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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 30, 1970

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CONTENTS

	Page
Table of case reported	V
Docket numbers of cases reported	VII
Table of cases cited	IX
Decisions of the Federal Maritime Commission	1
Index digest	281

TABLE OF CASES REPORTED

	Page
Agreement No. 5200–26 (Pacific Coast European Conference)	16
Agreement No. 9810—Stock Purchase Agreement Between Prudential Lines, Inc., and W. R. Grace & Co., and Sale and Transfer of Prudential Assets and Obligations to Grace Line, Inc	156
Agreement No. T–2214 Between the City of Long Beach, Calif., and Trans-ocean Gateway Corp	70
Ansor Corp. *v.* Micronesia Interocean Line, Inc	189
A. P. St. Philip, Inc. *v.* Atlantic Land and Improvement Co. and Seaboard Coast Line R. R. Co	166
Assembly Time—Port of San Diego	1
Atlantic & Gulf/West Coast of South America Conference Agreement No. 2744–30 et al	121
Atlantic Land and Improvement Co. and Seaboard Coast Line R. R. Co., A. P. St. Philip, Inc. *v*	166
Atlantic Lines, Ltd., Davies, Turner & Co. *v*	279
Ballmill Lumber & Sales Corp. *v.* Port of New York Authority, Weyer-haeuser Co., Atlantic Terminal, Inc., and Maher Lumber Terminal Corp	262
B.H. Loveless & Co. *v.* Micronesia Interocean Line, Inc	92, 98
Chevron Chemical Co. Ortho Division *v.* Nippon Yusen Kaisha Lines, Ltd	47
C. H. Leavell & Co. *v.* Hellenic Lines, Ltd	76
DaPrato *v.* Med-Gulf Conference	135
Davies, Turner & Co., as Agents for Robert S. Shlesinger, Owner *v.* Atlantic Lines, Ltd	279
Discal Corp. *v.* Micronesia Interocean Line, Inc	114
Enterprise Shipping Corp. *v.* Micronesia Interocean Line, Inc	105
Free Time and Demurrage Charges on Export Cargo	207
Ghezzi Trucking, Inc.—Cancellation of Inactive Tariff	253
Ghiselli Bros., Inc. *v.* Micronesia Interocean Line, Inc	179
Harrisons & Grosfield (Pacific) Inc. *v.* Nedlloyd & Hoegh Lines	176
Hawaii State Steel Co., Ltd. *v.* Micronesia Interocean Line, Inc	95
Hellenic Lines, Ltd., C. H. Leavell & Co. *v*	76
I. G. E. Export Division *v.* Micronesia Interocean Line, Inc	111
International Materials Corp. *v.* Micronesia Interocean Line, Inc	117
Johns-Manville Products Corp. Petition for Declaratory Order	192
L. T. C. Air Cargo, Inc.—Freight Forwarder License	267
Med-Gulf Conference, Messrs. DaPrato et al. *v*	135
Messrs. DaPrato-Florence as Buying Agents of Messrs. United China and Glass Co.—New Orleans *v.* Med-Gulf Conference on Behalf of Messrs. Lykes Bros. Steamship Co	135
Micronesia Interocean Line, Inc., Ansor Corp. *v*	189
Micronesia Interocean Line, Inc., B. H. Loveless & Co. *v*	92, 98
Micronesia Interocean Line, Inc., Carlton J. Siegler *v*	107, 257

	Page
Micronesia Interocean Line, Inc., Discal Corp. *v*	114
Micronesia Interocean Line, Inc., Enterprise Shipping Corp. *v*	105
Micronesia Interocean Line, Inc., Ghiselli Bros., Inc. *v*	179
Micronesia Interocean Line, Inc., Hawaii State Steel Co., Ltd. *v*	95
Micronesia Interocean Line, Inc., I. G. E. Export Division *v*	111
Micronesia Interocean Line, Inc., International Materials Corp. *v*	117
Micronesia Interocean Line, Inc., Walter Plunkett & Co. *v*	101
Nedlloyd & Hoegh Lines, Harrisons & Crosfield (Pacific) Inc. *v*	176
New Haven Terminal, Inc., Pittston Stevedoring *v*	33
Nippon Yusen Kaisha Lines, Ltd., Chevron Chemical Co. Ortho Division *v*	47
Norton, Lilly & Co., Inc., Robert S. Osgood, Inc., Los Angeles *v*	197
Pacific Coast European Conference Agreement No. 5200-26	16
Pittston Stevedoring Corp. *v.* New Haven Terminal Inc	33
Port of New York Authority, Ballmill Lumber & Sales Corp. *v*	262
Rejection of Tariff Filings of Sea-Land Service, Inc	200
Robert S. Osgood, Inc., Los Angeles *v.* Norton, Lilly & Co., Inc., as Agents Shipping Corp. of India, Ltd. (SCI) Line	197
Sea-Land Service, Inc.—Rejection of Tariff Filings	200
Siegler, Carlton J. *v.* Micronesia Interocean Iine, Inc	107, 257
Transmares—Freight Forwarder License	30
Truck Loading and Unloading Rates at New York Harbor	51
U.S. Pacific Coast/Australia, New Zealand, South Sea Islands Trade—Unapproved Agreements	139
Walter Plunkett & Co. *v.* Micronesia Interocean Line, Inc	101
Wilson, Violet A., d/b/a Transmares—Freight Forwarder License	30

DOCKET NUMBERS OF CASES REPORTED

Docket	Case	Page
405	Harrisons & Crosfield (Pacific) Inc.*v.* Nedlloyd & Hoegh Lines	176
406	Chevron Chemical Co. Ortho Division *v.* Nippon Yusen Kaisha Lines Ltd	47
407	Hawaii State Steel Co., Ltd. *v.* Micronesia Interocean Lines, Inc	95
408	Carlton J. Siegler *v.* Micronesia Interocean Line, Inc	107
409	International Materials Corp. *v.* Micronesia Interocean Line, Inc	117
410	B. H. Loveless & Co. *v.* Micronesia Interocean Line, Inc	92
411	B. H. Loveless & Co. *v.* Micronesia Interocean Line, Inc	98
412	Walter Plunkett & Co. *v.* Micronesia Interocean Line, Inc	101
413	Ansor Corp. *v.* Micronesia Interocean Line, Inc	189
414	I.G.E. Export Division *v.* Micronesia Interocean Line, Inc	111
415	Discal Corp. *v.* Micronesia Interocean Line, Inc	114
416	Ghiselli Bros., Inc. *v.* Micronesia Interocean Line, Inc	179
417	Enterprise Shipping Corp. *v.* Micronesia Interocean Line, Inc	105
418	Carlton J. Siegler *v.* Micronesia Interocean Line, Inc	257
419	Messrs. DaPrato—Florence as Buying Agents of Messrs. United China and Glass Co.—New Orleans *v.* Med-Gulf Conference on Behalf of Messrs. Lykes Bros. Steamship Co	135
420	Robert S. Osgood, Inc., Los Angeles *v.* Norton, Lilly & Co., Inc. as Agents Shipping Corp. of India, Ltd. (SCI Line)	197
422	Davies, Turner & Co., as Agents for Robert S. Shlesinger, Owner *v.* Atlantic Lines, Ltd	279
65–46	Truck Loading and Unloading Rates at New York Harbor	51
66–65	Ballmill Lumber & Sales Corp. *v.* The Port of New York Authority, Weyerhaeuser Co., Atlantic Terminals, Inc., and Maher Lumber Terminal Corp	262
67–56	Pittston Stevedoring Corp. *v.* New Haven Terminal, Inc	33
68–9	Free Time and Demurrage Charges on Export Cargo	207
68–13	Assembly Time—Port of San Diego	1
68–14	C. H. Leavell & Co. *v.* Hellenic Lines, Ltd	76
68–29	U.S. Pacific Coast/Australia, New Zealand, South Sea Island Trade—Unapproved Agreements	139
69–2	A. P. St. Philip, Inc. *v.* The Atlantic Land and Improvement Co. and Seaboard Coast Line R. R. Co	166
69–4	In the Matter of Agreement No. T–2214 Between the City of Long Beach, California, and Transocean Gateway Corp	70
69–7	In the Matter Agreement No. 5200–26 (Pacific Coast European Conference)	16
69–22	Independent Ocean Freight Forwarder License Application—Violet A. Wilson d/b/a Transmares	30

		Page
69–33	Atlantic & Gulf/West Coast of South America Conference Agreement No. 2744–30, et al	121
69–44	Ghezzi Trucking, Inc.—Cancellation of Inactive Tariff	253
69–51	Agreement No. 9810—Stock Purchase Agreement Between Prudential Lines, Inc., and W. R. Grace & Co., and Sale and Transfer of Prudential Assets and Obligations to Grace Line, Inc	156
69–52	Johns-Manville Products Corp. Petition for Declaratory Order	192
69–59	Independent Ocean Freight Forwarder License Application. L.T.C. Air Cargo, Inc	267
69–60	Rejection of Tariff Filings of Sea-Land Service, Inc	200

TABLE OF CASES CITED

	Page
Agreement No. T-213, 12 FMC 126	23
Agreements No. T-2108 and T-2108-A, 12 FMC 110	23, 74
Agreement No. 8005-4—Modifications of Conf. Agreement, 10 FMC 314	211
Agreements 8225 and 8225-1, 5 FMB 648	173
Agreements and Practices Re Brokerage, 3 USMC 170	143
Alabama Great Southern R. R. Co. *v.* FMC, 379 F2d 100	130
American Paper and Pulp Assn. *v.* B. & O. R. R. Co., 41 ICC 506	217, 222
American President Lines, Ltd. *v.* FMB, 317 F2d 887	57, 61–63, 213, 232, 235
American Trucking Assns., Inc. *v.* A. T. & S. F. Ry. Co., 387 US 397	85
Armstrong Cork Co. *v.* American-Hawaiian Steamship Co., 1 USMC 710	35
Assembly Time—Port of San Diego, 13 FMC 1	218, 219, 223, 227
Baltimore & O. R. Co. *v.* United States, 201 F2d 795	214
Baltimore & O. R. Co. *v.* United States, 208 F2d 734	232, 235
Boston Shipping Assn., Inc. *v.* Port of Boston, 10 FMC 409	232, 236, 243
Bull Dog Floor Chip Co. *v.* Chicago R. I., & P. Ry. Co., 225 ICC 313	195
California *v.* United States, 320 US 577	44, 66
California Stevedor & Ballast Co. *v.* Stockton Elevators, Inc., 8 FMC 97	44, 172, 173
California Stevedore & Ballast Co. *v.* Stockton Port District, 7 FMC 75	44
Carnation Co. *v.* Pacific Westbound Conf., 383 US 213	23
Carriage of Military Cargo	7
City of Los Angeles *v.* FMC, 388 F2d 582	124
Coe *v.* Errol, 116 US 517	187
Common Carrier Status, 6 FMB 245	130
Continental Oil Co. *v.* Kansas City Southern Ry. Co., 311 ICC 288	187
Disposition of Container Marine Lines Through Intermodal Container Freight Tariffs, 11 FMC 476	85, 122, 124, 202, 206
East Asiatic Co., Inc., 9 FMC 169	280
Eden Mining Co. *v.* Bluefields Fruit & S. S. Co., 1 USSB 41	35
Emergency Fleet Corp. *v.* Western Union, 275 US 415	7
FMC *v.* New York Terminal Conf., 262 F Supp 225	66
FMC *v.* New York Terminal Conf., 373 F2d 424	67
Ford Co. *v.* M. C. R. R. Co., 19 ICC 507	195
Free Time and Demurrage Charges—New York, 3 USMC 89	215, 217, 222, 231, 232
Free Time and Demurrage Practices at New York Harbor, 11 FMC 238	217, 222, 231, 232, 233, 243
Free Time Practices—Port of San Diego, 9 FMC 525	2, 11, 13, 174, 213–215, 232
Ghiselli Bros., Inc. *v.* Micronesia Interocean Line, 13 FMC 179	258
Givens *v.* L. & N. R. Co., 140 ICC 605	8
Guarantee Co. *v.* Title Guaranty Co., 224 US 152	7

Page

Havens & Co. *v.* C. & N. W. Ry. Co., 20 ICC 156 ---- 8
Holt Motor Co. *v.* Nicholson Universal S. S. Co., 56 F Supp 585 ---- 86
Intercoastal Cancellations and Restrictions, 2 USMC 397 ---- 174
Intercoastal Charters, 2 USMC 154 ---- 255
Intercoastal Investigation, 1935, 1 USSBB 400 ---- 42
Intercoastal Schedules of Hammond Shipping Co., Ltd., 1 USSBB 606 ---- 255
International Packers, Ltd. *v.* FMC, 356 F2d 808 ---- 83
Interpretation of Gov't Rate Tariff—Eastern Central, 323 ICC 347, 332 ICC 161 ---- 8
Joint Agreement—Far East Conf. and Pacific Westbound Conf., 8 FMC 553 ---- 24
Kelly Pipe Co. *v.* American Hawaiian S. S. Co., 286 ICC 328 ---- 194
Louisville & N. R. R. Co. *v.* Maxwell, 237 US 94 ---- 280
Ludwig Mueller Co., Inc. *v.* Peralta Shipping Corp., 8 FMC 361 ---- 280
Marine Space Enclosures, Inc. *v.* FMC, 420 F2d 577 ---- 123, 124, 133
Markstein *v.* Missouri Pac. R. Co., 243 ICC 345 ---- 195
Matson Navigation Co.—Container Freight Tariffs, 7 FMC 480 ---- 131
Mead Johnson & Co. *v.* Atlantic Coast Line R., 171 ICC 5 ---- 195
Mediterranean Pools Investigation, 9 FMC 264 ---- 23, 146
Merchants & Planters Co. *v.* G. H. & H. R. R. Co., 129 ICC 477 ---- 222
Modification of Agreement 5700–4, 10 FMC 261 ---- 26
National Cable and Metal Co. *v.* American Hawaii S. S. Co., 2 USMC 471 ---- 194
Northern Pump Co. *v.* Chicago, M. & St. P. & P. R. Co., 190 ICC 421 ---- 195
Outward Continental North Pacific Freight Conf. *v.* FMC, 385 F2d 981 ---- 124
Outbound Rates Affecting Export High Pressure Boilers, 9 FMC 441 ---- 88
Overseas Freight and Terminal Corp. (All Cargo Line), 8 FMC 437 ---- 83, 87, 89, 90
Pacific Coast European Conf., 7 FMC 27 ---- 26
Paul *v.* United States, 371 US 245 ---- 7
Penna. Motor Truck Assn. *v.* Phila. Piers, Inc., 4 FMB 192 ---- 214, 232, 235
Pennsylvania R. Co. *v.* PUC 298 US 170 ---- 187
Plymouth Coal Co. *v.* P. L. & W. R. R. Co., 36 ICC 76 ---- 222
Plymouth Coal Co. *v.* L. V. R. R. Co., 36 ICC 140 ---- 222
Practices & Agreements of Common Carriers, 7 FMC 51 ---- 141, 143
Practices, Etc. of San Francisco Bay Area Terminals, 2 USMC 588 ---- 215, 227, 228, 232
Rardin Grain Co. *v.* Illinois Central R. R. Co., 288 F Supp 813 ---- 86
Riss and Co., Inc., Extension—Explosives, 64 MCC 299 ---- 277
River Plate & Brazil Conf. *v.* Pressed Steel Car Co., 227 F2d 60 ---- 23
Silent Sioux Corp. *v.* Chicago & North Western Ry. Co., 262 F2d 474 ---- 280
South Pacific Terminal Co. v. ICC, 219 US 498 ---- 187
States Marine Lines, Inc. *v.* FMC, 376 F2d 230 ---- 19, 20, 21, 22, 23, 27
States Marine Lines, Inc. *v.* Pacific Coast European 12 FMC 1 ---- 19, 21, 22, 23
States Marine Lines, Inc. *v.* Trans-Pacific Freight Conf., 7 FMC 204 ---- 24
Storage Charges Under Agreements 6205 and 6215, 2 USMC 48 ---- 215
Storage of Import Property, 1 USMC 676 ---- 215, 217, 222
Sugar from Virgin Islands to United States, 1 USMC 695 ---- 255
Surcharge at U. S. Atlantic and Gulf Ports, 10 FMC 13 ---- 86
Tampa Bay Towing Co. *v.* A. P. St. Philip, Inc. (Cir. Ct. Fla., 1968) ---- 168
Tennessee Products & Chemical Corp. *v.* L. & N. R. R., 319 ICC 497 ---- 218
Texas & N. O. R. R. Co. *v.* Sabine Tram Co., 227 US 111 ---- 187
Transportation of Lumber Through Panama Canal, 2 USMC 143 ---- 174

Page

Truck and Lighter Loading and Unloading, 9 FMC 505 ---------------- 172
Turner, Dennis & Lowry L. Co. *v.* Chicago, M. & St. P. Ry. Co., 2 F2d 291, 271 US 259 ---------------- 222
Unapproved Section 15 Agreements—South African Trade, 7 FMC 159 -- 149, 51
United States *v.* Associated Air Transport, Inc., 275 F2d 827 ------------ 86
United States *v.* California, 297 US 175 ---------------- 7
United States *v.* Eastern Airlines, Inc., 192 F Supp 187 ---------------- 276
United States *v.* Illinois Terminal R. Co., 168 Fed 546 ---------------- 181
United States *v.* Union Pacific R. R. Co., 173 F Supp 397, 362 US 327 ---- 222
Volkswagenwerk *v.* FMC, 390 US 261 ---------------- 42
West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Trade, 10 FMC 95 ---------------- 143

FEDERAL MARITIME COMMISSION

DOCKET NO. 68-13

ASSEMBLY TIME—PORT OF SAN DIEGO

Decided July 18, 1969

A tariff rule providing an additional 10 days' free time, exclusive of Saturdays, Sundays, and holidays, at the Port of San Diego on commodities shipped for the account of the United States Government found not to be violative of section 16 First or section 17 of the Shipping Act, 1916.

A tariff rule granting 10 days' processing time, in addition to the present 10 days' free time provided by the Port of San Diego, on commercial bulk cargo bagged on the Port premises moving in single consignments of 10,000 tons or more found not to be violative of section 16 First or section 17 of the Shipping Act, 1916.

Aaron W. Reese and *Joseph D. Patello* for respondent Port of San Diego.

William A. Imhof, *Neal A. Jackson*, and *Charles W. Bucy* for intervenor United States Department of Agriculture.

Miriam E. Wolff for intervenor San Francisco Port Authority.

Albert E. Cronin, Jr. and *Walter H. Meryman* for intervenor Stockton Port District.

J. Robert Bray for intervenor Virginia State Port Authority.

James H. McJunkin and *Leslie E. Still* for intervenor Port of Long Beach.

J. Kerwin Rooney and *John E. Nolan*, for intervenor Port of Oakland.

Norman D. Kline, *James N. Albert*, and *Donald J. Brunner* as Hearing Counsel.

REPORT

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

We instituted this investigation by Order of March 7, 1968 to determine whether a tariff rule proposed by the Port of San Diego au-

thorizing an additional 10 days' "assembly time" for "consignments of not less than 3,000 net tons of bagged or Government owned or sponsored outbound cargo" is contrary to section 16 First and section 17 of the Shipping Act, 1916, and whether and in what respect the Commission should modify its order in Docket No. 1217—*Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525 (1966) to permit the proposed assembly time practice.

United States Department of Agriculture (USDA), City of Long Beach, City of Oakland, San Francisco Port Authority, Stockton Port District, and Virginia State Ports Authority intervened in the proceeding.

An Initial Decision was issued by Examiner John Marshall to which exceptions and replies thereto were filed, and oral argument was heard.

BACKGROUND AND FACTS

On May 23, 1966, this Commission, after an exhaustive analysis of prior free time decisions, handed down its decision in Docket No. 1217, *supra*, wherein we held that 10 days for outbound cargo, exclusive of Saturdays, Sunday, and holidays, was a reasonable amount of free time necessary for the assembly or removal of shippers' goods prior to the loading and subsequent to unloading of vessels at San Diego. In striking down San Diego's practice of granting 30 days' free time, the Commission found that the unreasonable extension of free time beyond 10 days either violated section 16 First because it shifted the burden of defraying the cost of providing what amounted to free storage to nonusers of the service or, if the cost of providing this service was not shifted to nonusers, it constituted an unreasonable practice within the meaning of section 17 because the service was being granted at charges less than that which it cost the terminal to provide, thus jeopardizing the efficiency, economy, and soundness of the terminal operations, and endangering stability and predictability of terminal rates and charges without any transportation justification.

Some 18 months after our decision in Docket No. 1217 was served, the Port of San Diego entered into a five-year lease agreement with Freight Handlers, Inc.[1] for some 21,000 square feet of space in the port area upon which Freight Handlers constructed a fertilizer bagging facility. Consideration of this operation was prompted by the fact that the closing of the Suez Canal had caused ocean freight rates from U.S. Gulf ports to Southeast Asia to become somewhat

[1] Freight Handlers, Inc. is a subsidiary of Crescent Wharf and Warehousing Company which functions primarily as a stevedoring contractor at the ports of San Diego, Los Angeles, and Long Beach.

higher than from West Coast ports. A particular commodity initially of interest was potash from the Carlsbad, New Mexico area which was being exported to India for use as fertilizer. Since then potash from Utah, diammonium phosphate from Idaho, soda ash from Wyoming and different grades of borax from undesignated sources, all used as fertilizer, have been added.

Until the construction of the bagging plant at San Diego, these materials from the added areas were not competitive for export markets. Such commodities cannot be shipped in bulk to a number of the recipient countries concerned because of the lack of bulk unloading facilities. The ports are open roadsteads where the cargo must be lifted ashore and then carried on human backs, or on trains, trucks, or carts to inland points for ultimate use. At the time there were no other export oriented bagging facilities on the Pacific Coast. The Ports of Oakland and Los Angeles have since installed bagging plants. The facility at Los Angeles, however, was built to handle inbound cargoes.

In order to remain competitive with the Gulf ports where free time above 10 days is accorded [2] and to afford Freight Handlers the opportunity to participate in the bagging and shipment of cargoes which up to that time had never moved out of West Coast ports, San Diego on January 23, 1968 petitioned the Commission for approval of the two proposed tariff items set forth below:

PROPOSED ASSEMBLY PERIOD

Item 437. An assembly period of not to exceed ten (10) working days, in addition to the free time provided by Item 435, may be granted for the assembly of single consignments of not less than 3,000 net tons of bagged or Government owned or sponsored outbound cargo. The granting of such assembly time shall be subject to the availability of space and granted only when arrangements therefor are made in advance of arrival of cargo at Port terminal facilities, and when the need for such an assembly period for single consignments is clearly established.

PROPOSED DEFINITION OF ASSEMBLY TIME

Item 5.(z). "*Assembly Time*" is a designated number of days, not to exceed ten (10), in addition to allowable free time, which may be granted for the accumulation of single lots or consignments for a particular shipper which constitutes a volume substantially in excess of an average shipment. Such a shipment shall be 3,000 tons or more to qualify for assembly time. Assembly time shall be granted only when the nature of the cargo or other circumstances preclude its delivery at the Port's marine terminals as a single consignment at one time.

[2] The Ports of Corpus Christi, Galveston, New Orleans, Pensacola and Tampa allow up to 30 days free time. Galveston provides that "Free time for outbound cargo may be extended 15 days for assembly of single consignments of not less than 3,000 net tons" and Houston has the same provision for shipments of not less than 5,000 tons.

Over 95 percent of the cargo bagged and shipped from San Diego has consisted of the various types of chemicals consigned to developing countries for use as fertilizer pursuant to programs of the Agency for International Development (AID). Most consignments range from 10,000 to 12,000 tons, this being the capacity of typical tramp vessels chartered for the purpose. The bagging facility is capable of an output of from 600 to 650 bags per 8 hour day. Thus, approximately 17 to 18 working days are required to bag and assemble a consignment. Operationally, the normal 10 days' free time presently provided for in San Diego's tariff would appear to be adequate to bag and assemble a 10,000 ton consignment since charter parties provide for loading at the rate of 1,000 tons per day and demurrage does not accrue while a vessel is loading.[3] In order to bag and load these large consignments within the prescribed period, however, Freight Handlers has found it necessary to operate two eight-hour shifts and to "absorb a considerable amount of overtime" which they state they cannot financially continue to do.

Besides operational problems, the bagging plant at San Diego has encountered problems in coordination. The bulk fertilizer moving to the San Diego bagging facility comes from distant inland points and there are delays in arrival of fertilizer, bags, and vessels. Coordinating the flow of USDA cargoes is especially troublesome. The problem here is due in part to the large number of suppliers and persons facilitating the movement of the commodities. For example, in the case of bagged grain products and nonfat dry milk, there are times when single consignments may originate from as many as a dozen suppliers.[4] Thus, effective coordination of such shipments is not always possible.

Between mid-August 1967 and the latter part of February 1968, Freight Handlers bagged and shipped in excess of 80,000 tons of cargo. Had it not been for the bagging facility, this cargo could not have moved through San Diego and it probably would not have moved through any other port of the West Coast. No showing has been made that the operation of the bagging facility has caused *any*

[3] San Diego's tariff provides for waiver of demurrage during vessel loading. Moreover, an additional 10 days' free time is granted if a chartered ship is delayed.

