support their claim that there is nothing unlawful about their present arrangement with Martrans by directing our attention to a number of Commission decisions which allegedly stand for the proposition that reduced rates or special rates are not only unobjectionable, but in some cases, even desirable. We fail to see how these holdings are relevant here. There is an obvious and fundamental difference between the cases cited by respondents and the proceeding before us now. Here we are dealing with a scheme of rate reductions which is expressly tied to a dual-rate contract. Such an arrangement, if permitted, would circumvent the statutory requirements of section 14 of the act.

In enacting Public Law 87–346, which ultimately became section 14b—

> * * * Congress, in a sense, reaffirmed the earlier philosophy of section 15 of the Shipping Act which, by authorizing supervised competition-restricting agreements among carriers, recognizes that there is some justification in the waterborne foreign commerce for making exception to our normal antitrust policies (*The Dual Rate Cases*, 8 F.M.C. 16, 24 (1964)).

Public Law 87–346, however, permits the use of dual-rate contracts only if we find that certain enumerated safeguards have been met. As we have discussed earlier, the present arrangement fails to include two of these safeguards, namely that (1) the contract be available on equal terms and conditions, and (2) the spread between the ordinary rate and contract rate shall be no more than 15 percent. The statute simply will not permit approval of such an arrangement.

The foregoing also disposes of hearing counsel's contention that the present arrangement between respondents and Martrans is also violative of section 15 of the act. For, as we have already established, the question here is one of unlawful implementation of a dual rate contract under the standards laid down in section 14b and not one of authority, or lack thereof, under section 15.

The order in this proceeding also raised the question of whether the fixing of special rates by the Conference on open-rated commodities could be considered a ratemaking action resulting from an unfiled and unapproved agreement among the Conference members. There is nothing in this record which could warrant or justify such a finding. Quite to the contrary, agreement No. 9548, the Conference's basic agreement, expressly authorizes the Conference members to place "special conditions" on open-rated commodities.[5] Moreover, as respondents point out, its tariff specifically requires that all "tariff rules and regulations must be observed" with respect to open-rated items.[6] This would of necessity include those relating to the rate reductions provided in tariff No. 9, FMC–2. There is absolutely no evidence here of any unfiled section 15 agreement.

Finally, we consider the possibility that the Conference's revised tariff may be unlawful under section 18b(3) of the act. Respondents strongly maintain that there is no basis for such a charge. We agree.

Section 18(b)(3) prohibits a carrier from collecting any rate or charge other than that which is "specified in its tariffs on file with the Commission" and further provides that no carrier shall "rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified." Manifestly, the revised tariff filing is not, in and of itself, violative of section 18(b)(3). As to the possibility of rebates or remissions under the revised tariff, Respondents assure us that all rates are charged strictly in accordance with their tariff provisions, precisely as required by section 18(b)(3).[7] We see no reason to question respondents' assertions on this matter. Accordingly, we find that freight tariff No. 9, FMC–2, has not been shown to be violative of section 18(b)(3).

An appropriate order will be entered.

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[5] Article VI of agreement 9548 specifically provides that the Conference may: "Declare rates on specified commodities to be open, with or without agreed minimal or special conditions, and thereafter declare the rates on such commodities or any of them to be closed * * *."

[6] The Conference's tariff rule No. 8 states in relevant part that—

Open rates. Rates shown as open may be fixed by the individual carriers without consultation and without restriction as to rate or currency but are subject to shipping period per respective rule unless shown to be open indefinitely. All other tariff rules and regulations must be observed.

[7] Hearing counsel themselves concede that the lower tariff rate applicable to Martrans cargoes is specified in the tariff "and as such contemplates no further rebate, refund, or remittance."

FEDERAL MARITIME COMMISSION

No. 67–41

SPECIAL RATES TO ALEXANDRIA AND PORT SAID
NORTH ATLANTIC MEDITERRANEAN FREIGHT CONFERENCE

ORDER

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

It is ordered, That respondents be, and they are hereby, notified and required to cease and desist from engaging in the violation of section 14b of the Shipping Act, 1916, as herein found.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 67-30

UNITED STATES OF AMERICA

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

Initial Decision Adopted February 1, 1968

A conference rule providing that claims for adjustment of freight charges must be presented within six months after shipment date cannot bar recovery of an overcharge as reparation, where the complaint is filed under section 22 of the Shipping Act, 1916, more than six months but less than two years after the shipment date. Reparation awarded in the amount of $7,552.49.

Terrence R. Murphy and *Lawrence F. Ledebur* for the United States of America, complainant.

Richard W. Kurrus and *James N. Jacobi* for American Export Isbrandtsen Lines, Inc., respondent.

INITIAL DECISION OF PAUL D. PAGE, JR., PRESIDING EXAMINER [1]

The facts in this complaint and answer proceeding were stipulated, and the essentials boil down to agreement that the respondent-carrier (Ex-Is) charged complainant-shipper (U.S.A.) $7,552.49 in excess of the rates and charges specified in the applicable tariffs in violation of section 18(b)(3) of the Shipping Act, 1916 (Act), and that U.S.A. is entitled to recover said amount from Ex-Is unless recovery in this action (which was filed more than six months but less than two years after the cause of action accrued) is barred by conference rules which read as follows:

"Claims for adjustment of freight charges must be presented in writing within six (6) months after date of shipment" (Rule 25 of the North Atlantic Mediterranean Freight Tariff (8) FMC-1, Rule 15 of the Atlantic and Gulf Red Sea and Gulf of Aden Agreement Freight

[1] This decision became the decision of the Commission on February 1, 1968.

Tariff No. 1, and Rule 18 of the Atlantic and Gulf American Flag Berth Operators Freight Tariff No. 1).

U.S.A. filed claims with Ex-Is for each of the over-charges agregating the $7,552.49 sought as reparation, after such overcharges were revealed by General Accounting office post-audits, not completed until more than six months after the dates of the shipments.

Discussion and Conclusions

The complaint was brought under section 22 of the Act within the time allowed by the section (two years after the cause of action accrued) and the Commission (the violation of the Act being admitted) is specifically authorized to direct the payment of full reparation to complainant for the injury caused by the violation.

Respondent's only argument to the contrary is the existence of a rule which provides that:

> Claims for adjustment of freight charges must be presented in writing within six (6) months after date of shipment.

Unless the rule be construed to bar recovery here it is not relevant, and if it is so construed it is invalid; for it would deny to the regulatory body (the Commission) power expressly conferred upon it by the applicable statute, section 22 of the Act.

The Commission and the predecessor Federal Maritime Board (in rule making proceedings, it is true, but nevertheless clearly and powerfully) has analyzed the type of case cited by respondents, and conclusively refuted respondent's argument in this case.

Carrier-Imposed Time Limits on Presentation of Claims for Freight Adjustments, 4 F.M.B. 29, 33–34 (1952) really says all that need be said here, as follows:

> Section 22 provides for Board investigations of alleged violations of the Act, either on sworn complaint or on the Board's own motion, and provides for the issuing of orders to abate violations of the Act and also for the payment of reparation for injury caused by any such violations, if a complaint is filed within two years after the cause of action accrued.
>
> Petitioners draw the analogy between shippers' claims for freight adjustment and shippers' claims for cargo damage. The time for filing cargo damage claims against ocean carriers was not regulated by Federal statute until 1936. Before that date, carriers frequently inserted clauses in their bills of lading requiring (a) the filing of written notice of damage with the carrier within a fixed time limit, and (b) the institution of suit within a fixed time limit. Unless the time limits were unreasonably short, the validity of such clauses was generally upheld prior to 1936, and the shipper was required to comply with both requirements in order to make a recovery. *The Turret Crown,* 284 Fed. 434 at 443 (1922).

In 1936, the Carriage of Goods by Sea Act, 46 U.S.C. 1300, etc., became effective, providing in section 1303(b) that unless notice of damage in writing is given to the carrier before removal of the cargo, such removal is *prima facie* evidence of delivery in good order, unless damage is not apparent, in which case three days are allowed; and further, that one year only is allowed for the institution of suit, the carrier being discharged from all liability thereafter. The freedom of contract existing prior to 1936 was cut down, and clauses inconsistent with the Act are now invalid. *The Argentino*, 28 F. Supp. 440; see also *Knauth-Ocean Bills of Lading*, p. 228 *et seq.* Petitioners argue that their freedom to stipulate with shippers for short time limits for the presentation of claims for freight adjustment should not be limited since Congress has not passed an act in this field as it has done in the cargo damage field. Petitioners also point out that Congress has legislated on the question of time limits for the recovery of freight overcharges by railroads by the 1920 amendment to the Interstate Commerce Act, 49 U.S.C.A. 16(3), and that failure to legislate similarly for ocean carriers is a reason against jurisdiction here. We do not think those statutory provisions are conclusive on our power or jurisdiction in this case. They merely show a different treatment by Congress of different situations.

The matter was considered carefully by the Commission in *Proposed Rule Covering Time Limit on the Filing of Overcharge Claims*, Docket No. 65–5 (10 FMC 1). In this decision the Commission stated the strongest argument that can be made (as it is made) in support of respondent's position as follows:

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

The Commission then destroyed claimed support for the argument, as follows:

We wish to make clear, * * * that our failure to promulgate a rule at this time is not to be interpreted to allow carriers in any way to limit the right of a shipper claiming injury under the 1916 Act or the 1933 Act to file a claim for reparation under section 22 of the Shipping Act with the Commission at any time within two years of accrual of the cause of action which is the basis of such injury and claim. We do not agree with the comments of the conferences and carriers which maintain that the two year statute of limitations contained in section 22 is a "pure statute of limitation" the purpose of which is merely to bar the bringing of stale claims, and which can be contracted away by agreement between shipper and carrier.

The practice of the ICC prior to the amendments of the statute under which it operates providing that claims against carriers and forwarders had to be made and that actions on such claims had to be brought within certain time limitations is not instructive for our purposes. Carriers and forwarders were allowed to stipulate as to the time within which actions could be brought at times when there were no time limitation provisions in the specific statutes under which they were regulated. Once Congress had spoken, however, and had indicated a period during which actions could be brought, either before the Commission or the courts, a public policy with the force of law was established and such stipulations no longer had the sanction of law. The *Schou-Gallis* case cited in footnote 2 is particularly instructive in this respect. In that case the issue was the lawfulness of an attempt by a freight forwarder to limit the time within which claims could be filed with it. The ICC, although striking down the particular tariff rule by which the forwarder imposed such limitation as unlawful as too indefinite in form, upheld the validity of the principle of a time limitation for the filing of claims with forwarders. After a discussion of the loss and damage cases noted above, the ICC observes that Part IV of the Interstate Commerce Act which regulates forwarders, unlike parts I and III regulating rail and water carriers respectively, "confers no specific authority upon this Commission to award damages as such in respect of either overcharges or unlawful rates charged shippers by freight forwarders. Also, * * * no periods of limitation are prescribed therein, and no reference is made of record specifically to any other statute which limits the time within which claims arising in respect of charges for services subject to part IV may be filed here or in the courts." (at 595) The ICC thus allowed the forwarder to modify the time-limitation rule to make it lawful. The instant proceeding, however, presents an entirely different situation. This Commission is empowered by Congress to great reparation for any violation of the statutes it administers. This was not the situation with respect to claims for forwarder overcharges before the ICC at the time of the *Schou-Gallis* case and has never been true with respect to claims for cargo damage. Such claims can only be brought in a court of law. There is also a statute of limitations governing the time within which such reparation may be sought embodied in our statute itself—no reference for the applicable time limitation need be made to principles of general law or state statutes of limitation as was necessary under ICC practice before the amendments to the Interstate Commerce Act discussed herein. No cases are advanced which hold that a common Carrier or other person subject to similar regulation may by contract change a time limitation for bringing a claim for reparation which is embodied in a statute of an administrative agency, nor will we permit it here.

At page 10 of its brief Ex-Is says that "complainant contends that the Commission has decided in *Time Limit on the Filing of Overcharge Claims* (Docket No. 65–5) *supra*, that such a conference rule cannot serve as a defense to a reparation claim under section 22 of the Act. We do not so read the Commission's decision."

The Examiner agrees with complainant, and does not see how the Commission's decision in Docket No. 65–5 can be read otherwise. The

Commission (1) points out that its failure to promulgate a rule in that case "is not to be interpreted to allow carriers in any way to limit the right of a shipper claiming injury under the 1916 Act or the 1933 Act to file a claim for reparation under section 22 of the Shipping Act with the Commission at any time within two years of accrual of the cause of action which is the basis of such injury and claim"; (2) decisively distinguishes reparation cases under the Shipping Act from cases arising under acts containing no statutory time limitation for complaint-filing such as that in section 22; and (3) states specifically that it *will not permit* a carrier by contract to change the time limitation in section 22. The foregoing Commission statements are wholly inconsistent with the ingenious construction of the decision hopefully proffered by respondent which seeks here to accomplish precisely what the Commission has said it will not permit.

In line with the Commission's statements and reasoning in the cited cases, and the absence of applicable and controlling authority to the contrary it is held that complainant U.S.A. is entitled to and is hereby awarded as full reparation the agreed amount of the admitted overcharge, $7,552.49, and respondent American Export Isbrandtsen Lines, Inc. is hereby directed to make such payment within thirty days after the Commission's final decision herein. To said amount respondent shall add interest at 6% per annum for the time (if any) elapsing between the date hereinabove set for payment and actual payment of the principal sum of $7,552.49.[2]

(Signed) PAUL D. PAGE, JR.,
Presiding Examiner.

[2] Various issues are raised by the parties which need not, and in the Examiner's opinion should not, in view of pending Docket No. 65–5 (which has been re-opened) be considered in this decision which is strictly limited to holding that the quoted rule is no bar to recovery in a complaint case brought under section 22 within the time allowed, and that complainant is entitled to reparation as stated herein.

FEDERAL MARITIME COMMISSION

No. 67–45

UNITED STATES OF AMERICA

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

Initial Decision Adopted February 1, 1968

A conference rule providing that claims for adjustment of freight charges must be presented within six months after shipment date cannot bar recovery of an overcharge as reparation, where the complaint is filed under section 22 of the Shipping Act, 1916, more than six months but less than two years after the shipment date. Reparation awarded in the amount of $6,810.54.

Terrence R. Murphy for the United States of America, complainant.

Richard W. Kurrus and *James N. Jacobi* for American Export Isbrandtsen Lines, Inc., respondent.

INITIAL DECISION OF PAUL D. PAGE, JR., PRESIDING EXAMINER [1]

The parties have stipulated with the Examiner's approval that the issues herein are identical with those in Docket No. 67–30 11 FMC 298, and have agreed that if American Export Isbrandtsen Lines (Ex-Is) should be ordered to pay reparation to the United States (U.S.A.) therein, as it was, then Ex-Is shall in this case pay U.S.A. as reparation, the sum of $6,810.51.

Premises considered, the Initial Decision in Docket No. 67–30 is incorporated herein by reference, and Ex-Is is hereby directed to pay U.S.A. as reparation, within thirty days after the Commission's final decision herein the sum of $6,810.54, and if payment is not made until more than thirty days after said decision to add to the principal sum interest at 6% per annum for time elapsing between thirty days after the decision date and the date of payment.

(Signed) PAUL D. PAGE, JR.,
Presiding Examiner.

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[1] This decision became the decision of the Commission on February 1, 1968.

FEDERAL MARITIME COMMISSION

No. 67–46

UNITED STATES OF AMERICA

v.

HELLENIC LINES LIMITED

Initial Decision Adopted February 1, 1968

A conference rule providing that claims for adjustment of freight charges must be presented within 6 months after shipment date cannot bar recovery of an overcharge as reparation, where the complaint is filed under section 22 of the Shipping Act, 1916, more than 6 months but less than 2 years after the shipment date. Reparation awarded in the amount of $1,862.30.

Terrence R. Murphy for the United States of America, complainant.
Stanley O. Sher for Hellenic Lines Limited, respondent.

INITIAL DECISION OF PAUL D. PAGE, JR., PRESIDING EXAMINER [1]

The parties have stipulated with the examiner's approval that the issues herein are identical with those in docket No. 67–30 11 FMC 298, and have agreed that if American Export Isbrandtsen Lines should be ordered to pay reparation to the United States (U.S.A.) therein, as it was, then Hellenic Lines Ltd. shall in this case pay U.S.A. as reparation, the sum of $1,862.30.

Premises considered, the initial decision in docket No. 67–30 is incorporated herein by reference, and Hellenic Lines Ltd. is hereby directed to pay U.S.A. as reparation, within 30 days after the Commission's final decision herein the sum of $1,862.30, and if payment is not made until more than 30 days after said decision to add to the principal sum interest at 6 percent per annum for time elapsing between 30 days after the decision date and the date of payment.

(Signed) PAUL D. PAGE, Jr.,
Presiding Examiner.

[1] This decision became the decision of the Commission on Feb. 1, 1968.

FEDERAL MARITIME COMMISSION

No. 67–51

UNITED STATES OF AMERICA

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

Initial Decision Adopted February 1, 1968

A conference rule providing that claims for adjustment of freight charges must be presented within 6 months after shipment date cannot bar recovery of an overcharge as reparation, where the complaint is filed under section 22 of the Shipping Act, 1916, more than 6 months but less than 2 years after the shipment date. Reparation awarded in the amount of $28,018.79.

Terrence R. Murphy for the United States of America, complainant.

Richard W. Kurrus and *James N. Jacobi* for American Export Isbrandtsen Lines, Inc., respondent.

INITIAL DECISION OF PAUL D. PAGE, JR., PRESIDING EXAMINER [1]

The parties have stipulated with the examiner's approval that the issues herein are identical with those in Docket No. 67–30 11 FMC 298, and have agreed that if American Export Isbrandtsen Lines (Ex-Is) should be ordered to pay reparation to the United States (U.S.A.) therein, as it was, then Ex-Is shall in this case pay U.S.A. as reparation, the sum of $28,018.79.

Premises considered, the initial decision in docket No. 67–30 is incorporated herein by reference, and Ex-Is is hereby directed to pay U.S.A. as reparation, within 30 days after the Commission's final decision herein the sum of $28,018.79, and if payment is not made until more than 30 days after said decision to add to the principal sum interest at 6 percent per annum for time elapsing between 30 days after the decision date and the date of payment.