[4] It is a basic goal of USDA programs to get the maximum amount of commodity per dollar spent. To this end suppliers are accorded periods varying from 3 weeks in the case of grain to 13 weeks in the case of dry milk within which to ship the commodities. The period required to accumulate these staggered shipments at the port must also take into account a leeway of 15 days for arrival of a vessel included in most charter parties. Compounding these problems is the requirement imposed by the Cargo Preference Act of 1904 (46 U.S.C. 1241(b)) that at least 50 percent of USDA cargoes move on U.S.-flag vessels. The result is that USDA cargoes are sometimes held at the terminal for a longer period than would otherwise be necessary in order that they may be shipped on a U.S. vessel.

diversion from other California ports. As a result of the bagging facility, the Port realized revenues totaling $49,783.17 which it would not otherwise have received. During fiscal year 1967–1968 Freight Handlers' bagging operations accounted for 16 percent of San Diego's export tonnage.

The USDA, which vigorously supports the efforts of the Port of San Diego to obtain authorization from the Commission to provide up to 10 days' "assembly time" in addition to normal free time for Government cargoes, is charged, *inter alia*, with the accomplishment of certain foreign aid programs set forth in Titles I and II of the Agricultural Trade Development and Assistance Act of 1954 (7 U.S.C. 1691, *et seq.*), commonly known as Public Law 480. Briefly, Title I authorizes the Commodity Credit Corporation (CCC) to finance the sale and exportation of agriculture commodities to friendly countries. Title I cargoes move pursuant to sales agreements between foreign governments and U.S. suppliers who are businessmen selling from private stocks. The commodities move under commercial bills of lading. The foreign buyer arranges ocean transportation and nominates the port of loading. The recipient nation is *generally* responsible for *all* transportation costs. The purchase and transportation is financed by various types of loans from the U.S. Government. The only Title I commodity which moved through San Diego, at least since 1965, has been cotton—3,645 long tons in bales.

Under Title II, commodities are exported to needy foreign countries, not as sales, but as outright gifts in cooperation with voluntary relief agencies. Transportation is arranged by the USDA which pays all costs, including inland transportation and terminal charges. Overall supervision of Title II programs is vested in the Agency for International Development. In the main, these cargoes consist of bagged grain products and vitamized nonfat dry milk.

Discussion and Conclusions

In his Initial Devision, Examiner John Marshall found that a tariff rule providing for an additional 10 days' assembly time at San Diego for "Government owned or sponsored cargo, or for charitable purposes" is in accordance with the policy set forth in section 6 of the Intercoastal Shipping Act, 1933 [5] and would not offend the proscriptions of section 16 First or section 17 of the Shipping Act, 1916.

[5] Section 6 of the Intercoastal Shipping Act, 1933 provides:
"That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates, for the United States, State, or municipal Governments, or for charitable purposes."

428-264—71——2

Accordingly, the following model tariff provision, recommended by Hearing Counsel, with the concurrence of USDA, was adopted by the Examiner:

> For good reason and upon the request of the U.S. Government, or for charitable purposes, additional free time may be granted over and above the initial ten-day free-time period, not to exceed ten days, excluding Saturdays, Sundays, and holidays.

The Examiner further required San Diego to maintain records of any extension of free time granted pursuant to the approved rule, showing the request, reason, commodity, consignee and the amount of additional free time used. Such records were to be maintained for "at least two years."

San Diego's request for permission to allow up to a 10-day "assembly time" period for "non-government" cargo was denied by the Examiner on the ground that the "relatively small" amount of such cargo had not been shown on the record to require any additional time.

Exceptions to the Examiner's decision have been filed by Stockton Port District and San Francisco Port Authority to which the Port of San Diego, USDA, and Hearing Counsel have replied.

A. *Government Cargo*

Before we touch upon other aspects of this proceeding as they relate to "government cargo," we should like to first dispose of Stockton's challenge to the Commission's jurisdiction generally to authorize additional free time for such cargo. While Stockton acknowledges that section 6 of the Intercoastal Shipping Act, 1933, authorizes the granting of free or reduced rates to the U.S. Government, it takes the position that the "* * * Shipping Act [1916] makes no exception for government * * * cargo, and for the Examiner to make such a recommendation would be to usurp the authority of Congress." This argument totally ignores the fact that the Intercoastal Shipping Act, 1933 is but an amendment to the Shipping Act, 1916. This fact is not only supported by the legislative history of the 1933 Act, but by the language of the preamble to the 1933 Act which clearly states that it is an act "* * * *Amending* the Shipping Act, 1916 * * *" (emphasis added).[6] It follows, therefore, that section 6 exempts transportation for the United States from the rate provisions of the Shipping Act, 1916, with the same force and effect as it does with regard to the provisions of the 1933 Act.[7]

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[6] In this regard, see also the preamble to Commission General Order 21, where we specifically recognized that the Intercoastal Shipping Act, 1933, was but an "amendment" to the 1916 Act.

[7] Moreover, section 6, like section 22 of the Interstate Commerce Act after which it was patterned, is merely declaratory of the pre-existing common law principle that the sovereign was entitled to reduced transportation rates; since, at common law, any statute

We move now to the specific objections of the parties to the Examiner's adopted model tariff rule. San Francisco, while not disagreeing in principle with the granting of additional free time for government cargo, objects to the Examiner making the rule applicable to "government owned or sponsored" cargo "for good cause." It is argued that this language is vague, undefined, and could result in the granting of unjustified extensions of free time to strictly commercial cargoes. Hearing Counsel agree that some of the language used in tariff rule, as interpreted by the Examiner in his decision, is ambiguous and submit that "* * * there is a valid question raised by San Francisco as to whether these provisions apply to shipments in which the U.S. Government is indirectly or remotely 'sponsoring' a movement and is not the actual owner or shipper." In this regard, it is Hearing Counsel's position that the United States should be accorded special treatment under section 6 *only* where it is the actual shipper and ultimately bears the transportation costs. They maintain that existing principles of law and the prevailing custom among U.S. ports clearly militate in support of this conclusion.

The USDA, on the other hand, argues that all cargo moving under Title I and Title II of Public Law 480 should qualify for extended free time, even where the U.S. Government itself does not receive any direct or actual benefit and where the United States is reimbursed for the transportation costs. They take the position that since both programs are charitable in motive and designed to improve our relations with recipient nations, the benefits of free time should be extended to all shipments moving under Title I or Title II, regardless of who ultimately receives the benefit of the special rate.

Whatever might be said for allowing additional free time on shipments for which the United States does not ultimately incur the cost of transportation on purely humanitarian or political grounds, it is abundantly clear that section 6 of the 1933 Act cannot be interpreted to allow free time under such circumstances. An early opinion of the Attorney General, 25 Ops. Att'y Gen. 408 (1905) declared that the applicability of section 22 of the Interstate Commerce Act, after which section 6 is patterned, *depends on whether the government receives the entire benefit of the reduced rate.* The opinion went on

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which would tend to restrain or diminish the sovereign's power, rights, or interest was not binding unless the sovereign was named therein. *Emer. Fleet Corp.* v. *West. Union,* 275 U.S. 415 (1927). It would indeed seem, as we pointed out in *In the Matter of the Carriage of Military Cargo,* 10 F.M.C. 69, 81 (1966), that "* * * any denial of reduced rate transportation to the Government would have to be based on *express* statutory language." (emphasis added). In this connection, see also *Guarantee Co.* v. *Title Guaranty Co.,* 224 U.S. 152 (1912) ; *United States* v. *California,* 297 U.S. 175 (1936) ; and *Paul* v. *United States,* 371, 245 (1963).

to construe the words "for the * * * governments" or " for the United States" as meaning *for the benefit* of the governments and further specified that this benefit must be *total* and *direct*. Consistent with this Attorney General's opinion and the principles of law stated therein, the ICC has historically held that it is improper to permit the benefit of special rates on Government material to accrue to anyone other than the Government itself. *Havens & Co.* v. *C. & N. W. Ry. Co.*, 20 I.C.C. 156, 158 (1911); *Givens* v. *L. & N. R. Co.*, 140 I.C.C. 605 (1928).

More recently, in *Interpretation of Gov't. Rate Tariff—Eastern Central*, 323 I.C.C. 347 (1964), a case directly on point, the ICC had occasion to consider the question of whether a carrier could accord a nongovernment (commercial) shipper a reduced rate under section 22 of its act, if "the costs paid to the carrier by the shipper or receiver are to be reimbursed by the Government." In concluding that the Government is entitled to "free or reduced rates" only where it is completely responsible for the payment of the transportation charges. the Commission stated:

> * * * [W]e conclude that section 22 quotations are applicable on transportation services which are performed for the government, so long as the direct and entire benefit of the special rates accrues solely to the government * * * [S]ection 22 rates are proper only where the government pays the charges or directly and completely reimburses the party which initially bears the freight charges * * *
>
> Indirect cost * * * is that which cannot be related specifically to a particular item because it is incurred for common or joint objectives of both the contractor and the government. Since the entire benefit does not accrue solely to the government, transportation which is considered a matter of indirect cost cannot be regarded as "for the government" so as to qualify for special rates under section 22, even if the indirect cost item is allowable and an allocable portion is in fact paid by the government. 323 I.C.C. at pp. 350–352.[8]

We agree with the reasoning and conclusions of the above opinions and we find nothing in the wording of our statute or in its legislative history to support a different interpretation. We find, therefore, that section 6 "free or reduced rates" are applicable on transportation services which are performed for the Government so long as it derives the direct, actual and entire benefit of the special rate. Applying this standard to the situation before us, we conclude that only those shipments for which the U.S. Government bears ultimate responsibility

[8] Upon further consideration of its *Eastern Central* decision last year, the ICC, in approving the use of specific endorsements on bills of lading, reaffirmed its earlier conclusion and again cautioned carriers "* * * to confine the application of section 22 rates to shipments on which the government pays the transportation charges." *Interpretation of Gov't. Rate Tariff—Eastern Central,* 332 I.C.C. 161, 163 (1968).

for the transportation costs can qualify for additional free time, beyond the 10 days now provided, at San Diego.[9]

In order to eliminate any possibility that "benefits of the rule would accrue to commercial shippers or to any party other than the U.S. Government," Hearing Counsel suggest that the tariff rule adopted by the Examiner might be amended to read as follows:

> Upon request of the United States Government, additional free time may be granted over and above the initial ten (10) day free-time period, not to exceed ten (10) days, excluding Saturdays, Sundays, and holidays. This provision shall apply only to commodities shipped for the account of the U.S. Government.

We fully endorse Hearing Counsel's recommended tariff rule. It is not only legally sound but also answers all of the valid objections raised by the parties.

We will not pretend to fully understand all of the legal intricacies and ramifications of P.L. 480 programs or the distinctions between Titles I and II as they relate to our decision here. Suffice it to say that the Government will have to support any request for additional free time by demonstrating to San Diego's satisfaction that the shipments involved are in fact being shipped for its "account" and that it will derive the full benefit of the additional free time. In order that we might be in a better position to police the implementation of the above tariff rule and to relieve any apprehension that these suggested rules would be abused by the Port of San Diego by extending privileges to cargo not entitled thereunder, we are adopting the Examiner's requirement that the Port maintain detailed records for inspection purposes of each extension granted for at least two years.

It must be noted significantly here that, other than the requirement that an extension of free time be granted *only* on those cargoes shipped for the account of the U.S. Government, we have imposed no conditions on the future use of the additional free time. Thus, the adopted rule is not limited in application to U.S. Government cargo bagged on the premises but would apply to *any* cargo shipped for the account of the U.S. Government moving through the Port of San Diego. This position we find to be consistent with the statutory policy described above.

Besides clearly indicating that the free time benefits would not extend to parties other than U.S. Government, Hearing Counsel's suggested rule also effectively eliminates other posisble ambiguities.

[9] This is also consistent with the interpretation already placed on such provisions at other U.S. ports. For example, witnesses testifying on behalf of Virginia ports stated that under the rule in their tariff special treatment would be limited to shipments where the Government was the actual shipper and paid for the costs of transportation, and not where it is merely lending money to foreign nations for purchase of American commodities.

In the first place the above provision eliminates reference to the introductory phrase "For good reason" which San Francisco contends to be subjective and improper for inclusion in tariffs. We concur with Hearing Counsel that there is no real need for the phrase since it is the policy and custom to grant special treatment to Government cargoes without further reason.

It will also be noted that Hearing Counsel remove from the ambit of the rule requests "for charitable purposes." While they explain that they "do not oppose such language in principle since policy and custom support it," they do agree with San Francisco that the term is not defined in the record and there is no evidence of record concerning *any* charitable commodities shipped through San Diego. Since San Diego did not request special treatment for charitable cargoes, nor does there appear to be any practical need for such an exception from established practices at the port, we find Hearing Counsel's deletion of the ambiguous language to be fully proper.

Moreover, we find that the granting of additional free time for U.S. Government cargo at San Diego has not been shown to be an unjust or unreasonable practice relating to the handling of property within the meaning of section 17 of the Act. There is no indication whatever in the record that the implementation of an additional free time rule for U.S. Government cargo would in any way interfere with and disrupt the normal flow of other cargo, otherwise contribute to congestion at the Port, or impose any additional expense on other cargo.

Without deciding whether section 16 First of the Act, requiring the equality of treatment between "any particular person, locality or description of traffic," could ever be violated by according "free or reduced rates" to U.S. Government cargo pursuant to section 6, we further find and conclude that there is no evidence to indicate that undue or unreasonable preference or prejudice in violation of section 16 First would result from the incorporation of the above extended free time provision into San Diego's tariff.

B. *Commercial Cargo*

The Examiner in his decision found that nongovernment or "commercial cargo" constituted something "less than 5%" of the total outbound cargo bagged and shipped at San Diego and that "* * * this relatively small portion of the total * * * [could not], on this record, be found to require or to be entitled to additional free time for assembly." Considering the fact that our interpretation of what constitutes "government property" within the meaning of section 6 of the Intercoastal Shipping Act, 1933, is manifestly more restrictive than the Examiner's, this finding has been rendered a little less than accurate. While a complete and precise breakdown of U.S. Government/com-

mercial cargo moving through San Diego is not contained in the record, it is nevertheless clear that there is sufficient "commercial cargo" being bagged and shipped at that port to warrant our consideration of San Diego's petition.

As it relates to commercial cargo, the essence of San Diego's initial petition, is a request to provide a specified period of time, in addition to the free time presently allowed, during which bulk cargo arriving at the port could be bagged or procesesd on port premises without accruing wharf demurrage or other terminal charges. Now, whatever else this period of time might be considered, whether it be "assembly", "bagging" or "processing" time, it clearly does not fall within our definition of "free time." In *Investigation of Free Time Practices—Port of San Diego*, *supra*, we defined the nature of "free time" as follows:

> Free time is not a gratuity, but it is required as a necessary part of the carrier's transportation obligation which includes a duty on the carrier to "tender for delivery" all cargo carried by it absent a special contract to the contrary * * *. Thus the establishment of the *minimum* amount of free time which under the law must be granted by carriers is a relatively simple proposition—the period must be realistically designed to allow the consignee sufficient time to pick up his cargo, taking into account physical limitations of the facilities, other delays, etc., i.e., the so-called transportation necessities of the particular port or terminal * * *

Thus, "free time" is limited strictly to that period of time required by the shipper to *assemble* or the consignee to *remove* his cargo prior to it being loaded or subsequent to its being discharged from the vessel. Clearly, it was never intended to encompass the period of time required by the shipper to bag or otherwise process his cargo while on terminal premises.

Processing time, as we shall refer to it herein, is not required as a "necessary part of the carrier's transportation obligation." The carrier has absolutely no obligation, transportational or otherwise, to provide a shipper any time beyond what is reasonable and necessary for the shipper to assemble, or the consignee to pick up, his cargo. Nor is the port itself in any way required to allow a shipper's goods to occupy terminal space beyond the normal free time period, free of terminal charges, while it is being processed. An allowance of "processing time" is provided gratuitously to the shipper as a service, and so long as it is not unlawful, it is solely within the managerial discretion of the port.

Considered as a terminal practice the validity of providing such a service is dependent on its "reasonableness" under section 17 and its "reasonableness" under this section is based, in turn, on a broad consideration of many factors relating to the conditions existing at the port

and the characteristics of the traffic involved. Viewed in the light of the foregoing and for reasons set forth below, we find that the record in this proceeding fully supports and justifies San Diego's allowance of time, free of terminal charges, for the "processing" of bulk cargo under certain conditions. In the first place, we fully recognize that San Diego is not here involved, as it was in Docket No. 1217, in a promotional "give-away program" of valuable port storage space at noncompensatory rates calculated solely to attract cargo to the port and give it the competitive edge over neighboring ports. San Diego's position in this proceeding represents and effort to meet specific operational needs which exist at the port in order to assure the continued movement through the port of a specific and limited type of cargo for which special transportational requirements exist.

The record is clear that the chemical fertilizers, which represent at least 95 percent of the total cargo bagged by Freight Handlers at San Diego, *cannot* move in bulk to the ports of the recipient countries because of deficient or nonexistent bulk unloading facilities at those ports. To the extent that these commodities *must* be bagged prior to shipment, they do in fact, as San Diego has contended throughout this proceeding, constitute a new and unique type of cargo.

Although mathematically the normal 10-day free time period should be adequate to proces a 10,000 ton consignment, it has been shown that this does not always prove true in practice. In fact, the record indicates that the capacity of the plant is limited and the facility has been severely taxed to bag and load 10,000 ton lots within the normal free time. Or, as the Examiner found in his decision:

> There are conditions, beyond the control of either the exporter or Freight Handlers, which arise from time to time rendering the normal ten day free time allowance inadequate for bagging and assembling large consignments. Included are unpredictable lapses in the availability of materials at the source and delays in the receipt from the manufacturer of the particular size bags specified in a particular bagging contract. The bags are actually procured by the exporter. As the bagging of this cargo is a necessary step in transporting it from source to destination, these are transportation problems and are not based on merchandising considerations or matters of commercial convenience. While the present ten day free time allowance may prove adequate in most instances additional time must be made available when it is not reasonably possible to receive, bag and assemble large consignments that quickly.

And as one witness testified, the coordinating problems that arise are the product of uncontrollable factors in the shipping process and cannot be attributed to fault on the part of any party.

The only reason that Freight Handlers has generally been able to bag, assemble, and load a 10,000 ton shipment within the presently allowable 10-day free time is because it has operated two eight hour shifts

and has "absorbed" the overtime. Freight Handlers has testified, however, that they cannot remain in business in San Diego if they must continue to absorb losses when conditions conspire to prevent the processing and assembly of shipments within the regular time period. Under these circumstances, we think it plain that a 10-day "processing time" period for single consignments of 10,000 tons or more is neither unrealistic nor excessive.

At this juncture, we might point out that the 3,000 ton minimum on single consignment proposed by San Diego is manifestly unrealistic and unsupportable on the record. In the first place, the record clearly demonstrates that under actual experience the present 10-day free time period is more than sufficient to process a shipment as small as 3,000 tons. Secondly, the commodities in question here generally move in approximately 10,000 ton lots because this represents the normal capacity of the vessels which are chartered. In this regard, one of San Diego's own exhibits showing the actual experience of the bagging facility indicates that of 11 vessel loadings, only in 4 instances was the total tonnage loaded less than 10,000 tons and one of these came about as a result of some 194 tons being shut out of an earlier loading. For this reason, we find that the 10,000 ton minimum recommended by Hearing Counsel at San Francisco's suggestion is more consistent with the record.

Besides being required by existing circumstances, there is no indication that the establishment of a 10-day processing period at San Diego would in any way operate to the detriment or otherwise adversely affect the efficiency, economy, and financial soundness of port operations at San Diego. The operations of Freight Handlers have not caused displacement of any other cargoes normally being shipped or received at San Diego. The record is clear that the port space that has been utilized by Freight Handlers for the bagging and accumulation of bagged cargo was not needed for any other cargo. Nor is there any indication that the establishment of a processing period would in the future displace or impede the flow of other cargoes.

As far as the economy and financial soundness of the port is concerned, the construction of the bagging facility has provided new sources of revenue to the port and has brought cargo to the port, which would not have otherwise moved out of the West Coast. There has been no evidence that there has been any diversion of cargo from any other West Coast port as a result of the new industry at San Diego.

In *Investigation of Free Time Practices—Port of San Diego*, *supra*, at 547, we determined that as used in section 17 and as applied to terminal practices, a "* * * 'reasonable practice' most appropriately means

a practice, otherwise lawful but not excessive and which is fit and appropriate to the end in view." In view of all that has been stated herein, we find that a provision such as the one set forth below would not only satisfy the above criteria as to "reasonableness" but would also accomplish the objectives of the Port of San Diego:

Processing time not to exceed ten (10) days, excluding Saturdays, Sundays, and holidays, in addition to the free time provided by Item 435, may also be granted for the bagging of commercial bulk outbound cargo moving in single consignments of 10,000 net tons or more.

Moreover, it has not been shown that the implementation of a tariff rule allowing a specified period of "processing time" for commercial bulk cargo under the conditions set forth herein would in any way unduly or unreasonably prefer or disadvantage any person, locality, or description of traffic within the meaning of section 16 First of the Act.

Ultimate Conclusions

1. On the basis of all of the foregoing and the entire record herein, it is found and concluded that the tariff provisions set forth below would not offend the proscriptions of either section 16 First or section 17 of the Shipping Act, 1916:

Upon request of the United States Government, additional free time may be granted over and above the initial ten (10) day free-time period, not to exceed ten (10) days, excluding Saturdays, Sundays, and holidays. This provision shall apply only to commodities shipped for the account of the U.S. Government.

Processing time not to exceed ten (10) days, excluding Saturdays, Sundays, and holidays, in addition to the free time provided by Item 435, may also be granted for the bagging of commercial bulk outbound cargo moving in single consignments of 10,000 net tons or more.

2. With regard to free time extensions granted for commodities shipped for the account of the U.S. Government, San Diego will maintain records of such extensions for at least two years. These records will reflect the request, the reason, the commodity, the consignee and the additional free time used.

An appropriate order will be entered.

By the Commission.

[SEAL] (Signed) Thomas Lisi,
Secretary.

ORDER

The Commission having this day entered its Report in this proceeding which is hereby made a part hereof by reference and concluded the Port of San Diego's tariff rule providing an additional 10 days exclusive of Saturdays, Sundays, and holidays on commodities shipped for account of the United States Government is not violative of section 16 First or section 17 of the Shipping Act, 1916; and having further concluded that the Port of San Diego's tariff rule granting an additional 10 days' processing time in addition to the present 10 days' free time on commercial bulk cargo bagged on the Port premises moving in single consignments of 10,000 tons or more is not violative of section 16 First or section 17 of the Shipping Act, 1916,

It is ordered, That the Port of San Diego amend its tariff to provide:

Upon request of the United States Government, additional free time may be granted over and above the initial ten (10) day free-time period, not to exceed ten (10) days, excluding Saturdays, Sundays, and holidays. This provision shall apply only to commodities shipped for the account of the U.S. Government.

Processing time not to exceed ten (10) days, excluding Saturdays, Sundays, and holidays, in addition to the free time provided by Item 435, may also be granted for the bagging of commercial bulk outbound cargo moving in single consignments of 10,000 net tons or more.

It is further ordered, That with regard to free time extensions granted for commodities shipped for the account of the U.S. Government, San Diego will maintain records of such extensions for at least two years. These records will reflect the request, the reason, the commodity, the consignee and the additional free time used.

By the Commission.

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 69-7

IN THE MATTER OF AGREEMENT NO. 5200-26
(PACIFIC COAST EUROPEAN CONFERENCE)

Decided July 22, 1969

Where modification of conference self-policing system is designed to guarantee a fair and impartial hearing to an accused line and does not affect any substantive right or obligation of the members under the conference agreement, such procedures may be used to investigate and prosecute breaches which predate the approval thereof provided Commission approval under section 15 is obtained.

Approval of agreement authorizing a conference to utilize recently amended self-policing procedures to investigate and prosecute breaches of the conference agreement which predate the approval of such amendment does not constitute the retroactive approval of past unauthorized activities.

An amendment to a self-policing system which creates no new substantive liabilities but merely guarantees to an accused line the right to a fair and impartial hearing is procedural only and an agreement permitting its retrospective application does not amount to an *ex post facto* regulation.

Where the approval of an agreement authorizing a conference to utilize its recently amended self-policing procedures retrospectively will restore the continuity of the conference's self-policing system such agreement is in harmony with the legal requirement of section 15.

Leonard G. James, *F. Conger Fawcett*, and *John P. Meade* for respondents, Pacific Coast European Conference and its member lines.

George F. Galland and *Amy Scupi* for respondent, States Marine Lines.

Donald J. Brunner and *James N. Albert*, Hearing Counsel.

REPORT

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

We instituted this proceeding to determine whether Agreement No. 5200-26 should be approved, disapproved, or modified pursuant to

section 15 of the Shipping Act, 1916, as amended. The agreement, if approved, would authorize the Pacific Coast European Conference to utilize its recently amended self-policing provisions,[1] "* * * to investigate and prosecute pursuant to those provisions, any alleged breaches brought to its attention at any time after March 8, 1967."

A protest urging our disapproval of the agreement was filed by States Marine Lines, a former member of the Conference, which resigned its membership on December 1, 1967 while allegations of malpractices were still pending against it. States Marine Lines and the Pacific Coast European Conference and its member lines were named as respondents in the order of investigation. Hearing Counsel also participated. There appeared to be no genuine or material issues of fact and the proceeding was limited to the submission of briefs and affidavits. We heard oral argument.