(*Signed*) PAUL D. PAGE, Jr.,
Presiding Examiner.

[1] This decision became the decision of the Commission on February 1, 1968.

FEDERAL MARITIME COMMISSION

DOCKET NO. 67-37

UNITED STATES OF AMERICA

v.

GULF & SOUTH AMERICAN STEAMSHIP CO., INC.

NOTICE OF EFFECTIVE DATE OF DECISION

February 8, 1968

No exceptions having been filed to the initial decision of the Examiner in this proceeding, and the Commission having determined not to review same, notice is hereby given, in accordance with Rule 13(g) of the Commission's Rules of Practice and Procedure, that the decision became the decision of the Commission on February 8, 1968.

It is ordered, That Gulf & South American Steamship Company make payment to the United States of America in the amount and manner set forth in the decision of the Examiner.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 67–37

UNITED STATES OF AMERICA

v.

GULF & SOUTH AMERICAN STEAMSHIP CO., INC.

Initial Decision Adopted February 8, 1968

A tariff item captioned "automobile parts" and containing the statement that "this caption includes * * * those items which are integral parts of automobiles * * * necessary for their operation" covers automobile engines. The fact that the tariff item includes certain "examples" of cargo, and automobile engines are not among such examples does not exclude automobile engines from the scope of the tariff. Reparation awarded.

Terrence R. Murphy and *Bertram E. Snyder* for the United States of America, complainant.

Michael Joseph for Gulf & South American Steamship Co., Inc., respondent.

INITIAL DECISION OF PAUL D. PAGE, JR., PRESIDING EXAMINER[1]

Complainant, the United States of America (U.S.A.) seeks under section 22 of the Shipping Act, 1916 (the Act) to recover from respondent, Gulf & South American Steamship Co., Inc. (G. & S.A.) as reparation the sum of $1,344.09. In its answer G. & S.A. has admitted an overcharge of $683.02, leaving in dispute an alleged overcharge of $661.07. Under rule 10(v) of the Commission's Rules of Practice and Procedure the facts have been stipulated as follows:

1. Complainant's complaint against Respondent, dated June 6, 1967, alleges several instances of overcharges by Respondent in a total amount of $1,344.09. Respondent's answer admits that it inadvertently overcharged Complainant in the amount of $683.02 and that Complainant is entitled to recover that amount, leaving in dispute between the parties an alleged overcharge in the amount of $661.07.

2. The disputed overcharge of $661.07 relates to Complainant's shipment under Government Bill of Lading C-4048767 and ocean Bill of Lading SP-33 of cargo described therein by Complainant as 18

[1] This decision became the decision of the Commission on February 8, 1968.

Boxes "engines, internal combustion automobile" occupying 785 cubic feet and one box "engine diesel, auto" occupying 68 cubic feet.

3. Atlantic & Gulf/West Coast of South America Conference Freight Tariff No. SA-11 governed the freight charges applicable to the shipment of the 19 boxes in question. The following are certain provisions of that tariff which were in effect at the time of said shipment:

Item 2. Application of Rates.

* * * * * * *

(c) Rates published herein apply per ton of 40 cubic feet or 2,000 pounds, as indicated, whichever basis yields the greater revenue, except as otherwise specified.

(d) Commodity rates take precedence over class rates.

(e) The charge for a package containing different articles shall be at the rate, class or commodity, applicable to the highest rated article in the package. This rule does not apply to ingredients comprising a mixture.

No.	Commodity	Per ton	Groups 1	Groups 2
Item 105	Automobiles, viz: Freight and Passenger, S.U. or K.D.; not identified elsewhere in this item, viz— Passenger Cars Buses/Trackless Trolleys Motor Truck Tractors Motor Trucks/Freight Trailers, empty Also Chassis, Cabs, Bodies for above	Boxed W/M	$27.00	$29.00
	Also Automobile and truck Parts when shipped by Automobile and/or Truck Manufacturers for assembly into complete units when so declared on the bill of lading.	Unboxed W/M	31.00	33.00
*	* * *	*	*	*
	Freight and Passenger Automobiles and/or Trailers, specially equipped, viz (as further described in Original Page No. 16): Automobile Parts (Not Spark Plugs (see Item 1000)) This caption includes and is limited to those items which are integral parts of automobiles and trucks necessary for their operation. Examples are parts for bodies, chassis, engines and power trains, engine cooling, electrical and ignition systems (not including spark plugs), brake and steering systems, and axles and wheels. Excluded from this caption are Automobile/Motor Truck Accessories, viz: Air Conditioners. Heaters. Radios, Television Sets, and/or Antennas for same. Hub Caps. Floor Mats. Luggage Racks. Horns. Mirrors (exterior). Tire Chains. Tools. Tire Repair Materials. Windshield Defrosters and Fans. Windshield Wipers, Motors, Arms and/or Blades. Cigar/Cigarette Lighters. Seat Covers and/or Cushions. This caption does not include storage batteries containing liquid or when shipped with liquid in the same container; nor articles taking a "D" rating in this tariff; or other items not within the definition of Automobile Parts as set forth herein. All parts shipped under this caption must be prefixed by the word "Automobile."	W/M	31.00	33.00

* * * * * * *

Item 1000 Classification and Commodity Index

Article	*Class*
* * * * * * *	
Engines, Caloric, Gas, Internal Combustion, Oil or Steam.............	4
* * * * * * *	

4. Under Item 2(b) of the tariff, the port of destination of the shipment in question was a "Group 1" port. Under Item 999 the "Class 4" rate for "Group 1" ports was specified at $62. The symbol "W/M" is defined by the tariff as meaning "weight or measurement, whichever basis yields the greater revenue." With respect to the 19 boxes in question, measurement would have yielded the greater revenue.

5. Respondent applied the "Class 4" rate for "Engines, Caloric, Gas, Internal Combustion, Oil or Steam" as set forth in Item 1000 to the 19 boxes in question. Complainant believes that Respondent should have applied the rate for automobile parts, including engines as set forth in Item 105.

The primary question here is if automobile engines are "automobile parts" within the meaning of Tariff Item 105. If so, U.S.A. was entitled to the $31 rate therein provided, and has been overcharged $661.07 by G. & S.A.'s application of the $62 rate provided for "Engines, Caloric, Gas, Internal Combustion, Oil or Steam" in Item 1000.

G. & S.A.'s argument is, as it must be that Item 105 does not provide a rate for automobile engines. Whatever argument might be made by G. &. S.A. if Item 105 simply provided a rate for "automobile parts" and stopped, the decision here must turn upon the definition of "automobile parts" which follows, and reads:

> This caption (automobile parts) includes * * * those items which are integral parts of automobiles * * * necessary for their operation.

It simply cannot be validly asserted that automobile engines are *not* integral parts of automobiles, necessary for their operation, and as they are, they are entitled to the Item 105 $31.00 rate.

G. & S.A. necessarily overlooks the conclusive language just quoted, and relies upon arguing that only engine parts and not whole engines are included as "examples" of automobile parts. Assuming that this is true, which is by no means clear, for the language relied upon leaves something to be desired grammatically, it does not follow that because engines are not listed among the "examples" of automobile parts, they are not automobile parts, for the listing clearly does not purport to be exhaustive.

At most, as U.S.A. correctly contends, the contruction applied by G. & S.A. to the "example" language would make this tariff item ambiguous, and as such, it would be construed against the carrier.[2]

G. & S.A., with well-grounded suspicion of strength of its primary argument, argues further that recovery should be denied because the tariff requires that "parts * * * must be *prefixed* by the word 'Automobile'" (emphasis by G. & S.A.); whereas U.S.A. as shipper included the words "automobile" or "auto" in its description of shipments, but as a "suffix" rather than a "prefix." The argument falls of its own weight, for the shipper's description accurately described the cargo for the carrier's benefit, which is all that can reasonably be required.

Premises considered, it is held that U.S.A. is entitled to recover from G. & S.A. as reparation (in addition to the agreed item of $683.02) the sum of $661.07; a total of $1,344.09. G. & S.A. is hereby directed to pay U.S.A. said sum of $1,344.09 within thirty days after the Commission's final decision herein. If payment is not made within said thirty-day period, interest at 6% per annum for the time elapsing between the end of that period and the date of payment shall be added to the principal amount.

(Signed) PAUL D. PAGE, JR.,
Presiding Examiner.

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[2] "*Bratti v. Prudential et al.*, 8 FMC 375, 379 (1965) and cases therein cited."

FEDERAL MARITIME COMMISSION

DOCKET NO. 67–59

UNITED STATES OF AMERICA

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

NOTICE OF EFFECTIVE DATE OF DECISION

February 8, 1968

No exceptions having been filed to the initial decision of the Examiner in this proceeding and the Commission having determined not to review same, notice is hereby given, in accordance with Rule 13(g) of the Commission's Rules of Practice and Procedure, that the decision became the decision of the Commission on February 8, 1968.

It is ordered, That American Export Isbrandtsen Lines make payment to the United States of America in the amount and manner set forth in the decision of the Examiner.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 67–59

UNITED STATES OF AMERICA

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

INITIAL DECISION ADOPTED FEBRUARY 8, 1968

A conference rule providing that claims for adjustment of freight charges must be presented within six months after shipment date cannot bar recovery of an overcharge as reparation, where the complaint is filed under section 22 of the Shipping Act, 1916, more than six months but less than two years after the shipment date. Reparation awarded in the amount of $11,819.20.

Terrence R. Murphy for the United States of America, complainant.

Richard W. Kurrus and *James N. Jacobi* for American Export Isbrandtsen Lines, Inc., respondent.

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

The parties have stipulated that the issues herein are identical with those in Docket No. 67–30, a complaint-and-answer case between the same parties, and that they will be bound in the present case by the decision of the Commission in Docket No. 67–30. If American Export Isbrandtsen Lines, Inc. (AEIL) is ordered to pay reparation in Docket No. 67–30, it is agreed that AEIL in the present proceeding shall pay to the United States of America the sum of $11,819.20 as reparations for freight overcharges.

In *Time Limit on the Filing of Overcharge Claims*, 10 F.M.C. 1 at page 6, is was stated that, no cases are advanced which hold that a common carrier * * * may by contract change a time limitation for bringing a claim for reparation which (time limitation) is embodied in a statute of an administrative agency, nor will we permit it here. The initial decision in Docket No. 67–30 directed that reparation be paid. Since the present proceeding by stipulation concerns the same issues, it is found that the complaint is entitled to reparation of $11,819.20 as sought in its complaint. In view of the stipulation of the

[1] This decision became the decision of the Commission on February 8, 1968.

parties no answer to the complaint was filed and an answer is not required.

AEIL hereby is directed to pay the United States of America within thirty days after the Commission's final decision herein the sum of $11,819.20 and if payment is not made until more than thirty days after said decision to add to the principal sum interest at 6% per annum for time elapsing between thirty days after the decision date and the date of payment.

(Signed) CHARLES E. MORGAN,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

DOCKET No. 67-52

ALASKA STEAMSHIP CO.—CANCELLATION OF FMC PORT-TO-PORT RATES—WEST COAST/ALASKA TRADE

Decided February 8, 1968

Service of Alaska Steamship Co. between Seattle, Wash., and various ports in the State of Alaska found subject to jurisdiction of Federal Maritime Commission.

Truck movement performed by wholly owned affiliate of Alaska Steamship Co. within Seattle commercial zone is local pickup-and-delivery service, rates for which may properly be included in port-to-port rates filed by ocean carrier.

The utilization of vessels of the Alaska Ferry System to effect transportation between Seattle and certain Alaskan ports involves only substitution of one carrier for another for part of service and does not deprive FMC of jurisdiction over entire movement. Alaska Ferry System is carrier by water, and Alaska Steamship Co.'s arrangement utilizing it for continuous carriage from originating point on line of Alaska Steamship Co. to destination on line of Alaska Ferry System is through route with another carrier by water within the meaning of section 18(a), Shipping Act, 1916, and section 2, Intercoastal Shipping Act, 1933, and rates for such movement must be filed with this Commission. Limited participation of Alaska Steamship Co. as motor carrier and other ICC-certificated motor carriers in this movement in driving containers on and off vessels of Alaska Ferry System is incidental to total through port-to-port movement and not of type envisaged by Public Law 87-595 as granting to ICC jurisdiction over entire movement.

Stanley B. Long and *Arthur G. Grunke*, for respondent, Alaska Steamship Co.

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

Donald J. Brunner, *Norman D. Kline*, and *E. Duncan Hamner, Jr.*, 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 October 20, 1967, to resolve the question of the Federal Maritime Commission's (FMC) jurisdiction over the service provided by the Alaska Steamship Co. (Alaska Steam) between Seattle, Wash., and the Alaskan ports of Ketchikan, Juneau, Haines, Wrangell, Petersburg, Sitka, and Valdez. Alaska Steam filed tariff pages containing cancellation notices which would, with minor exceptions, have removed FMC jurisdiction over the carrier's service between these ports effective October 27, 1967, with respect to Valdez, and November 1, 1967, with respect to the other ports. Alaska Steam has filed rates covering movements to and from each of these Alaskan ports with the Interstate Commerce Commission (ICC) to be effective upon cancellation of its rates with us. A similar action by Alaska Steam canceling the carrier's rates between Seattle, Wash., and Seward, Alaska, effective December 11, 1967, was placed under investigation in this proceeding by a subsequent order served November 15, 1967.

Because the cancellation of the tariffs on file with FMC for the above-discussed movements might result in port-to-port transportation by Alaska Steam without rates on file with FMC in apparent violation of section 18(a) of the Shipping Act, 1916 (the Act), and section 2 of the Intercoastal Shipping Act, 1933 (the 1933 Act), we suspended the cancellations involved for the 4-month period provided for by section 3 of the 1933 Act.[1]

Since no factual issues were involved, the investigation has been conducted by means of affidavits and legal memorandums submitted by Alaska Steam and Hearing Counsel.[2] We heard oral argument on November 29, 1967.

The Service of Alaska Steam

Prior to the filing of the tariff cancellations which are the subject of this proceeding, Alaska Steam maintained three facilities for cargo tendered for delivery between Seattle and the Alaskan ports under consideration in this proceeding. The carrier's tariffs indicated that any cargo could be tendered at any of the three facilities. However, Alaska Steam generally received less-than-container-load shipments at the AAA Transfer, Inc. (AAA Transfer), terminal at 558 Occidental Avenue South, Seattle, Wash. In fact, in March 1966, Alaska Steam announced that the AAA Transfer vanning station was designed to

[1] Sec. 3 of the 1933 Act provides in pertinent part that FMC may investigate the lawfulness of "any new individual or joint regulation or practice affecting any rate, fare, or charge," and may "suspend the operation of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than four months beyond the time when it would otherwise go into effect."

[2] Sea-Land Service, Inc., intervened but did not otherwise participate in this proceeding. Alaska Steam availed itself of the opportunity provided by FMC to file additional affidavits with respect to its Seward operation.

concentrate reception for all cargo suitable for vanning for all Alaskan ports served all year and that the facility would provide for fast reception and skillful, modern handling methods. Service rendered at this address included receiving, checking, assembling, loading of containers, and delivery to dock at no extra charge to the shipper. In the words of the carrier, "AAA Transfer * * * [is] * * * acting in the same capacity as are the 'container freight stations' referred to in Matson Navigation Company's Tariff 14-A (their FMC-F No. 137)." Cargoes loaded into containers at the vanning station were then transported to Alaska Steam's facilities at pier 46 for transportation by Alaska Steam to Alaskan ports.

Container-load shipments, on the other hand, in practice appear to have been received at Alaska Steam's facilities at pier 46, and cargo not suitable for vanning and certain other shipments were accepted at Alaska Steam's facility at pier 42, Seattle, Wash. Alaska Steam gave notice that operations at pier 42 would cease as of the end of calendar year 1967.

The service offered by Alaska Steam under its newly filed ICC tariffs is identical to this prior service with the following exceptions: Tender of less-than-container-load shipments may be made at Southwest Spokane Street and Colorado Avenue, Seattle, Wash., as well as at the Occidental Avenue facility,[3] and Alaska Steam provides for pickup and delivery (spotting) of fully loaded containers at any point within the commercial zone of Seattle, Wash.

In both the previous and present tariffs, shippers may obtain an allowance amounting to 26 cents per 100 pounds if they load and deliver the containers themselves to Alaska Steam's pier 46.

None of the subject rates of Alaska Steam appear to include pickup or delivery service at shippers' premises in Alaska. Spotting in Seattle is performed for Alaska Steam by AAA Transfer, complete control of which was acquired by Alaska Steam on July 20,1967, pursuant to ICC authorization of May 24, 1967. AAA Transfer is a duly certificated motor carrier under part II of the Interstate Commerce Act.

The only operational changes in Alaska involved herein reflect Alaska Steam's decision to serve certain ports in Alaska partially by means of vessels of the Alaska Ferry System (Alaska Ferry) rather than solely by Alaska Steam's own vessels. Wrangell and Sitka in southeastern Alaska will be served by Alaska Steam directly during certain weeks, while on alternating weeks Alaska Steam's con-

[3] There is no provision in the tariff for delivery of such shipments to shippers' premises except on some individual items and shippers must obtain their goods at the carrier's terminal.

tainerized cargo will be transferred in the manner described below to the Alaska Ferry's vessels at Ketchikan or Juneau for the remainder of the movement. Petersburg, also in southeastern Alaska, will be served by Alaska Steam only by employing Alaska Ferry's vessels for the transportation beyond the transfer point. Prior to the operational changes, Petersburg had been served directly by Alaska Steam's vessels. The port of Valdez similarly will be served only by means of Alaska Ferry's vessels which will be loaded at the port of Cordova. Previously, Alaska Steam operated in reverse order, calling directly at Valdez and transferring containers onto Alaska Ferry for carriage to Cordova.

For transferring cargo in containers from its own vessels to those of Alaska Ferry, a motor tractor must be utilized. Containers which have been transported aboard an Alaska Steam vessel are placed on a chassis at point of interchange. A tractor then drays the container-loaded chassis aboard an Alaska Ferry vessel, after which the tractor is disconnected and driven off. When the Alaska Ferry's vessel calls at the destination port, a tractor is again connected and the container and chassis are driven off the vessel.

Since ICC requires that any motor carrier transporting cargo moving in interstate commerce must obtain operating rights under part II of the Interstate Commerce Act, such rights are a necessary prerequisite to the use of a motor tractor for driving container-loaded chassis on and off vessels of Alaska Ferry.[4] In southeastern Alaska, Alaska Steam itself has obtained motor carrier operating rights. Alaska Steam does not, however, publish a local motor carrier tariff in Alaska, nor any motor tariff independent of its through service to and from Seattle. In the Cordova/Valdez trade, Weaver Bros., an independent motor carrier which has obtained extensive operating rights throughout Alaska and publishes local motor carrier tariffs, performs the drive-on, drive-off service. Hoover's Movers will also participate in the drive-on, drive-off service at Cordova.

There are no roads connecting any of the ports involved in this proceeding. The entire forward movement between Seattle and ports in Alaska is by water, including the employment of the Alaska Ferry System.

Issue for Resolution

The orders of investigation in this proceeding frame the following issue for resolution: Whether or not the Commission is deprived of

[4] Under sec. 204(a)(4a) of the Interstate Commerce Act, 49 U.S.C. 304(a)(4a), ICC may upon certain findings exempt motor carriers whose physical operations are solely within a single State.

jurisdiction over the rates applicable to the movements between Seattle and the Alaskan ports involved herein by reason of (1) the truck movement within the commercial zone of Seattle or (2) the substitution of one vessel for another to effect transportation between the involved ports with or without the participation of another carrier.

Positions of the Parties

Alaska Steam

Alaska Steam's main argument is that the rates which it has attempted to cancel here and refile with ICC cover a through route and are joint rates properly filed with ICC under section 216, part II, of the Interstate Commerce Act, 49 U.S.C. 316(c), as amended by Public Law 87–595.[5]

In support of this position, the carrier maintains that the service provided under its new rate filings is substantially different from the service previously offered because of the pickup-and-delivery service provided for full containers within the Seattle commercial area. Such service, it maintains, could not lawfully have been performed without certification by ICC. Alaska Steam is not certificated to perform such movement. AAA Transfer is so certificated.

Alaska Steam argues that the legislative history of Public Law 87–595 indicates that the rates covering the type of service here involved are to be filed with ICC. The Alaska Statehood Act, Alaska Steam argues, merely preserved FMC jurisdiction over transportation between the lower 48 States and Alaska until Congress had time to reconsider the matter. In enacting Public Law 87–595, Congress did reconsider the matter, and, in reconsidering, placed within ICC the jurisdiction over movements participated in in any way by ICC-certificated carriers.

Alaska Steam also specifically challenges FMC's jurisdiction over goods transported in part by way of Alaska Ferry. Alaska Steam indicates that ICC treats Alaska Ferry as a public way and that any carrier transporting goods over such public way must be certificated as a motor carrier under part II of the Interstate Commerce Act. In fact, Alaska Steam points out, ICC required that it be certificated as a motor carrier before it could lawfully use the ferry system.

[5] Section 316(c) as so amended provides:

"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 classification, regulations, and practices in connection therewith shall be subject to the provisions of this part."

Finally, Alaska Steam contends that FMC lacked the authority to attack Alaska Steam's actions here under investigation by means of suspension and that these actions should have been challenged by way of a complaint filed with ICC.

Hearing Counsel

Hearing Counsel maintain that Alaska Steam's service continues to be subject to FMC jurisdiction since the carrier is providing a port-to-port service coupled with an efficient pickup-and-delivery service at Seattle and is merely substituting vessels to continue its service to certain Alaska ports.

Hearing Counsel maintain that the Seattle spotting operation is a pickup-and-delivery service within a geographic port area and, as such, is merely an incidental service which is part of Alaska Steam's port-to-port operation. The only change, Hearing Counsel contend, in Alaska Steam's service in the Seattle area is the institution of pickup and delivery for full-container-load shipments, and, while this service marks an improvement in Alaska Steam's operation, it is the same type service that has always been held subject to FMC jurisdiction. The fact that it is performed by a motor carrier subject to the jurisdiction of ICC does not deprive FMC of jurisdiction over the entire port-to-port service. Matson has utilized such motor carriers to perform pickup-and-delivery service as part of a total port-to-port service which has been held subject to FMC's jurisdiction (*Matson Navigation Co.—Container Freight Tariff's*, 7 FMC 480 (1963)).

Hearing Counsel argue that the necessity of obtaining certification from ICC before motor carrier transportation can lawfully be performed does not establish that when an arrangement is entered into with one who provides such motor transportation a joint rate or through route within the meaning of Public Law 87–595 has thus been established, nor does any conflict arise between this agency and ICC because of the necessity for such certification. Additionally, Hearing Counsel maintain that Public Law 87–595 was not designed to cover a pickup-and-delivery service because tariffs providing for such service would always have been accepted by FMC and, consequently, Congress did not intend it to apply to such service.

Finally, Hearing Counsel argue that the limited use of Alaska Ferry is nothing more nor less than the substitution of one vessel for another and that Alaska Steam's operation in conjunction with Alaska Ferry constitutes a through route with another carrier by water, and hence the rates covering this operation must be filed under section 18(a) of the Act and section 2 of the 1933 Act.

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DISCUSSIONS AND CONCLUSIONS

Alaska Steam, in addition to the affidavits and legal memorandums provided for in the orders in this proceeding, also filed petitions and motions asking FMC to vacate the orders and to stay their effectiveness pending vacation. These petitions and motions were also argued orally at the same time Alaska Steam delivered its oral presentation on the merits. We have considered all the contentions made by Alaska Steam in our deliberations in this proceeding. However, inasmuch as the grounds raised in support of the petitions and motions are substantially the same as the arguments made in the memorandums and affidavits (indeed, the documents incorporate each other by reference), they are considered together herein.

1. *The Truck Movement Within the Seattle Commercial Zone*

In *Sea-Land Service, Inc., Cancellation of FMC Port-to-Port Rates—West Coast/Alaska Trade*, docket No. 67–43, 11 FMC 137, we held that a pickup-and-delivery service performed by an ICC-certificated motor carrier was an incidental part of a port-to-port service, and we retained jurisdiction over the entire port-to-port movement, which includes the pickup-and-delivery service performed in connection therewith.

The pickup-and-delivery service performed in the instant case is the same type as the motor services performed in connection with waterline hauls in the *Sea-Land* and *Matson* cases.[6] The propositions of law in the instant case with respect to the pickup-and-delivery service are the same as those presented to us in *Sea-Land*.

We here affirm the result reached in *Sea-Land*, and we conclude for the reasons stated therein that the entire service offered by Alaska Steam in connection with AAA Transfer in the Seattle commercial zone is subject to our jurisdiction as a port-to-port service, rates for which must be filed with us under sections 18(a) of the Act and 2 of the 1933 Act.[7]

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[6] In *Matson, Sea-Land,* and the instant case, containers are transported between shipper or consignee's premises and ocean carrier's pier, and the area involved is the commercial area of a port city—in the Sea-Land case, Anchorage, and in the Matson case, San Francisco, Stockton, and Los Angeles. In fact, in the *Matson* case, the Los Angeles and Stockton commercial areas were, like Alaska Steam's Seattle pickup-and-delivery area, the commercial zones prescribed by ICC, and the San Francisco and Los Angeles areas were considerably more extensive and included far more people than the Seattle commercial area. Matson has also filed, as a revision to the tariff under investigation in connection with its pickup-and-delivery service, a tariff covering a similar service in the Seattle area of a geographic scope at least as wide as the AAA Transfer operation.

[7] Alaska Steam refers to statements of former FMC Chairman Stakem and FMC's "Alaska Trade Study" as supporting the view that Congress intended to place in ICC the jurisdiction over movements participated in in any way by ICC-certificated carriers. Nothing in

Nothing herein, nor anything contained in our previous decision in *Sea-Land*, is intended to change or expand our holding in *Matson Navigation Co.—Container Freight Tariffs*, 7 FMC 480 (1963), nor is anything herein intended to impinge upon the jurisdiction of ICC with reference to motor carriers. It is only intended to reaffirm the jurisdiction of FMC over port-to-port rates and not over the motor carriers performing the pickup-and-delivery services in connection therewith.[8]

Chairman Stakem's statements on the effect of the joint rate bill or the "Alaska Trade Study" indicates that FMC does not have jurisdiction over a service of the type performed by Alaska Steam. Chairman Stakem merely asserted that if joint rates and through routes within the meaning of Public Law 87–595 were entered into between an FMC water carrier and an ICC motor carrier the FMC would lose jurisdiction over the water transportation involved in such movement. While the "Alaska Trade Study" does indicate that ICC requires certification of motor carriers performing pickup-and-delivery service for carriers subject to the Shipping Act, it does not indicate that when arrangements for such service are entered into the entire port-to-port service of the water carrier is removed from FMC jurisdiction. It does, in fact, say that "pickup and delivery services in the terminal area are not a divisible service but are part of the through movement performed by the line haul carrier." The "Alaska Trade Study," moreover, rather than suggesting the FMC has been stripped of jurisdiction over port-to-port services, suggests the desirability of securing legislation which would exempt motor carriers performing pickup-and-delivery services for FMC water carriers from ICC jurisdiction and placing such carriers under FMC jurisdiction ("Alaska Trade Study," ch. 1, p. 7).

Alaska Steam alludes to the facts that AAA Transfer makes out its own bill of lading and provides for the safe transfer of goods within its custody. As an ICC-regulated carrier it could do no less, and the fact that it transports cargo moving in interstate commerce requires that it be certificated by ICC. But this does not mean the service AAA Transfer performs somehow removes Alaska Steam's service from our jurisdiction. Nor does the asserted independence of AAA Transfer from the direction and control of Alaska Steam dictate a contrary result. The carriers performing the motor services for Sea-Land were, so far as it appears, independent of their direction and control. Moreover, contrary to the affidavit filed by AAA Transfer's President, the independence would appear to be largely a fiction inasmuch as Alaska Steam on July 20, 1967, acquired complete control of AAA Transfer by purchase of all the latter's outstanding capital stock pursuant to an order of ICC entered May 24, 1967.

[8] Counsel for Alaska Steam in oral argument appears to suggest that the failure of Congress to exempt terminal area or "incidental" services performed by an ICC-certificated carrier in connection with a service regulated by FMC meant that such incidental service when performed in connection with an FMC carrier converted the entire service into one subject to ICC jurisdiction. However, decisions of both the regulatory agencies and the courts have made clear that the question of exemption of incidental services and the question of jurisdiction over a complete transportation service performed in part by a carrier not subject to the jurisdiction of the agency regulating the dominant service are mutually exclusive. When an air carrier substituted a motor haul for a portion of its air carriage, the Civil Aeronautics Board (CAB), in *The Flying Tiger Line Air-Truck Service*, 30 CAB 242, 245 (1959), held that such motor movement was "air transportation" within the meaning of the Federal Aviation Act. In so doing, however, it made clear that whether or not the truck haul was to be considered incidental to air transportation and—

"exempt from economic regulation under that statute [the Interstate Commerce Act] is a matter for the Interstate Commerce Commission. We do not intend that our action here should influence what that decision should be. If the Commission [ICC] should conclude under the standards normally applied by it that the truck operation is not exempt, the trucker must have or obtain the required authority in order for Flying Tiger Line [the air carrier] to operate in the manner it proposed."

The Court of Appeals for the District of Columbia Circuit in affirming the CAB's decision cited this language of the Board as "adequately and correctly" disposing of the contention that CAB could not assert jurisdiction over the truck movement as a part of the air carrier's through transportation since the motor carrier performing it had not been exempted by ICC. *City of Philadelphia* v. *Civil Aeronautics Board*, 289 F. 2d 770, 774–775 (D.C. Cir. 1961).

2. *Alaska Steam's Operation in Conjunction With Alaska Ferry and the Effect on FMC Jurisdiction, If Any*

Having determined that Alaska Steam's pickup-and-delivery operations in Seattle in no way deprive us of jurisdiction over the rates in question, we now reach the question of whether or not Alaska Steam's decision to serve certain ports in Alaska by substituting vessels of Alaska Ferry for its own vessels has any effect on our jurisdiction here.

The substitution of vessels of Alaska Ferry for those of Alaska Steam to furnish a portion of the latter's service does not remove the entire service from FMC jurisdiction. The substitution of another means of transportation for a portion of a water carrier's route is nothing new. Moreover, the substitution does not change the essential character of the transportation. In *City of Philadelphia*, *supra*, the Court of Appeals for the District of Columbia Circuit affirmed the Civil Aeronautics Board's (CAB) determination that the substitution of a motor haul of about 90 miles for a feeder-plane service previously provided did not alter the fact that the entire movement was air transport subject to regulation by CAB.[9] We have recognized the lawfulness under section 18(a) of the Act and section 2 of the 1933 Act of a substitution of another carrier (there motor) to perform a portion of the water carrier's Oakland, California, to Alaska service by means of an overland haul between Oakland and Seattle (*Puget Sound Tug & Barge Co.* v. *Alaska Freight Lines*, 7 FMC 550, 556–557 (1963)).

Alaska Steam indicates that it had a good reason for substituting the vessels of Alaska Ferry for its own—reasons of economy. We agree that these are good reasons. They are not, however, reasons of a type to convert what is essentially one type of movement into that of another transportation mode. In *Flying Tiger Line, Air-Truck Service*, 30 CAB 242, 257–258 (1959), the CAB decision affirmed in the *Philadelphia* case, supra, CAB stated that the substitution of motor carriage for a portion of the air transportation for reasons of economy and efficiency did not convert the substituted portion into motor transportation.

A fortiori, then, it should be clear that the substitution of another *vessel* (i.e., a vessel of Alaska Ferry) for economic reasons does not remove the service from the jurisdiction of this agency and the filing requirements of section 18(a) of the Act and section 2 of the 1933 Act.

Moreover, inasmuch as the substituted service herein involves the participation between certain ports by another water carrier, it con-

[9] Although, as noted in footnote 8, the motor carrier utilized by the airline may have required ICC certification.

stitutes a through route with another water carrier for which all rates, fares, and charges must be filed with us under section 18(a) of the Act and section 2 of the 1933 Act.[10] Alaska Steam marshals the fact that ICC treats a ferry as a public way and any carrier, including Alaska Steam, utilizing Alaska Ferry must be certificated as a motor carrier under part II of the Interstate Commerce Act as supporting its contention that this agency cannot assert jurisdiction over transportation utilizing Alaska Ferry. Both of these facts are irrelevant to the question of our jurisdiction.

We have already noted that any motor carrier transporting any cargo moving in interstate commerce must, unless exempted, be certificated by ICC. That agency, moreover, has indicated that carriage by water over the route traversed by Alaska Ferry is not within its jurisdiction.[11] Carriage performed by a motor carrier over a water route not within ICC's jurisdiction cannot, practically speaking, be called anything other than an operation over a public way or marine highway insofar as ICC is concerned.

The Interstate Commerce Commission has itself recognized:

> * * * the possibility that the port-to-port service of the Alaska Ferry System or of applicants [motor carriers using the Ferry], 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. *Lindstrom Extension—Southeast Alaska*, 98 M.C.C. 647, at 653 (1965).

Moreover, ICC itself has determined that even for its own regulatory purposes a ferry may have "a dual status, both as a ferry and as a carrier subject to part III [the water carrier part] of the [Interstate Commerce] Act." *Black Ball* v. *Acme*, 76 M.C.C. 5, 9 (1958).

The cases advanced by Alaska Steam in support of its contention that transportation utilizing Alaska Ferry is not subject to our jurisdiction[12] do not involve Alaska Ferry. To the extent they are relevant to our consideration here, however, they support the conclusion that Alaska Ferry is not a ferry. The *United* case merely held that to the extent a motor carrier wished to utilize a ferry it required a certificate from ICC. The *Black Ball* case, moreover, indicates that an operation like that of Alaska Ferry is not that of a ferryboat. "A

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[10] Sec. 2 of the 1933 Act (46 U.S.C. 844) provides that "if a through route has been established, all the rates, fares, and charges for or in connection with transportation between * * * points on its [the FMC carrier's] own route and points on the route of *any other carrier by water*" must be filed here. [Emphasis supplied.] A similar provision is contained in sec. 18(a), Shipping Act, 1916.

[11] See *Alaska Steamship Co. Alaska "Grandfather" Application*, 325 ICC 196 (1965), and *Erickson and Wolf Alaska "Grandfather" Application*, 325 ICC 276, 278 (1965).