The Facts

The Pacific Coast European Conference is a conference of common carriers by water serving the trade between U.S. Pacific Coast and Alaskan ports and ports in Europe and its environs. The Conference was established pursuant to Agreement No. 5200 and approved by the Commission's predecessors on May 26, 1937. Although Agreement No. 5200 has undergone many modifications since it was orginally approved, certain Articles of the Agreement have remained virtually unchanged from the beginning. Among such provisions are Articles 2 and 3, whereby members of the Conference agree to adhere to the Conference's published rate structure and regulations. These Articles provide in pertinent part:

> 2. No party hereto shall engage, directly or indirectly, in the aforementioned transportation under terms, conditions and/or rates different from those agreed upon by and between the members hereto, * * *.
>
> * * * * * * *
>
> 3. All freight and other charges for and in connection with such transportation shall be charged and collected by the parties hereto based on actual gross weight or measurement of the cargo or per package according to tariff, and strictly in accordance with the rates, charges, classifications, rules, and/or regulations adopted by the parties. There shall be no undue preferences or disadvantages, nor unjust nor unreasonable discrimination, or unfair practices against any consignor or consignee by any of the parties hereto.
>
> Each of the parties hereto agrees that neither it nor its principals nor associated nor affiliated companies of any of them shall give or promise, either directly or indirectly, to any shipper, or consignee or broker, or prospective shipper or consignee or broker, or to any officer, employee, agent or representa-

[1] Agreement No. 5200-25, approved by order of the Commission on November 15, 1968.

tive of any such shipper or consignee or broker, or prospective shipper, or consignee or broker, or to any member of the family of any of the aforesaid, in any manner, any return, commission, compensation, concession, free or reduced storage, free or reduced passenger rates, any bribe, gratuity, gift of substantial value or other payment or remuneration through any device whatsoever, or render to any of the foregoing any service outside or beyond that called for in the contracts of affreightment or tariffs.

NOTE:—Free or reduced ocean passages. Personal Grounds—Principals of Member Companies may grant free or reduced rate passages on personal grounds, but in no instance shall free or reduced rate passages be granted in conflict with the above or in violation of Section 16 of the Shipping Act, 1916.

There shall be no payment or refund of freight or compensation received and no absorption at loading and discharging ports of rail, truck or coastal steamer freights or other charges directly or indirectly, by any of the parties hereto, except as may be agreed to by three-fourths of the parties hereto at any regular meeting of the Conference.

The parties hereto and each of them further agree that they shall not enter into any agreement of any nature, with any party or parties, which would in any way affect the integrity of this agreement, or any agreements, rates, rules or regulations made pursuant hereto.

Until December 1, 1967 respondent, States Marine Lines, Inc. and Global Bulk Transport, Inc., operating as a joint service, held a single membership in the Conference. It had been a member continuously for approximately 18 years.

Prior to November 15, 1968 the procedures governing the Conference's self-policing activity consisted primarily of two Articles in the agreement which read as follows:

Article 15

BREACH OF AGREEMENT. Except as otherwise provided in Article Four (4), liquidated damages for nonobservance of this Agreement, or of any of the rules, regulations or tariffs of the Conference, shall be not less than Five Hundred Dollars ($500.00) nor more than Ten Thousand Dollars ($10,000). If in the opinion of the Conference members, failure to observe the Conference Agreement or Conference rules, regulations or tariffs, in a particular case, or cumulatively, jeopardizes the accomplishment of the basic purposes of this Agreement, the offending party may be expelled from the Conference. The determination as to nonobservance of this Agreement or of any rule, regulation or tariff of the Conference and whether the offending party shall pay liquidated damages or be expelled from the Conference shall be by agreement of the parties as provided in Article Eight (8). Should an offending party fail to pay liquidated damages assessed hereunder to the Conference within five (5) days after written demand therefor, the said party shall be and become liable to civil action. In no case shall the party com-

plained against cast any vote on the matter under consideration. No expulsion shall become effective until a detailed statement setting forth the reason or reasons therefor has been furnished to the expelled member and a copy of such notification mailed to the governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended.

Article 8

DECISIONS. Decisions at Duly called meetings are to be made by a three-fourths vote of members present and entitled to vote; otherwise, they are to be made by three-fourths vote of all members entitled to vote. Changes in this agreement, however, shall be made only by unanimous vote of all members entitled to vote.

In March 1967 the United States Court of Appeals for the District of Columbia Circuit determined [2] that a conference self-policing system must contain specific assurances that an accused member will be treated fairly and provision for impartial review by a totally disinterested person or body of any determination to penalize a member line.

Within a few days following this decision counsel for the Conference wrote a letter to the Conference Chairman advising that, in his opinion, the self-policing system should be amended to conform to the guidelines laid down by the Court and submitted a draft revision for that purpose. A general conference meeting on the draft was held in London on June 28, 1967, at which time 21 members of the 22-member conference voted to adopt the proposed revision. (The conference agreement requires unanimous vote to effect changes in the basic agreement.) On July 6, 1967, States Marine notified the Conference that it was withdrawing its affirmative vote, requesting time to consult with counsel. On July 10, 1967, Weyerhaeuser Line, the one member absent from the meeting held in June, voted "no" to a proposed revision.

On August 22, 1967, the Conference instituted a self-policing action against States Marine for alleged breaches of the Conference agreement seeking liquidated damages in the amount of $130,000.

Instead of defending against these charges on the merits, States Marine filed the complaint which became our Docket 67–49.[3] It also sought and obtained an injunction against the Conference and its member lines in the United States District Court for the Northern District of California Southern Division (No. 47855) forbidding any

[2] *States Marine Lines, Inc.* v. *Federal Maritime Com'n*, 376 F.2d 230 (D.C. Cir. 1967).

[3] *States Marine Lines, Inc., et al.* v. *Pacific Coast European Conference, et al., 12 FMC 1*, 1968.

attempt to collect penalties from States Marine until the Commission had made its decision in Docket 67–49.

On August 29, 1967 States Marine did furnish the Conference with its recommended modifications. These proposals were similar to the system which had been voted on at the London meeting but were considerably more detailed on the procedural safeguards to be afforded the accused as well as the arbitration procedures.

While Docket No. 67–49 was pending before the Commission, States Marine gave notice of its intention to withdraw from conference membership and, in fact, did resign effective December 1, 1967.

Subsequently, the Conference Chairman advised States Marine that a meeting of the Conference would be held on January 4, 1968, to consider the outstanding charges. States Marine was invited to be present and to participate in its defense. By letter dated January 3, 1968, States Marine declined to participate and suggested that the matter be postponed until after the Commission reached its decision in this docket.

Nevertheless, the meeting was held, and States Marine was found guilty and penalized by the membership in the amount of $130,000. In a letter signed by the Conference Chairman dated January 5, 1968, States Marine was advised of this action. In this letter, States Marine was also offered an opportunity to have the adverse determination reviewed by an impartial board of arbitrators.

Our report in Docket 67-49 was served June 27, 1968, and in it we held that the Conference's self-policing system as it then existed was "legally defective in that it contain[ed] no procedures guaranteeing fundamental fairness as defined by the Court in the *States Marine* case." We added that, "It may not be used and the assessment against States Marine is void." The Conference was ordered to amend its self-policing procedures.

Therefore, the Conference sought reconsideration of our decision and a stay pending judicial review. These requests were denied, and on October 21, 1968 the Conference filed Agreement No. 5200-25 which we approved on November 15, 1968.

On October 28, 1968 Agreement No. 5200-26, now under consideration, was filed for approval. It consists of one paragraph as follows:

> The procedures contained in this article conform to the decision in *States Marine Lines, Inc.* v. *F.M.C.*, 376 F. 230 (D.C. Cir. 1967). The amendment of this article to so conform shall affect self-regulatory procedure only, and shall effect no substantive change in the parties' rights or obligations under this agreement. The amended procedures shall apply to, and the Conference shall be authorized to investigate and prosecute pursuant to these provisions, any alleged breaches brought to its attention at any time after March 8, 1967.

Discussion

The scope of this proceeding is limited to the following legal issues:

> Whether section 15 approval should be given to Agreement No. 5200-26 which contains (1) legal conclusions, and (2) a provision which would give retroactive effect to a recently approved self-policing procedure.

In their opening briefs, both States Marine and Hearing Counsel opposed the approval of the first two sentences contained in the agreement on the ground that the legality and interpretation of an agreement filed under section 15 is for the Commission and the courts to determine and is not something to which the parties may agree.

In its reply brief, the Conference indicated its willingness to delete these two sentences in the interests of avoiding unnecessary controversy and suggests that Agreement 5200-26 be approved in the following form:

> The amended self-policing procedure approved by the Federal Maritime Commission on November 13, 1968, shall apply to and the Conference shall be authorized to investigate and prosecute pursuant to such provisions, any alleged breaches brought to its attention at any time after March 8, 1967.

Since the Conference has agreed to withdraw the objectionable language, this issue has been rendered moot and nothing more need be said.

When it filed its complaint in Docket 67-49 States Marine noted only two deficiencies in the Conference's then-existing self-policing system. The first was the lack of any procedures guaranteeing the right of an accused line to be furnished with all of the evidence to be relied upon and a fair opportunity to rebut or explain such evidence. The second was the absence of any provision for an impartial tribunal vested with the final authority to pass on questions of guilt or level of penalty to be assessed.

States Marine did not challenge the legality of Articles 2 and 3 of the basic conference agreement defining malpractices, nor did it attack the range of penalties which might be assessed upon a competent finding of guilt. Its objection was addressed solely to the conference agreement's failure to include specific procedures for the adjudication of alleged malpractices in accordance with the principles set down in the opinion of the Court of Appeals in the *States Marine* case, *supra.*

In our report in Docket 67-49, we agreed that the Conference's self-policing system as then constituted was:

> [L]egally defective in that it contains no procedures guaranteeing "fundamental fairness" as defined by the court in the *States Marine* case. It may not be used and the assessment against States Marine is void.

Having made this determination, we added:

> This does not mean, however, that the Conference has lost its right of action against States Marine for alleged wrongdoing while a Conference member. It could well be that the Conference may still enforce Conference obligations incurred by States Marine prior to its resignation from the Conference.

The legal defect of the Conference's former self-policing system consisted solely in its lack of a procedural system whereby a fair and impartial hearing would be guaranteed to the accused member and only so much of the system which required the conference members themselves to sit in final judgement was affirmatively found to be illegal in Docket 67-49.

Since its original self-policing system was first approved, the Conference has always had the legal right and obligation to investigate malpractices and bring charges against members where probable cause existed.

Thus, not all actions taken under that earlier system were illegal. The method of investigating and bringing formal charges was neither challenged nor at issue. It was only the lack of fair procedures and an impartial tribunal which prevented the Conference, once having initiated a self-policing proceeding, from seeing the case through to a final decision. In short, the Conference's old self-policing system was not totally illegal—merely inadequate. While the deficiency in the old self-policing system was serious enough to effectively block any final action against an accused line, this disability was removed when Agreement No. 5200–25 was approved on November 15, 1968.

However, since States Marine resigned from the Conference on December 1, 1967, it was not a party to Agreement No. 5200–25, and contends that it can never be tried under the new procedures. It poses the problem in the form of a dilemma. Under the old self-policing system the Conference was helpless to try States Marine, since its procedures were legally inadequate in the light of the procedural standards required by the *States Marine* case. While the Conference still had its "illegal" self-policing system, States Marine withdrew from membership. By the time the Conference amended its agreement so as to comply with the *States Marine* case, States Marine was no longer a member and, therefore, cannot be bound by its terms.

In asserting that the Conference has never had valid self-policing jurisdiction, States Marine misconstrues our holding in *States Marine* v. *Pacific Coast European Conference*, *supra*. Its argument is premised on the erroneous assumption that the Conference was stripped of all self-policing authority by reason of our conclusion in Docket 67–49 that the procedures were inadequate.

The validity of an allegation of breach of a conference agreement or a malpractice thereunder is not affected by the illegality of the procedural machinery under which such charges are to be tried. Thus, a valid charge, i.e. one which, if proved, constitutes a breach for which penalties may be properly assessed, stands until adjudicated. Any such adjudication, of course, had to await the adoption and approval of legal procedures.

In the instant case there has never been a valid assessment of penalties nor has there been a competent, final determination that States Marine is guilty of any conduct which would justify such an assessment. However, there are charges, regular on their face, outstanding against States Marine. These charges were equally legal under the old and new procedures and have lost none of their vitality by virtue of the amended procedures contained in Agreement No. 5200–25. All that was lacking was the existence of a valid tribunal before which to try the charges and appropriate procedures to protect the accused. This is all that our report in Docket 67–49 stands for.

Accordingly, we conclude that the Conference has never lost the legal right to police its own membership although it has been under a legal disability to conduct a valid adjudicatory proceeding under its old self-policing procedures. This temporary disability was removed upon the approval of Agreement No. 5200–25 which created a viable set of procedures fully in accord with the Court's decision in the *States Marine* case, *supra*.

States Marine contends, however, that the Commission cannot approve Agreement No. 5200–26 because to do so would confer retroactive section 15 approval.

In support of this argument, it cites the following cases: *Mediterranean Pools Investigation*, 9 F.M.C. 264 (1966); *Agreements No. T–2108 and T–2108–A* and *Agreement No. T–2138* (Dockets No. 68–26 and 68–27, 12 F.M.C. 104 and 110 (1968); *River Plate & Brazil Conf.* v. *Pressed Steel Car. Co.*, 227 F.2d 60 (2nd Cir. 1955); and *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966). All of these cases stand for the proposition that the Commission has no authority to approve any conduct under a section 15-type agreement which transpired prior to approval. In each of the cited cases there was an attempt to legitimize activity which had already taken place.

In this case the Conference has done nothing under Agreement 5200–26, nor is it asking the Commission to approve any conduct which has taken place in the past. The only activity contemplated under Agreement 5200–26 is the future investigation and prosecution of malpractices and the utilization of newly amended procedures for the adjudication of such allegations.

It could be argued that an amendment such as Agreement 5200–26 which makes no substantive changes in the self-policing system, i.e. one which neither adds nor deletes offences for which sanctions may be imposed is automatically applicable to prior breaches as well as those which take place after approval.

Agreement No. 5200–25, however, is silent on whether the new procedures contained therein may be used to investigate and adjudicate offences which occurred prior to its effective date.

In *States Marine Lines, Inc.* v. *Trans-Pac. Freight Conf.*, 7 F.M.C. 204, 216 (1962), we had occasion to comment on the possible application of newly approved self-policing procedures to past offenses:

> [I]f it is the purpose of a conference to have its neutral body or other self-policing system deal with past events, this purpose should be specifically included in the agreement establishing the self-policing system when it is submitted for approval.

We perceive no reason to deviate from that position and in the interests of clarity it is better that it be spelled out in the form of an amendment such as the one which is before us.

As we stated in *Joint Agreement—Far East Conf. and Pac. W.B. Conf.*, 8 F.M.C. 553, 558 (1965):

> Any interested party should be able, by a reading of the agreement, to ascertain how the agreement is to work, without resort to inquiries of the parties or an investigation by the Commission.

In its opening brief, States Marine asserts that the order of investigation should have included the issue of whether the agreement is "discriminatory and unfair as between carriers, operates to the detriment of the commerce of the United States, and is contrary to the public interest."

Because this "issue" was not specifically included in the order of investigation, States Marine simply declined to brief it.

There are two reasons—either one of which is sufficient—why this argument should be rejected.

If a party with an interest in an agreement is dissatisfied with the scope of an order of investigation or in doubt as to its scope, the appropriate vehicle for relief is the filing of a timely motion. States Marine waited until its opening brief to raise this issue for the first time, although a full month had elapsed after service of the order of investigation.

Secondly, a cursory examination of this so-called issue reveals that it is a dubious one at best. The order of investigation specifically states that the legal issue is:

Whether section 15 approval should be given to Agreement No. 5200–26 which contains (1) legal conclusions, and (2) a provision which would give retroactive effect to a recently approved self-policing procedure.

Thus, the issue before the Commission in this case is the approvability of Agreement 5200–26 under the legal standards imposed by section 15. Or, in other words, would the agreement be discriminatory or unfair as between carriers, operate to the detriment of the commerce of the United States, or be contrary to the public interest within the meaning of section 15. Thus, the only way to urge disapproval of the agreement in question was to argue the very issues allegedly precluded by our order.

The Conference has made it clear that if Agreement No. 5200–26 is approved, it intends to utilize its recently approved self-policing procedures to adjudicate the charges which were outstanding against States Marine at the time it resigned its membership.

States Marine, however, insists that the "entire purpose of the agreement is to further the Conference's vendetta against States Marine," and that it is illegal on its face.

This is essentially the same accusation which States Marine made in Docket No. 67–49. In that case it was on firmer ground since the then existing procedures lent themselves to the possibility of arbitrariness. This argument has lost its vitality since the approval of Agreement No. 5200–25.

The charges outstanding against States Marine have been held in abeyance for precisely the reason that without adequate procedural protection and without an impartial tribunal the possibility of arbitrary and discriminatory treatment was indeed real. With the advent of a procedural system which even States Marine concedes [4] is fair, the possibility of injustice has been minimized, if not entirely removed.

If the Conference follows its own self-policing procedures conscientiously, as it must under the law, States Marine will be afforded every procedural protection and the right to an impartial determination of the charges outstanding against it. Nevertheless, if it should happen that the Pacific Coast European Conference uses its self-policing system as an instrument of oppression, States Marine (or any other line so victimized) would not be without recourse.

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[4] States Marine was a party to the proceeding which resulted in the approval of Agreement 5200–25 and voiced no objection to it. Moreover, counsel for States Marine in the oral argument in this case stated:

> * * * [I]t filed a new self-policing system which States Marine did not oppose. It was Agreement No. 5200–25 and it was approved by the Commission on November 15, 1968. States Marine makes no contention that this new agreement is illegal.

In *Modification of Agreement 5700-4*, 10 F.M.C. 261, 274 (1967), we said in language which is equally pertinent here:

> The remaining reasons advanced by States Marine for an evidentiary hearing are premised on the assumption that the self-policing formula will not be applied justly and in good faith. This is mere speculation on the part of States Marine. In short, States Marine's objections to the self-policing system consist mainly of conjectures as to how the self-policing system might be used as an instrument of oppression. We are duly concerned about the rights of an individual member of a conference and the doors of the Commission are always open to anyone with a legitimate complaint. If a conference does not administer its approved system of self-policing in a fair manner this would surely support a finding of "* * * inadequate policing of the obligations under it * * *" for which the mandatory penalty is disapproval of the entire conference agreement.

States Marine admits that the Conference has not lost its right of action against it if the conference agreement was breached. In its opening brief (repeated again in its reply brief) States Marine asserts:

> * * * If States Marine had indeed violated the conference agreement, the conference has a cause of action at law, enforceable in court, against States Marine.

This statement, while true, is a gross oversimplification of the law governing the right of a conference to discipline its members.

If a member of a conference breaches the agreement or engages in an act defined therein as a malpractice it is accountable to its fellow members in accordance with the terms and conditions of the agreement. The fact that a member of the conference terminates its membership in the organization in no way changes the right of the conference members to proceed against the former member for breaches or malpractices which occurred during the accused member's period of membership any more than a former member of a private club can escape liability for obligations incurred during membership. The courts have uniformly held that a private club or association must first exhaust its own internal administrative processes before seeking judicial aid to enforce a right of action against a member. 6 Am. Jur. 2d *Associations and Clubs*, § 39, p. 469. Thus, even if the Pacific Coast European Conference were a purely private organization it would be required to exhaust its own internal remedies before going into court.

Needless to say, a conference is more than a mere private organization. We have repeatedly held that a section 15 agreement is "* * * a public contract impressed with the public interest and permitted to exist only so long as it serves that interest." *In Re: Pacific Coast European Conference*, 7 F.M.C. 27, 37 (1961).

When Congress amended section 15 in 1961 [5] it clearly directed the

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[5] This language was added to section 15 in 1961 by P.L. 87-346, sec. 2, 75 Stat. 764.

conferences themselves to police the malpractices of their own members. We are required to disapprove any agreement "on a finding of inadequate policing of the obligations under it * * *."

Pursuant to this amendment and our general rulemaking authority under the Act, we promulgated General Order 7 on August 22, 1963,[6] saying in part:

> This provision, in demanding the adequate policing of the obligations under the agreement, clearly presupposes the establishment of some procedure for that purpose.

In the *States Marine* case, *supra*, the Court admonished that:

> * * * [T]o place the Commission in the role of an on-going appellate panel, intimately involving it in a case-by-case review of the Conferences' Neutral Body system, would hardly be consistent with Congress' intent that the Conferences engage in *self*-regulation. 376 F. 2d 230 at 242.

States Marine's suggestion that the Conference may bring a lawsuit for breach of the conference agreement runs directly counter to the Congressional mandate that the conferences regulate themselves as well as the common law governing the right of associations to discipline their members. While a conference is by no means barred from seeking judicial aid, it should do so only after first utilizing the procedural scheme contained in its own basic agreement.

These charges against States Marine are still outstanding. The situation is precisely the same as it was January 1968 with one important exception. The Conference now has adopted, and we have approved, an agreement to the basic conference agreement[7] which requires the Conference to follow carefully defined procedures governing the conduct of self-policing cases, all of which are designed to afford a fair hearing to an accused member. The legal disability which arose by reason of the lack of adequate self-policing procedures has been removed, and the Conference is free to police its members' obligations within the limits of its approved agreement. Moreover, upon the approval of Agreement 5200–26 these procedures may be used to investigate and prosecute offences which are alleged to have occurred any time after March 8, 1967, including the charges outstanding against States Marine.

Of course, States Marine may not be tried for any offence which did not constitute a breach at the time it was alleged to have occurred. Similarly, States Marine may not be subjected to any penalty save those which were specified in the conference agreement at that time.

[6] 28 F.R. 9257.
[7] Agreement No. 5200–25, *supra*.

Aside from this, there is no reason in logic or in law why States Marine may not be tried under amended procedures as approved by the Commission even though it is no longer a member of the Conference and, therefore, did not "agree" to these amendments.

For the reasons stated herein, we will approve Agreement No. 5200–26. An appropriate order will be entered.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 69-7

IN THE MATTER OF AGREEMENT NO. 5200-26
(PACIFIC COAST EUROPEAN CONFERENCE)

ORDER

The Commission having this day entered its report in this proceeding, which is hereby made a part hereof by reference and concluded that Agreement No. 5200-26 should be approved under section 15, Shipping Act, 1916,

Now therefore, it is ordered, That Agreement No. 5200-26 be, and the same hereby is approved in the following form:

The amended self-policing procedure approved by the Federal Maritime Commission on November 13, 1968, shall apply to, and the Conference shall be authorized to investigate and prosecute pursuant to such provisions, any alleged breaches brought to its attention at any time after March 8, 1967.

By the Commission.

[SEAL]

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 69-22

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION—VIOLET A. WILSON D/B/A TRANSMARES

Adopted July 23, 1969

Applicant, Violet A. Wilson d/b/a Transmares, will be an independent ocean freight forwarder as defined in the Shipping Act, 1916; is fit, willing, and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules and regulations of the Commission issued thereunder; the proposed forwarding business will be consistent with the national maritime policies declared in the Merchant Marine Act, 1936; and will be issued a license as provided in section 44(b) of the Shipping Act, 1916.

Violet A. Wilson on her own behalf.
James Albert and *Donald J. Brunner* as Hearing Counsel.

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

This investigation was ordered because it appeared that applicant's husband,[2] Cristobal Mandry, has in the past few years conducted freight forwarding without being licensed, and has in other ways so conducted himself that a license should be denied if he was to take any part in applicant's activity as a forwarder. The record fully bears out the Commission's misgivings with respect to Mr. Mandry's unfitness, and the application would be denied if the record did not establish, as it does, that Mr. Mandry will not have any part in transacting applicant's forwarding business.

At the conclusion of the hearing the following questions were asked and answered:

[1] This decision became the decision of the Commission July 23, 1969.
[2] Applicant will be doing business as "Transmares", a name formerly utilized by Cristobal Mandry. Mrs. Mandry as applicant uses her maiden name, Violet A. Wilson. Sometimes in the record and in this decision, applicant is called Mandry and sometimes Wilson.

EXAMINER PAGE: Do you fully understand, Mrs. Mandry, that if you are licensed by the Commission that such a license will be issued relying on your representation that your husband has no part whatsoever in the business and will play no part in your activities as a forwarder?

Do you fully understand that?

MRS. WILSON: Yes, sir.

EXAMINER PAGE: And that if that understanding should not be kept, of course, your license would be forfeited promptly?

MRS. WILSON: Yes, I understand.

Turning now to Mrs. Wilson's qualifications in her own right, the evidence is undisputed and conclusive that she is a qualified applicant, fit, willing and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules and regulations of the Commission issued thereunder, and that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936.

This is disclosed by the testimony of Robert E. Sunkel, the Commission's chief investigator in the New Orleans Office, detailing a thorough and careful investigation made by him. His testimony is that to the best of his knowledge Mrs. Wilson was not active in the unlicensed forwarding, as she became ill in the early part of the 1960's, was no longer active in the forwarding business, and worked at home as a seamstress.

Mr. Sunkel contacted several groups about Mrs. Wilson. With respect to steamship companies and agents, there were responsible officials of Strachan Shipping Company, United Fruit Company, Amarand Shipping Company, and Ayers Shipping Company. He summed up what he learned from them as follows:

All of these people furnished recommendations as to Mrs. Mandry's abilities as a freight forwarder.

Essentially all of them stated that they have known her for many years dating back into the early to mid-fifties.

They all stated that they considered her an excellent forwarder and completely capable of handling her own forwarding business.

They had never experienced any difficulties with any documentation work she had done on shipments going forward on their lines.

Each and every one of them recommended that she be licensed.

The Whitney National Bank, The International Bank, and the Hibernia Homestead gave satisfactory reports, and at none of them was any derogatory information discovered.

While stating that they had no personal acquaintance with Mrs. Wilson, Mr. T. R. Spedden, president of the New Orleans Freight Forwarders Association (he holds F.M.C. License No. 1) and another

officer of the same association, Mr. Walter Flower, both stated that they knew no reason why she should not be licensed.

Hearing Counsel summed up his feeling as to applicant's qualifications as follows:

I personally feel as though Mrs. Mandry should be given a license on the basis of the record we have before us today as well as information that has come to my knowledge to Mr. Sunkel and through my own investigation.

He was careful to point out that Mrs. Wilson's community property interest in her husband's unlicensed forwarding in the past was a negative factor which might be ground for denying a license.

Upon the whole record it does not appear that this lady should be punished for activities in which she had no part, and which took place while she was in bad health and working as a seamstress. The important point is that she is fully qualified to go into the forwarding business, to be joined as she testified, by her son upon his graduation from high school, and fit to act in the important fiduciary position of independent freight forwarder.[3]

Ultimate Conclusions

Applicant, Violet A. Wilson d/b/a Transmares, will be an independent ocean freight forwarder as defined in the Shipping Act, 1916; is fit, willing, and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules, and regulations of the Commission issued thereunder; the proposed forwarding business will be consistent with the national maritime policies declared in the Merchant Marine Act, 1936; and will be issued a license as provided in section 44(b) of the Shipping Act, 1916.

(Signed) Paul D. Page, Jr.,
Chief Examiner.

It is ordered, That Violet A. Wilson d/b/a Transmares, Inc., is granted an independent ocean freight forwarder license pursuant to Section 44 of the Shipping Act, 1916.

It is further ordered, That this proceeding is discontinued.

By the Commission.

(Signed) Thomas Lisi,
Secretary.

[3] It is both a duty and a pleasure to commend the performance of Mr. Albert and Mr. Sunkel in this case. The latter investigated fully and fairly, and as a witness testified impressively. The former while overlooking nothing adverse to the applicant (who appeared without counsel) took no advantage, and at the end of the testimony stated his opinion that applicant should be licensed.

FEDERAL MARITIME COMMISSION

DOCKET NO. 67–56

PITTSTON STEVEDORING CORPORATION

v.

NEW HAVEN TERMINAL, INC.

Initial Decision Adopted August 8, 1969

Usage charge of $1.00 per 1,000 board feet of lumber assessed by New Haven Terminal, Inc. against Complainant's stevedoring operation at Respondent's terminal, has not been shown to be reasonably related to the services and facilities furnished and accordingly found to be an unjust and unreasonable practice within the meaning of section 17 of the Shipping Act, 1916.

Respondent's assessment of a usage charge of $1.00 per 1,000 board feet of lumber found to be unduly and unreasonably prejudicial or disadvantageous in violation of section 16 First of the Shipping Act, 1916.

Reparation found to be due but amount thereof cannot be ascertained upon present record. Proceeding remanded to Examiner for determination of reparation.

Charles M. Mattingly, Jr. and *Richard P. Lerner* for Complainant.

John W. Barnett and *David P. Faulkner* for Respondent.

John Cunningham and *Mark P. Schlefer* for intervener, Nacirema Operating Company.

Donald J. Brunner and *G. Edward Borst, Jr.*, Hearing Counsel.

REPORT

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

This proceeding was initiated by the complaint of Pittston Stevedoring Corp. (Pittston) against New Haven Terminal, Inc. (New Haven), alleging that New Haven's assessment of a "usage charge" subjected Complainant to an undue or unreasonable prejudice or disadvantage within the meaning of section 16 of the Shipping Act, 1916 (the Act),

and constitutes a practice which is unjust and unreasonable in connection with the receiving, handling, or delivery of property within the meaning of section 17 of the Act. Complainant seeks reparation in the amount of $100,000 and an order requiring Respondent to cease and desist from levying the charge. Nacirema Operating Company, Inc., a Port of New York terminal operator and stevedoring company, and Hearing Counsel, intervened in the proceeding.

In his Initial Decision served April 23, 1969, Examiner Herbert K. Greer ordered New Haven to cease and desist from imposing its usage charge. In so doing, the Examiner concluded that a:

> * * * usage charge of $1.00 per 1000 board feet of lumber assessed by respondent against complainant's stevedoring operation at respondent's terminal bears no reasonable relationship to the use by or services rendered to complainant and imposing it constitutes an unjust and unreasonable practice in connection with the receiving of property in violation of section 17 of the Shipping Act, 1916.

The Examiner further found that while Pittston was entitled to reparation, the amount could not be fairly determined "without consideration being given to a *fair and reasonable charge* against complainant for use of respondent's facility" (emphasis added), a determination which could not be made on the present record. Accordingly, he directed the Complainant to prepare a statement and otherwise comply with section 15(b) of the Commission's Rules of Practice and Procedure and added that "* * * if necessary further hearing will be held for the purpose of hearing evidence or argument on reparation * * *." The proceeding is now before us upon exceptions to the Initial Decision.

Respondent's exceptions are generally directed to the Examiner's finding that the subject usage charge was not related to the services rendered. In essence, these exceptions constitute nothing more than a reargument of issues and contentions which were exhaustively briefed and considered and resolved by the Examiner in his Initial Decision. A careful consideration of the record in this proceeding leads us to the conclusion that the Examiner's disposition of these issues and contentions was proper and well founded, except to the extent that he failed to find that New Haven's assessment of the subject usage charge was violative of section 16 First of the Act as well as section 17.

The Examiner in effect rejected the allegation that the assessment of the "usage charge" also violated section 16 of the Act. He acknowledged that Complainant had "raised the issue of self preference," but concluded that "* * * no authority is cited or found which would require a terminal operator to charge itself for the use of its own facilities." Pittston, in its exceptions, reasserts its position that "* * * the implementation and selective application of he usage charge resulted

in an undue, unreasonable preference in violation of * * * section [16]." Hearing Counsel concur with Pittston that New Haven violated section 16. We also find considerable merit in Complainant's position.

The language of section 16 forbidding "any undue or unreasonable prejudice or disadvantage in any respect whatsoever" is specifically directed against *every* form of unjust discrimination against the shipping public. *Armstrong Cork Co.* v. *American-Hawaiian Steamship Co.*, 1 U.S.M.C. 719, 723 (1938). This principle of equality forbids any difference in charge which is not based upon a difference in service. *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41, 45 (1922). The record is abundantly clear that Respondent's exaction of a "usage charge" was applied *only* to movements of lumber and to no other commodities. It follows, therefore, that unless the services and facilities rendered incident to Complainant's unloading and handling of lumber, justified the charge assessed, discriminaton within the contemplation of the statute is established. From the facts of record in this proceeding before us, it is manifest, as the Examiner found, that the Respondent has not justified the imposition of a "usage charge" on lumber. We conclude, therefore, that to the extent Respondent's usage charge has been found unrealistic in terms of the terminal facilities and services furnished, it subjects a "description of traffic," namely lumber, to an "undue and unreasonable prejudice or disadvantage" in violation of section 16 of the Act.

We are remanding this proceeding to the Examiner for determination of reparation consistent with his finding that the amount of reparation must take into consideration any amount determined to be a "fair and reasonable charge" against complainant.

Accordingly, and to the extent that it is not inconsistent with the foregoing, we adopt the Examiner's Initial Decision (a copy of which is attached hereto and made a part hereof) as our own.

An appropriate order will be entered.

By the Commission.

THOMAS LISI,
Secretary.

ORDER

This proceeding being at issue upon complaint, having been duly heard, and full investigation having been had, and the Commission on this day having made and entered a Report stating its findings and conclusions, which Report is hereby referred to and made a part hereof;

Therefore, it is ordered, That New Haven Terminal, Inc. cease and desist from imposing a "usage charge" of $1.00 per 1,000 board feet of lumber as set forth in its Lumber Tariff No. 1; and

It is further ordered, That the proceeding in Docket No. 67–56 be, and hereby is, remanded to the Examiner for determination of reparation due Complainant as a result of Respondent's assessment of an unlawful "usage charge." Reparation should be determined pursuant to Rule 15 of the Commission's Rules of Practice and Procedure if possible, but, if necessary, further hearing may be held for the purpose of hearing evidence or argument on reparation.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 67–56

PITTSTON STEVEDORING CORPORATION

v.

NEW HAVEN TERMINAL INC.

A terminal operator may impose a usage charge on persons coming onto its facility for a gainful purpose, however, such charge is subject to the just and reasonable requirements set forth in section 17 of the Shipping Act, 1916.

Usage charge of $1.00 per 1000 board feet of lumber imposed on stevedores doing business at a terminal in competition with terminal operator's stevedoring operation, found not reasonably related to the services furnished, and its imposition by respondent constitutes an unjust and unreasonable practice which violates section 17 of the Act. Cease and desist order entered.

Charles M. Mattingly, Jr. and *Richard P. Lerner* for complainant.

John W. Barnett and *David P. Faulkner* for respondent.

John Cunningham and *Mark P. Schlefer* for intervener, Nacirema Operating Company.

Donald J. Brunner and *G. Edward Borst, Jr.*, Hearing Counsel, interveners.

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

Pittston Stevedoring Corp. complains that the lumber tariff filed by respondent New Haven Terminal, Incorporated, which imposes a charge of $1.00 per thousand gross feet of lumber on stevedores, rail carriers, truckers, shippers or cosignees loading or unloading railcars, vessels, or trucks, subjects complainant to an undue or unreasonable prejudice or disadvantage within the meaning of section 16 of the Shipping Act, 1916 (the Act), and constitutes a practice which is unjust and unreasonable in connection with the receiving, handling or delivery of property within the meaning of section 17 of the Act. Complainant asks for reparation in the amount of $100,000 and for an order requiring respondent to cease and desist from levying the charge.

[1] This decision became the decision of the Commission August 8, 1969.

428–264—71——4

Hearing Counsel and Nacirema Operating Co., Inc., intervened.

THE FACTS

1. Pittston Stevedoring Corporation (Complainant) is a New York corporation engaged in the business of furnishing stevedoring services to common carriers operating in the foreign and domestic commerce of the United States.

2. New Haven Terminal, Inc. (Respondent), a person subject to the Act, is a corporation operating a terminal facility at New Haven, Connecticut, furnishing wharfage, dock, warehouse and other terminal facilities in connection with common carrier by water, and also furnishing stevedoring services.

3. For approximately fifteen years prior to December 11, 1968, complainant operated at respondent's New Haven facility, unloading lumber from vessels to a place of rest on the dock. From this place of rest, respondent backhauled, stored, and delivered the lumber to consignees who were charged for such service in accordance with rates set forth in respondent's tariff.

4. Wilford and McKay, an agent of the carriers, engaged complainant to stevedore vessels at respondent's facility.

5. Prior to November 1, 1967, complainant operated at respondent's New Haven facility without being subjected to a usage charge. On or about September 1, 1967, respondent issued FMC Lumber Tariff No. 1, cancelling all prior lumber tariffs and levying a new charge of $1.00 per thousand gross feet of lumber for:

> The use of terminal facilities by rail carrier, stevedoring company, truckers, shippers or consignees, their agents, servants and/or employees when they perform their own loading or unloading of railroad cars, vessels, trucks or the use of said facilities for which a charge is not otherwise specified.

6. On September 1, 1967, in response to complainant's inquiry as to what services were not compensated for under respondent's former tariff, respondent wrote:

> Our present tariff includes rates for backhandling (which includes wharfage) storage, dockage, loading trucks and ships on overtime. Items such as services supplied to longshoremen for their use and convenience are not included in the listed rates. The "Usage" charge covers all these services provided for the longshoremen.

7. The services supplied by respondent for the convenience of longshoremen and complainant's three supervisory personnel were the same before and after the effective date of the usage charge. Complainant's timekeeper used a space 6 x 6 feet in a 20 x 25 foot shed on the pier,

the balance of the space in the shed being used by respondent. A telephone was in the shed but was used by the timekeeper only about 10 times each year. Ordinarily, calls were made from public telephones, two of which were in a shack on the pier which was also available to longshoremen for use during coffee breaks and lunch hour. The shack contained a water cooler. Three of respondent's personnel used parking spaces on the installation. Toilet facilities were available. Complainant had not at any time requested respondent to provide services or facilities for longshoremen. The facilities used by complainant's personnel were also available to stevedores employed by respondent.

8. In addition to the above described facilities, respondent furnished a stacker (7½ ton forklift) to unload and load forklifts which complainant brought by truck to New Haven from other localities. The stacker was operated by either respondent's or complainant's employee and the loading or unloading consumed from 15 to 30 minutes. Respondent, in determining its stevedoring costs, used $1.50 per hour for one forklift which included 50¢ for gas and oil.

9. A lumber stevedoring gang consists of 14 longshoremen, a foreman and a driver. Complainant, when operating at respondent's facility obtained longshoremen from the same union respondent obtained stevedores for its own operation. In addition to using the local longshoremen, complainant sent from its New York office a mechanic, timekeeper, and a superintendent, the superintendent not being present during 25% of complainant's New Haven operations.

10. A gang of stevedores unloads an average of 30,000 board feet of lumber per gang hour. The number of gangs employed to unload a vessel varies according to the number of hatches to be served. The usage charge is determined by number of board feet unloaded, not on the number of gangs working on the vessel, persons using the conveniences or days involved.

11. Subsequent to the effective date of the usage charge, complainant continued to operate at respondent's facility. During the period January 1 to September 30, 1968, complainant unloaded 49,715,430 gross feet of lumber. Complainant continued to operate at New Haven until December 10, 1968. Respondent billed complainant for $72,075.36, usage charge and complainant paid $6,165.85 but refused to make further payment. Because of this refusal, respondent denied complainant further use of its facility.

12. Prior to the imposition of the usage charge, complainant's New Haven operation yielded a profit of 50¢ per 1000 feet of lumber stevedored during 1964, 45¢ during 1965 and 41¢ during 1967.

13. Respondent's bookkeeping method resulted in showing a profit of $1.15 per 1000 board feet during 1967 and 97¢ during 1968.

14. During the period January 1 to September 30, 1968, complainant would have suffered a loss of $33,960.54 if all usage charges assessed had been paid.

15. Complainant is unable to compete with respondent for stevedoring at the New Haven installation for the reason that the usage charge exceeds complainant's profit, and the charge is not applicable to respondent's stevedoring operation.

16. Respondent performs stevedoring services at its terminal other than lumber stevedoring.

17. Terminals other than respondent, include usage charges in their tariffs, however these charges may not be compared with respondent's usage charge because of varying methods employed.

18. Lumber terminals are available to vessels and shippers at New London, Connecticut, 48 miles from New Haven, and Bridgeport, Connecticut, 20 miles from New Haven.

19. Wilford and McKay, agents, ordinarily select the stevedore to handle vessels transporting lumber from Canada.

20. The costs incurred in stevedoring operations relate principally to labor. Respondent's overall stevedoring costs are, to some degree, less than complainant's costs due to location and to an arrangement with Excello Corporation (having common officers and stockholders) for the furnishing of equipment. The difference in profit computations submitted by the parties is mainly due to the difference in accounting methods and assigning or apportioning of costs.

Position of the Parties

Complainant

Complainant contends that the usage charge when considered alone violates section 16 of the Act in that it creates a self preference in respondent which is undue and unreasonable. It is pointed out that respondent, in addition to being a terminal operator, is also a stevedore competing with complainant and that while complainant must pay the usage charge, respondent does not impose the charge upon itself nor upon its lumber stevedoring customers which situation, complainant asserts, results in prejudice to its operation. Complainant maintains that respondent is receiving compensation for services furnished stevedores by including a charge thereof in its wharfage, backhauling and storage tariff, although such service is not specified in the tariff. Complainant argues that the usage charge bears little or no relation to the services rendered and thus violates section 17 of the Act as an

unjust and unreasonable practice. It is contended that the purpose and effect of the usage charge is to create a monopoly in respondent to perform all stevedoring services at its New Haven installation, contrary to the national policy which favors free and healthy competition and that respondent has failed to establish benefits which will flow from a monopoly to justify the disadvantages which will result to complainant, the carriers involved, and the public. Respondent's accounting method is said to be unrealistic, and demonstrates a "profit loss" not supported by reliable fiscal evidence.

Respondent

Respondent argues that a practice in the industry, recognized by this Commission, establishes that when a terminal's facilities are used for any gainful purpose, a charge for such use is permissible. It is contended that the $1.00 usage charge is reasonable in that it falls within the dollar amount of contribution to unallocated overhead and profit which respondent itself obtains from its own stevedoring revenue; that is, when a competitor stevedors at the New Haven terminal, respondent is losing the opportunity to defray its overhead and/or contribute to its profit in an amount which exceeds the amount of the usage charge. Respondent contends that sections 16 and 17 of the Act are designed to protect shippers, shipowners, cargoes and consignees from burdensome or discriminatory regulations and practices which might jeopardize freedom of commerce or safety on the high seas but that such considerations are not here involved. Respondent distinguishes prior Commission precedent relating to the ship master's right to select a stevedore on the ground that this proceeding involves only unloading; not loading a vessel for carriage of cargo on the high seas. The usage charge is said to be non-discriminatory because it applies equally to all persons using respondent's facility; that the charge does not constitute an unjust or unreasonable practice or regulation because it has been fairly determined. Complainant's accounting method of showing its costs is challenged. Respondent questions the commission's authority to inquire into rate levels in a proceeding based on sections 16 and 17 of the Act.

Hearing Counsel

Intervening Hearing Counsel consider the usage charge not justified on a cost basis and the profit to respondent emanating therefrom to be artificially high. It is maintained that the charge results in a monopoly in respondent inasmuch as complainant has demonstrated that it cannot operate at the New Haven facility if the charge is imposed; and proposed that such monopoly is detrimental to the commerce of

the United States as well as constituting undue prejudice to complainant in violation of section 16 of the Act. Hearing Counsel urge that the charge be found in violation of the Act without prejudice to the institution of a charge related to the cost of providing the services covered by the charge.

Intervener Nacirema Operating Co., Inc., takes the position that the charge is unlawful in that the natural consequence thereof is to create a stevedoring monopoly at respondent's terminal, contrary to Commission precedent and national policy, and that it constitutes an undue preference of the terminal itself in the capacity of a stevedore.

Discussion

The primary issue presented for decision is whether a usage charge assessed by respondent against complaint's stevedoring operation at respondent's facility violates section 17 of the Act, the second paragraph of which provides:

> Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivery of property. Whenever the board finds that any such practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

It is respondent's position that any person using its terminal facilities for a gainful purpose should pay for the privilege. The Commission's General Order 15, CFR 533.1–533.6, in section 6(d)(8) recognizes that a tariff may be established for "the use of said facilities for any gainful purpose for which a charge is not otherwise specified", and complainant when stevedoring at New Haven uses respondent's facilities for a gainful purpose. The term "practice" as used in section 17 of the Act is associated with rates and charges. *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. at page 432 (1935). The question then is whether the usage charge is an unreasonable or unjust rate, and practice, in connection with the receiving of property. Respondent assessed complainant on the basis of $1.00 per 1,000 board feet of lumber unloaded from vessels at the New Haven facility. The record discloses that a gang of stevedores unloads an average of 30,000 board feet of lumber each hour, thus the charge amounts to $30.00 per hour. The test to be here applied is whether the charge levied is reasonably related to the services rendered. *Volkswagenwerk* v. *F.M.C.*, 390 U.S. 261 (1968).

Complainant's operation at respondent's facility differed from general stevedoring. As described by its witness:

> * * * lumber contract was made with the steamship operator simply for discharging the ship to a place of rest on the dock. You are not concerned with the

taking it away from the ship onto the terminal. Whereas, with general cargo you have the receiving the cargo, gathering, storing on the pier and loading, and vice versa for the discharging; with lumber, you are finished with the lumber as soon as you land it on the dock and the terminal takes it away.

Respondent's tariff includes a charge for wharfage which is applied against the vessel or the cargo on all cargo conveyed over or onto the wharf and complainant performed the unloading service as contractor or employee of the vessel. Thus use of the wharf by complainant for that purpose cannot be considered in determining the reasonableness of the usage charge, General Order 15 limiting usage charges to those "not otherwise specified." The only services or facilities furnished to complainant's employees by respondent for which no charge was specified consisted of a 6 x 6 foot space in a shed for the use of a timekeeper, 3 parking spaces, a shed where longshoremen ate lunch or used during coffee breaks and which contained a water cooler and a public telephone, toilet facilities, and the occasional use of a stacker to unload and load complainant's fork lifts from a truck. These facilities were not constructed for or set aside for complainant's exclusive use. Except for the stacker, they were also used by the longshoremen employed by respondent during its own stevedoring operations. Respondent's letter of September 1, 1967, evidences its intent to base the usage charge on services provided for longshoremen. A lumber stevedoring gang consists of 16 men. The intermittent use of the above described facilities or services by 16 men, even if the use of the stacker is added, bears no reasonable relationship to a charge of $30.00 per hour and fails to meet the standard set forth in *Volkswagenwerk*, *supra*. Justification on a cost basis does not appear on the record.

Nevertheless, respondent argues that the usage charge is founded on a rational economic basis. Economic considerations are somewhat confused due to the different accounting methods employed by the parties. Complainant's accountant testified testified that its computation of an average of 46¢ per 1,000 board feet of lumber stevedored was well founded and his computations are acceptable. He further testified that if his method was applied to respondent's operation, the result would be a loss. Respondent's method of accounting showed a gross profit of approximately $1.70 per 1,000 board feet but when applying overhead, this figure was reduced to approximately $1.00. It is respondent's position that if a competing stevedore obtains business which respondent might have obtained, respondent is deprived of the opportunity to contribute lumber stevedoring profits to overall overhead and gross profit. Otherwise stated, if respondent is deprived of the opportunity to earn revenue, it may assess against the competing stevedore a charge equal to the profit it thereby loses. Justification for the amount of the

charge is not found in this position. Granting that respondent profits by its stevedoring activities (although the amount is questionable) and recognizing that respondent is entitled to a return on its substantial investment in terminal facilities, a rate set forth in a tariff remains subject to the statutory requirement that it be just and reasonable. *California Stevedore & Ballast Co. et al.* v. *Stockton Elevators, Inc.*, 8 F.M.C. 97, 104. (1964). The fact that respondent may lose an opportunity to earn revenue and profit thereby does not relieve it from the statutory requirement that it must establish and maintain just and reasonable practices (rates) in connection with receiving property. Nor is that fact justification for escape from the Supreme Court's mandate that a charge must be reasonably related to the services rendered. Respondent may assess a usage charge on persons using its facility for a gainful purpose, but it must be ordered to cease and desist the assessment of $1.00 per 1,000 board feet of lumber stevedored by others at its installation. This finding is without prejudice to the filing of a lumber tariff imposing a charge reasonably related to the services rendered.

Respondent questions the authority and nature of the Commission's powers over the usage charge. In *California* v. *United States*, 320 U.S. 577 (1944), the Supreme Court held:

> The withholding of rate-making power for services other than water carriage does not qualify the unlimited grant to the Commission of the power to stop effectively all unjust and unreasonable practices in receiving, handling, storing or delivering property. Finding a wrong which it is duty bound to remedy, the Maritime Commission as the expert body established by Congress for safeguarding this specialized aspect of the national interest, may, within the framework of the Shipping Act, fashion the tools for so doing.

The requirement that respondent cease and desist from imposing an excessive charge and substitute a charge based on the services rendered is clearly within the Commission's authority.

Regardless of the intent of respondent in imposing the usage charge, it has resulted in the exclusion of stevedores competing with respondent for the performance of lumber stevedoring at the New Haven facility. Complainant, Intervener and Hearing Counsel consider this a monopolistic situation contrary to the national policy of free and open competition. It is well established that monopolistic practices, to be accepted, must be well justified. Further, it is the custom in ocean commerce that the vessel be permitted to select the stevedore inasmuch as stevedoring is a responsibility of the vessel. *California Stevedore & Ballast Co., et al.* v. *Stockton Port District*, 7 F.M.C. 75 (1962). Sufficient justification does not appear on this record for depriving the master of a vessel of the right to select a stevedore, whether directly

or through an agent. Nor is there economic justification for excluding competing stevedores from respondent's installation. While this finding may add to the unlawful nature of the usage charge, it may not contribute to the ultimate solution of the probem presented. It is proper, as above stated, for respondent to impose a charge on persons coming onto and using its facilities for a gainful purpose and a charge reasonably related to the services rendered may be set forth in the lumber tariff. The nature of those services as shown on this record would indicate that a reasonable charge would not result in excluding all stevedoring competition and the issue of monopoly would then become moot. It is stressed that no attempt is here made to fix the usage charge but only to provide a guide or "tool" for establishing a reasonable rate.

Complainant has raised the issue of self preference arguing that it is unlawful for respondent, competing for stevedoring business at its installation, to impose a charge on other stevedores but not upon itself. There is no doubt that in this situation, respondent has an advantage over its competitors but no authority is cited or found which would require a terminal operator to charge itself for the use of its own facilities. The usage charge, as above stated and as set forth in General Order 15, may be applied to persons using another's facilities for a gainful purpose. A usage charge may result in a preference but it would not be undue if reasonably related to the use by parties against whom the charge is assessed. In respondent's words, complainant is not entitled to a "free ride."