[12] *United Truck Lines* v. *United States*, 216 F. 2d 396: *Black Ball* v. *Acme, supra.*

The operation of Alaska Ferry under consideration in this proceeding constitutes what is readily seen; it is carriage by water on regular routes with fixed schedules for all who wish to avail themselves of the service. One who performs such service is obviously a carrier by water.[17]

The provisions of section 18(a) of the Act and section 2 of the 1933 Act, requiring the filing of "all the rates, fares, and charges for or in connection with transportation [by a water carrier subject to our jurisdiction] between * * * points on its own route and points on the route of any other carrier by water * * * if a through route has been established * * * ", require that the service of Alaska Ferry utilized by Alaska Steam for the continuous carriage from originating point on the line of Alaska Steam to destination on the line of Alaska Ferry be included in the tariffs filed with FMC. The facts that no express agreement has been entered into between Alaska Steam and Alaska Ferry for the carriage of the former's cargo and that Alaska Steam does not control Alaska Ferry's operation are irrelevant. Nor is the fact that no joint rates or any agreements upon rates have been entered

[17] Alaska Steam submitted a newspaper (Seattle Post Intelligencer) clipping dated Nov. 30, 1967 (1 day after oral argument herein) which has been received by us as a part of the record in an attempt to maintain as complete and fair a record as possible, even though no motion for reopening has been filed in accordance with rule 16 of our rules of practice and procedure and there has been no opportunity for cross-examination of the matter contained therein. To the extent the article is material to this proceeding, however, it is more damaging than helpful to Alaska Steam's position. The article indicates that Alaska Ferry will commence "30-hour, twice-weekly [passenger] service from Ketchikan to Puget Sound * * * Seattle or Bellingham will be the southern terminus of the service, which covers a magnificently scenic route. But, Alaska Governor Walter J. Hickel said yesterday: 'We'll listen to any other port on Puget Sound that wants to talk to us.'" The passenger operations of the Alaska Ferry are not within the scope of this investigation. However, expansion of Alaska Ferry to include regularly scheduled passenger service between the lower 48 and Seattle along a scenic route makes Alaska Ferry look even less like a true ferry than it did before. Alaska Steam argues that the fact that the Coast Guard will "designate the waters between Ketchikan and Puget Sound as 'lakes, bays and sounds'" to allow Alaska Ferry to operate over those waters because the ferries are not classified as deep-sea ships somehow deprives us of jurisdiction. Coast Guard designations are irrelevant insofar as the regulatory authority of the FMC is concerned. The reason for this designation is obvious. As the newspaper article itself notes, "This is a *device* to qualify Alaska Ferry's three largest ships, the Matanuska, the Malaspina and the Taku, to run with passengers between Puget Sound and southeastern Alaska." [Emphasis supplied.] This may be a perfectly reasonable action insofar as the Coast Guard is concerned, but as the Interstate Commerce Commission pointed out, "We think it clear that the navigational boundary line established by the Commandant of the Coast Guard with respect to the waters involved here would not fix, change, or limit the statutory jurisdiction of Federal regulatory agencies" (*Erickson and Wolf Alaska "Grandfather" Application, supra,* at 278). Similarly, the designation by the State of Alaska of the ferry as the "Alaska Marine Highway" and including its regulations for it in its "highway" statutes may have legitimate purposes (primarily as indicated by 19.15.010 to 19.15.040, the necessary governmental function of raising funds for the establishment of an adequate transportation system) but those purposes are unrelated to the regulation of common carriers by water provided for in our statutes. We also note, moreover, that while the definition of "highway" in the Alaska Statutes includes a "ferry system" [Alaska Statutes, 19.05.130], "ferry" itself is defined as "a vessel used in the common carriage of passengers and self-propelled vehicles * * *" [Alaska Statutes, 19.60.070].

into between Alaska Ferry and Alaska Steam important. Section 18(a) of the Act and section 2 of the 1933 Act, unlike Public Law 87–595, speak not of "joint rates" but only of "through routes." [18] As our predecessor has stated, a "through route" is "an arrangement, express or *implied*, between connecting carriers for the continuous carriage of goods from an originating point on the line of one carrier to destination on the line of another." [Emphasis supplied.] *In Re Inland Waterways Corporation and Mississippi Valley Barge Line*, 2 U.S.M.C. 458, 462–463 (1940), citing *Intercoastal Investigation*, 1935, 1 U.S.S.B.B. 400, 445–446 (1935). The FMC predecessor went on to state:

> Through carriage implies a "through rate." This "through rate" is not necessarily a "joint rate." It may be merely an aggregation of separate rates fixed independently by the several carriers forming the "through rate," as where the "through rate" is the "sum of the locals" of the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. 1 U.S.S.B.B. at 446.[19]

The only motor portion of the entire movement from Seattle to final destination in Alaska (outside the pickup-and-delivery service already discussed) is the movement performed by certificated ICC motor carriers in transferring the container-loaded chassis of Alaska Steam on and off vessels of Alaska Ferry. There is no motor carriage resembling the Consolidated Freightways operation from Utah, Idaho, and Montana, which precipitated passage of Public Law 87–595. No line haul overland of any kind is involved.[20] There is not even a movement in Alaska of an extent as great as a pickup-and-delivery service. The incidental nature of this movement is clearly seen when it is borne in mind that only as much land is traversed as lies between the two vessels when positioned alongside the pier. This type of service is not a departure from the former operation of Alaska Steam in Alaska. Even prior to the filing of the tariff here under investigation, the same substituted service was performed, for a part of the movement, but in reverse; i.e., Alaska Steam called directly at Valdez and used Alaska Ferry for substituted service to Cordova.

The staff of ICC indicated that the transfer service could only be performed by a certificated carrier, and when rates are entered into

[18] See footnote 25, infra.

[19] Hearing Counsel argue that the decisions of this agency indicate that the Alaska Ferry is a common carrier by water within the meaning of the Shipping Acts. We need not resolve this matter in this proceeding. Inasmuch as section 18(a) of the Act and section 2 of the 1933 Act require the filing of "all rates" on a "through route" involving any "carrier by water," and we have determined that Alaska Ferry is such a carrier within the meaning of that statute and insofar as this proceeding is concerned, we need proceed no further in our examination of Alaska Ferry's service herein.

[20] As explained in the *Sea-Land* case, Public Law 87–595 was designed to enable carriers providing line hauls by different transportation modes to enter into joint rates and through routes and file with a single agency a tariff covering the through movement.

jointly with such carrier, the motor carrier's rates must be filed with ICC. We do not read the correspondence between the staff of ICC and Alaska Steam taken in its totality as indicating that any rate entered into between a line-haul water carrier subject to the Shipping Acts and an ICC-certificated motor carrier is a joint rate establishing a through route within the meaning of Public Law 87–595, but only rates involving at least two line hauls.[21] To the extent it can be so read, however, it would appear to be inconsistent with the statement of the full ICC in a docketed proceeding, the *Lindstrom* case, supra, indicating that port-to-port operations utilizing Alaska Ferry are within FMC jurisdiction.

That the framers of Public Law 87–595 could not have envisioned a drive-on, drive-off service of the type here involved as included within the provisions of that Act is attested to by the fact that tariffs for a service involving such an incidental movement have always been accepted by this agency and its predecessors and therefore did not present the dilemma faced by Consolidated in not being able to provide a through service because no single agency would or could accept the tariffs which it attempted to file. It is also buttressed by the observations that the operations of Alaska Ferry did not commence until 1963. Public Law 87–595 was, therefore, not designed to remedy any problems concerning operations in connection with Alaska Ferry.

Alaska Steam as a motor carrier exists only to drive its containers on and off Alaska Ferry, publishing no local Alaskan motor rates which would merge with water carrier rates to form the joint rate contemplated in Public Law 87–595. Moreover, the fact that Alaska Steam as a motor carrier, Weaver Bros., or any other motor carrier may be indicated as participating in the movement in the tariffs filed with ICC does not remove the through service from our jurisdiction. They may participate, but the participation is not of the kind intended by the framers of Public Law 87–595 as subjecting the entire water movement to ICC supervision.

Finally, some idea of the essential nature of the movement may be gleaned from the fact that Alaska Steam filed its ICC tariffs as if it were a certificated water carrier. By its own admission, as well as by an official docketed decision of ICC,[22] it is not such a carrier. There-

[21] Such reading of the ICC staff correspondence is supported, for example, by the correspondence from the staff with regard to Alaska Steam's service (not under investigation herein) between Alaska and Tacoma, Wash., involving a land haul between Seattle and Tacoma. In advising Alaska Steam that it was of the opinion that rates for such service are within ICC jurisdiction, the staff of that agency stated that "The motor service between Tacoma and Seattle is *line haul service*. The fact that motor haul is a minor segment of the total transportation to or from Alaska ports in no way removes application of section 216(c)." [Emphasis supplied.] (Letter to Alaska Steam from Grayson B. Robinson, Assistant Director, Bureau of Traffic, dated Dec. 15, 1964.)

[22] See *Alaska Steamship Co. Alaska "Grandfather" Application, supra.*

fore, the applicable provisions of Public Law 87–595 (amended sec. 216(c) of the Interstate Commerce Act) entitle only a part II motor carrier to file joint-rate tariffs with an FMC water carrier. However, Alaska Steam filed tariffs designated ICC Nos. 96, 98, and 99, which are part III water carrier designations. Motor carrier tariffs bear an MF No. designation. Only the name Alaska Steamship Co. appears on the title pages of the supposedly joint or motor carrier tariffs. Motor carriers such as AAA Transfer, Weaver Bros., and Hoover's Movers are listed elsewhere as participating carriers. These facts indicate that Alaska Steam itself visualizes the service provided as essentially a water service, and, moreover, essentially its own water service.

Alaska Steam alleges several factual inaccuracies in the Commission's orders of investigation. However, with one minor exception, these alleged factual inaccuracies are either semantic in nature or disputes as to what conclusions are to be reached with respect to Alaska Steam's service. In the former category are Alaska Steam's objections to the Commission's characterization of AAA's vanning station as a collecting point and its motor service as drayage, and a reference to one of its vessels as a shuttle barge. Such appellations have been omitted from this report. In the latter category are arguments, treated in the "Discussion and Conclusions" section of this report, about whether or not Alaska Steam's service is really port-to-port and whether or not the service it has entered into with motor carriers is really joint. The only material factual inaccuracy mentioned is that Petersburg will not be served directly but only via Alaska Ferry. Hearing Counsel do not dispute this fact, and it has been corrected in the factual discussion above. The Court of Appeals for the District of Columbia Circuit has recently affirmed the position that an evidentiary hearing is necessary only when material facts are in dispute (*The City of Los Angeles* v. *F.M.C. and U.S.A.*, CADC 388 F2nd 582 (1967)). Thus, there appears no need for the full hearing demanded by Alaska Steam.

3. *The Procedural Arguments*

Alaska Steam makes two arguments attacking the procedure through which FMC instituted this proceeding:

(1) Alaska Steam maintains that FMC is, by this proceeding, attacking collaterally the jurisdiction of ICC because we are challenging the validity of a tariff filing with ICC, and such a challenge may only lawfully be made by the filing of a complaint with ICC under section 216(e) of the Interstate Commerce Act. Such a complaint, Alaska Steam indicates, has not been filed.

(2) By suspending the cancellation of tariffs, FMC, Alaska Steam maintains, has unlawfully applied its suspension authority. FMC can only suspend new rates and rate schedules, and Alaska Steam has filed no new rates, but merely cancelled old ones. Moreover, Alaska Steam contends, to prevent the cancellation of rates is to require the carrier to continue service which FMC has no authority to do.

In response to Alaska Steam's first contention, we need only say that the failure to file a tariff subject to FMC jurisdiction with FMC is a violation of our statutes, not those of ICC. If FMC is of the opinion, as it was, that an action by one it regulates is of doubtful legality, it is under a duty to examine the matter and in a proper case investigate and suspend. To do less or other than this would be a breach of our statutory mandate. If Alaska Steam had a question as to whether or not its service was subject to FMC jurisdiction, it could have obtained the answer without resorting to procedures under the Interstate Commerce Act.[23] It might also be observed that the section in the Interstate Commerce Act providing for the filing of a complaint by a body politic (sec. 216(e)) uses the word "may" which indicates that the filing of such complaint is not mandatory, and section 216(j) indicates that "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith." Certainly, a proceeding before a regulatory agency which has reason to believe its statutes may be violated and the filing of a petition for declaratory order with an agency that has for many years asserted jurisdiction over a certain type of transportation are appropriate alternative remedies to the filing of a complaint under a provision providing only for a permissive filing.

As to the second argument attacking our procedure, Alaska Steam is incorrect that only new rates may be suspended. Section 2 of the 1933 Act provides that new "practices" may also be suspended. The attempt to remove a service of a type long held subject to FMC's jurisdiction is certainly a new practice within the meaning of this section. Furthermore, the carrying on of such service without a properly filed tariff with FMC is an apparent violation of that section which FMC is empowered to suspend.[24] The FMC is not, contrary to Alaska Steam's assertion, forcing it to continue its service. Here the service under investigation is being performed under tariffs filed with ICC and is precisely the type of service that FMC and its predecessors have always held subject to their jurisdiction.

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[23] It could, for example, have petitioned FMC for a declaratory order pursuant to rule 5(h) of FMC's rules of practice and procedure.

[24] See footnote 1, supra.

The cases cited by Alaska Steam in support of its position are inapposite. *Lucking* v. *Detroit Nav. Co.*, 265 U.S. 346 (1924) and *McCormick S.S. Co.* v. *United States*, 16 F. Supp. 45 (1936), do not involve any question of suspension power and merely stand for the position that a water carrier cannot be compelled to provide a certain service. In both of these cases, the carrier had clearly ceased to provide a service for which rates would have been required to be filed with the regulatory agency by ceasing to provide service to certain ports.[25] *Alaska Steamship Company* v. *Federal Maritime Commission*, 362 F. 2d 406 (1965) merely held that we had no authority to suspend rates which had already gone into effect. That case involved new rates rather than a new practice, and concerned suspension action which the court determined took place after the effective date of the new rates. Here the proposed tariffs have been suspended well in advance of their effective dates.

Alaska Steam is, of course, free to cancel its service at any time upon proper notice, but until it does so it must have lawfully filed tariffs covering such service.[26]

The suspended tariff publications under consideration herein if allowed to become effective would result in the carrying on by Alaska Steam of a service subject to our jurisdiction without having the tariffs on file as required by section 18(a) of the Act and section 2 of the 1933 Act.

The petitions and motions to vacate and stay our orders herein are denied, and an appropriate order will be entered requiring the cancellation of the suspended tariffs herein found to be unlawful.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

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[25] *McCormick S.S. Co.* v. *United States,* while not supporting Alaska Steam's position, does cite the provision of sec. 2 of the 1933 Act, requiring the filing of all rates, fares, and charges on a through route when one has been established with any other carrier by water and interprets it as referring to any arrangement for continuous carriage, whether by joint rates or otherwise. The carrier had discontinued a through service provided by means of joint rates with barge operators. The court observed :

"This through service cannot be continued unless there are filed with the Shipping Board Bureau of the Department of Commerce the schedules of rates not only if joint, but also the ship and the barge rates if the carriage to San Francisco and the on-carriage to Berkeley and Emeryville are by separate rates * * * the continuance of either form of through service without such filings [is] prohibited by the statute * * *."

Such a construction supports our determination that the arrangement whereby Alaska Ferry transports Alaska Steam's containers is a through route with another carrier by water within the meaning of our statutes.

[26] Generally speaking, a change in schedules in the domestic offshore trade may only be made upon 30 days' notice. See *Order That A. H. Bull S.S. Co. Show Cause,* 7 FMC 133 (1965) and cases there cited.

FEDERAL MARITIME COMMISSION

DOCKET No. 67–52

ALASKA STEAMSHIP CO.—CANCELLATION OF FMC PORT-TO-PORT RATES—WEST COAST/ALASKA TRADE

ORDER

This proceeding having been instituted by the Federal Maritime Commission, and the Commission having fully considered the matter and having this day made and entered of record a report containing its findings and conclusions 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 Alaska Steamship Co. shall, within 30 days of the date of service of this order cancel 7th Revised Page No. 1 to FMC–F No. 127, Supplement 3 to FMC–F No. 114, and Supplement Nos. 2 and 3 to FMC–F No. 144.

It is further ordered, That Alaska Steamship Co. shall continue to comply with the tariff filing requirements of section 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933, with respect to the service which was found in the report herein to be subject to the jurisdiction of the Federal Maritime Commission.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 67–48

INTER-AMERICAN FREIGHT CONFERENCE AGREEMENTS NOS. 9648 AND 9649 AND OTHER RELATED AGREEMENTS

Decided February 15, 1968

The Inter-American Freight Conference Agreement as amended, No. 9648–A approved under section 15, Shipping Act, 1916; such approval being limited in duration to a period of 18 months

Donald Macleay and *Harold A. Sakayan* for Delta Steamship Lines, Inc.

Frank J. McConnell and *Benjamin Haller* for Companhia de Navegacao Loide Brazileiro, Cómpanhia de Navegacao Maritima Netumar, and Navegacao Mercantile, S.A.

B. G. Andrews and *Frederick P. Kopp* for Georgia Steamship Corporation.

Ira L. Ewers, *J. R. Ewers*, *W. B. Ewers* and *James F. Dwyer* for Moore-McCormack Lines, Inc.

Seymour H. Kligler for Empresa Lineas Maritimas Argentinas.

Harold E. Mesirow for Booth Steamship Company, Ltd., and Lamport & Holt Line, Ltd.

Elmer C. Maddy, *Baldvin Einarson*, *Thomas K. Roche*, and *Sanford C. Miller* for Brazil/United States-Canada Freight Conference and its member lines.

Thomas F. Kimball, *Gilbert C. Wheat*, and *R. Frederic Fisher* for Westfal-Larsen and Company.

Donald J. Mulvihill and *Walter J. Kenney* for National Coffee Association.

Elroy H. Wolff and *Peter S. Craig* for the Department of Transportation.

Donald J. Brunner, *Paul J. Fitzpatrick*, *Arthur A. Park, Jr.*, and *Frank L. Bartak* 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*):

By an initial decision served December 12, 1967, Examiner Paul D. Page, Jr., approved Agreement No. 9648–A establishing the Inter-American Freight Conference to cover transportation of cargo between U.S. Atlantic and Gulf and ports in Brazil, Uruguay, Argentina, and Paraguay.

Hearing Counsel and the Department of Transportation took exception to the initial decision and replies thereto were filed. These pleadings made it appear that the area of disagreement between the parties could be considerably narrowed if they were given the opportunity to negotiate a stipulation and clarification of issues. Accordingly, on January 17, 1968, we directed the parties to indicate, by appropriate motion or stipulation, those issues as to which there remained an insoluble difference between the parties. They were further directed to state whether an evidentiary hearing was desired and, if so, to further state those matters of disputed fact upon which they desired to adduce evidence and the relevance of those facts to the issues remaining in the proceeding. Responses to that order have been received and the case is now before us for decision.[1]

The issues remaining for decision, and our disposition of them, are best understood in the light of certain background events which culminated in the agreement presently before us for approval.[2]

The Inter-American Freight Conference can be said to have had its inception in Resolution No. 2995 issued by the Brazilian Merchant Marine Commission on May 30, 1967. This resolution, a broad pronouncement of Brazilian maritime policy, developed what has come to be known in this proceeding as the concept of Pan-Americanism. This concept seeks to establish the right of those lines flying the flag of the country of origin or the country of destination to "equality of participation" in the various Brazilian trades. The resolution would reserve to so-called third flag carriers (those flying any flag other than the importing or exporting country) "a percentual participation" to be agreed upon. The resolution further called upon Brazilian flag

[1] In their responses to our order, only two parties requested oral argument. In view of the restricted character of the issues remaining before us and of the completeness and thoroughness of the pleadings filed herein, we see no need for oral argument and we will not put the parties involved to the additional time and expense of holding it.

[2] This background material was largely taken from the exceptions of DOT, the factual accuracy of which was not challenged by any party. The various resolutions, decrees and documents referred to were filed as attachments to DOT's exceptions and again no challenge was made to their authenticity or the accuracy of the translations.

shipowners to convene the other lines in the trade to work out agreements in furtherance of the policy thus announced.

Shortly thereafter, a series of meetings were held among the lines operating between Brazil and the United States and Canada to arrive at an agreement for the pooling of coffee carryings. Agreement failed over a dispute as to the percentage to be allocated to the third flag lines. The national flag lines then resigned from the then-existing conferences and undertook to establish a new conference. About this same time, the President of Brazil issued Decree No. 60.994 which provided that all acts of the Brazilian Executive Power (e.g. the decrees and resolutions later discussed) having "the purpose to protect and regulate the maritime transportation of goods" would apply only to those conferences or agreements to which a Brazilian flag line was a member or a signatory.

Thus, under later decrees and resolutions of the Brazilian Government, any conference formed which did not have a Brazilian flag line as a member or any pooling agreement which did not have a Brazilian line as a signatory would be neither recognized nor sanctioned by the Government of Brazil.

Subsequently, the proposed Inter-American Freight Conference Agreement (No. 9648), a set of so-called Pooling Guidelines (No. 9649) and three pooling agreements covering coffee to U.S. Atlantic ports (9649–A), coffee to U.S. Gulf ports (9649–B), and cocoa to U.S. Atlantic ports (9649–C), were filed with us. A petition for interim approval was denied by us on August 26, 1967, and we issued our order instituting this proceeding on August 31, 1967.[3] A complaint against the signatories of Agreements 9648 and 9649 filed by the third flag lines not parties to the agreements was consolidated with this proceeding.[4]

The third flag lines also filed suit in the U.S. District Court for the Southern District of New York against the signatories of No. 9648 alleging violations of the antitrust laws. There ensued a series of meetings between the third flag lines and the Brazilian authorities the end result of which was, not necessarily in this order: (1) the withdrawal of Agreement 9649 and the related agreements, (2) the dismissal of the complaint in docket No. 67–47 and the substitution of an

[3] That order, among other things, set the proceeding down for hearing. One of the alleged errors of the Examiner was the failure to hold a hearing which, it is urged, violated our order of investigation. The order, of course, intended that such a hearing be held only if it was necessary. The Examiner concluded it was not and, as we shall discuss later, we agree.

[4] The third flag lines had, since August 10, 1967, been unable to carry any cargo from Brazil to this country because of a decree issued by the Brazilian Maritime Commission (No. 3023) which restricted the carriage of Brazilian exports destined to the United States to signatories of Agreement 9648. The complaint of the third flag lines was assigned docket No. 67–47.

amended conference agreement which the Examiner designated No. 9648–A and which the third flag lines all had signed.[5] At the same time, negotiations to establish pools governing the carriage of cargo in the trade continued.

On November 10, 1967, the Brazilian Merchant Marine Commission issued Resolution No. 3131 which *inter alia* establishes the minimum carryings by national flag lines at 65 percent, to be divided equally, and fixes the maximum participation of the third flag lines at 35 percent. Under the resolution, the failure of the lines to enter into agreements effectuating this policy will result in control of shipments by the Brazilian Merchant Marine Commission which then, by unilateral allocation of the cargoes, seeks to insure the minimum participation by the national lines.

Basically, Agreement 9648–A divides the trade into three sections: (*a*) From U.S. Atlantic and Gulf ports to ports in Brazil, Uruguay, Argentina, and Paraguay with headquarters in New York City; (*b*) from ports of Paraguay, Argentina, and Uruguay to U.S. Atlantic and Gulf ports with headquarters in Buenos Aires; and (*c*) from Brazilian ports to U.S. Atlantic and gulf ports with headquarters in Rio de Janeiro. Each section will file separate tariffs. An Executive Administrator is to be appointed for each section with managerial and ministerial duties and responsibilities. The agreement authorizes the fixing of rates, establishes procedures for the conduct of meetings, provides for the admission of new members and creates the machinery for self policing. It specifies an admission fee, provides for loss of voting rights upon cessation of service and allows withdrawal without penalty. Penalties are provided for violation of the agreement. With certain exceptions, discussed below, the agreement is typical of the basic conference agreements now on file with and approved by us.

Discussion and Conclusions

The responses to our order for stipulation and clarification of the issues in this proceeding leave only three major areas of dispute: (1) the embodiment in the agreement of the concept of "Pan-Americanism", (2) the need to amend the agreement so as to grant each member the right to act independently of the conference upon 48 hours' advance notice, and (3) the need for an evidentiary hearing prior to approval of the agreement.

[5] It would also appear that the third flag lines agreed to seek dismissal of their court action. The Examiner granted the motion of complainants to dismiss docket No. 67–47 and no appeal from the Examiner's ruling under Rule 10(m) of our Rules of Practice and Procedure has been filed.

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Pan-Americanism

Article 1, Preamble (b) provides:

All parties to this Agreement recognize that the Pan-American Nations and the Lines of the Pan-American nations associated in this conference have a paramount interest in the development of the foreign commerce of their respective countries and intend to develop their respective merchant marines and services to carry a substantial portion of the foreign commerce of the countries served.

This preamble is objectionable to Hearing Counsel and DOT at least so long as Articles 23 and 24 remain in the agreement.[6] These provide:

ARTICLE 23

Signatories to this agreement acknowledge by affixing their signatures hereto their voluntary acceptance of all principles, terms and conditions of this Conference and understand and agree that membership in this Conference requires that all lines charge, assess and maintain Conference tariff rates in all sections in which they operate, otherwise failure in the part of a member to charge, assess and maintain Conference tariff rates, rules and regulations shall subject them to expulsion in accordance with Article 13.

ARTICLE 24

All parties hereto recognize the authority and regulating powers of the government authorities of the various countries served and will abide by the laws, statutes, regulations and rules of these countries including registration with government authorities where required.

In seeking the deletion of Articles 23 and 24,[7] Hearing Counsel express concern that these articles when tied to Article 1, Preamble (b), would provide an unacceptable precedent for our approval. He points out that we have never approved such a concept and to do so would constitute a dangerous guideline for future agreements. Hearing Counsel pose three questions as to the effect of the agreement should Articles 23 and 24 remain:

[6] In reality, DOT supports Hearing Counsel's proposal for "conditional approval" (discussed *infra*) only if all of Hearing Counsel's modifications to the agreement are adopted. DOT raises only two specific issues in its response to our order: (1) whether we may determine the legality of 9648–A by examining only the agreement itself or whether we must consider also "the facts and circumstances surrounding the agreement, including certain decrees and resolutions of the government of Brazil * * *"; and (2) whether the agreement violates section 15 because its interaction with those decrees and resolutions "precludes all outside competition" and "prevents free conference exit and entry". In a similar vein, Delta Steamship Lines, although it remains a signatory to 9648–A, and advocates in principle at least the need for a conference in the trade, nevertheless supports the proposal of Hearing Counsel. Thus, these parties object to the specific provisions of the agreement largely through their support of Hearing Counsel. For the sake of brevity, we shall, except where necessary for clarity, refer to the objections as being only those of Hearing Counsel.

[7] Hearing Counsel originally sought the deletion of Preamble (b) but would settle for the removal of Articles 23 and 24.

1. Would any member line be relinquishing its right to future negotiations to any terms and conditions of the agreement?

2. Would any member line be relinquishing its right to appeal any condition that might develop in the future on some action not considered when the agreement was executed?

3. Would any member be relinquishing its right to appeal any quota or condition set up by any pooling agreement?

First, our approval of the agreement with or without the preamble or Articles 23 and 24 is not intended as an expression of opinion on the concept of Pan-Americanism. The preamble is at most a neutral provision. It grants no authority, denies no rights and imposes no substantive duties. It merely calls upon the members, primarily it would appear, those flying "third flags", to recognize what could well be termed a fact of life. The Government of Brazil has made abundantly clear by the decrees and resolutions already referred to its intention to develop is foreign commerce and a merchant marine capable of carrying a substantial portion of it; and certainly, the United States has unequivocally stated as its policy that:

> It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times * * *. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine. (Section 10-, Merchant Marine Act 1936.)

Little difference can be found in the "policies" of the two countries. Hearing Counsel would differentiate between Preamble (b) and section 101 of the Merchant Marine Act of 1936 by pointing out that section 101, (a) is a statement of governmental policy and not an agreement between carriers; (b) has not been implemented by any discriminatory decrees or resolutions; and (c) is implemented by a construction and operating differential subsidy rather than through depriving competitors of cargo. We think it clear that Hearing Counsel's concern here is not with this agreement but with the actions of Brazil. As we shall discuss in detail later, the manner in which each country seeks to effectuate its policy may well be another matter and one which, in our view, is not properly in issue here. We are not cited to nor can we find anything in section 15 or any other provision of the Shipping Act which would render unlawful an agreement between carriers operating between two countries to "recognize" the publicly announced policies of those countries. Certainly, the deletion of the preamble or Articles 23 and 24 would not of itself alter or change the policies of the countries involved.

Secondly, we do not share Hearing Counsel's fears about Articles 23 and 24. We answer Hearing Counsel's queries concerning them in the negative. Article 23 pledges the signatories' voluntary acceptance of the principles, terms and conditions of the Conference, while Article 24 embodies the signatories' recognition of "the authority and regulating powers of the government authorities of the various countries served" and requires the parties to abide by the "laws, statutes, regulations and rules" of those countries.

Under Article 23, Hearing Counsel are obviously concerned with the voluntary acceptance of the "principle" of Pan-Americanism. We have just indicated our view on the impact of the preamble which injects Pan-Americanism into the agreement.

We do not read Article 23 as altering the provisions of Preamble (b) which merely calls for "recognition" of the interests of the Pan-American nations and their national flag lines. Article 23, as we construe and would approve it, does not bind the members to any positive action in futherance of Pan Americanism. It may be the duty of the national flag lines to foster this principle or concept but that duty does not arise from the provisions of Agreement 9648-A.

As for Article 24, we do not construe a naked agreement to abide by the laws of a country as any form of waiver of the right of a party to appeal or petition for redress. Such a construction would violate some very fundamental principles of notice, justice and fair play adhered to by all of the countries within the trades covered by the agreement. Should any such construction be attempted, this Commission has the continuing power under section 15 to alter or modify the agreement and would, of course, exercise it. We will not require the deletion of Articles 23 and 24 as a condition of our approval.

The Right of Independent Action

Article 5 of the Agreement now provides:

Each section shall issue separate freight tariffs establishing and maintaining fair and reasonable rates which shall be fixed where conditions permit equally on the same commodities.

Hearing Counsel would amend the article by adding the following:

The parties hereto agree, however, that each party has the right to alter for itself any rates, charges, classification, or related tariff matter previously agreed upon or theretofore in force which would result in a decreased cost to a shipper upon first giving the other parties at least forty-eight hours advance notice thereof. Any such altered rate, charge, classification, or related tariff matter resulting in a decreased cost to a shipper shall not become effective prior to publication and filing with the Federal Maritime Commission.

Hearing Counsel's purpose in urging the inclusion of an independent action clause is "to preserve a degree of competition within the conference where by virtue of Brazilian decrees, competition outside the conference is absolutely foreclosed." The opponents of the clause (all the parties to the agreement except Delta) urge that the inclusion of such a right of independent action would render the Conference a nullity. Hearing Counsel counter this argument by pointing to 19 other agreements which contain similar clauses. Hearing Counsel point out that out of these agreements, there has been in the last two years only one instance by one line of an exercise of the right of independent action.

Section 15 provides only that:

> No * * * agreement shall be approved * * * (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action.

Here, it is clear that Hearing Counsel's basic reason for urging the independent action clause concerns not this agreement itself but rather the decrees and resolutions of the Brazilian Government, particularly No. 3023 which reserves Brazilian exports to members of the Conference thereby eliminating outside competition. Thus, it is the decree and not the agreement before us that brings about the condition deplored by Hearing Counsel. But just as Hearing Counsel urge that inclusion of their independent action clause would not create a novel situation, neither would the omission of such clause be a novelty in this trade.

On October 13, 1960, the Brazilian Government's Superintendent of money and credit issued a decree known as SUMOC 202 which provided in pertinent part:

> 1. Brazilian export products with destination United States of America or Canada will be transported exclusively by shipping companies which are members of the Brazil/United States Freight Conference.
>
> 2. In the case of products which transportation is regulated by specific accords or agreements between member lines of the conference signed under the auspices of the above conference and not rejected by the Brazilian authorities, loading of these products will be effected exclusively on vessels of those shipping companies that are signatories to said agreements.[8]

Thus, as early as 1960, competition outside the Conference in the Brazilian trade has been "precluded" by governmental decree. We are aware of no carrier which applied for entry into the Conference and

[8] See *Nopal* v. *Moore-McCormack Lines, Inc.*, 8 F.M.C. 213 (1964).

was denied; nor are we aware of any shipper complaints of lack of service.[9]

Inclusion of an independent action clause will not, of course, create any "outside" competition. As for competition within the Conference, Agreement 9648–A provides for as much as most other conference agreements. The agreement itself still allows for service competition within the Conference, for the agreement imposes no quotas and allocates no cargo. Should the agreement at some future time because of its "interaction" with the Brazilian Resolutions 3023 and 3131 or because of other agreements filed with us become the vehicle for distributing specific shares of the total Brazil-United States shipping trade among the members of the Inter-American Freight Conference, that will be the time to reexamine our approval in the light of any such developments. It is sufficient here to point out that no attempt at such a utilization of the conference is provided for in the agreement and thus is not before us now. When the air is cleared of these eventualities, there remains only Agreement 9648–A which is, as we have already pointed out, of a kind we have readily approved in the past, and we see no reason for withholding our approval here.

The Need for an Evidentiary Hearing

Hearing Counsel, DOT, and Delta all urge that an evidentiary hearing is required either before approval or after "conditional" approval of Agreement 9648A. The suggested "compromise" to outright approval under section 15 urged only on the condition that we approve the agreement, as Hearing Counsel would modify it, further urges that we have an evidentiary hearing after "conditional" approval.[10]

The areas into which Hearing Counsel, DOT, and Delta would have an evidentiary hearing to probe are:

1. The existence of malpractices in the trade covered by the agreement.
2. The effects of the various decrees and resolutions of the Brazilian Government upon the agreement; and
3. Whether the agreement represents the full and complete agreement of the parties.

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[9] This sets aside, of course, the situation dealt with in the *Nopal* case, *supra*.

[10] In approving any agreement under section 15, we must find that the agreement is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports or between exporters of the United States and their foreign competitors; that it is not detrimental to the commerce of the United States or contrary to the public interest, and that it is not otherwise in violation of the Shipping Act. Either an evidentiary hearing is necessary to make these findings or it is not needed at all. The suggested compromise would appear to urge us to grant our approval to the agreement and then have a hearing to determine whether our approval was proper.

While it is clear that the parties desire to adduce evidence on these issues, it is less than clear what the parties consider the relevancy and materiality of this evidence to the only issue before us in this proceeding—the approval of Agreement 9648–A.

Whether or not actual malpractices in the trade can be proved in a hearing, the short summary of background to this agreement already given clearly indicates the need for the restoration of some form of order and stability in the trade. Indeed, Hearing Counsel, in suggesting the compromise of a "conditional" approval, urge that immediate approval may bring "stability to a trade beset by controversy".

Running throughout the arguments of Hearing Counsel, DOT, and Delta has been the consistent assertion that we may not approve Agreement 9648 without considering its interaction with the various decrees and resolutions, of the Brazilian Governments and any proposed pooling agreements which would further effectuate those decrees and resolutions. It is, of course, impossible to deny the existence of the decrees and resolutions and in granting our approval here, we have carefully considered the consequences of that approval in the light of them. This is quite different from accepting the assertion that the very existence of these decrees and resolutions preclude any approval under section 15. Resolution No. 3131 quite clearly provides that, absent a conference agreement, the Government of Brazil may, and undoubtedly would, unilaterally allocate the shipments in the trade to assure at least the minimum participation of the national flag lines. Our approval of the agreement here in no way affects the power of the Government of Brazil to do this. To withhold our approval under such circumstances would be to ignore the realities of the present posture of the trade. And again, we would point out that the agreement we are here approving of itself does not acomplish the deplored restrictions on competition and allegedly discriminatory allocations.

In a similar approach, DOT would have the Conference come forward with evidence as to whether there are in fact any malpractices in the trade. To DOT, this is necessary to show the agreement is necessary "to eliminate or remedy conditions which preclude or hinder the achievement of the regulatory purposes of the Shipping Act," citing our decision in the *Mediterranean Pools Investigation*, 9 F.M.C. 264, 290 (1966). It is apparently DOT's position that, absent any showing of actual malpractices, there would be no justification for approval of the agreement and therefore to approve it, would be contrary to the public interest.

We are faced here with balancing the public interest in the fostering of free and open competition in furtherance of the antitrust policies with the interest of the public in stability and predictability of rates and the orderly conduct of our foreign commerce. Whatever may be necessary to "justify" approval of a pooling or other agreement, we think that the need for a conference in this trade is beyond dispute. Indeed, nobody seriously disputes that need. In this instance, competition, be it within or without the Conference, must give way to the restoration of order and stability. There is no necessity for an evidentiary hearing to establish the "need" for a conference in this trade and we will not order one. DOT urges that an evidentiary hearing is necessary to determine the "relationships between the unfiled October 28 agreements * * * and the conference agreement." The agreements referred to are attached as an exhibit to the exceptions filed by DOT. They consist of two pools to govern the carriage of green coffee in the trade and a number of individual agreements whereby each of the third flag lines agree to seek dismissal of their complaints here and in court. Evidence is needed here, we are told, to determine whether we have before us "in the conference agreement a true and complete memorandum of the agreement among the parties". The flaw in this argument is obvious but quite difficult to state.

DOT does not assert that the Conference agreement is not a self-contained document. Agreement 9648–A has all the provisions required by the Shipping Act and all the provisions generally considered advisable to establish a workable conference. To hold that the existence of other agreements, already filed or to be filed, renders the Conference agreement less than complete, implies at least that once having entered into one agreement, the parties thereto may never have another without placing themselves in violation of section 15 for having on file something less than a true and complete memorandum of their agreement, or that different matters may not be made the subject of separate agreements. Agreement 9648–A is, so far as we are aware, the true and complete agreement insofar as the establishment of a conference is concerned. As we have already indicated, if and when other agreements are filed, we shall take whatever action then becomes necessary.