It is noted that the wording of the tariff where it refers to stevedores may require modification. The tariff applies to stevedores doing their *own* loading or unloading and a stevedore, as employee or contractor of a vessel, does not perform this service for itself. For that reason, the usage charge as it applies to complainant has been related to that portion of General Order 15, above quoted, which permits a charge for use "not otherwise specified."

The question of the amount of reparation is not discussed in the briefs. The record discloses that complainant has not been able to compete with respondent at the New Haven terminal due to the imposition of the usage charge since December 11, 1968. Complainant and respondent stipulated that:

> The total billings of the usage charge to date have been $72,075.38 of which there has been paid $6,165.85 and there is due and unpaid $65,909.53.

Complainant is entitled to reparation but the amount cannot be fairly determined without consideration being given to a fair and reasonable charge against complainant for use of respondent's facility, a determination which cannot be here made. Reparation should be determined

pursuant to Rule 15 and if necessary further hearing will be held for the purpose of hearing evidence or argument on reparation at a date to be later determined.

Other issues discussed by the parties have been considered but found not necessary to the resolution of the basic problem presented.

Ultimate Conclusions

The usage charge of $1.00 per 1,000 board feet of lumber assessed by respondent against complainant's stevedoring operation at respondent's terminal bears no reasonable relationship to the use by or services rendered to complainant and imposing it constitutes an unjust and unreasonable practice in connection with the receiving of property in violation of section 17 of the Shipping Act, 1916.

Respondent may impose a usage charge on persons coming onto its facility for a gainful purpose provided such charge is reasonably related to the use by, or services to, such persons.

Reparation is due but the record does not contain sufficient information upon which to assess damages to complainant. Complainant shall comply with Rule 15(b) of the Commission's Rules of Practice and Procedure and the amount of reparation shall be thereafter determined.

Respondent shall cease and desist from imposing a usage charge of $1.00 per 1,000 board feet of lumber set forth in its Lumber Tariff No. 1.

An appropriate order will be issued.

(Signed) Herbert K. Greer,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 406

CHEVRON CHEMICAL CO. ORTHO DIVISION

v.

NIPPON YUSEN KAISHA LINES LTD.

Adopted September 4, 1969

Respondent permitted to refund to complainant the sum of $1,240.20 as a portion of freight charges assessed and collected on four shipments of agricultural insecticides from Oakland, California to Kenya.

R. O. Flood for complaint.

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

Nippon Yusen Kaisha (N.Y.K.), a common carrier by water, through its agent Transmarine Navigation Corp., has filed an application for permission to refund a portion of the freight charges collected from Chevron Chemical Company, Ortho Division, on four shipments of Agricultural insecticide from Oakland, California to Mombasa, Kenya.

Prior to the date of these shipments and during the latter part of 1968, Chevron inquired of N.Y.K. whether they would be interested in handling cargo to Mombasa, Kenya via Japanese ports, at the same rate as was being charged by Nedlloyd Lines on shipments direct from San Francisco to Mombasa. N.Y.K. advised Chevron that they would so handle the cargo. The Nedlloyd rate on file with the Commission applicable to such commodity as of April 1, 1968, was $57.00 W/M, per 40 cubic feet reduced to $51.00 as of October 7, 1968, and increased to $55.75 as of December 2, 1968 the latter being the rate in

[1] This decision became the decision of the Commission September 4, 1969.

effect at the time of the shipments here involved. N.Y.K., having agreed with Chevron to apply the Nedlloyd rates, filed an amended rate with the Commission during the month of November, 1968, however by reason of administrative error, the tariff set forth a rate of $61.75 W/M, instead of the Nedlloyd rate of $55.75.

Chevron dispatched by N.Y.K. vessels, the following shipments of agricultural insecticides:

Consignees	Measurement (cubic feet)	Bill of lading date	Freight
Kleenway Chemicals Ltd., Narobi, Kenya	1,013	Mar. 3, 1969	$1,563.82
	1,620	Apr. 12, 1969	2,500.88
Shell Chemical Co. of Eastern Africa Ltd	3,510	Feb. 4, 1969	5,418.56
Murphy Chemicals (East Africa)	2,125	Feb. 4, 1969	3,280.47
Total	8,268		12,763.73

The rate applied to these shipments was $61.75 per 40 cubic feet, that being the rate erroneously filed with the Commission by N.Y.K. Had the Nedlloyd rate of $55.75 W/M been applied as N.Y.K. had agreed and as it had intended to charge, the total freight charges would have been $11,523.53, or $1,240.20 less than the freight collected.

Public Law 90–298 75 Stat. 764, authorizes the Commission in its discretion and for good cause shown to:

> * * * permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper * * * where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier by water in foreign commerce * * * has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which said refund * * * would be based: Provided, further, That the carrier * * * agrees that if permission is granted by The Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund * * * would be based, and additional refunds * * * as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: And provided further, That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

N.Y.K. has filed a rate of $55.75 W/M per 40 cubic feet applicable to the commodities here involved prior to filing its application for authority to make refund. Applicant avers that no other shipments

of the same or a similar commodity moved via its vessels during the same or approximate period the shipments here involved were made. The application was deposited in the United States Mail on July 31, 1969, and received by the Commission on August 4, 1969. Rule 8(f) of the Commission, Rules of Practice and Procedure provides that the day of service of documents served is deposited in the United States mail, thus the application was filed with the Commission within 180 days of the earlier shipment here involved.

It appearing that the application has been timely filed; that no other shipments were made of the commodity involved on applicant's vessels in the approximate period during which the Chevron shipments were made; that the applicant has filed a tariff showing the rates here sought to be applied prior to the date of the application; that the rate applied was erroneously filed by reason of administrative mistake; and good cause appearing, Nippon Yusen Kaisha Lines Ltd. is authorized to refund to Chevron Chemical Company, Ortho Division, the sum of $1,240.20. Applicant shall publish the appropriate notice referred to in the statute above set forth and in 46 CFR 502.92 and the refund shall be effective within 30 days after publication of such notice. Within five days thereafter, applicant shall notify the Commission of the date of the refund and the manner in which payment was made.

(Signed) HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C., *August 15, 1969.*

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 406

CHEVRON CHEMICAL CO. ORTHO DIVISION

v.

NIPPON YUSEN KAISHA LINES LTD.

Adopted September 4, 1969

No exceptions having been taken to the initial decision of the Examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the decision became the decision of the Commission on September 4, 1969.

It is ordered, That Nippon Yusen Kaisha Lines Ltd. refund to Chevron Chemical Company, Ortho Division, the sum of $1,240.20.

It is further ordered, That Nippon Yusen Kaisha publish promptly in its appropriate tariff, the following notice:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 406, that effective February 4, 1969, the rate on agricultural fungicides from Oakland, California, to Mombasa, Kenya, for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of N.Y.K. during the period from February 4, 1969, until April 30, 1969, inclusive, is $55.75 W/M, subject to all other applicable rules, regulations, terms and conditions of said rate and this tariff.

It is further ordered, That Nippon Yusen Kaisha notify the Secretary on or before October 3, 1969, of the date and manner in which the refund herein ordered has been made

By the Commission

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65–46

TRUCK LOADING AND UNLOADING RATES AT NEW YORK HARBOR

Decided September 15, 1969

Implementation of terminal conference tariff truck loading and unloading definition which includes a charge to cargo for movement between transit shed and truck tailgate constitutes an unjust and unreasonable practice under section 17 of the Shipping Act, 1916.

Elkan Turk, Jr. and *Joseph A. Byrne* for respondent New York Terminal Conference.

Elmer C. Maddy, *Baldvin Einarson*, and *John Williams* for respondent United States Lines, Inc.

Elven S. Sheahan for respondent The Cunard Steam-Ship Company Limited.

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

Herbert Burstein and *Arthur Liberstein* for intervenor Empire State Highway Transportation Association, Inc.

Robert G. Gawley for intervenor Niagara Frontier Tariff Bureau, Inc.

Warren D. Mulloy for intervenor Eastern Railroads.

Samuel W. Earnshaw for intervenor International Latex Corporation, its Subsidiaries and Affiliates.

Bryce Rea, Jr., and *Thomas M. Knebel* for intervenor Middle Atlantic Conference.

Eugene W. Johnson for intervenor The Copper Development Association.

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

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

REPORT

BY THE COMMISSION (James F. Fanseen, *Acting Chairman;* Ashton C. Barrett, George H. Hearn, *Commissioners*):[1]

We instituted this investigation by order of December 14, 1965 to determine the reasonableness of truck loading and unloading rates charged by members of the New York Terminal Conference (Conference). United States Lines, Inc. and The Cunard Steam-Ship Company Limited were named respondents by supplemental order. Intervention was granted to the parties as listed in the appearances.

During the course of hearings the Conference introduced a cost study in an attempt to establish that its truck loading and unloading rates did not violate the provisions of the Shipping Act, 1916 (Act). Empire State Highway Transportation Association, Inc. (Empire) and Hearing Counsel took issue with the cost study, alleging it improperly allocated costs to cargo rather than to the ocean carriers. The alleged improper allocation was said to result from the Conference's tariff definition of truck loading and unloading. The Conference would have the service of truck loading include movement of cargo between truck tailgate and transit sheds as well as stowing in the body of the truck whereas Hearing Counsel and Empire would limit it to stowing at the tailgate; charging the tailgate-shed movement and cost thereof to the ocean carrier.

The parties agreed that a quick decision on the propriety of the Conference's tariff definition was necessary to enable the parties to proceed in presenting or evaluating meaningful cost data.

In response to a petition filed by Hearing Counsel, with the concurrence or acquiescence of all interested parties, we served a supplemental order on February 19, 1969. We stated in that order that the cost study prepared by the Conference based on its tariff definitions might have improperly allocated costs to cargo interests rather than to ocean carriers; that it is in the public interest to determine a reasonable method of cost allocation to insure proper ratemaking practices for the future; and that an expedited determination of these matters will assist in bringing the proceeding to an orderly conclusion. We therefore ordered that the investigation specifically determine whether the implementation of the definition of the truck loading and unloading service as quoted by the New York Terminal Conference constitutes a just and reasonable practice within the meaning of section 17 of the Shipping Act, 1916; and whether the utilization of any

[1] Vice Chairman Day abstains.

method of cost accounting or allocation based upon such a definition distributes costs between cargo interests and ocean carriers in a just and reasonable manner within the meaning of section 17. We ordered these issues severed from those already in the proceeding for expedited hearing and the issuance of an early decision.

Hearing Counsel, the Conference, Cunard Line, and Empire prepared a stipulation of facts pertaining to the severed issues. This stipulation has the concurrence of the interested parties and has been received into the record. The stipulation is set forth below. The appendices referred to in the stipulation have been omitted.

Of the parties listed in the appearances, the Conference, U.S. Lines, Empire, Middle Atlantic, the American Institute for Imported Steel, and Hearing Counsel have participated on brief and at oral argument in respect to the severed issues.

STIPULATION OF FACTS

Respondent New York Terminal Conference operates about 125 piers in the port of New York, varying in size, physical facilities, and age. The piers operated by respondents are either of the "finger" or "quay" type and, with limited exceptions, have been constructed in the last ten years or piers which may have been constructed prior thereto but have been substantially modernized within the last ten years.

Practically all of the common-carrier-by-water inbound and outbound general cargo handled in the Port of New York moves over the piers operated by respondent's members.

Prior to December 31, 1953, truck loading and unloading at New York was performed by public loaders, who performed such functions independently of the terminal operators. Abuses developed under this system, and public loaders were outlawed by the provisions of the New York-New Jersey Waterfront Commission Compact, P.L. 87–252, approved August 12, 1953. In pertinent part the declaration of policy stated in the compact is:

> * * * that the function of loading and unloading trucks and other land vehicles at the piers and other waterfront terminals can and should be performed, as in every other major American port, without the evils and abuses of the public loader system, and by the carriers of freight by water, stevedores and operators of such piers and other waterfront terminals or the operators of such trucks or other land vehicles.

The abuses which gave rise to the aforementioned legislation pertained widespread corruption among the public loaders in which unsavory elements demanded bribes and often performed no service at all,

428-264—71——5

although a tariff for truck loading was actually published. If unloading was requested by the truckman, the public loader performed the service at a negotiated rate. (See Official Loading Charges in the Port of New York, established by Truck Loading Authority, which consisted of Joseph P. Ryan, President for I.L.A., Joseph Bergen, President for Port Loaders Council Local 1757, and Joseph M. Adelizzi, Chairman for Joint Shipper-Truckmen Committee and issued by Hugh E. Sheridan, Chairman, Effective June 5, 1950.) The public loader often owned no equipment and his usual service consisted of loading cargo onto a truck from a point not more than a truck's length away from the tailgate. In many instances, the public loaders extorted the free use of equipment and labor from shipping and stevedoring companies. In most cases the public loader kept no financial records, did not maintain cargo liability insurance, and was unregulated. Each pier had its "boss loader" through who all loading work had to be cleared, regardless of whether his or any loader's services were desired by anyone. Public "boss loaders" were, in most instances, members of an I.L.A. local and at the same time were employers of members of their own union. (New York State Crime Commission, *Public Hearings (No. 5) Port of New York (Waterfront)*, December 3, 1952–March 17, 1953.)

In the days of the public loaders, the ocean carrier paid for the discharge of the vessel, the movement of the inbound cargo to a place of rest on the pier and not infrequently, under duress from the public loaders, also paid for the movement of cargo from place of rest to the tailgate of the truck or the vicinity thereof, in cases where the truck did not proceed to the vicinity of the place of rest.

Previous to the public loader system, it was customary for truckmen to load their own trucks with the aid of one or more helpers. With the stringency of labor during World War I, truckmen began dispensing with their helpers and hiring necessary manpower from among the laborers available at the piers. Such laborers would, naturally, tend to be longshoremen and members of longshoremen's unions. The public loader system was born out of this background. Thenceforth, loading was under the control of the public loaders.

After the public loaders were outlawed, ocean carriers were generally unwilling to furnish truck loading and unloading service. They generally urged that terminal operators provide same in order to keep the piers clear and conditions fluid. Thereafter, committees representing the terminal operators and the truckers met and arrived at the informal decision that the terminal operators should take over the responsibility of furnishing the truck loading and unloading service. Termi-

nal operators were hesitant until arrangements were worked out whereby steamship companies would make terminal operators whole for whatever losses would be incurred. Truck loading and unloading is a service essential to the efficient operation of ocean carriers. In the handling of freight at the piers, the steamship lines' objective is to have a vessel loaded and unloaded in the shortest period of time, so that the turnaround period of the vessel is kept at a minimum. To accomplish this, the terminal operator's objective is to have cargo move onto and off of the pier by truck and lighter as quickly as possible. It is also essential in order for the cargo owner to get his goods and fulfill his obligation to get them off the pier or pay progressive demurrage. After a period of flux, during which the responsibility for the service and the charges therefor were unsettled, the present system evolved pursuant to Agreement No. 8005, approved by the Commission's predecessor, on March 23, 1955.

Agreement No. 8005 authorized the members of the New York Terminal Conference who theretofore had been permitted individually by the Waterfront Commission Compact "to load or unload waterborne freight onto or from vehicles at piers or at other waterfront terminals in the Port of Greater New York and vicinity, for a fee or other compensation, * * *" jointly "* * * to establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices * * *" with respect thereto. The members were required to "assess and collect rates and charges for and in connection with such services strictly in accordance with rates, charges, * * * set forth in said tariffs. * * *"

A subsequent amendment to Agreement No. 8005 authorized the members to restrict performance of the service of truck loading to the operators of the piers or waterfront terminals. This agreement implemented the jurisdictional position of the I.L.A. with respect to waterfront truck loading and facilitated the planning of labor hiring by the terminal operators. The same system exists with regard to the non-member respondents.

Pursuant to the authority granted by the Commission, terminal operators who are parties to Agreement 8005 have issued a number of tariffs, the present tariff being No. 7 in the series. The tariffs provided for class and commodity rates.

The great preponderance of service performed by the terminals under the tariffs is truck loading rather than unloading. The truckers, in most cases, do their own unloading. Prior to the issuance of Tariff No. 4, the tariffs provided for "partial service", which was defined to mean "the moving of the cargo from a place of rest on the dock which

is readily accessible to the truck and elevating the same to a place of rest on the truck without the necessity of placing men on the truck." Tariff No. 4 does not provide for partial service, leaving the truckers the choice between full service and no service.

Tariff No. 1, issued by the Terminal Conference, defined the service as follows:

1. "Truck Loading" shall mean the service of moving cargo from its place of rest on the dock to the truck, elevating onto the tailgate of the truck and placing in the truck, but shall not include the sorting of cargo by marks at time of delivery nor the loading onto consignee's pallets.

(*a*) The loading and placing of cargo in the truck shall be with the assistance of, and under the supervision of, the driver of the truck.

(*b*) When the complete truck loading service is requested and performed the charge therefor shall be as provided herein under the column headed "Tailgate Service".

(*c*) When only tailgate delivery of the cargo is requested and performed the charge therefore shall be as provided herein under the column headed "Tailgate Service".

(i) Tailgate service shall mean the moving of cargo from its place of rest at the dock to the truck and elevating same to the level of the tailgate or floor of the truck.

(*d*) When the trucker performs the complete loading service he shall not be required to break down cargo more than man high (6 feet).

2. "Truck Unloading" shall mean the service of removing cargo from the body of the truck to a place of rest designated by the terminal operator, and shall include sorting by port.

(*a*) The unloading of cargo from the truck shall be with the assistance of, and under the supervision of, the driver of the truck.

(*b*) When the complete truck unloading service is requested and performed the charge shall be at the full tariff rate.

(*c*) When only tailgate delivery of the cargo is requested and performed the charge therefor shall be as provided herein under the column headed "Tailgate Service".

(i) When the truck driver and/or his helper palletize the cargo at the tailgate there shall be no charge for tailgate receipt.

(*d*) When the trucker performs the complete unloading service he shall not be required to tier cargo more than man high (6 feet).

This tariff never became effective because of dispute and litigation. Tariff No. 2, effective August 15, 1955, provided for three types of service, viz: truck loading-full service, truck loading-partial service, and truck unloading. Truck loading-full service was defined to be "the service of moving cargo from a place of rest on the dock which is readily accessible to the truck, elevating the cargo on to the truck and stowing of the cargo in the truck, but shall not include the sorting of the cargo by marks at the time of delivery nor the loading on to consignee's pallets."

Truck loading-partial service was defined as "the moving of cargo from a place of rest on the dock which is readily accessible to the truck and elevating the same to a place of rest on the truck without the necessity of placing men on the truck." Truck unloading was defined as "the service of removing cargo from the body of the truck to a place of rest designated by the Terminal Operator, and shall include sorting by port."

In the case of truck unloading, the motor carrier had the option to perform the service itself, and in this instance, all the motor carrier was required to do was to remove the cargo from the truck to a point on the terminal facility adjacent to the truck tailgate as designated by the terminal operator. This provision is still in effect. The service of moving the outbound cargo from the place adjacent to the truck tailgate is not deemed to be included within the truck unloading service for which the motor carrier may be assessed a charge.

Partial service was deleted from Tariff No. 4.

The above definitions of truck loading and unloading are substantially the same as those published in Tariff No. 7 except for the deletion of partial service and the clause "which is readily accessible to the truck" following the words "place of rest." The latter deletion first occurred in Tariff No. 6, effective April 1, 1963. On May 24, 1962, the U.S. Court of Appeals for the District of Columbia Circuit had decided *American President Lines, Ltd.* v. *Federal Maritime Board*, 317 F.2d 887. Truckers may elect to unload their own trucks, in which case they do not use a tariff service and are not charged by the terminal operators for moving cargo from the truck or beyond the tailgate.

The piers are policed, and no one may enter or leave a pier without permission. This policy is dictated both by good business practice and by regulation of the Waterfront Commission. The procedure for delivering inbound cargo to a truck is fairly uniform. The truck is registered at the entrance to the terminal and a gate pass is issued to the driver. The driver goes to the delivery clerk and submits the necessary customs permits, releases and proof of this authority to receive the cargo. If the drivers' papers are in order and approved, he then awaits the assignment of the necessary checkers, truck loaders and designated loading station. In the rare instances, under present practice, in which the truck moves on to the pier and up to the pile of cargo, clearance for entry must await satisfactory conditions on the pier as to a clear access and non-interference with other operations. After the truck is loaded, the driver is required to go to the delivery office to sign for the load according to the checker's tally. Thereafter, the gateman permits the truck to leave the pier.

Trucks, to be loaded speedily and efficiently, require the use of hilos, pushers, cranes, escalators, pallets, pallet and live rollers, and other special equipment. Such equipment is owned and maintained by the terminal operators at the piers they operate, and it is utilized by them for the truck loading and unloading service.

In the case of imports, the inbound cargo is removed from the ship and placed upon the stringpiece and almost immediately thereafter removed to the shed or moved directly from the ship to the shed. Except in limited instances, the shed has a platform, and motor vehicles arriving to pick up import cargo may be backed in the platforms in truck bays for the receipt of import cargo. Additionally, the compound-farm area may be used to load trucks. Whether platform or compound-farm area or both are used depends upon prevailing conditions at the pier, in the judgment of the terminal operator. For reasons of safety and efficient operation, trucks are not allowed to drive freely throughout the pier premises. In exceptional cases, with the consent of the terminal operator, it may still be possible for trucks to back into the immediate vicinity of the pile for the receipt of cargo.

The custom generally is to elevate and stow cargo in trucks at some place other than the place of rest where the cargo was located when the truckman arrived. When cargo is moved from first place of rest to another, this is not for the account of the cargo and was not included as a cost in the Price Waterhouse study.

In cases where the truck does back into the immediate vicinity of the pile of cargo, the run for the lift truck between cargo and truck will be shorter than otherwise. The same charge is assessed, however, as if the cargo had been moved from place of rest to tailgate. This is so because the charges in the conference tariffs are assessed on the basis of average experience throughout the port.

In all cases, except in the rare instances described above, when a motor vehicle is ready to receive the import cargo from the terminal operator, the latter moves the cargo by hilos from the shed to the platform or compound-farm area, where it is then stowed upon the truck.

In the case of truck unloading, the trucks will either be backed into the platform or placed in the compound-farm area, and the freight removed from the truck on to the platform or at a point in the immediate vicinity of the truck or placed on pallets stacked tailgate high at the tail of the truck and thereafter removed by the terminal operators to a point in the shed, pending arrival of a vessel.

The determination of place of rest and loading area is made by the terminal operator based upon type and volume of inbound cargo and

experience as to the order in which cargo will be called for. It is physically impossible to keep each and every consignment discharged from an ocean-going vessel in such a location that a truck tailgate can be placed adjacent to it throughout the period from completion of discharge until the cargo is called for. Generally, the truckman will call the pier to ascertain if the cargo is available, unless he has information that the vessel has already completed discharge. Unless arrangements are made by the terminal operator and the motor carrier for the pickup of inbound cargo at a specified time, there is no certainty as to what inbound cargo will be picked up on any given day or the hour thereof. The inbound cargo is handled on the pier by I.L.A. labor from the place of rest to the tailgate of the truck. The loading and stowing on the truck is done by I.L.A. labor under the supervision and with the assistance of the truck driver. The terminal operators hire I.L.A. longshoremen for loading and unloading trucks. This labor is identified as terminal labor, as opposed to gang labor who are, in turn, responsible for loading and unloading the vessels. The I.L.A. terminal labor is hired for a four-hour period from 8:00 to 12:00, and may be rehired for the afternoon period from 1:00 to 5:00. Checkers are hired for a full eight-hour day. The men must be paid for at least the minimum periods of hire. The number of men hired by the terminal operators for performing truck loading and unloading is determined by the terminal operator's judgment as to the amount of cargo that will either be picked up or delivered to the pier on a given day. The Collective Bargaining Agreement setting forth the terms and conditions of employment for the terminal labor is negotiated between the International Longshoremen's Association and the New York Shipping Association, of which the terminal operators are associate members who do not have a vote as to the approval or disapproval of any collective bargaining agreement entered into by the parties. However, representatives of the terminal operators do participate in the negotiations.

Terminal and stevedoring services performed for the ocean carrier by terminal operators are provided pursuant to negotiated contracts between individual terminal operators and ocean carriers. There is keen competition among terminal operators for these contracts. The bulk of the operators' revenues, about 90%, are derived from services other than the truck loading and unloading. The latter services are not the subject of competition but are provided at uniform rates as set forth in the New York Terminal Conference Tariff No. 7.

Contracts between terminal operators and ocean carriers vary in types, frequently covering services beyond bare stevedoring, which may

include movement of cargo to the vicinity of the truck. Such additional services may include, among other things, sorting according to B/L marks, movement on the pier to accommodate changing situations, e.g., simultaneous receipt and loading of outbound cargoes for the same or another vessel, getting packages for weighing or sampling, moving cargo from place of rest to the head of the pier in anticipation of a call by a trucker and, again, in some instances, movement of the cargo between the place of rest on the pier and the vicinity of the truck. There are some contracts under which the ocean carrier pays the cost of all terminal service and is credited with revenue under the Conference tariff. There are in effect some bare stevedoring contracts which make no reference to truck loading or unloading. In such instances, the ocean carriers perform the aforeaid service.