In short, even assuming that no malpractices may be proved and recognizing the existence of the various decrees and resolutions and in admitting the possibility of further agreements in effectuation of Pan-Americanism, we do not agree that an evidentiary hearing would produce anything relevant or material to our decision here.

Finally, and at the risk of stating the obvious, we would make clear that by approving Agreement 9648, we are not in any respect relinquishing our regulatory control over the trade nor do we intend to relax our surveillance of future events occuring therein. Accordingly, and for these reasons set forth herein, we find and conclude that Agreement 9648–A as set forth in the Appendix hereto, meets the standards of section 15 and should be approved. However, because this trade is one in which relatively short periods of time can produce significant changes in circumstances, we will limit the approval we are granting here to a duration of 18 months from the date of service of this order. The purpose of this limitation is twofold, in addition to granting the parties an opportunity to restore order to the trade, it allows them to demonstrate that the conference, once established, will operate to the benefit of the shipping public. If the parties request continuation of the agreement beyond this period, we will at an appropriate time take whatever action is necessary. An appropriate order will be issued.

(SEAL) (Signed) THOMAS LISI,
Secretary.

APPENDIX

INTER-AMERICAN FREIGHT CONFERENCE AGREEMENT

ARTICLE 1

Preamble (a)

In consideration of the benefits, advantages and privileges to be severally and collectively derived from this Agreement, the parties hereto, common carriers by water, will co-operate in the promotion and development of the foreign commerce of the United States of America, Brazil, Argentina, Uruguay and Paraguay, through establishment of regular, dependable ocean transportation.

Preamble (b)

All parties to this Agreement recognize that the Pan-American Nations and the Lines of the Pan-American Nations associated in this Conference have a paramount interest in the development of the foregin commerce of their respective countries and intend to develop their respective merchant marines and services to carry a substantial portion of the foreign commerce of the countries served.

ARTICLE 2

Scope

This Agreement will govern the transportation of cargo between the Atlantic and Gulf of Mexico ports of the United States of Amercia and the ports of Brazil, Uruguay, Argentina and Paraguay.

ARTICLE 3

Division of Conference

To accomplish the aims and purposees of the Agreement the parties hereto associate themselves in an Agreement to be known as the Inter-American Freight Conference, which shall be divided into three (3) sections:

"A" U.S. Atlantic and Gulf, Brazil, Uruguay, Argentina, Paraguay Section.

"B" Paraguay, Argentina, Uruguay, U.S. Atlantic and Gulf Section.

"C" Brazil, U.S. Atlantic and Gulf Section.

ARTICLE 4

Definition of Sections

Under the terms of this Agreement, the following defines the Sections established:

Section A.—From U.S. Atlantic and Gulf ports to ports in Brazil, Uruguay, Argentina and Paraguay with headquarters in New York City.

Section B.—From ports of Paraguay, Argentina and Uruguay to U.S. Atlantic and Gulf ports with headquarters in Buenos Aires.

Section C.—From Brazilian ports to U.S. Atlantic and Gulf ports with headquarters in Rio de Janeiro.

Any member line of this Conference Agreement must be a member of the above Sections of the Conference in which it operates.

ARTICLE 5

Separate Tariffs for Each Section

Each Section shall issue separate freight tariffs establishing and maintaining fair and reasonable rates which shall be fixed where conditions permit equally on the same commodities.

ARTICLE 6(a)

Board of Directors

A Board of Directors shall be elected by two-thirds of the active member lines in each Section of the Conference to govern, direct and manage each Section through an Executive Administrator, appointed by the parties of each Section. The Executive Administrator shall not be financially interested in or employed by or in any way connected with any member line or agent or any representative thereof. The Executive Administrator will be subordinate to the Board of Directors of each Section and have duties and responsibilities as outlined in this Agreement.

The Board of Directors shall be composed of five members, of which at least three must be representatives of Pan-American Lines who are members of each Section of this Conference.

The Board of Directors shall elect a Chairman and Vice-Chairman from its members in each Section to serve for a period of one year.

The Board of Directors of each Section shall meet as circumstances and conditions warrant, but at least once a month.

The Board of Directors of each Section shall have authority to increase the number of Directors as circumstances warrant.

ARTICLE 6(b)

Headquarters of the Conference Sections

The office of the Executive Administrator of Section "A" shall be in New York.

The office of the Executive Administrator of Section "B" shall be in Buenos Aires.

The office of the Executive Administrator of Section "C" shall be in Rio de Janeiro.

ARTICLE 6(c)

Responsibilities of the Executive Administrator

The Executive Administrator will act in accordance with instructions of the Board of Directors and Conference members of his respective Section; his responsibilities and duties shall include but not be limited to the following:

(1) The Executive Administrator shall act at all times in the best interest of all lines in conformity with the principles of the Conference Agreement.

(2) Administer, manage and supervise all Conference matters and activities in his Section by direction.

(3) Act as reporting and filing agent with respective government authorities wherever required.

(4) Handle shipper and other complaints and report when required to proper government authorities.

(5) Act as liaison in all matters involving malpractices with the Screening Committee and Neutral Body.

(6) Represent his respective Section of the Conference when authorized in all matters as directed.

(7) Attend and act as secretary at all Board of Directors' and Principals' meetings.

(8) Prepare and submit for the approval of the Board of Directors an annual budget and a quarterly financial statement.

(9) Conduct and preside at all Conference meetings of his Section, except Principals' meetings.

(10) Supervise and maintain current status of Conference tariffs of his respective Section.

(11) The Executive Administrator shall be assigned other responsibilities and duties as directed by the Board of Directors and members of each respective Conference Section as circumstances or conditions warrant.

ARTICLE 6(d)

Prinicpals' Meetings

Principals shall meet as circumstances and conditions warrant, and shall elect one of their members to be chairman of their meetings. Principals are authorized to discuss and agree upon any matters within the scope of this Agreement.

ARTICLE 7

Establishment of Rates

Subject to applicable provisions of law of the countries served, each Section of the Conference is authorized to:

(1) Agree upon and establish rates and charges for the carriage of cargo. Rates and contract conditions established shall be made a part of the Section of the Conference records and filed with the respective Government authorities wherever required, provided that any contract/non-contract rate systems as may be adopted by the Section are subject to prior approval by the Government Agencies with jurisdiction and shall be made part of the respective tariffs.

(2) Declare rates for specified commodities to be "open" with or without agreed minimums, and thereafter declare the rates for such commodities to be "closed".

(3) Agree upon and establish tariffs, tariff amendments and supplements.

(4) Make rules and regulations for the handling and carriage of cargo.

(5) Provide for use of contract/non-contract rate systems.

(6) Agree on amounts of brokerage and conditions for payment of brokerage as permitted by applicable law and in accordance with applicable tariff provisions.

(7) Keep such records and statistics as may be required by the parties or deemed helpful to their interests.

ARTICLE 8

Discounts, Refunds, Absorptions

There shall be no discount, payment or return of any description directly or indirectly to any shipper, contractor, consignee, receiver of cargo or any other person or company, except brokerage or commission to duly authorized agents or representatives of member lines by any of the parties hereto, their agents, associates, subsidiary or parent companies. There shall be no payment, refund or absorption at loading or discharging ports of rail or coastal steamer freight, lighterage, trucking or other charges, directly or indirectly, by any of the parties hereto, except as may otherwise be agreed and shown in the respective Section tariff.

ARTICLE 9(a)

Voting

The member lines of any Section shall consider and pass upon any matter or thing within the scope of this Agreement at any meeting of a Section provided that notice in writing, descriptive of the matter to be considered, has been given each party thereto by the respective Executive Administrator not later than 4 P.M. of the third working day prior to the date of meeting; however, if all Section members are in unanimous agreement, a meeting may be scheduled and held with less than three working days' notice. A meeting shall be called by the Executive Administrator at the request of any member line. If all of the parties thereto are present at any meeting and all agree to waive the notice, action may be taken on any matter within the scope of this Agreement without prior notice thereof. Any matter or thing properly brought before the meeting and agreed to by two-thirds (2/3) of the parties of the Section involved unless otherwise provided in this Agreement shall hereby become an agreement binding upon all the parties of that Section, with the same force and effect as if expressly made part of this Agreement, however, in no case shall the number of votes be less than one-half of the number of active Section members entitled to vote. A quorum in any Section of the Conference shall consist of two-thirds of the active members present and with voting rights.

ARTICLE 9(b)

Telephone Voting

In addition to taking action at meetings, action may be taken by telephone poll of the members, conducted by the Executive Administrator. Any action voted on by telephone poll shall require, in order to be adopted, the unanimous affirmative vote of those members entitled to vote under the provisions of this article and if so adopted shall be binding on all members. The results of each telephone poll will be made known to all members. Any matter failing to receive unanimous affirmative vote by telephone poll shall be referred to the members at the next meeting for further consideration.

ARTICLE 10

Sailing Requirements

Failure to have a sailing to the territory within applicable sections of this Agreement for the period of ninety (90) days shall be regarded as suspension of service from that section and members whose services have been thus suspended shall have no right to vote on any matters within that section of the Conference Agreement until such service has been resumed; provided, however, that suspension of voting rights shall not be regarded as expulsion from the Conference, and the restoration of voting rights shall not be regarded as admission or re-admission to membership in the Conference. Notice of any suspension or reinstatement of a member line will be furnished promptly to the respective government authorities wherever required.

ARTICLE 11

Admission

Any common carrier by water, which has been regularly engaged as a common carrier in the trade covered by this Agreement, or which furnishes evidence of ability and intention in good faith to institute and maintain such a common carrier service between ports within the scope of this Agreement, and which recognizes and agrees in good faith to abide by all the terms and conditions of this Agreement, may hereafter become a party to this Agreement by affixing its signature thereto and shall pay two thousand five hundred dollars (US$2,500) as an admission fee which is not refundable. Every application for membership shall be acted upon promptly. No carrier which has complied with the conditions set forth in this paragraph shall be denied admission or re-admission to membership.

Prompt notice of admission to membership shall be furnished to the respective Government authorities of the countries served and no admission shall be effective prior to the postmark date of such notice. Advice of any denial of admission to membership, together with a complete statement of the reasons therefor, shall be furnished promptly to the respective Government authorities *of the countries* served.

ARTICLE 12

Withdrawal

Any member may withdraw from a Section of the Conference in which it is a member without penalty by giving the *Section* at least thirty (30) days' written notice of intention to withdraw; provided, however, that action taken by the *Section* to compel the payment of outstanding financial obligations by the resigning member shall not be construed as a penalty for withdrawal. Notice of withdrawal of any member shall be furnished promptly to the respective Government authorities of the countries served.

Any party hereto, who shall have given notice of withdrawal as provided above shall not, after such notice shall have been given, be entitled to vote on any matter within the scope of the *Section* which shall continue in effect after the date when such party's withdrawal shall have become effective.

ARTICLE 13

Expulsion

No member may be expelled against its will from *a Section*, except for failure to maintain a common carrier service between the ports within the scope of this Agreement or for failure to abide by the terms and conditions of this Agreement. No expulsion shall become effective until a detailed statement setting forth the reason or reasons therefor has been furnished the expelled member and a copy of the statement submitted to the respective government authorities of the countries served.

ARTICLE 14

Neutral Body Agreement—Self-Policing

(a) Each Section, jointly or separately, shall promptly retain the services as a Neutral Body of such individual or firm as may be elected by a majority of all of the active members of the Section or Sections. The term "active member" is hereby defined to mean and include all of the parties hereto whose *voting* rights shall not, at the date when the respective vote is taken, be suspended pursuant to the provisions of Article 10 of this Agreement, and whose right to vote shall not, at the said date, have ended pursuant to the provisions of Article 12 of this Agreement. In the event that such a person or firm shall cease to act as the Neutral Body, the Section or Sections shall, by similar procedure, choose a successor or successors.

(b) In order to qualify to be elected and retained, the Neutral Body shall have no financial interest in any member line and shall not be in the employment of or under retainer thereto at the time of appointment as Neutral Body or at any time while acting in that capacity. Any person or firm who may be employed by the Neutral Body as authorized in Article 14(g) shall conform to the standards of neutrality applicable to the Neutral Body as defined in this Article and shall so certify to the Neutral Body. Each notice of a determination pursuant to Article 14(j) shall contain a certification by the Neutral Body that, throughout the period of investigation and determination, the Neutral Body qualified for election and retainer as aforesaid.

(c) The Neutral Body shall investigate all complaints made to it charging breach by any party of any term, condition, undertaking, or provision of this Agreement, and shall determine whether such breach has occurred; provided, however, that no complaint shall be considered and dealt with in accordance with this Agreement unless it shall have been delivered to the Neutral Body on or before (I) the date which shall be one year after the date of the occurrence of matters complained of, or (II) the effective date of the withdrawal of the party complained of *from this Agreement and membership in any Sections or section of the Conference, whichever of* said dates shall earlier occur.

(d) All complaints charging breach by any party of any term, condition, undertaking or provision of this Agreement shall be addressed to the Executive Administrator of the Section where the complaint originated, who shall refer such complaints to a Screening Committee composed of three member lines of that section of the Conference who shall be elected by the members of that section on a rotating basis for one (1) year; provided, however, if members of the screening committee shall be involved in a complaint, either as the party making the complaint, or accused therein of breach of the Conference Agreement, any such member or members shall be disqualified to consider such complaint, and in its or their stead, and for the purpose of considering the particular complaint only, there shall be elected to replace the disqualified line or lines by the Section on a rotating basis member line or lines not so involved. The Screening Committee shall, within thirty (30) days after receipt thereof, by a majority vote of its members, refer to the Neutral Body for investigation and determination complaints indicating a breach of the Conference Agreement. Complaints not referred to the Neutral Body by the Screening Committee shall through the Executive Administrator be returned to the complaining member, together with a statement of the reasons for their return.

(e) In no event shall the Executive Administrator, the Screening Committee or the Neutral Body disclose the fact that a complaint has been made or the identity of the complainant, the accused party or any other person involved, except in making the communications involved in this Article 14 or in response to legal process.

(f) All disbursements incurred by the Executive Administrator or the Screening

Committee in the performance of their functions under this Article shall be reimbursed by the *appropriate* Section.

(g) In making investigations and determinations herein above specified, the Neutral Body shall be authorized, at its discretion, to engage lawyers, experts, accountants and agents, and they or any of them shall be authorized, at any reasonable time or at any place in the world, to inspect and copy such documents, papers or records, or parts thereof, of any of the parties hereto, that at his or their discretion may be deemed relevant to the matter under investigation or determination; and the parties hereto agree that they will make their books, records and documents of the Sections, accessible to inspection and copying at all reasonable hours by the Neutral Body and any persons engaged by it in pursuance of its authority and in the performance of its duties hereunder. The member lines shall, within a reasonable time after the effective date of this Agreement or, in the case of lines which shall become members after said effective date, upon subscribing to a counterpart of the Conference Agreement, furnish to the appropriate Section commitments from their agents, sub-agents and/or companies affiliated with such agents and/or sub-agents, including stevedoring and forwarding affiliates, over which the respective signatories exercise control, authorizing the Neutral Body to investigate, inspect or copy any of their pertinent records or documents wherever located, required for the proper carrying out of any investigation provided for in this Agreement.

(h) The Neutral Body shall give to any party charged with a breach of the Conference Agreement reasonable notice of the charge and opportunity to adduce evidence and make arguments, orally or in writing, by itself or by counsel in its own behalf. Any party charged with such breach shall, before a determination that it has committed such breach, be given an opportunity to examine copies of documents received by the Neutral Body as evidence supporting the charge, and shall be informed of the substance of all testimony supporting the charge; provided that such examination and such information shall not disclose the identity of the complainant.

(i) The Neutral Body may, at its discretion, conduct a hearing on any charge of breach of the Conference Agreement, but, in conducting such a hearing, shall not be limited by the rules of procedure and evidence of any jurisdiction or court. The Neutral Body shall consider all evidence which it deems well founded, trustworthy and probative of the issue before it and, without any rules as to the burden of proof or the amount of proof necessary to reach a determination, shall determine whether or not the party charged has committed a breach of the Conference Agreement.

(j) Promptly upon determining whether or not there has been a breach of the Conference Agreement, the Neutral Body shall give written notice of its determination to each of the member lines; provided, however, that neither in such notice nor otherwise shall the Neutral Body disclose the identity of any complainants. In the event that the determination is that a party has committed such a breach, the notice shall set forth the sum to be paid by such party as liquidated damages for violation of the Conference Agreement computed as follows:

(i) For the first violation, either (a) if the transaction which constituted the violation did not involve the collection of freight money on ascertainable shipments by the party which committed the breach, an amount commensurate with the seriousness of the breach, to be determined by the Neutral Body, but in no event more than ten thousand dollars United States currency

(US$10,000), or (b) if the transaction which constituted the violation did involve the collection of freight money, the amount of such freight money, if such freight shall have been received in United States currency, otherwise the equivalent in United States currency at the date of receipt of the freight received.

(ii) For the second violation either (a) fifteen thousand dollars United States currency (US$15,000) or (b) the amount of freight money, if any, received by such party, if such freight shall have been received in United States currency, otherwise the equivalent in United States currency at the date of receipt of the freight received, whichever (a) or (b) shall be the greater sum;

(iii) For the third violation either (a) twenty thousand dollars United States currency (US$20,000) or (b) the amount of freight money, if any, received by such party, if such freight shall have been received in United States currency, otherwise the equivalent in United States currency at the date of receipt of the freight received, whichever (a) or (b) shall be the greater sum;

(iv) For the fourth violation, and each subsequent violation, either (a) twenty-five thousand dollars United States currency (US$25,000) or (b) the amount of freight money, if any, received by such party, if such freight shall have been received in United States currency, otherwise the equivalent in United States currency at the date of receipt of the freight received, whichever (a) or (b) shall be the greater sum.

Such notification shall also contain a statement of the fee of the Neutral Body for the conduct of the investigation and/or determination, and of all its disbursements incurred in connection therewith. If the determination is that such breach has been committed, the party which shall be determined to have committed same shall promptly pay to the Neutral Body the amount of its fee and disbursements, and also shall pay to the appropriate Section the amount assessed as herein above provided; but if the determination shall be that no such breach has been committed, the party which made the complaint shall promptly pay to the Neutral Body the amount of its fee and disbursements.

(k) In the event that the Neutral Body shall have determined that any party has committed a malpractice and shall assess liquidated damages, costs and expenses (hereinafter the "assessment") against the party and in the event that the party shall duly have promptly paid to the appropriate Section the amount of such assessment, the party shall have the right, by written notice delivered or mailed to the Executive Administrator at the time of making such payment, which shall state the name and address of the arbitrator selected by the party, to call for an arbitration, pursuant to the Arbitration Law of the State of New York and under the Rules of the American Arbitration Association, to determine whether the Neutral Body and its agents, lawyers, experts and others who shall have acted for it (hereinafter, "representatives") shall have been qualified to act as such pursuant to Article 14(b) hereof, shall have performed their duties with respect to the complaint and the assessment in accordance with the provisions of this Agreement and the regulations and resolutions adopted pursuant thereto and shall have accorded to the party all the rights and privileges with respect to the complaint and the prosecution thereof of which a party is assured by the terms of this Agreement and of any rules or regulations which the parties may adopt pursuant to this Agreement.

If a party makes such payment and calls for such arbitration, the Executive

Administrator shall hold the amount paid in a separate account to be disposed of as hereinafter set forth.

If the arbitration shall result in an award answering said questions in the affirmative, then the right of the party to challenge further the liquidated damages, costs and expenses assessed against it in accordance with the provisions of this Agreement shall cease and come to an end; and the Executive Administrator shall apply all sums received as prescribed by Article 14(j) after defraying therefrom the costs and expenses of investigation and adjudication by the Neutral Body.

If the award of the arbitrators shall answer said questions or any of them in the negative, then the arbitrators in their award shall specify the respects in which the Neutral Body or its representatives shall not have been qualified to act or in which the Neutral Body or its representatives shall have failed or omitted to act in accordance with the provisions of this Agreement and the regulations and resolutions adopted pursuant thereto and/or the respect in which they shall have failed or omitted to accord to the party all of the rights and privileges with respect to the complaint and the prosecution thereof of which the party is assured by the terms of this Agreement and of said regulations and resolutions. In such case the matter shall be remanded to the Neutral Body or its successor if the arbitrators shall have found that the Neutral Body did not throughout its investigation and determination possess the qualifications specified in Article 14(b) with instructions to pass upon the complaint anew in complete accordance with the provisions of this Agreement and said regulations and resolutions and in connection therewith to accord to the party all of the rights and privileges with respect to the complaint and the prosecution thereof of which the party was deprived as found by said award. If after the reconsideration by the Neutral Body pursuant to the award of the arbitrators the Neutral Body shall make against the party an assessment which is other than the amounts previously assessed, the party shall make such further payment to the Section or the Section shall make such refund to the party as shall adjust the amount of the assessment theretofore paid by the party to the amount ultimately determined by the Neutral Body.

After effect shall have been given to adjustment, if any, in the amount of Decided Liabilities in accordance with the foregoing provisions of this Article, the Executive Administrator shall apply all sums as prescribed in Article 14(j) which he shall not have been required by the foregoing terms to refund to the party after defraying therefrom the expenses of the investigation and adjudication by the Neutral Body.

If the party shall call for arbitration as aforesaid, the Executive Administrator shall promptly deliver a copy of said call to the Neutral Body and an arbitrator shall be chosen by the Neutral Body within ten days after the receipt by the Executive Administrator of the Call for arbitration. The Neutral Body shall promptly give notice in writing to the Executive Administrator and the party setting forth the name and address of the arbitrator thus chosen by the Neutral Body. The two arbitrators selected as aforesaid shall thereupon elect a third arbitrator, or if said two arbitrators are unable within ten days after their appointment to agree upon the selection of the third arbitrator, then the third arbitrator shall be such person as shall be selected by the American Arbitration Association. The award of said arbitrators shall be determined by a vote of a majority of the arbitrators. The parties agree to accept and abide by said award. If the award of the arbitrators shall answer the questions submitted to them

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in the affirmative, then the party shall pay all of the costs of arbitration. If the arbitrators shall answer some or all of the questions submitted to them in the negative, then the costs of the arbitration shall be borne equally by all parties other than the party against which the complaint is lodged.

(l) The Section shall apply all sums received as liquidated damages hereunder so as to reduce *pro tanto* the assessments for the maintenance of the Section levied upon all parties hereto, except the party which shall have paid the respective liquidated damages.

(m) The parties recognize that when any one of them shall by a breach of this Conference Agreement obtain any cargoes for transportation, such party so obtaining the cargo will inflict upon the other parties damages amounting to at least the amount of the freight collected by the party which shall have committed the breach and will, in addition, inflict further damages by the impairment of the stability of the Conference rate structure; and that successive breaches will inflict increasingly great damages because of the increasingly great impairment of such stability. The parties likewise recognize that in the case of breaches of the Conference Agreement which do not directly involve the transportation of cargoes, similar cumulative impairment and damage will occur. The parties agree that the amount of the damages resulting from such impairment will be difficult, if not impossible, of ascertainment, and accordingly they agree that the amounts to be assessed by the Neutral Body as aforesaid will be and shall be interpreted as liquidated damages and not as penalties.

ARTICLE 15

Responsibility of Lines for Acts of Agents

The act of any agent, sub-agent, subsidiary or associate company of any party hereto, or of any company which is a subsidiary of or affiliated with any such agent or sub-agent, or of any company furnishing stevedoring, lighterage, terminal or other kindred services to any of the foregoing, over which a party to this Agreement exercises control, which violates the Conference Agreement, shall be considered and dealt with pursuant to Article 14 hereof as a breach of said Agreement by said party, and such party shall be fully responsible for the payment of any liquidated damages and/or fees and/or disbursements of the Neutral Body in accordance therewith.

ARTICLE 16

Tariff Committee

Each Section of the Conference shall appoint from among its members a Tariff Committee. Each of such Committees shall consider and recommend for adoption and agreement by the members of the respective Section of the Conference schedules of tariff rates and charges to be charged and collected for the transportation of merchandise between the ports comprised in such section, brokerage and other transportation regulations; and provided that notice of the matter to be considered at any meeting has been given to the members of the Section concerned by the Executive Administrator, as provided in Article 9 hereof, the members of the Section concerned shall be bound by the agreement of two-thirds (⅔) of their number entitled to vote as to any tariff rate, rule or regulation, with the same force and effect as if expressly made a part hereof.

ARTICLE 17

Posting of Bonds, Administration, Security, and Custody Thereof

To secure the payment of any award which may be entered in any arbitration proceedings, as hereinafter provided, parties to this Agreement shall, at or before the time they sign this Agreement, deposit through the Executive Administrator in New York in such bank or trust company as may be designated by two-thirds of the parties hereto, the sum of ten thousand dollars (US$10,000) in cash or the equivalent at market value in government, state or municipal bonds or other bonds as may be approved by the Conference or deliver to the Executive Administrator an irrevocable letter of credit as a guaranty of prompt payment. Such bank or trust company shall undertake, if money be deposited, to issue and deliver to the Executive Administrator certificates of deposit therefore payable to the depositing party or order, and/or if bonds be deposited, to execute and deliver to the Executive Administrator and the depositing party trust receipts wherein said bank or trust company shall agree to hold said bonds to the depositing party on the conditions:

(a) That it will return said bonds to the depositing party on written order of the Executive Administrator;

(b) That it will, on the filing with it by the Executive Administrator of the certified copy of any judgment or award against the depositing party, sell in the open market the bonds deposited and will pay the money realized therefrom to the Executive Administrator provided, however, that if the judgment is less than the market value of the total of the bonds deposited, said bank or trust company shall sell only such part of said bonds as shall be necessary to realize the amount of such judgment.

The interest accruing on said bonds shall be collected by said bank or trust company as same becomes due, and with the interest accruing from the certificates of deposit, shall be paid direct to the depositing party, all of which interest shall be held by the depositing party for its own use free of trust. The certificates of deposit shall be held by the Executive Administrator as bailee representing the parties to this Agreement and subject to the provisions of this Agreement.

If the trust deposit of a party is depleted for any cause, failure of such party to restore its trust deposits to the amount and in the manner hereinbefore provided for the creation of its original trust deposit, within the ten (10) days after notice in writing of such depletion has been served upon it by the Executive Administrator shall constitute a breach of this Agreement.

In the event that any award or judgment is granted as hereinafter provided against any depositing party and said award or judgment is not paid within ten (10) days after it is granted, it shall be the duty of the Executive Administrator, and the Executive Administrator is hereby vested with full power and authority, to apply the proceeds of said trust deposit to the payment of said award or judgment.

It shall be the duty of the Executive Administrator, and the Executive Administrator is hereby vested with full power and authority, to redeliver to the depositing party any certificates of deposit, letters of credit or any bonds or the proceeds of bonds in his possession whenever the depositing party is entitled to receive same under the terms and conditions of this Agreement. In the event any member ceases to be a party to this Agreement, any certificate of deposit, letter of credit, or bonds deposited with the Executive Administrator, or bonds deposited with any bank or trust company shall be returned to the eliminated party, provided that there is not pending against him any undetermined charge of a breach of this Agreement, which *prima facie* may result in a judgment for damages. If there is such a charge pending, the trust shall not terminate, nor shall the certificate of deposit, the letter of credit or said bonds be returned to the eliminated party until such charge is dismissed or the award is satisfied. The elimination of any party hereto shall not release such party from any liability under this Agreement for any cause preceding the date of such elimination.

ARTICLE 18

Shippers' Requests and Complaints

The Executive Administrator of each Section will maintain files on shippers' requests and complaints. Reports of shippers' requests and complaints and disposition thereof shall be furnished periodically, not exceeding three (3) months, to the respective government authorities wherever required.

Each Section of the Conference may convene a special meeting to consider requests from shippers and/or consignees involving rates and conditions of carriage, at which meeting shippers and/or consignees may attend; attendance at all other Conference meetings in each Section shall be restricted to direct employees of member lines or their appointed agents.

ARTICLE 19

Expenses of Administering and Maintaining Conference

The expenses of administering and maintaining each Section of the Conference shall be borne equally by members within each Section of the Conference.

ARTICLE 20

Record of Vote

The record of the vote, except votes by secret ballot, of each individual member by name on each question voted on shall be retained by the Executive Administrator for a period of at least two (2) years from the date of the vote. In the event of a secret ballot, a record of the total number of votes indicating the number in favor and the number opposed to the action shall be retained by the Executive Administrator for a period of at least two (2) years from the date of the vote.

ARTICLE 21

Furnishing Reports

Full and complete Minutes and reports of all meetings, reports of telephone poll votes and records of action of committees certified by the Executive Administrator or Chairman as accurate and complete shall be furnished as soon as practicable to all members of respective Sections; and within thirty (30) days of the meeting or poll to governmental authorities having jurisdiction over this Agreement.

The Executive Administrator shall file with the governmental agency charged with the administration of Section 15 of the Shipping Act, 1916, as amended, a monthly report containing the following information: (i) a list of all complaints of rebates or any other malpractices received from Member Lines or any other person during each one-month period, but the parties involved need not be identified; and (ii) a description of all actions taken on each complaint, including the nature of the violation found and the penalty or other sanction imposed.

In the event that no complaints were received in the one-month period, a negative report so stating shall be filed. Such monthly reports are to be initialed by all member lines.

ARTICLE 22

Effective Date of Agreement

This Agreement and any modification thereof to become effective then approved by the respective Government authorities having jurisdiction over this Agreement.

ARTICLE 23

Membership Pledge

Signatories to this Agreement acknowledge by affixing their signatures hereto their voluntary acceptance of all principles, terms and conditions of this Conference and understand and agree that membership in this Conference requires that all lines charge, assess and maintain Conference tariff rates in all Sections in which they operate, otherwise failure on the part of a member to charge, assess and maintain Conference tariff rates, rules and regulations shall subject them to explusion in accordance with Article 13.

ARTICLE 24

Adherence to Government Regulations and Legislation

All parties hereto recognize the authority and regulating powers of the government authorities of the various countries served and will abide by the laws, statutes, regulations and rules of these countries, including registration with government authorities where required.

ARTICLE 25

Amendments and/or Modifications

This Agreement cannot be amended or modified except by unanimous consent of all members.

FEDERAL MARITIME COMMISSION

DOCKET No. 67–48

INTER-AMERICAN FREIGHT CONFERENCE AGREEMENTS Nos. 9648 AND 9649 AND OTHER RELATED AGREEMENTS

ORDER

The Commission has this day entered its Report in this proceeding which is hereby made a part hereof by reference, and has found that Agreement 9648–A, as set forth in the Appendix to said Report is not unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, ports or between exporters from the United States and their foreign competitors, nor detrimental to the commerce of the United States, contrary to the public interest, or violative of the Shipping Act, 1916, if the conditions set forth below are met.

Therefore, it is ordered, That Agreement 9648–A as set forth in the Appendix to the aforementioned Report is hereby approved except that Article 6(a) thereof is to remain inoperative until such time as the parties to this proceeding agree to a clarification of Article 6(a).

It is further ordered, That the approval herein granted shall be limited to a period not to exceed eighteen (18) months from the date of service of this order.

By the Commission:

(SEAL) (Signed) THOMAS LISI,

Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65-41

PACIFIC FAR EAST LINES—ALLEGED REBATES TO FOREMOST DAIRIES, INC., CONNELL BROS. CO., LTD., AND ADVANCE MILL SUPPLY CORP.

Decided February 28, 1968

Undisclosed arrangement whereby a carrier purchases fuel oil at a premium from a favored shipper who is not regularly engaged in the oil business under an assignable contract whereby said shipper receives a commission of 10 cents per barrel from the actual supplier without performing any substantial services to earn said commission found to violate section 16, Second, of the Shipping Act, 1916.

Shipper who knowingly and wilfully enters into such an arrangement found to violate section 16, first paragraph.

Said arrangement constitutes violations of section 18(b)(3) of the Shipping Act and section 2 of the Intercoastal Shipping Act, each in its respective sphere of jurisdiction.

Absent a showing that commissions received were in direct proportion to the cargo offerings, said arrangement held not to be in violation of section 14, Fourth.

Absent a showing of actual injury to competitors, said arrangement held not to be in violation of section 16, First.

Warner W. Gardner and *Benjamin W. Boley* for respondent Pacific Far East Lines, Inc.

Leonard G. James and *F. Conger Fawcett* for respondent Foremost Dairies, Inc.

Sanford D. Gilbert for respondent Advance Mill Supply Corporation.

William J. Ball for respondent Connell Bros. Co., Ltd.

Donald J. Brunner, *Richard L. Abbott* and *G. Edward Borst, Jr.*, Hearing Counsel.

REPORT

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

The Commission instituted this proceeding on November 17, 1965, to determine whether PFEL's practice of purchasing bunker fuel oil from certain favored shippers violated sections 14 Fourth, 16 First, 16 Second or 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §§ 812, 815, 817(b)), or section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. § 844), and whether the shippers who furnished this oil thereby obtained transportation by water for property at less than the rates which would be otherwise applicable in violation of section 16, first paragraph, of the Shipping Act. Chief Examiner Gus O. Basham issued an initial decision on August 31, 1967. We heard oral argument on November 15, 1967.

In its order of investigation, the Commission named as respondents Pacific Far East Lines (PFEL), Foremost Dairies, Inc., Connell Bros. Co., Ltd. and Advance Mill Supply Corp.

THE FACTS

PFEL is a common carrier by water in the foreign commerce and the domestic offshore commerce of the United States. The remaining three respondents are shippers utilizing PFEL's services to a substantial extent, both in the foreign and domestic offshore trades. During the period under consideration, these latter respondents also supplied a large portion of PFEL's bunker fuel oil needs.

PFEL purchases approximately 1.5 million barrels of fuel oil each year from a number of suppliers. In accordance with industry practice on the west coast, PFEL negotiates its oil contracts in the fall for deliveries the following year. PFEL considers several factors, such as price and whether the supplier is also a shipper, in deciding how much oil to purchase from each supplier. Several of the major oil companies ship various products overseas and utilize PFEL's services. These oil company/shippers supply a certain portion of PFEL's fuel oil needs. PFEL also awards oil contracts to brokers, such as Connell Bros., or commission agents like Advance Mill Supply. Both of these firms, who are substantial shippers with PFEL, are also engaged in the petroleum business. PFEL also buys some fuel oil from companies such as Signal Oil Co., which is not a shipper at all. Generally on purchases from nonshippers PFEL obtains the lowest prices.

Foremost Dairies has been a shipper with PFEL for many years and generally has shipped exclusively with them. Toward the end of 1960, Foremost led PFEL to believe that it might be considering the use of other carriers. Not wishing to risk the loss of the Foremost account, officials of PFEL and Foremost met in the latter part of 1960 to discuss the situation and come up with some plan whereby Foremost's continued patronage would be assured. John R. Wagner, senior vice president of PFEL, put it this way:

> Naturally, with any big account like that you try to hold them * * * Foremost indicated, "Well, we are doing so well with you fellows but why should we keep all of our eggs in one basket."
>
> We were always trying and looking for some way to maintain the account and keep as exclusive as we could because they had very good cargo.
>
> So, somewhere around the end of 1960, * * * our then president and some of our staff met with some of the Foremost people, and from that came the idea that possibly one way of doing it was to have a fuel oil contract * * *.

As a result of this meeting, PFEL awarded a contract to Foremost to supply a minimum of 250,000 barrels of oil during 1961 at the lowest price per barrel posted [1] by the major oil companies in San Francisco. The parties entered into the contract with the understanding that Foremost would assign it to a bona fide oil company. Mr. Wagner testified that there was no problem getting suppliers and that he had at least three companies perfectly willing to take it on. It was further understood that the assignee would pay Foremost a commission on each barrel of oil which it delivered under the assignment. Foremost, of course, is not in the fuel oil business and does not hold itself out as such.

PFEL had no further dealings with Foremost regarding the oil except to recommend several oil suppliers which had expressed a willingness to act as assignee and to pay a commission of 10 cents per barrel to Foremost Dairies.