Respondent Cunard Lines, effective March 10, 1969, in order to bring its tariff definitions into line with its practices followed throughout the periods covered by its Tariffs Nos. 1 and 2, F.M.C. T-1 and T-2, amended its Tariff No. 2, F.M.C. T-2, to define truck loading as:

Truck Loading Service shall mean the service of moving cargo from a place of rest *adjacent to truck tailgate* on the dock, elevating the cargo onto the truck and stowing of the cargo in the truck, but shall not include special stowage, sorting or grading of, or otherwise selecting, the cargo for the convenience of the truckers or the consignee, nor the loading onto consignee's pallets.

and truck unloading as:

Truck unloading shall mean the service of removing cargo from the body of the truck to a place of rest *adjacent to truck tailgate* designated by the Terminal Operator, and shall include sorting by port. Truck unloading shall be performed at the request of the truckman. (The underscored is the amending language.)

Disscussion

The issue before us, as set forth in our supplemental order, is whether the implementation by the Conference of its definition of the truck loading and unloading service constitutes a just and reasonable practice within the meaning of section 17 of the Act.

As is seen above, the controversy arises over that part of the Conference's definition which includes in the service of truck loading and unloading the movement of cargo between place of rest on the terminal facility and place adjacent to the truck tailgate. Implementation of this definition assesses a charge for this movement on the cargo via the trucker. We separated this portion of the proceeding to determine

if the assessment of this charge through the Conference's definition constitutes an unjust or unreasonable practice. We conclude that it does.

The Conference and U.S. Lines have maintained that the inclusion in the truck loading tariff definition of the movement of cargo from place of rest on the pier to a spot adjacent to the truck accurately reflects the boundary between the obligation of ocean carriers with respect to inbound cargo at the Port of New York and the responsibilities of receivers of such cargo who employ truckmen or others to call for their cargo. In other words, they contend that it is entirely proper to assess a charge against the receivers of cargo for this particular movement and that the carrier is not responsible for performing this service.

The Conference argues that it is well settled that the ocean carrier's obligation, under its contract of transportation, ceases when it has discharged the cargo and placed it in a location from which it can readily be located and removed, and has allowed the cargo interests concerned the specified period of free time within which to call for the cargo. *American President Lines, Ltd.* v. *Federal Martime Board*, 317 F.2d 887 (D.C. Cir. 1962), is cited to support this position.

U.S. Lines stresses that the carrier, by law, has no obligation to remove the cargo from the dock; that after the carrier has put the cargo on the dock, reasonably accessible, properly segregated and marked, it is for the receiver to take over and remove it; that the persons who aid in that task do it for the account of the receiver; that it is the receiver's lift-truck, in this sense, that comes to the pile, takes up the cargo and brings it to the truck.

U.S. Lines points out that the stipulation of facts shows that it is physically impossible to keep every consignment of inbound cargo in such a location that a truck tailgate can be placed adjacent to it. They conclude then that as long as the cargo is readily accessible to the receiver's forklift, there is no impediment in his way and there is no further duty on the carrier's part to effectuate delivery of the cargo.

The *American President Line* case, *supra*, described the transportation obligation of ocean carriers. The Court said:

> Ships bringing transoceanic freight into port are required by their transportation obligation, absent a special contract, to unload 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.

In citing this case to support their position the Conference stresses the point that the carrier's duty ends at place of rest. They argue that place of rest at the Port of New York is the transit shed and therefore the carrier's duty ends at the transit shed. We do not read the case as so limiting the carrier's responsibility. The Conference would have us overlook the Court's language which describes place of rest as a place "accessible to the consignee". The carrier's duty is not fulfilled by bringing cargo to rest in a transit shed when the transit shed is not accessible to the consignee or cargo receiver. We recognize that at the Port of New York cargo cannot be placed in areas adjacent to trucks immediately upon discharge from ships and that neither can trucks freely drive around the piers searching for cargo. However, we think Hearing Counsel correctly recognized that it is the carrier's duty to provide adequate terminal facilities which are convenient and safe for delivery and receipt of cargo, and that if, as is the case at the Port of New York, cargo can only be brought to truck tailgate after first being deposited in a transit shed in order to prevent chaos on the piers, the necessary movement to truck tailgate is part of the service required to be provided by the ocean carrier and not one for which a separate charge is assessed the cargo receiver. Ocean carriers have not rendered the cargo "accessible" to the trucker by placing it in transit sheds from which trucks are barred entry.

Much has been said in this proceeding as to what constitutes accessibility of cargo to the cargo receiver. As mentioned above, U. S. Lines contends that the cargo at rest in the transit shed is accessible in that the cargo receiver can simply send in a forklift, hilo, or whatever, and move the cargo to the truck.

U. S. Lines' position might be correct if the cargo receiver were permitted to so utilize his own equipment or were not assessed an additional charge for this movement. However, to say that cargo is accessible because the cargo receiver can send in a terminal operator's lift truck is simply not reasonable. Neither is it logical to say cargo is accessible to the cargo receiver when the cargo receiver is required to pay an additional charge to obtain the cargo or to bring the cargo to truck tailgate. Since it is the obligation of the ocean carrier to render the cargo reasonably accessible to the cargo receiver, any service performed by the terminal operator which contributes to the fulfillment of that obligation is for the account of the ocean carrier. This in no way changes the rule that the carrier is not required to make delivery to the consignee.

The Conference looks to another portion of the *American President Line* case to support its position. This case involved a controversy over

the Federal Maritime Board's interpretation of its free time and demurrage rules. The Board's interpretation was to the effect that carriers would be barred from assessing demurrage on cargo when they are unable to deliver because of a longshoremen's strike, and this bar would apply regardless of whether the cargo was made available during the entire prescribed period of free time. The Court described the Board's position and characterized what the Board sought to accomplish as being a violent shift from the provisions of its previous rule regarding demurrage and free time. The Court said at p. 890:

> The Board's position, as made clear by its brief and argument here, is that the legal duty of the carrier to deliver continues until the consignee calls for the cargo; that even after free time has expired the carrier has the duty of making the cargo physically available to the consignee's trucks; and that the carrier must provide the labor to load the consignee's trucks. A longshore strike, the Board says, prevents the carrier from fulfilling this obligation. This is a violent shift from the provisions of General Order 69 and introduces a new concept into the industry. A carrier does not, as we have pointed out, under long-established custom and official rules, deliver good to consignees; it tenders them for delivery, makes them available for delivery. We think the proposal to deny the carriers demurrage charges at the first period demurrage rate, where goods have been properly marked, etc., on the dock for more than five days before the strike began, is a violation of General Order 69 * * *.

The Conference characterizes this language as a rebuke by the Court of an attempt by the Board to extend the carrier's duty to include the service in question here. The Conference feels this decision bars us from finding the carrier responsible for movement of cargo to a place adjacent to truck tailgate.

A careful analysis of the Court's opinion shows that it would not relieve the carrier of its duty to perform the service in question here. The "violent shift" the Court was worried about was a shift in the free time and demurrage requirements to preclude demurrage payments to a carrier even after it had properly tendered cargo for delivery for the entire free time period. The case before us does not involve free time and demurrage requirements. This case does involve the requirement discussed by the Court of a carrier to tender for delivery. We are saying no more than the Court in *American President Line*, i.e., a carrier must tender goods for delivery, it need not deliver them to consignees. A proper tender is not made at the transit shed when the cargo receiver has no access to that area. The Court was worried that the former Board's position would extend the carrier's duty to include making the cargo physically available to the consignee by providing labor to load the consignee's truck. We agree that this would be a new concept in the industry. However, we are

not suggesting such a requirement. We are only requiring a carrier to bring cargo to a place accessible to the cargo receiver for truck loading. We are not requiring the carrier to load or to provide labor for loading.

U.S. Lines has cited several other cases to support its position regarding the obligation of a carrier to deliver or tender for delivery. The select portions quoted by U.S. Lines sometimes appear on their face to lend support to its position. However, as suggested and carefully outlined by Hearing Counsel, a closer analysis of each of these cases demonstrates that they are not controlling, largely because of different facts and sometimes because of different customs or regulatory laws involved.

There has been much discussion in this proceeding as to who will bear the costs of the service in question and whether assessment of the charge by the terminal operator results either in double payment by the cargo or double compensation for the carrier or the terminal operator.

Three forms of stevedoring contracts between the carriers and the Conference are employed at the Port of New York and bear on this question.

Under one form of contract the terminal operator bills the carrier for stevedoring services on the basis of actual cost plus a profit. The terminal operator credits the carrier with revenue collected under the truck loading tariff. This type of arrangement is said to result in the ocean carrier receiving double compensation for the service of making cargo reasonably accessible to the consignee; once in the freight rate and a second time in the revenues from truck loading.

Another type of contract calls for no reimbursement by the carrier to the terminal operator for the tariff service of truck loading. The terminal operator bears the costs and keeps the revenue obtained under the truck loading tariff. It is alleged that under this category of contract the cost of the service is charged by the terminal operator to the cargo rather than to the carrier, permitting the carrier, who received payment for the service in the freight rate, to retain compensation for a service which it did not provide to the consignee.

Under the third type of contract, the carrier pays the terminal operator for "assisting receiving and delivery". It is suggested that the terminal operator in this case is being compensated both by the carrier and the consignee for the same service, and that in any event the carrier may unjustly benefit to the extent that it does not reimburse the terminal for its full costs of moving cargo from the transit shed to the tailgate of the truck.

Whether the employment of any of these contracts in conjunction with the Conference's current truck loading tariff results in double payment or double compensation is not clearly established. Double compensation to the carrier occurs if the carrier includes the movement from transit shed to truck tailgate in its freight rate. This is assumed or conjectured, but not established. Double payment by the cargo also depends on this assumption. Double compensation to the terminal operator for this service occurs if its service to the carrier of "assisting delivery" includes the movement in question.

While the many allegations and counter-allegations about double payment and double compensation may not be conclusively shown to be true, we think they sufficiently point out the potential dangers inherent in the employment of the Conference's present truck loading definition in connection with the stevedoring contracts in use at the Port of New York. The existence of these real or potential dangers only accentuates the desirability and necessity of requiring a change in the conference tariff definitions to properly allocate between carrier and cargo the costs of the various aspects of the loading and unloading service.

The Conference has also argued that a change in the truck loading definition to relieve the cargo owner or his agent, the truckman, of the cost of movement between place of rest and tailgate would be a radical departure from the "user concept", which stands for the proposition that the cost of a service must be borne by the users of that service, and that accordingly the rates charged the users must be sufficient to produce revenue which will meet costs and a reasonable profit. The Conference explains that to make carriers bear the cost of this service would compel them to subsidize all or part of the costs of the service rendered to truckmen. This they say will result in subsidization of users by nonusers since some of the carriers' patrons use lighters for pickup and delivery and if the steamship companies should pass on, through higher freight rates, the cost of subsidizing the truckmen, the result would be that users of lighters would be contributing to the cost of the service rendered to those who pay truck loading and unloading tariff charges.

This argument is answered simply by pointing out that there would be no passing on of the cost to subsidize truckmen since carriers would not in fact be subsidizing truckmen. What would happen is that the carriers would be paying for movement to tailgate; a service which is part of their legal obligation to tender for delivery. The carriers would not be paying a loading charge or any other charge which might properly be assessed the truckman. Hence, there is no subsidization or passing on to non-users.

The Conference raises the additional argument that with one exception the definitions of truck loading and unloading contained in the current tariffs governing operations at various North Atlantic ports, other than New York, clearly encompass the movement between the truck and the place of rest on the pier, and that since uniformity of practice in this respect is desirable, the Commission would be ill advised to require a change in the New York Conference's definition.

While we are desirous of obtaining uniformity of practice among ports wherever feasible, we are unable to base any decision on the evidence in the record concerning practices employed at the various North Atlantic ports. The simple reason for this is that we have no information before us to indicate what are the customs, practices, or conditions at these ports. We have the bare tariff provisions but the experience of Cunard Line demonstrates the danger of drawing conclusions as to practice based simply on tariff provisions. The Cunard tariff previously defined truck loading to mean "the service of moving cargo from a place of rest on the dock, stowing of the cargo onto the truck, etc." Cunard has stated that place of rest in practice has always meant place of rest "adjacent to truck tailgate". This could not be determined by a mere reading of the language in the tariff.

Finally, the Conference resurrects its argument that if we were to require a revision of the tariff definition of the service upon which the cost study was premised for the purpose of refining the allocation of costs between ocean carriers and truckmen, we would be exercising a degree of ratemaking authority over the terminals which we do not possess. The argument is that we do not have conventional ratemaking authority with respect to marine terminals; our ratemaking authority being limited to carriers.

The fact that we have authority to investigate unlawful rating practices under section 17 of the Act was established long ago in *California* v. *United States*, 320 U.S. 577 (1944). The District Court for the Southern District of New York in *Federal Maritime Commission* v. *New York Terminal Conference, et al.*, 262 F. Supp. 225 (1966),[2] more recently confirmed this. The Court's language is directly responsive to the Conference's argument about our conventional ratemaking authority. The Court said at p. 228:

> Granting that the Shipping Act gives the Commission the power to prescribe just and reasonable rates, in *haec verba*, only with regard to carriers, * * * this does not preclude the regulation of rates charged by other persons subject to the Act under other provisions. Rates charged by the Conference are expressly made subject to Commission review by Section 15, 46 USC § 814, and the rates * * * may constitute unreasonable practices under Section 17, 46 USC § 816.

[2] *Federal Maritime Com'n* v. *New York Terminal Conference*, 373 F.2d 424 (C.A. 2, 1967) affirming.

The Conference further states that whatever ratemaking authority we might have under section 15 to protect against concerted setting of exhorbitant rates which yield an outrageous profit would not be exercisable here, since the Conference's cost study already indicated that the rates are not outrageously profitable.

In view of our decision here that the Conference's tariff definition improperly charges cargo for a portion of the service, no reliance can be placed on the Conference's cost study since it is based on that definition.

CONCLUSION

Respondent, New York Terminal Conference's tariff definition of loading and unloading improperly assesses a charge on cargo for a movement which is the responsibility of the ocean carrier. Consequently the implementation of that tariff definition constitutes an unjust and unreasonable practice within the meaning of section 17 of the Act. Additionally, the utilization of any method of cost accounting or allocation based upon such a definition distributes costs between cargo interests and ocean carriers in an unjust and unreasonable manner within the meaning of section 17.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65-46

TRUCK LOADING AND UNLOADING RATES AT NEW YORK HARBOR

ORDER

By supplemental order of February 19, 1969, the Federal Maritime Commission severed this portion of the proceeding to expeditiously determine whether the implementation by the New York Terminal Conference of its definition of the truck loading and unloading services contained in its Truck Loading and Unloading Tariff No. 7 constitutes a just and reasonable practice within the meaning of section 17 of the Shipping Act, 1916. The Commission also sought to determine whether the utilization of any method of cost accounting or allocation based upon such a definition distributes costs between cargo interests and ocean carriers in a just and reasonable manner within the meaning of section 17.

The Commission has fully considered these matters and has this date made and entered a report containing its finding and conclusions thereon, which report is hereby referred to and made a part hereof.

It is ordered, pursuant to section 17 of the Shipping Act, 1916, that the New York Terminal Conference cease and desist from implementing the definition of the truck loading and unloading service contained in New York Terminal Conference Truck Loading and Unloading Tariff No. 7.

It is further ordered, pursuant to section 17 of the Shipping Act, 1916, that the New York Terminal Conference amend its Truck Loading and Unloading Tariff No. 7 to define the services of truck loading and unloading as follows:

Truck Loading—shall mean the service of moving cargo from a place of rest on the terminal facility adjacent to truck tailgate, elevating the cargo onto the truck and stowing of the cargo in the truck, but shall not include, among other things, special stowage, sorting or grading of, or otherwise selecting, the cargo for the convenience of the trucker or the consignee, nor the loading of cargo onto consignee's pallets.

Truck Unloading—1. When the Participating Member performs truck unloading, such service shall consist of removing cargo from the body of the truck to a place of rest on the terminal facility adjacent to truck tailgate as designated by the Participating Member, and shall include sorting by port. Truck unloading shall be performed by the Participating Member at the request of the motor carrier.

2. When the motor carrier's employees perform the unloading service, it shall include the removing of cargo from the body of the truck to a place of rest on the terminal facility adjacent to truck tailgate, as designated by the Participating Member. Motor carrier's employees shall be required to tier cargo to the height specified by the Participating Member but in no event shall they be required to tier cargo more than six (6) feet high.

By the Commission.

[SEAL]

THOMAS LISI,
Secretary.

428-264 — 71 — 6

FEDERAL MARITIME COMMISSION

No. 69–4

IN THE MATTER OF AGREEMENT NO. T–2214 BETWEEN THE CITY OF LONG BEACH, CALIFORNIA, AND TRANSOCEAN GATEWAY CORPORATION

Adopted September 18, 1969

Rental for marine properties for use as a public container terminal, subject to an adjustment in the minimum rental for the second year, found compensatory on proposed ten-year basis, and not shown to be unjustly discriminatory or unfair to other ports or terminals. Lease agreement approved subject to said adjustment in second year minimum rental.

Leslie E. Still, Jr., for respondent, the City of Long Beach, California.

Joseph Lotterman and *Howard A. Levy* for respondent, Transocean Gateway Corporation.

Roger Arnebergh, *Edward C. Farrell*, *Walter C. Foster* and *Maynard Asper* for petitioner, the City of Los Angeles, California.

Donald J. Brunner and *Robert H. Tell* as Hearing Counsel.

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

By order of investigation served January 10, 1969, the Commission instituted this proceeding to determine whether Agreement No. T–2214 (the Agreement), a marine terminal lease, between the City of Long Beach, California (Long Beach), and Transocean Gateway Corporation (Transocean), should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916 (the Act).

The Commission has received a protest against approval of the Agreement from petitioner, the City of Los Angeles, California, urging that the Agreement should not be approved because the rentals contained therein are noncompensatory in violation of section 15 of the Act. Accordingly, the Commission's order of investigation pro-

[1] This decision became the decision of the Commission September 18, 1969.

vided that the issues in this proceeding are to "be confined to whether the rentals contained in Agreement No. T-2214 are non-compensatory resulting in prejudice to other ports or terminals." Hearing was held April 8-9, 1969. The matter was argued orally before the Presiding Examiner by respondents, Long Beach and Transocean, and by petitioner, the City of Los Angeles, and in accordance with the procedure agreed to by all parties, Hearing Counsel filed a reply brief, and respondent Transocean an answering brief. Long Beach and the City of Los Angeles waived the filing of answering briefs in consideration of their presentations on oral argument. The City of Los Angeles opposes, and the other parties favor approval of the Agreement.

The Agreement provides for the non-exclusive preferential assignment to Transocean of the wharf and contiguous wharf premises at berths 246 and 247, Pier J, Long Beach, California (Parcel I). In addition, the Agreement provides that Transocean has an option for the non-exclusive preferential assignment of the wharf and contiguous wharf premises at berth 245, Pier J (Parcel II), together with an option for the non-exclusive preferential assignment of up to 80 acres of additional property adjacent to or contiguous to Parcel I and Parcel II. Transocean is to use the leased properties as a public container terminal. At the terminal, Transocean will furnish warehousing and rail and truck facilities, facilities for the loading and unloading of vessels, and facilities for other generally related purposes.

Transocean has the right under the Agreement of first refusal of any additional public container facility constructed or made available by Long Beach. The term of the lease is ten years, with an option to renew for an additional ten years. Long Beach reserves the right to make a temporary assignment of the leased facilities to other persons when the premises either in whole or in part are not required by Transocean.

Transocean will assume the burden of providing the requisite container handling equipment, such as cranes, top loaders and containers, at an estimated cost to Transocean initially of about $1,333,333. Initially Transocean will provide one container crane and certain other equipment, but for the operation of the container terminal at full capacity, there would have to be substantial additional investment on the part of Transocean, including another container crane.

Construction of facilities in the terminal area in issue was begun by Long Beach with no specific tenant in mind. These facilities were offered to certain Japanese steamship lines before the Agreement was made with Transocean. When negotiations were commenced with

Transocean, the wharves for the two berths in issue were about one-third complete. At present, the wharves on berths 246 and 247 are virtually finished, and the back area is being graded to its final elevation.

Under terms of the Agreement, Transocean will provide its services in operating a public container terminal at rates that shall conform as nearly as possible to those in the tariff of the Port of Long Beach.

As compensation for the leased premises, Transocean, for each month of its occupancy of these terminal facilities, shall pay to Long Beach a sum equal to the total amount of all charges for dockage, wharfage, wharf demurrage, wharf storage and all other terminal charges, computed on the basis of the Port of Long Beach tariff with respect to Transocean's operations at the premises for vessels berthed and for cargo loaded, discharged or held, subject to certain provisions, including those in the next paragraph.

For the first year of the Agreement, the amount paid by Transocean to Long Beach is subject to a maximum of $300,000, but with no minimum; for the second year, there will be a minimum of $200,000 and a maximum of $350,000; for the third year, and any succeeding year of the Agreement, the minimum will be $340,000, and the maximum will be $420,000.

In summary, for the ten-years of the Agreement, the minimum payment by Transocean to Long Beach would be zero for the first year, plus $200,000 for the second year, plus eight times $340,000 for the next eight years, or a total of $2,920,000.

The expenses of Long Beach in connection with the leased facilities for the 10 year period have been estimated by Long Beach to total $2,381,500, which is a sum less than the minimum revenues of $2,920,000 which Long Beach would receive from Transocean. In addition, Long Beach might receive other revenues from the leased facilities through its right to make temporary assignments of the leased facilities to persons other than Transocean when the premises either in whole or in part are not required by Transocean. Also, both respondents expect that in due time, the facilities will earn in excess of the agreed minimum revenues.

Long Beach did not insist on a minimum rental for the first year of the lease, because of its desire to have a public containership terminal, because Transocean agreed to furnish from its own funds the operating equipment, such as the container crane, and because Long Beach was willing to speculate along with Transocean that the venture would be a success. A principal reason for the lack of a minimum rental for

the first year apparently was because Transocean was to pay for the container crane and other terminal equipment, thereby obviating an investment by Long Beach in container crane and related equipment.

The investment costs in land and water area of Long Beach for Berths 246 and 247 are estimated to total $1,542,200. This estimate is based on 710,200 square feet of land at $2 a square foot or $1,420,400; on 103,600 square feet of area under wharf at 50 cents a square foot, or $51,800; and on 140,000 square feet of water area at 50 cents a square foot, or $70,000. Improvements estimated as of February 26, 1969, totalled $1,236,800. The improvements include paving, freight station and office, gate house, railroad tracks, utilities and other items. Based on a contract figure of $1,109.75 per linear foot and 1,400 feet of wharf, the wharf was valued at $1,553,660. The total of the land area, the improvements, and the wharf is $4,332,660.

The concrete wharf is assigned a life of 50 years, with a straight line depreciation of 2 percent a year, and the other structures, utilities, paving and improvements are assigned a life of 20 years, with a straight line depreciation of 5 percent a year. Two percent of the estimated value of the wharf, plus five percent of the estimated value of the structures and improvements amounts to about a composite 2.14 percent of the total estimated investment in berths 246 and 247. Accordingly, depreciation was calculated by Long Beach on a yearly basis at the composite figure of 2.14 percent of the total investment.

Prorated port costs, or costs that could not be directly assigned to any particular berths of the Long Beach Harbor, on the last available annual basis totalled $2,847,492, or 2.50 percent of the total investment cost of $113,775,813 of the revenue producing facilities of the Long Beach Harbor.

Direct costs attributable to a particular berth or terminal were determined from a previous study of Long Beach to average 0.84 percent of the cost of investment.

The sum of 2.14 percent for depreciation, 0.84 percent for direct costs, and 2.50 percent for prorated port costs results in 5.48 percent for the total expenses for berths 246–247, whereas the average annual gross rate of return over the 10-year life of the Agreement based on minimum payments by Transocean would be 6.74 percent (revised investment of $4,332,660 divided into one-tenth of minimum 10 year return of $2,920,000). This leaves a net profit on investment to Long Beach of 1.26 percent. If Transocean were to make maximum payments for the 10 years, the net profit to Long Beach would be 3.78 percent.

The principal issue herein is whether the proposed rentals are compensatory. A subsidiary issue is whether the rentals must be compensatory on a year by year basis, that is for example, must the rental for the first year be compensatory. Neither the minimum rental of zero for the first year, nor the minimum rental of $200,000 for the second year is compensatory. All other rentals, whether minimum or maximum, in the Agreement are compensatory, in that they exceed the estimated total expenses of Long Beach of $238,150 per year. The City of Los Angeles admits that the rental provisions of the Agreement when considered on the overall 10-year term of the Agreement are compensatory. The respondents insist and Hearing Counsel agree that whether the rentals are compensatory or not must be decided on the 10-year basis of the Agreement.

The City of Los Angeles in opposing the Agreement relies in part on the finding in Docket No. 68-26, *Agreements No. T-2108 and T-2108A, 12 F.M.C. 110*, October 15, 1968, in which a lease agreement was approved subject to an increase in the minimum payment to insure that the facilities in question were not furnished at less than cost during any year of the pendency of the agreement. This cited case concerned an agreement to lease for three years which was cancellable at the end of the first year at the option of the lessee-tenant.

In the present proceeding we have a somewhat different situation, in the form of a non-cancellable ten-year lease, which is admittedly compensatory over this ten-year period on the basis of the total of its minimum yearly rentals. The City of Los Angeles argues in part that this lease is no better than the financial capability of its tenant-lessee, but here we must defer to the judgment of Long Beach.

It has been said in other cases of terminal rentals that it is not our prerogative to prescribe specific rates of return to public bodies experienced in terminal management. The present record generally affords no ground for disputing Long Beach's judgment in negotiating this lease to Transocean.

Nevertheless, there is one disturbing element in the Agreement, and we are constrained to listen to the argument of the City of Los Angeles that there be some limit placed on the number of years that the minimum rental in a lease of this nature may be less than fully compensatory. There appears in the present case to be ample justification for the lack of a minimum rental for the first year, particularly because of the substantial investment in terminal equipment to be made by Transocean. However, it is our conclusion that the second year's rental should not be less than compensatory, nor should any succeeding year's rental.

Accordingly, the present agreement appears approvable subject to the change or adjustment of the minimum rental for the second year from its noncompensatory amount of $200,000 to the compensatory amount of $240,000.

It is concluded and found that the total minimum rental in Agreement No. T–2214, a non-cancellable ten-year lease, subject to the adjustment in the minimum rental for the second year of the lease to $240,000 is compensatory and does not result in undue prejudice to other ports or terminals. It is further concluded and found that the Agreement subject to the adjustment to $240,000 of the minimum rental for the second year of the lease, has not been shown to be otherwise unlawful under section 15 of the Shipping Act. The Agreement subject to the change in the second year's minimum rental will be approved.

CHARLES E. MORGAN,
Presiding Examiner.

WASHINGTON, D.C., *June 25, 1969.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 68–14

C. H. LEAVELL & COMPANY

v.

HELLENIC LINES, LIMITED

Decided September 29, 1969

Where complainant shipped cargo on two of respondent's vessels scheduled for Red Sea port via Suez Canal, which was closed after commencement of voyages following outbreak of Arab-Israeli War of 1967 requiring both voyages to be diverted via Cape of Good Hope, the first after back tracking from Alexandria, a 65% surcharge imposed on the voyage which was extended 164% in time and 193% in mileage, and a 25% surcharge imposed on the voyage which was extended 71% in time and 94% in mileage, found authorized by filed tariff rule and bill of lading clauses providing for additional compensation in unspecified amount in the event of such contingency, and not in violation of section 18(d) of the Shipping Act, 1916.

Incorporation by reference of definitely ascertainable matter in bill of lading terms comprising transportation agreement follows established maritime custom which is not invalidated by section 18(b) of Shipping Act, 1916.

Samuel W. Earnshaw for complainant.

Stanley O. Sher for respondent.

Donald J. Brunner, *E. Duncan Hamner, Jr.*, and *Robert H. Tell*, Hearing Counsel, intervener.

REPORT

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

This is a complaint proceeding brought by C. H. Leavell & Co., a shipper, to recover reparation for surcharges collected by respondent carrier, Hellenic Lines, Limited, in alleged violation of the Shipping Act, 1916 (46 U.S.C. 801, *et seq.*). Examiner Walter T. Southworth issued an initial decision on February 6, 1969, in which he concluded that the surcharges were justified. Leavell and intervener Hearing

Counsel filed exceptions. The Commission heard oral argument on June 25, 1969.

FACTS

Leavell is a construction contractor. It held a $5,000,000 contract to construct a sewage project in Khartoum North, Sudan, sponsored by the Agency for International Development (AID). Hellenic is a foreign-flag common carrier by water in the foreign commerce of the United States. Until the 1967 closing of the Suez Canal, Hellenic maintained a regularly scheduled, advertised liner service from Atlantic and Gulf ports of the United States via the Mediterranean and Suez Canal to ports on the Red Sea and Gulf of Aden. Leavell shipped construction material and equipment for its Khartoum project, consigned to itself at Port Sudan, on the *Hellenic Glory* and *Hellenic Pioneer*, on voyages which were scheduled to call at the Red Sea ports of Jidda and Port Sudan in the said service, as well as at Alexandria (in the case of *Hellenic Glory*, at least) and ports beyond Port Sudan.

The *Hellenic Glory* commenced her voyage at New Orleans on May 5, 1967. She proceeded to Houston, then returned to New Orleans, where on May 18, 1967, she loaded 5,275,000 pounds of cargo for Leavell. In addition to some 4,200,000 pounds of asbestos cement pipe, the cargo included trucks, tractors, concrete mixers and other heavy construction machinery; total freight was more than $142,000. The *Glory* departed New Orleans (second call) May 19, 1967, and arrived at New York May 23. There she loaded a relatively small shipment (about 300 revenue tons) of construction supplies, tools, and small equipment likewise consigned by Leavell to itself at Port Sudan.

The *Glory* departed New York May 27, 1967. At that time there was no thought that she might not be able to transit the Suez Canal; the possibility had not been discussed with complainant or its freight forwarder, or with any other shipper. Her first scheduled call was Alexanderia, then Jidda (on the easterly shore of the Red Sea, across from and slightly north of Port Sudan), Port Sudan, and on to Djibouti, Karachi, Rangoon, and Calcutta. She was originally scheduled to arrive at Port Sudan June 14, 1967, but the normal time from New York to Port Sudan via the canal is 22 days with stops at Alexandria and Jidda, or 18 days without such stops. Freight charges were calculated in accordance with basic tariff rates without the inclusion of any unusual or additional sum because of any apprehension of war or closing of the canal.

On May 13, 1967, the U.A.R. had begun to move forces through Cairo eastward into the Sinai Desert, following threats of Israel's prime minister (provoked in turn by raids of the Syrian-sponsored Al

Fatah organization) that it would "choose the time, the place, and the means to counter the aggressor." On May 18, the U.A.R. formally requested withdrawal of United Nations forces on the Sinai border. On May 22, President Nasser, under pressure in the Arab world, closed the Strait of Tiran to Israeli Shipping.

On Sunday, June 4, the Israeli Cabinet decided upon war. It began next morning, June 5, with an air strike that destroyed the U.A.R. Air Force as a fighting service in three hours. The land battle for Sinai began the same morning.

That day *Hellenic Glory* was less than a day's steaming time from Gibraltar. She was not, of course, privy to Israel's plans, any more than President Nasser had been. She entered the Strait of Gibraltar, passed Gibraltar on June 6 at 4:00 a.m. Gibraltar time (which is the same as Greenwich Mean Time), and hove to pending further developments and the receipt of instructions from her owner's office in New York. After "steaming about in circles" for a day, she was directed to put in at Ceuta (directly across the Strait from Gibraltar) for fuel. This unscheduled call was made to take advantage of Ceuta's bunkering facilities while Hellenic's New York office was assessing the situation. Every effort was being made to find out just what was going on in Egypt and Israel. The company had access to such information as was publicly available, through a news ticker in its office; it was unable to establish contact with its own representative in Cairo.

On Thursday evening, June 8, the UN Security Council concluded a cease-fire after four days' trying, and the battle for Sinai gradually came to an end. By that night, the fourth day of the war, the Israeli forces commanded the length of the Suez Canal. The same day, the *Glory* sailed from Ceuta and proceeded slowly eastward into the Mediterranean. President Nasser had ordered the Suez Canal closed on June 6.

On Friday, June 9, the Israeli forces attacked Syria from the northeast border of Israel, farthest from the Sinai Desert and the canal. The Arabs abandoned their positions within 27 hours.

Meanwhile the *Glory* was proceeding eastward. She was ordered into Heraklion, on the island of Crete, where she arrived June 14. The next day, June 15, she finally went in to Alexandria, the first scheduled port of call.

The *Glory* was directed not to wait for the canal to open, but to proceed to Jidda and Port Sudan via Gibraltar and the Cape of Good Hope. She departed Alexandria June 17, stopped at Durban for fuel, and, after practically circumnavigating the African continent, arrived at Jidda July 21. She discharged her Jidda cargo, sailed July 24, and

arrived at Port Sudan July 25. At the date of this decision, the Suez Canal is still closed.

The *Glory's* scheduled voyage from New York, its point of departure from the United States, to Port Sudan via Alexandria, the canal and Jidda was one of about 22 days and 6,000 miles. The actual voyage was one of 58 days and 17,565 miles from New York. In terms of percentages of the scheduled time and mileage, the course followed added 164 percent in time and 193 percent in mileage.

Hellenic added a 65 percent surcharge to the normal freight charges due from complainant. Such surcharge was made against all cargo on this voyage of *Hellenic Glory.*

Leavell's cargo on *Hellenic Pioneer* was loaded at New Orleans on or about May 29, 1967. It consisted of 1,086,082 pounds of merchandise, principally steel reinforcing bars in addition to some trucks and other construction and office equipment. Total freight was about $18,000, calculated at regular tariff rates in contemplation of the scheduled voyage via the Suez Canal, under the same circumstances as set forth above with respect to *Hellenic Glory. Hellenic Pioneer* left New Orleans May 30, made calls at Baltimore and Philadelphia, and arrived at New York June 7, two days after the war began. She could have sailed June 10, but was held at New York until June 16 pending clarification of the situation in the Middle East.

While the *Pioneer* was at New York, Hellenic's traffic manager had daily telephone conversations with the president of Mohegan International Corporation, complainant's freight forwarder, which had made all the arrangements for Leavell's shipments. It was never suggested to Hellenic that Leavell's cargo be discharged at New York.

On June 8, 1967, Hellenic filed with the Commission, by special permission, a tariff amendment, effective the same date, adding a 25 percent surcharge on all rates due to the Middle East crisis.

Hellenic's disposition of the *Pioneer* was consistent with that of the *Glory*. On June 16, the day before the *Glory* sailed from Alexandria, the *Pioneer* sailed from New York for Jidda, via the Cape of Good Hope instead of via Gibraltar and Suez as had been scheduled when she sailed from New Orleans. She arrived at Jidda July 18, left there July 20, and arrived at Port Sudan July 21. The distance was 11,649 miles and the time about 35 days, against some 6,000 miles via Suez and (without a stop at Alexandria) about 20 days. The normal mileage was thus increased by about 94 percent and the elapsed time by about 71 percent. Hellenic assessed a 25 percent surcharge, equivalent to $4,544.52 against complainant's shipment on the *Pioneer.*

On June 7, when *Glory* was at Ceuta and the *Pioneer* at New York, Leavell had instructed Mohegan, its freight forwarder as follows:

CONFIRMING TELEPHONE INSTRUCTIONS GLORY OR PIONEER ARE NOT TO SAIL WITHOUT PREVIOUSLY ADVISING US SO WE MAY GIVE INSTRUCTIONS AS TO DISPOSITION OF CARGO.

Mohegan conveyed the message to Hellenic that day. No "instructions" were thereafter given by Leavell, although Leavell was kept informed as to Hellenic's intentions. On June 15 (a Thursday), Leavell cabled its Khartoum representative (with copies to AID and the United States Embassy): "Glory sailing from Alexandria Friday and Pioneer from New York over weekend both via Cape for Port Sudan." This was approximately correct; the *Pioneer* sailed from New York Friday the 16th, and the *Glory* sailed from Alexandria Saturday the 17th.

While the *Glory* was sailing westward toward Gibraltar there was some talk between Leavell and Mohegan about the possibility of discharging Leavell's cargo at Genoa or some other Mediterranean port. Hellenic's traffic manager told Mohegan's president, Seymour, that this would involve great difficulty because 2,000 tons of cargo destined for Jidda were on top of Leavell's cargo and would have to be discharged before Leavell's cargo could be reached, and then reloaded; and that a deviation of Genoa would require consideration from the standpoint of vessel and cargo insurance. On the afternoon of June 20, when the *Glory* was two days from Gibraltar, Seymour wired Leavell that Hellenic refused to offload its cargo at Genoa "due to excessive exposure of damage and loss on super-imposed cargo"; and that the *Glory*, and also the *Pioneer*, were proceeding to ports of destination via the Cape of Good Hope. Hellenic's witness denied that there was a refusal to offload and there was no evidence thereof other than the hearsay telegram; Seymour did not testify. In any event, the subject was not renewed with Hellenic after its traffic manager pointed out to Seymour the difficulty it would involve. At no time prior to the arrival of the vessels at Port Sudan did Leavell take any firm position contrary to or critical of Hellenic's handling of the situation (other than the imposition of the surcharges), although it was at all times kept advised of Hellenic's acts and intentions through its freight forwarder.

The Tariffs and Bills of Lading

Hellenic had tariffs on file with the Commission and open to public inspection. These tariffs contained rules or regulations and specimens of the bill of lading evidencing the transportation agreement. Among the provisions of such rules and regulations and bill of lading were the following:

1. Under "Rules and Regulations," paragraph (a) of Rule 3 ("Application of Rates") provided, as far as pertinent here:

If the expense of transiting the Suez Canal increases through any cause whatsoever except carriers' fault, and/or in the opinion of HELLENIC LINES LIMITED it is unsafe, imprudent, inadvisable or unlawful, a Surcharge on all freights and charges as specified herein may be levied without notice regardless of the other provisions of this Rule; and owners of the goods shall pay the Surcharge.

2. Hellenic's bill of lading provided, in Clause 5 thereof:

Without limitation of any other provision herein, in any situation whatever or wherever occurring and whether existing or anticipated before commencement of, or during the voyage, which, in the judgment of the carrier is likely to give rise to risk of capture, seizure, detention, damage, delay or disadvantage to, or loss of the ship or any part of the cargo or to make it unsafe, imprudent or unlawful for any reason to * * * continue the voyage or to give rise to delay or difficulty in arriving, entering, discharging at or leaving the port of discharge * * * the carrier, whether or not proceeding toward or attempting to enter the port of discharge, may proceed by any route or return directly or indirctly to or stop at such other port or place whatever as the carrier may consider safe or advisable under the circumstances once or oftener, backwards or forwards in any order and discharge the goods at any place he may select there, or the carrier may retain the cargo on board until a return trip or until such time as the carrier thinks advisable and discharge the goods at any place whatever as herein provided, or the carrier may discharge and forward the goods by any means whatever, all at the risk and expense of the goods * * *. The carrier shall be entitled to a reasonable extra compensation for any services in connection with the foregoing above the agreed freight * * *.

3. Hellenic's bill of lading provided, in Clause 25 thereof:

Baltic Suez Stop Clause 1956 is considered as incorporated in the present Bill of Lading.

The Baltic Suez Stop Clause was drafted in 1956 by the Baltic and International Maritime Conference, an association of shipping lines and shipowners based in Copenhagen which has drawn various forms of bills of lading and charter parties. The clause reads as follows:

If before the vessel commences loading navigation on the Suez Canal is interrupted the owners/carriers shall be entitled to cancel this contract; if navigation is interrupted as aforesaid after loading has commenced the vessel may proceed by some other route and the freight shall be increased in proportion to the longer sailing distance.

The Baltic and International Maritime Conference is not comparable to the ordinary steamship conference; it does not make rates. Hellenic is not a member, and no copy of the Suez Stop Clause is on file with the Commission, as far as the record shows. Hellenic sent a copy to complainant's forwarder, Mohegan, and to all other shippers

on the vessels, shortly after it decided to divert the *Glory* and *Pioneer* via the Cape. Prior to that time it had not furnished, or been asked to furnish, a copy to Mohegan or complainant.

Although Leavell's shipment on the *Glory* made up about 20 percent of the vessel's cargo, there were about 1,000 shippers on the voyage, all of who, except the Military Sea Transportation Service, have paid the 65 percent surcharge and (except for complainant) have made no complaint about it; in fact Hellenic has had "several telephone calls complimenting us for fulfilling the voyage of the vessel." A claim for about $2,200 is being filed against Military Sea Transportation Service.

Discussion

The presiding examiner found that the surcharges were authorized by the tariffs on file and the bills of lading which provided for additional compensation in an unspecified amount in the event of an unforeseen deviation due to the outbreak of the Arab-Israeli War of 1967.

The examiner reasoned that the goods were shipped under a tariff duly filed with the Commission which gave notice by rule that if it were "unsafe, imprudent, inadvisable or unlawful" to proceed through the Suez Canal, and an alternate route was used, a surcharge on all freights and charges specified in the tariff might be levied without notice. Since transit of the canal was not only unsafe, imprudent and unlawful, but impossible, as the result of circumstances which arose after the voyages commenced, the examiner found Hellenic was justified in using alternate routes to reach the port of discharge.

In addition, the examiner relied upon the fact that the shipments were governed by bills of lading, specimens of which were included in the tariffs filed with the Commission as provided by section 18(b)(1), which contained provisions applicable to the instant situations as part of the transportation agreement between the parties. Clause 5 of the bill of lading stipulated generally that the carrier should be entitled to "a reasonable extra compensation for any services in connection with" various situations arising during a voyage, including situations likely to result in risk of damage or delay in arriving at the port of discharge or make it unsafe, imprudent, or unlawful to continue the voyage; in which events the carrier might (among other options) proceed toward the port of discharge by any route. Clause 25 of the bill of lading incorporated by reference the "Baltic Suez Stop Clause 1956," which clause specifically provided that if navigation of the Suez Canel were interrupted during the voyage, the vessel might proceed by some other route and the freight be increased "in proportion to the longer sailing distance."

The examiner concluded that although Hellenic relied on the "Baltic Suez Stop Clause" in assessing the 25 percent and 65 percent surcharges, any one of the three clauses—Tariff Rule 3(a), bill of lading clause 5, or bill of lading clause 25—authorizes the charges, and satisfies section 18(b) as interpreted in the *All Cargo* case.[1]

In *All Cargo*, the Commission sustained a surcharge of 125 percent assessed because the shipper's perishable cargo was kept under refrigeration aboard the vessel, at anchor or at dock, during a longshoremen's strike which caused the vessel to lose about 33½ days on a scheduled voyage of about 25 days (or 13 days from the last European port to the first United States port), under the following bill of lading provision:

> For any service rendered to the goods as hereinabove provided, the carrier shall be entitled to extra compensation; and if in following the procedure permitted herein the length or duration of the voyage of the ship is increased the shipper and consignee shall pay proportionate additional freight, all of which shall be a lien on the goods.

The amount of extra compensation charged in *All Cargo* was found to be lawful and not arbitrary, not as being "proportionate" to the increased "length or duration of the voyage," but simply because it was considerably less than the expenses for charter hire and bunkers incurred by the carrier during the period of the strike.

The examiner found that Hellenic rendered services, obviously at increased cost to itself, in connection with circumstances within the contemplation of clause 5 of its bill of lading. Hellenic did not merely return the goods to the port of loading as it might have done under the bill of lading clause, but carried them on to the port of destination although (in the case of the *Glory*) it added a month and some 11,500 miles to its scheduled voyage in order to do so. Effort was made and action taken to deliver the goods otherwise than by the direct carriage contemplated by Hellenic's tariff, and for such services extra compensation was provided in the transportation agreement. Hellenic was therefore entitled to reasonable extra compensation by reason of bill of lading clauses 5 and 25 as well as tariff rule 3(a).

The examiner next considered whether under the circumstances the 65 percent and 25 percent surcharges constituted fair and reasonable extra compensation, under the express and implied limitations of the filed tariff rules and transportation agreement, for the services rendered the goods over and above the services covered by the basic transportation rates and accessorial charges.

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[1] *Extra Charges Caused by Longshoremen Strike,* 8 F.M.C. 437 (1965), aff'd sub nom. *International Packers, Ltd.* v. *Federal Maritime Com'n,* 356 F.2d 808 (D.C. Cir. 1966).

The examiner found that in the case of the *Glory*, the scheduled voyage from New York—the voyage upon which Hellenic's underlying rates were based—would have covered about 6,000 miles and required about 22 days. The actual voyage was one of 17,565 port-to-port miles exclusive of mileage to nonscheduled ports and steaming in circles while awaiting developments—an increase of 193 percent. The actual time was 58 days—an increase of 164 percent. Even if half the carrier's total costs—including voyage operating costs, overhead, and depreciation—be assumed to consist of port and cargo costs which were not increased, and with due consideration for the relatively nominal saving of $6,000 to $7,000 in canal tolls, the examiner found the surcharge to be reasonable.

In the case of the *Pioneer*, the examiner found a 6,000-mile, 20-day voyage became an 11,649-mile, 35-day voyage; an increase of about 94 percent in distance and 71 percent in time. The examiner found that these facts provide a sufficient showing of reasonableness in the circumstances to support a 25 percent surcharge.

Leavell argues on three major points: (1) whether the 1961 amendments to the Shipping Act as interpreted in light of their Congressional policy, permit a carrier to depart from its expressed tariff in any way; (2) whether the tariff and bill of lading provisions permit the surcharges; and (3) whether the surcharges, if legal at all, are reasonable in amount.

Leavell emphasizes the legislative history of section 18(b) to establish a single purpose: that tariff compliance and enforcement requirements be strictly applied and enforced. In other words, Leavell argues that in spite of emergency or other conditions and in spite of any terms which might be included in the carrier's bill of lading, the tariff rate is absolutely mandatory, and no exceptions whatsoever are permitted. In support of this proposition Leavell relies upon the failure of the statute or the legislative history to contain any authority to the contrary. Further, Leavell cites the pronouncements of sister transportation agencies that no deviations shall be allowed from the applicable tariff. In conclusion, Leavell argues that there are no exceptions to the tariff filing and enforcement requirements of section 18(b).

Section 18(b), containing tariff filing requirements applicable to carriers in the foreign commerce of the United States, was added by P.L. 87–346, effective October 3, 1961. "These requirements are generally that rates must be posted and filed with the Board 30 days prior to their effective date; that terminal and other accessorial charges must be stated separately; that carriers will not charge a different rate than that filed with the Board and posted publicly; and that the Board may

establish regulations relating to the form of tariff which shall be used by such carriers."[2] The objective of section 18(b)'s filing requirements was similarly expressed in a 1962 letter of the Chairman of the Commission concerning implementation of P.L. 87-346:

> * * * we are convinced * * * that shippers and receivers are entitled to know their transportation charges *in advance*, and that such *certainty of charges* is beneficial to our foreign commerce. We are equally persuaded that the public interest requires the assurance of *equal treatment* to all who are similarly situated. (Emphasis added.)

The emphasized words in the preceding quotation indicate the purpose of section 18(b). The shipping public is entitled to be provided with advance notice of rates certain to be charged and which will be charged equally to all shippers for the same services. This does not mean, however, that in all cases and under all circumstances the conditions will prevail which permit strict adherence to those requirements.

Business life is filled with intangible elements and non-quantifiable factors. This is especially true in the business of ocean transportation and is recognized, in particular, in the contracts which are employed between carriers and shippers. This being so, it can hardly be suggested that Congress, in enacting section 18(b), intended to legislate away the traditional and necessary relationships between the shipper and carrier.

It cannot be practically expected that carriers can put a predetermined price on every conceivable contingency of the kind to which ocean transportation is subject. On the other hand, it is equally hard to assume that legislation is written without an awareness of contemporary conditions. We are no longer living in the days of wind-driven wooden ships with all their navigational inadequacies.

We cannot interpret statutory provisions in terms no longer relevant. "Enlightened regulation is the key to effective regulation; no regulatory agency can permit regulation to be outstripped by new techniques in the industry." *Disposition of Container Marine Lines Through Intermodal Container Freight Tariffs Nos. 1 and 2, FMC Nos. 10 and 11*, 11 F.M.C. 476, 489 (1968). See also *American Trucking Assns. Inc.* v. *A.T. & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967).

Consequently, while we conclude that section 18(b) does not preclude reference to an implementation of emergency language in tariffs and bills of lading, we do not approve unlimited use of such practices. It

[2] From letter of Secretary of Commerce to Chairman, Committee on Merchant Marine and Fisheries, House of Representatives, March 20, 1961, recommending favorable consideration of the bill (H.R. 6775) on behalf of the Department and the Federal Maritime Board. Legislative History of the Steamship Conference/Dual Rate Law, 87th Cong., 2d Sess., Document No. 100, p. 132.

is not a question of conflict between the tariff filing requirements of section 18(b) and established maritime law. Rather we are confronted with the matter of the public interest which this Commission is statutorily obliged to protect. Consequently, there must be a balancing of the interests of a need for adherence to section 18(b), a recognition of the contingencies of ocean transportation and an obedience to public interest standards.

Under these circumstances we find no malfeasance in the actions of Hellenic in this case; and we find that in a proper case extra compensation may be provided for by the agreement of transportation set forth in the bill of lading, with the reasonable amount thereof to be determined upon the occurrence and in light of the circumstances of the contingency.

However, resort to clauses in tariffs or bills of lading which effect a change in the tariff rate is closely circumscribed by the policy of section 18(b). We interpret that section to mean that only where it is impossible to file a new rate (and seek special permission where required) will a carrier be allowed to depart from the tariff rate pursuant to emergency provisions. For example, this means that the emergency must occur while the vessel is at sea, or at least after the cargo has been loaded. And, of course, the emergency must be such that it was unforeseeable to a prudent steamship operator in the exercise of a high degree of diligency. Cf. *Surcharge at U.S. Atlantic and Gulf Ports*, 10 F.M.C. 13, 23 (1966).

Thus, each case involving an emergency departure from filed rates will be determined on its own facts; and, as we have said, unlimited use of emergency rate provisions will be subjected to severe scrutiny. In essence, however, contractual relationships between the shipper and carrier are commercial matters. It is best if shippers and carriers reach accommodation on such matters without government agency interference. Consequently, we hope shippers and carriers recognize the need for their commercial practices to keep in step with the modernization of transportation technology.

We are not persuaded by Leavell's reference to the decisions of other transportation agencies.[3] These cases are distinguished simply because they do not concern themselves with emergency situations. Likewise, Leavell's reliance on the Commission's General Order No. 13, 46 C.F.R. 531.0, et seq., is misplaced. The general order applies to normal, not emergency conditions.

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[3] *United States* v. *Associated Air Transport, Inc.*, 275 F.2d 827 (5th Cir. 1960); *Holt Motor Co.* v. *Nicholson Universal S.S. Co.*, 56 F. Supp. 585 (D.C. Minn. 1944); *Rardin Grain Company* v. *Illinois Central Railroad Co.*, 288 F. Supp. 813 (S.D. Ill. 1968); and other cases.