One of these, Advance Mill Supply Corp., obtained the assignment during the years 1961 through 1963. Foremost received commissions from Advance for deliveries during 1961 through 1963 totaling \$23,425.20 in 1961, \$26,361.70 in 1962, and \$28,753.30 in 1963. These arrangements were made with the full knowledge of PFEL.

[1] The posted price is a maximum or list price which is charged for oil. This is published by the major oil suppliers for the various ports throughout the world. In addition, a so-called voluntary discount is normally allowed. Further discounts below the posted price and voluntary discount are frequently the subject of negotiation between oil users and suppliers depending on market price fluctuations. This latter practice has become so common during the past 8 years that PFEL's witness testified that by 1966 such discounts were involved in 78 percent of its bunker oil purchases. Thus, a supply contract at the lowest posted price on its face contains considerable latitude to allow the payment of commissions or further discounts.

Prior to 1964, Signal Oil Co. sold relatively small amounts of oil directly to PFEL at discount prices. (Signal was not a shipper and its discount price was the only selling point it had.) In the course of negotiating its 1964 contract with PFEL, Signal indicated that it would like to increase its bunker sales and expressed a willingness to become the actual supplier of oil under any PFEL oil contract. PFEL probably mentioned its Foremost contract and the possibility of Signal furnishing the oil under it. As a result, PFEL entered into a direct contract with Signal to furnish between 62,500 and 80,000 barrels during 1964 at $1.65 per parrel at Los Angeles.

The PFEL-Foremost contract for 1964 called for the delivery of between 287,000 and 300,000 barrels of oil at a price of $1.75 per barrel. This contract was immediately assigned to Signal under an agreement whereby Signal paid a commission of 10 cents per barrel to Foremost. This arrangement was repeated in 1965. Foremost received $28,369.10 in commissions in 1964 and $23,837.50 in 1965.

During the years 1961 to 1965, Foremost gave 50 to 75 percent of its cargo to PFEL for carrying goods in foreign and domestic commerce for total freight revenue of $2,778,555. During the same years, Foremost received $126,833.90 as commissions on the sale of fuel oil to PFEL. Since 1966, PFEL has discontinued purchasing oil through Foremost.

Foremost's total involvement in the fuel business was to sign a contract and an assignment in the fall of each year and to endorse commission checks. Foremost invested nothing, incurred no expenses, performed no services, and, as a practical matter, had no responsibility under its arrangement with PFEL.

No other shipper knew or could have learned about the existence of PFEL's oil purchase arrangements with Foremost. Only the assignee oil suppliers, a bank (which advanced some money on the strength of one of the contracts), and the Maritime Administration which, in response to its inquiry, was furnished with copies of the contracts in question in 1963, were advised of the contracts.

PFEL also purchased substantial quantities of oil from respondents, Connell Bros. Co., Ltd. and Advance Mill Supply Corp. These firms, unlike Foremost, are regularly engaged in the business of selling bunker fuel oil, among other commodities. They are also substantial shippers on PFEL's vessels. The prices paid for the oil to Connell and Advance were not excessive, and PFEL in all instances received its full tariff rate on commodities carried for these respondents. The commissions and profits received by Advance and Connell reflect bona fide business efforts and expenses on their part.

The Initial Decision

The Initial Decision of Chief Examiner Gus O. Basham concluded that ordinary reciprocity (viz the mutual exchange of normal business patronage) is not at issue. Hence, he found that the reciprocal arrangements between Advance and Connell on the one hand and PFEL on the other were entirely proper and legal since both of these firms are in the oil business and the prices paid by PFEL for the oil purchased were fair. He, therefore, dismissed these two shippers as parties respondent.

He concluded, however, that the Foremost-PFEL relationship presented a different situation since Foremost was in the dairy business, not in the oil business. Having made this distinction, the examiner then reviewed the arrangement in the light of the various sections of the Shipping Act and Intercoastal Shipping Act which were allegedly violated.

He dismissed the section 14 Fourth charges on the ground that there was no showing that the oil commissions received by Foremost were based on the volume of freight it shipped. Similarly, he found no violation of Section 16 First, absent a record showing of actual competitive injury. He found that PFEL had violated sections 16 Second and 18(b)(3) of the Shipping Act and section 2 of the 1933 Act. The Chief Examiner exonerated Foremost of any violation of section 16, first paragraph.

Discussion

We are in general agreement with the examiner's conclusions with one important exception—his determination that Foremost Dairies, Inc., did not violate section 16, first paragraph.

This case presents a situation where a carrier and one of its major shippers entered into an arrangement the net effect of which was to reduce that shipper's costs of ocean transportation. While there is nothing intrinsically wrong with a carrier's purchasing goods or services from its shipper-customers—indeed, this is a perfectly normal business practice—it is, nevertheless, by its very nature, the kind of relationship which is susceptible of abuse. Thus, whenever a carrier enters into any financial dealings with one of its shippers, a very high standard of ethical conduct must prevail.

While the price paid by PFEL for the oil it obtained through the Foremost contracts was always fair when measured against the prevailing market price, this fact, standing alone, is somewhat misleading. The truth of the matter is that PFEL simultaneously paid 10 cents per barrel more for oil from Foremost's assignee, Signal Oil Co., than the price it was paying to the same Signal Oil Co. for oil which it was buying under a direct contract. It was no coincidence that the commission received by Foremost amounted to exactly 10 cents per barrel. The conclusion is inescapable that PFEL paid a premium price for this oil in order to allow Foremost to obtain a reduction in its ocean freight costs in clear violation of section 16 Second, of the act. It is equally clear that Foremost, knowingly and wilfully, obtained reduced rates for transportation by water in violation of section 16, first paragraph.

The Secton 16 Violations

The introductory paragraph of section 16 provides in pertinent part:

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

Similarly, section 16 Second makes it illegal for a carrier:

> To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

These subsections are aimed at protecting competing shippers and carriers from shippers who attempt to obtain (or succeed in obtaining) transportation at reduced rates through devices or representations involving fraud, falsehood, or concealment. There is no question of carrier protection here since both PFEL and Foremost acted together—each with a full knowledge of what was transpiring.

The record leaves no room for speculation as to PFEL's motive in deciding to purchase a portion of its fuel oil from, or rather through, Foremost. It was to hold a big account as PFEL's executive vice president candidly admitted. The granting of rebates is one of the oldest devices in the shipping industry for the accomplishment of this purpose, and the arrangement involved here is but a slightly sophisticated variation of this ancient theme. PFEL knew very well that it was paying a premium price to Signal Oil Co. for every barrel of oil it was supplying under its assignment from Foremost. Signal was little more than the transmission belt over which the rebate was paid.

Foremost was no mere passive recipient of the oil commissions. It readily acquiesced in the scheme by signing the contracts and assigning them immediately to bona fide oil suppliers. Foremost knew that its successful venture into the oil business came about solely because of its economic leverage over a carrier which wanted to retain its business. It knew also that no real responsibility arose under the contracts. It would be hard to imagine that the responsible officials of Foremost were so naive as not to know that they were the beneficiaries of a rebating scheme.

Absent some extraordinary circumstances (of which there is no evidence in this case), a violation of section 16 Second by a carrier necessarily involves a violation of section 16, first paragraph, by the favored shipper where the shipper, knowingly and wilfully, acquiesces in the arrangement whereby the rebate is allowed.

If the scheme itself is illegal, the words "knowingly and wilfully" found in the first paragraph of section 16 mean simply that the shipper's participation was with knowledge of the benefits which would flow from the arrangement and an intent to enjoy such benefits. This case is quite a different situation from that presented in the *Continental Can* [2] and *Royal Netherlands* [3] cases. Each of those cases involved the misclassification of glass tumblers as "empty jars," thereby permitting the shipper to enjoy a lower than applicable rate. In the *Continental* case, the Second Circuit Court of Appeals found that there was an ambiguity in the classification terminology, and thus the shipper might not, knowingly and wilfully, have used the incorrect description. Resolving the doubt in the shipper's favor, the court held that there could have been an honest mistake as to correct classification. In the *Royal Netherlands* case, however, the U.S. Court of Appeals for the District of Columbia found that there was no possibility of honest mistake since the items shipped under the classification "empty jars" included such things as ash trays, stem wear, and other glass objects obviously not suitable for use as containers for packing of food.

Unlike the situation in *Continental*, *supra*, where the shipper might well have thought the classification he used was perfectly correct, there is nothing in this case which would lead us to believe that Foremost labored under any similar mistake of fact. To make the situation comparable, there would have to be a showing that Foremost performed actual and substantial services to earn its commissions. Foremost knew that it was getting something for nothing. Whether it had knowledge that this violated the Shipping Act is immaterial.

Foremost urges that we adopt the examiner's interpretation of the words "knowingly and wilfully" as meaning actual or constructive knowledge that the requirements of the statute were being disregarded. Such a construction would make ignorance of the law a valid defense

[2] *Continental Can Company* v. *United States*, 272 F. 2d 312 (2d Cir. 1959).

[3] *Royal Netherlands Steamship Co.* v. *Federal Maritime Bd.*, 304 F. 2d 938 (D.C. Cir. 1962).

and substitute some subjective standard whereby actual knowledge of statutory language by a shipper would have to be established before a violation under this section could be found. Congress did not intend to impose such a novel evidentiary requirement.

Foremost cites *Philippine Merchants Steamship Co. Inc.* v. *Cargill, Inc.*, 9 F.M.C. 155 (1965) to support its contention that an essential element of proof of a violation of section 16, first paragraph, is known illegality; i.e., that the shipper has done something or attempted to do something which it knew or should have known was unlawful. This reliance is misplaced. The essential element of proof to which that case is addressed is the "unfair device or means". These words have a restrictive meaning derived from their proximity to the words "false billing," etc. used in both the introductory paragraph to section 16 and section 16 Second. Applying the principles of *ejusdem generis*, the Commission and the courts have uniformly held that the act forbidden must be similar to those specifically proscribed in order to be an unjust or unfair device or means. In other words, the unjust or unfair device or means must partake of some element of falsification,[4] deception, fraud,[5] or concealment,[6] in order to satisfy the legal requirements of these subsections.

In the *Philippine Merchants* decision, *supra*, we said that the missing essential element of proof was the unfair device or means (9 F.M.C. at 165). However, Cargill's practice of imposing a service charge was open and aboveboard. Therefore, while it was found to be an unreasonable practice within the meaning of section 17, it simply did not and could not have come within the ambit of section 16, first paragraph, or section 16 Second. Judge Learned Hand articulated this distinction in *Prince Line, Ltd.* v. *American Paper Exports, Inc.*, *supra*,[7] where he said:

> The law did not forbid all concessions to a shipper; apparently it assumed that if these were above board, and known or ascertainable by competitors, the resulting jealousies and pressure upon the carrier would be corrective enough. But it did forbid the carrier to grant such favors, when accompanied by any concealment, and its command in that event was as absolute as though it had been unconditional.

Both Foremost and PFEL deny that there was any affirmative attempt at concealment or deception as to the existence of the contracts or

[4] *Hohenberg Bros. Co.* v. *Federal Maritime Commission*, 316 F. 2d 381 (1963).

[5] *U.S.* v. *Hanley*, 71 Fed. 672 (1896); *Armour Packing Co.* v. *U.S.*, 153 Fed. 1 (1907) aff'd. 209 U.S. 56 (1908).

[6] *Prince Line, Ltd.* v. *American Paper Exports, Inc.*, 55 F. 2d 1053 (1932); *Ambler* v. *Bloedel Donovan Lumber Mills*, 68 F. 2d 268 (1933).

[7] With the subsequent enactment of the Intercoastal Shipping Act, 1933, section 2, and the amendment of the Shipping Act, section 18(b)(3), any tariff deviations have been made illegal.

their content. They point out that disclosures were made to a bank and to the Maritime Administration, as well as to the oil suppliers. This does not constitute disclosure to an important class of persons that this section was designed to protect; namely, competing shippers. We agree with the examiner when he said in his initial decision that:

> The fatal defect in the arrangement between PFEL and Foremost is the lack of any means whereby any actual or potential competitors of Foremost could find out what Foremost's actual transportation costs were. Absent such knowledge, and without an arrangement providing them with exactly the same benefits, they would be at an obviously undue disadvantage.

The present case is similar to two cases decided by our predecessor, the U.S. Maritime Commission. Concealment, in the sense of nondisclosure to competing shippers, was present in each of those cases just as in the instant case. In the *Payments to Shippers* case,[8] a dummy corporation was set up by the carrier to receive payments from it for soliciting cargoes of automobiles. The stock of this corporation was offered to automobile dealers in proportion to autos shipped. The Commission found that the arrangement was in violation of section 16, because the favored shippers were given rebates in the form of dividends. Similarly, a violation was found in the *Nicholson Universal* case,[9] where the carrier paid a shipper of automobiles to provide loading, unloading, and other services at fees in excess of the value of the services.

The PFEL-Foremost arrangement was unjust and unfair because "* * * it destroyed that equality of treatment between shippers, which it was the primary purpose of the section, and for that matter of the whole statute, to maintain." *Ibid.*

Unlike section 16 First, there is no requirement under sections 16, first paragraph, or 16 Second, that actual competitive injury be established. It is enough that the practice involved has the capacity or tendency to injure competition. *U.S. Lines and Gondrand Bros.—Sec. 16 Violation*, 7 F.M.C. 464, 470 (1962). We hold that the PFEL-Foremost scheme was such a practice because it lowered Foremost's ocean transportation costs.

Section 18(b)(3) and Section 2

Having found that Foremost obtained transportation at less than the rates which would otherwise be applicable and that PFEL allowed Foremost to obtain transportation at less than the regular rates or charges then established and enforced, it follows that PFEL violated

[8] *Payments to Shippers by Wis. & Mich. Steamship Co.*, 1 U.S.M.C. 744 (1938).

[9] *Agreements of Nicholson Universal Steamship Co.*, 2 U.S.M.C. 414 (1940).

section 18(b)(3) of the Shipping Act and section 2 of the Intercoastal Shipping Act, each in its respective areas of application. This is so because any deviation from the rates on file with this Commission violates these sections.

These sections prohibit the refunding, rebating, or remitting in any manner or by any device any portion of the rates or charges specified in the tariffs on file. The Foremost fuel oil contracts are essentially the same kind of scheme as that condemned in the *Nicholson Universal* case, *supra*, where a section 2 violation was found in addition to the section 16 violations.

Section 16 First

The examiner found that there was nothing in the record to show if anyone was an actual victim of discrimination as a result of the Foremost-PFEL fuel oil contracts and concluded that section 16 First was not violated. We agree. *West Indies Fruit Co.* v. *Flota Mercante Grancolombiana*, 7 F.M.C. 66, 69 (1962).[10]

Section 14 Fourth

Hearing Counsel contend that the fuel oil supply contracts entered into between PFEL and Foremost constitute a violation of section 14 Fourth of the Shipping Act. This section forbids any common carrier by water from making "any unfair or unjustly discriminatory contract with any shipper based on volume of freight offered."

PFEL points out that this section is aimed at the malpractice of granting volume discounts to large shippers on the basis of, or in proportion to, the volume of freight offered. Moreover, argues PFEL, this section historically has been applied only to those arrangements in which the carrier's published tariff itself contains the provisions for discounts geared to the volume of cargo offered by a favored shipper.

While we perceive no requirement that the particular kind of rebate arrangement forbidden by this section must be reflected in the carrier's published tariffs in order to be illegal, we do agree with the examiner when he stated that there would have to be a discernible relationship between the commissions paid to Foremost and the amount of its cargo offerings to PFEL before a violation could be established.

CONCLUSIONS

Notwithstanding our conclusion that the practices engaged in by respondents amounted to violations of the Shipping Act, we see no

[10] But see our report in *North Atlantic Mediterranean Freight Conference—Rates on Household Goods*, Docket No. 66–49, 11 F.M.C. 202.

regulatory purpose to be served by issuance of an order to cease and desist.

We note that the PFEL-Foremost oil contracts were discontinued immediately upon the initiation of this case. While mere discontinuance of an illegal practice does not preclude our issuance of a corrective order, it furnishes a persuasive reason why an order is unnecessary especially where, as here, we perceive no probability that the illegal practices will be resumed.

In summary, we conclude that, in connection with the arrangement entered into between respondents Pacific Far East Lines and Foremost Dairies, Inc., whereby Foremost received commissions on the sale of substantial quantities of bunker fuel oil without performing commensurate services or incurring actual liability:

1. That PFEL violated section 16 Second of the Shipping Act in that it allowed Foremost to obtain transportation for property at less than the regular rates or charges then established by unjust or unfair means;

2. That PFEL violated section 18(b)(3) of the Shipping Act in that it utilized the said arrangement as a device to rebate, refund, or remit a portion of the rates or charges specified in its applicable tariffs then legally on file with this Commission;

3. That PFEL violated section 2 of the Intercoastal Shipping Act in that it utilized such arrangement as a device to refund or remit a portion of the rates or charges specified in its applicable tariffs then legally on file with this Commission;

4. That PFEL did not violate section 14 Fourth or section 16 First of the Shipping Act;

5. That Foremost violated section 16, first paragraph, in that it knowingly and wilfully, by an unjust or unfair device or means, obtained transportation by water for property at less than the rates or charges which would otherwise be applicable;

6. That no violations have been established in connection with PFEL's fuel oil transactions with respondents, Connell Bros. Co., Ltd., and Advance Mill Supply Corp.;

7. That the practices herein found to be illegal were promptly discontinued upon the initiation of this proceeding and there is no necessity for an order to cease and desist; and

8. That this proceeding is discontinued.

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COMMISSIONER JAMES V. DAY, CONCURRING AND DISSENTING:

I dissent in that I do not find that Foremost Dairies, Inc., violated section 16, first paragraph. Considering, as did the examiner, the custom of reciprocity, the fact that PFEL, after inquiry, concluded that the Foremost contract was proper, that Foremost also had reason to believe that its participation was likewise proper, and the lack of convincing proof of guilty knowledge on the part of either party: I conclude that Foremost cannot be charged with knowingly having by unjust or unfair device obtained transportation at less than otherwise applicable rates.[11] I concur with the other conclusions of the majority including discontinuance of this proceeding.

(Signed) THOMAS LISI,
Secretary.

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[11] See *U.S. v. Illinois Cent. R. Co.*, 303 U.S. 239 (1938).