Leavell objects to the strong reliance upon the *All Cargo* case. Leavell would distinguish that case because here there was no statement in the tariff or stipulation by the shipper that the transportation was subject to the terms of the bill of lading. Leavell would also distinguish the case because of its feeling that there is a vast difference between a labor strike and the closing of the Suez Canal. Leavell's argument is based upon its contention that the closing of the canal was readily foreseeable, while the typical labor strike is not. Next, Leavell would distinguish the *All Cargo* case because that case was based upon the inability of the carrier to comply with the terms of the bill of lading; that is, to discharge the cargo. On the other hand, Hellenic was able to deliver cargo to the port of destination; it was simply unable to use the route that it had contracted with Leavell to follow. Thus, Hellenic actually performed the transportation in the manner contemplated by the bill of lading—transportation from United States to Sudan.

In *All Cargo*, the carrier's tariff of rates stated, on its title page, that transportation thereunder was "subject to the terms and conditions of the line's bill of lading and other documents currently in use by the lines"—a fact which, not surprisingly, was noted by the Hearing Examiner whose decision was adopted by the Commission, as well as by the affirming Court of Appeals. That fact was not essential to the decision; however, for under section 18(b)(1) the specimen bill of lading is by definition a part of the carrier's tariff required to be filed: "Such tariffs * * * shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement."

Here respondent's specimen bill of lading was filed with the Commission pursuant to section 18(b)(1). By that circumstance it became part of respondent's filed tariff, within the meaning of the statute; no additional effect could have been obtained by mentioning it in the title page of the "tariff"; i.e., the document showing rates and rules, which in common parlance is usually referred to as the carrier's tariff.

The differences between Hellenic's bill of lading provisions and those in *All Cargo* are not substantial. Both bills of lading provided for "extra compensation"; more precisely, in Hellenic's case, "reasonable extra compensation", although the *All Cargo* clause would certainly be limited, by interpretation, to reasonable extra compensation. The *All Cargo* clause went on to provide that, if the "length or duration of the voyage" were increased, the shipper should pay "proportionate extra freight." Obviously, "proportionate" meant proportionate to the increased length or duration of the voyage. This interpretation matches the emergency language of Hellenic's tariff and bill of lading.

Therefore, there is no significant, legal distinction between *All Cargo* and the present situation.

Leavell next argues that, even if section 18(b) allows resort to emergency language, Hellenic's tariff and bills of lading do not justify the surcharges. Thus, Leavell contends that rule 3(a) contains no specific formula for determining the amount of the surcharge.[4] With respect to clause 5 of the bill of lading, Leavell argues that the bill of lading was not incorporated by reference into the tariff and is too vague to be considered to be a valid tariff provision. Finally, Leavell argues that the Baltic-Suez Stop Clause was not on file with the Commission and cannot be used to justify the surcharges.

Complainant shipped goods on what were mutually expected to be normal liner voyages, scheduled to proceed through the Suez Canal to the Red Sea and thence to Port Sudan. They were shipped under a tariff duly filed with the Commission which gave notice by rule that, if it were "unsafe, imprudent, inadvisable or unlawful" to proceed through the Suez Canal, and an alternate route were used, a surcharge on all freights and charges specified in the tariff might be levied without notice. In fact, transit of the canal was not only unsafe, imprudent and unlawful, but impossible, as the result of circumstances which arose after the voyages commenced.

As the examiner found, the scheduled voyage of the *Glory* from New York—the voyage upon which respondent's underlying rates were based—would have covered about 6,000 miles and required about 22 days. The actual voyage was one of 17,565 port-to-port miles exclusive of mileage to nonscheduled ports and steaming in circles while awaiting developments; an increase of 193 percent. The actual time was 58 days—an increase of 164 percent. Even if half the carrier's total costs—including voyage operating costs, overhead and depreciation—be assumed to consist of port and cargo costs which were not increased, and with due consideration for the relatively nominal saving of $6,000 to $7,000 in canal tolls, the 65 percent surcharge was reasonable. Cf. *Outbound Rates Affecting Export High Pressure Boilers*, 9 F.M.C. 441, 454 (1966).

Likewise, the record shows that *Pioneer's* itinerary increased from a 6,000-mile, 20-day voyage to an 11,646-mile, 35-day voyage; an increase of about 94 percent in distance and 71 percent in time. Therefore, the 25 percent surcharge was reasonable under the circumstances.[5]

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[4] Leavell's suggestion, that Hellenic's basic rates were too high, is not proven on the record.

[5] Leavell recalculated the additional mileages and times for both voyages. However, Leavell's calculations, even assuming their validity, would not compromise the reasonableness of either surcharge.

The burden of showing that the charges were unreasonable is upon complainant, although the fact of substantial surcharges alone is sufficient to require the carrier to come forward with some proof of their propriety. Both Hearing Counsel and complainant contend that respondent must justify its surcharge by showing its actual costs and the increase therein attributable to the lengthened voyage. That was done in *All Cargo*, to the extent of showing daily charter expense and estimated fuel costs attributable to the additional time spent at anchor; but that is not the only way to show reasonableness. In *All Cargo*, the fact that the vessel was under charter provided a simple means of proof. In the instant case, respondent's showing of increased voyage distance and duration is sufficient to overcome any presumption of unreasonableness; and there is no basis for a finding that the surcharges assessed were unreasonable, in the complete absence of any proof of unreasonableness. On the contrary, the record supports a positive finding that the surcharges assessed for the extra services rendered to complainant's cargoes represented, in each case, a reasonable extra charge for such services.

In addition to the tariff rule expressly directed to closure of the Suez Canal route, the shipments were governed by bills of lading, specimens of which were included in the tariffs filed with the Commission as provided by section 18(b)(1), which contained provisions applicable to the instant situations as part of the transportation agreement between the parties. Clause 5 of the bill of lading stipulated generally that the carrier should be entitled to "a reasonable extra compensation for any services in connection with" various situations arising during a voyage, including situations likely to result in risk of damage or delay in arriving at the port of discharge or make it unsafe, imprudent or unlawful to continue the voyage; in which events the carrier might (among other options) proceed toward the port of discharge by any route. Clause 25 of the bill of lading incorporated by reference the "Baltic Suez Clause 1956", which clause specifically provided that, if navigation of the Suez Canal were interrupted during the voyage, the vessel might proceed by some other route and the freight be increased "in proportion to the longer sailing distance."

Tariff Rule 3(a) and bill of lading clause 5 both authorize the assessment of the 25 and 65 percent surcharges. However, we do not rely upon the Baltic Suez Stop Clause, which was allegedly incorporated by reference into bill of lading clause 25. The Baltic Suez Stop Clause was not on file with the Commission and does not appear to have been readily available to shippers. Therefore, there was insufficient notice to shippers. Accordingly, it cannot be given any effect; and, in fact,

carriers should be very wary of relying on material which is not on file with the Commission as a basis for determining rates and surcharges.

Leavell argues that Hellenic has failed to come forward with dollars and cents justification for the level of its surcharge. Leavell specifically objects to the examiner's emphasis upon time and mileage comparisons which are not indicative of specific costs. Likewise, Leavell argues that the surcharges are unreasonable because competitive carriers did not assess such surcharges. We see no reason why Hellenic should come forward with additional dollars and cents justification of the level of the surcharges. The fact that competitive carriers who, may or may not, have found themselves in situations similar to Hellenic, did not assess emergency surcharges is immaterial.

Hearing Counsel, an intervener in this proceeding, have also excepted to the initial decision of the examiner. Initially, Hearing Counsel argue that the examiner reached the wrong result because, contrary to well established maritime principles, the examiner construed the applicable tariff and bill of lading against the shipper and in favor of the carrier. According to Hearing Counsel this alone is grounds for reversal, although they do not attempt to state how they would construe the appropriate language.

We disagree; the examiner did not construe any bill of lading or tariff provision for or against anyone. He simply construed the provisions as they are. Hearing Counsel's suggestion that this is a matter of ambiguity misses the mark.

Next, Hearing Counsel argued that Tariff Rule 3(a), which does not specify a sum certain for the amount of surcharges that will be levied in the event some contingency occurs, is defective. In arguing this point, Hearing Counsel urge that the examiner's reliance upon the *All Cargo* case is misplaced. Hearing Counsel would distinguish this case because of their feeling that the contingency in issue here—the closing of the Suez Canal—was not entirely fortuitous. Hearing Counsel contend that respondent was aware of the potential closing of the canal and should have set forth in its tariff the surcharge to be applied in the event the canal was closed.

On the contrary, there was nothing in the events immediately preceding the outbreak of hostilities which gave respondent or complainant, or anyone else, reason to believe that the particular developments with which we are concerned would occur when and as they did. Thus, there is no support in the record for Hearing Counsels' prediction that the Suez Canal crises was predictable.

Therefore, we conclude that the 65 percent and 25 percent surcharges collected from Leavell for shipments on respondent's *Hellenic Glory* and *Hellenic Pioneer*, respectively, under the circumstances hereinabove set forth, were authorized by respondent's tariff, including its specimen bill of lading setting forth the transportation agreement, duly filed with the Commission pursuant to section 18(b) of the Shipping Act, 1916, and were not in violation of any provision of the said section 18(b).

The complaint is dismissed.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 410

B. H. LOVELESS & CO.

v.

MICRONESIA INTEROCEAN LINE, INC.

October 14, 1969

Respondent permitted to refund to complainant the sum of $125.24 as a portion of freight charges assessed and collected on a shipment of asphalt floor tiles from San Francisco, California, to Saipan.

B. H. Loveless for complainant.
Kai Angermann for respondent.

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

Respondent Micronesia Interocean Line, Inc., a common carrier by water in the foreign commerce of the United States, has filed an application for permission to refund a portion of the freight charges collected from complainant B. H. Loveless & Co., a foreign freight forwarder, on a shipment of Asphalt Floor Tiles via respondent's vessel from San Francisco, California to Saipan, Marianas Islands.

Public Law 90–298, 75 Stat. 764, authorizes the Commission in its discretion to:

> * * * permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper * * * where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier by water in foreign commerce * * * has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which said refund * * * would be based: Provided, further, That the carrier * * * agrees that if permission is granted by The Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal

[1] This decision became the decision of the Commission October 14, 1969.

Maritime Commission may require, which give notice of the rate on which such refund * * * would be based, and additional refunds * * * as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: And provided further, That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

The application was transmitted to the Commission on May 9, 1969, and the shipment involved was under bill of lading dated February 7, 1969, thus the application was timely filed.

Respondent's bill of lading LA/SAIPAN No. 4 included 109 Cartons of Asphalt Floor Tile weighing 5,693 pounds to which commodity respondent applied the N.O.S. rate of $94.50 per 2,000 pounds and collected from complainant the sum of $268.99. The request for permission to refund is based on an agreement between respondent and the Trust Territory of the Pacific Islands whereby respondent agreed to assess rates no higher than those in effect for shipments moving on Far East Line to the Trust Territory via Guam. Respondent, when issuing its tariff in September 1968, listed only rates on commodities known to be moving in the trade, being to a degree handicapped by reason of destruction of certain records by Typhoon Jean. Subsequently, it found that certain commodities moving in the trade had been omitted and in March 1969, in order to comply with its agreement, revised its tariff to include rates on other commodities, including a rate of $50.50 per 2,000 pounds for asphalt floor tile. The omission of asphalt floor tile in the tariff at the time of the shipment here involved was in the nature of an administrative error.

Had the $50.50 per 2,000 pound rate on asphalt tile as corrected in the March 1969 tariff revision been applied to the shipment here involved, the freight would have been $143.75, or $125.24 less than the amount charged and paid by complainant.

Respondent has filed its application within the 180 days statutory period and has filed a tariff reflecting the lower rate here sought to be applied prior to the date of the application. One other shipment of asphalt floor tiles was carried during the period here involved and respondent has concurrently filed an application to make refund on that shipment (Special Docket No. 409). The rate charged and collected having been due to administrative error, since corrected, respondent is authorized to refund to complainant the sum of $125.24. Respondent shall publish the appropriate notice referred to in the above set forth statute and in 46 C.F.R. 502.92 and the refund shall be made within 30 days of such notice. Within 5 days thereafter, respond-

ent shall notify the Commission of the date of the refund and the manner in which payment was made.

(Signed) HERBERT K. GREER,
Presiding Examiner.

ORDER

It is ordered, That Micronesia Interocean Line, Inc., refund to B. H. Loveless and Co., the amount of $125.24.

It is further ordered, That Micronesia Interocean Line, Inc., publish promptly in its appropriate tariff, the following notice:

> Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 410, that effective February 7, 1969, the rate on asphalt floor tiles from San Francisco, California, to Saipan Mariana Islands, for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of Micronesia Interocean Line during the period from February 7, 1969, until March 13, 1969, is $50.50 per 2,000 pounds, subject to all other applicable rules, regulations, terms, and conditions of the said rate and this tariff.

It is further ordered, That Micronesia Interocean Line notify the Secretary on or before November 20, 1969, of the date and manner in which the refund herein ordered was made.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

Special Docket No. 407

Hawaii State Steel Company Ltd.

v.

Micronesia Interocean Line, Inc.

Adopted October 16, 1959

Respondent permitted to refund to complainant the sum of $29.03 as a portion of freight charges assessed and collected on a shipment of lamps from Honolulu to Koror, Palau, Western Caroline Islands.

Initial Decision of John Marshall, Presiding Examiner [1]

Respondent Micronesia Interocean Line, Inc., a common carrier by water in the foreign commerce of the United States, has filed an application for permission to refund a portion of the freight charges collected from complainant Hawaii State Steel Company Ltd., on a shipment of lamps via respondent's vessel from Honolulu to Koror, Palau, Western Caroline Islands.

Public Law 90–298, 75 Stat. 764, authorizes the Commission in its discretion to:

> * * * permit a common carrier by water in foreign commerce * * * to refund a portion of freight charges collected from a shipper * * * where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund * * * will not result in discrimination among shippers: *Provided further*, That the * * * carrier * * * has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which said refund * * * would be based: *Provided further*, That the carrier * * * agrees that if permission is granted by The Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund * * * would be based, and additional refunds * * * as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: *And provided further*, That application for refund * * * must be filed with the Commission within one hundred and eighty days from the date of shipment.

[1] This decision became the decision of the Commission October 16, 1969.

The application was transmitted to the Commission on May 29, 1969, and the shipment involved was under bill of lading dated March 13, 1969.

Respondent's bill of lading No. KOR-4 included a shipment of lamps totalling 85.5 cu. ft. Respondent applied the N.O.S. rate of $94.50 per 40 cu. ft. and complainant paid the sum of $203.18. The request for permission to refund is based on an agreement between respondent and the Trust Territory of the Pacific Islands whereby respondent agreed to assess rates no higher than those in effect for shipments moving on Far East Line to the Trust Territory via Guam. Respondent, when issuing its tariff in September 1968, listed only rates on commodities known to be moving in the trade, being to a degree handicapped by reason of destruction of certain records by Typhoon Jean. Subsequently, it found that certain commodities moving in the trade had been omitted and in April 1969, in order to comply with its agreement, revised its tariff to include rates on other commodities, including a rate of $81.00 per 40 cu. ft. for lamps. The omission of lamps from the tariff at the time of the shipment here involved was in the nature of an administrative error.

Had the $81.00 per 40 cu. ft. rate on lamps been applied to this shipment, the freight would have been $174.15 or $29.03 less than the amount paid by complainant.

Respondent filed its application within the 180 day statutory period and, prior thereto, amended its tariff to reflect the lower rate. The rate charged and collected having been due to administrative error, since corrected, respondent is authorized to refund to complainant the sum of $29.03. Respondent shall publish the appropriate notice referred to in the above set forth statute and in 46 C.F.R. 502.92 and the refund shall be made within 30 days of such notice. Within 5 days thereafter, respondent shall notify the Commission of the date of the refund and the manner in which payment was made.

JOHN MARSHALL,
Presiding Examiner.

Washington, D.C., SEPTEMBER 24, 1969.

It is ordered, That Micronesia Interocean Line, Inc., refund to Hawaii State Steel Company Ltd., the amount of $29.03.

It is furthered ordered, That Micronesia Interocean Line, Inc., publish promptly in its appropriate tariff, the following notice:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 407, that effective March 13, 1969, the rate on lamps from Honolulu, Hawaii, to Koror, Palau, Western Caroline Islands for purposes of refunds or waiver of freight charges on shipments which may have been shipped on vessels of Micronesia Interocean Line on March 13, 1969, is

$81.00 per 40 cu. ft., subject to all other applicable rules, regulations, terms and conditions of the said rate and this tariff.

It is further ordered, That Micronesia Interocean Line notify the Secretary on or before November 20, 1969, of the date and manner in which the refund herein ordered has been made.

By the Commission.

[SEAL] (Signed) THOMAS LISI, *Secretary.*

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 411

B. H. LOVELESS & COMPANY

v.

MICRONESIA INTEROCEAN LINE, INC.

October 16, 1969

Respondent permitted to refund to complainant a portion of the freight charges assessed and collected on a shipment of insecticides and a shipment of plastic pipe fittings between San Francisco, California and Saipan, Mariannas.

B. H. Loveless for complainant.
Kai Angermann for respondent.

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

Respondent Micronesia Interocean Line, Inc., a common carrier by water in the foreign commerce of the United States, has filed an application for permission to refund a portion of the freight charges collected from complainant B. H. Loveless & Co., a foreign freight forwarder, on two shipments from San Francisco, California to Saipan in the Trust Territory of the Pacific Islands. Public Law 90–298, 75 Stat. 764, authorizes the Commission in its discretion to:

> * * * permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper * * * where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier by water in foreign commerce * * * has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which said refund * * * would be based: Provided, further, That the carrier * * * agrees that if permission is granted by The Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate

[1] This decision became the decision of the Commission October 16, 1969.

on which such refund * * * would be based, and additional refunds * * * as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: And provided further, That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

The application was transmitted to the Commission on May 9, 1969 and within 180 days of the date of the shipments.

Respondent issued bill of lading SF/S–21 on December 14, 1969, designating complainant as forwarder, E. D. Black as shipper and Black Construction Company, Saipan, as consignee. The commodities shipped were generally described as construction materials but included by reference to a list attached to the bill of lading, 9 Drums of Insecticide measuring 56 cubic feet. Respondent charged and complainant paid the N.O.S. rate of $94.50 per 40 cubic feet, a total of $132.30.

On February 7, 1969, respondent issued bill of lading SF/S–24 designating complainant as forwarder, Heidi & Cook, Ltd. as consignor and consignee. The commodities described on the bill of lading included 4 cartons of plastic pipe fittings measuring 36 cubic feet. Respondent charged and complainant paid the N.O.S. rate of $94.50 per 40 cubic feet, a total of $85.05.

The request for permission to refund is based on an agreement between respondent and the Trust Territory of the Pacific Islands whereby respondent agreed to assess rates no higher than those in effect for shipments moving on Far East Line to the Trust Territory via Guam. Respondent, when issuing its tariff in September, 1968, listed only rates on commodities known to be moving in the trade, being to a degree handicapped by reason of destruction of records during Typhoon Jean. Subsequently, it found that certain commodities moving in the trade had been omitted and in March, 1969, in order to comply with its agreement, revised its tariff to include rates on other commodities. In this revision, a rate of $84.25 per 40 cubic feet was set forth for insecticides and a rate of $67.25 for plastic fittings. The omission of insecticides and plastic fittings from the tariff in effect at the time of the shipments was in the nature of an administrative error.

Had the $84.25 per 40 cubic feet rate been applied to the shipment of the insecticides, the freight would have been $117.95, or $14.35 less than the $132.30 charged and collected. Application of the rate of $67.25 to the shipment of plastic fittings would have resulted in a freight charge of $60.53, $24.52 less than the $85.05 charged and collected. The total respondent requests authority to refund is $38.87.

Respondent has filed its application within the 180 day statutory period and has filed a tariff reflecting the lower rates here sought to be applied prior to the date of this application. One other shipment during the time here involved was made at the higher rate, however, respondent has filed a request to make similar refund with the Commission. The rate charged and collected having been because of administrative error, since corrected, respondent is authorized to refund to complainant the sum of $38.87. Respondent shall publish the appropriate notice referred to in the above set forth statute and in 46 C.F.R. 502.92 and the refund shall be made within 30 days of such notice. Within 5 days thereafter, respondent shall notify the Commission of the date of the refund and the manner in which payment was made.

HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C.,
September 24, 1969.

It is ordered, That Micronesia Interocean Line, Inc., refund to B. H. Loveless and Co. the amount of $38.87.

It is further ordered, That Micronesia Interocean Line, Inc., publish promptly in its appropriate tariff, the following notice:

Notice is hereby given, as required by the decison of the Federal Maritime Commission in Special Docket No. 411 that (1) effective December 14, 1969, the rate on insecticides from San Francisco, California to Saipan, Mariana Islands, during the period from December 14, 1968, until March 13, 1969, is $84.25 per 40 cubic feet; and (2) effective February 7, 1969, the rate on plastic pipe fittings from San Francisco, California to Saipan, Mariana Islands, during the period from February 7, 1969, until March 13, 1969, is $67.25 W/M. The above rates are for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of Micronesia Interocean Line and are subject to all other applicable rules, regulations, terms, and conditions of the said rates and this tariff.

It is further ordered, That Micronesia Interocean Line notify the Secretary on or before November 20, 1969, of the date and manner in which the refund herein ordered was made.

By the Commission

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET No. 412

WALTER PLUNKETT & COMPANY

v.

MICRONESIA INTEROCEAN LINE, INC.

October 16, 1969

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER GRANTING REFUND

No exceptions having been taken to the initial decision of the examiner in this proceeding and the Commission having determined not to review same, notice is hereby given that the decision became the decision of the Commission on October 16, 1969.

It is ordered, That Micronesia Interocean Line, Inc., refund to Walter Plunkett and Co., the amount of $62.28.

It is further ordered, That, as to other matters set forth in the application herein, permission to refund is denied.

It is further ordered, That Micronesia Interocean Line publish promptly in its appropriate tariff the following notice:

Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 412 that, effective December 14, 1968, the rates on "copper sheets" and "automobile parts and accessories" from San Francisco, California, to ports in the Trust Territories for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of Micronesia Interocean Line during the period from December 14, 1968, until March 13, 1969, are $72.00 per 2000 pounds and $62.50 W/M, respectively, subject to all other applicable rules, regulations, terms, and conditions of said rates and this tariff.

It is further ordered, That Micronesia Interocean Line notify the Secretary on or before November 20, 1969, of the date and manner in which the refund herein ordered has been made.

By the Commission.

[SEAL]

THOMAS LISI,
Secretary.

428-264—71——8

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 412

WALTER PLUNKETT & COMPANY

v.

MICRONESIA INTEROCEAN LINE, INC.

October 16, 1969

Respondent permitted to refund to complainant a portion of the freight charges assessed and collected on shipments of copper sheets and auto parts from San Francisco, California to ports in the Trust Territories.

Richard Parmenter for complainant.
Kai Angermann for respondent.

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

Respondent Micronesia Interocean Line, Inc., a common carrier by water in the foreign commerce of the United States, has filed an application for permission to refund a portion of the freight charges collected from complainant Walter Plunkett & Company, a foreign freight forwarder, on six shipments carried by respondent from San Francisco, Calif. to ports in the Trust Territory of the Pacific Islands. Public Law 90–298, 75 Stat. 764, authorizes the Commission in its discretion to:

* * * permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper * * * where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier by water in foreign commerce * * * has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which said refund * * * would be based: Provided, further, That the carrier * * * agrees that if permission is granted by The Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund * * * would be based, and additional refunds * * * as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order ap-

[1] This decision became the decision of the Commission October 16, 1969.

proving the application: And provided further, That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

The application was transmitted to the Commission by respondent on June 3, 1969 and as originally submitted involved shipments made on November 8, 1968 and December 14, 1968. Delay was occasioned by the necessity to require modifications of the application (together with several other applications submitted by respondent). Respondent was advised by the Commission that as to the shipments of November 8, 1968, refund could not be considered as the statutory time of filing had expired. Although the application as submitted to the examiner referred to such shipments, the application as to shipments made on November 8, 1968 is hereby denied, the filing having been more than 180 days subsequent to shipment.

Two shipments made on December 14, 1968 are here considered. The first shipment, evidenced by respondent's bill of lading SF/K21, designated complainant as the forwarder, R. M. Waite Co. as shipper, consigned to the order of the Bank of Hawaii, involved the following commodities:

Item No.	*Commodity*	*Cubic feet*	*Weight in lbs.*
(1)	Bdls. Copper Sheets	38	3, 687
(2)	Bales Plastic Conduits	39	551
(3)	Ctn. Plastic Pipe	4	41
(4)	Fittings	36	815
(5)	Bdl. Aluminum Conduits	9	302
(6)	Ctns. Bolts, Anchors and Screws	21	3, 550
(7)	Ctns. Glue	2	38
(8)	Ctn. Calking Compound	1	40

Freight charges were assessed by respondent and paid by complainant as follows:

3687 lbs. @ 94.50/ST—174.21 (Item No. 1)
88 Cu. ft. @ 63.50/40′—139.70 (Items Nos. 2, 3, 4, & 5)
3350 lbs. @ 94.50/ST—167.74 (Item No. 6)
3 cu. ft. @ 94.50/40′—7.00 (Items Nos. 7 & 8)

The second shipment here involved was under respondent's bill of lading SF/S12, complainant being designated as the forwarder, Gates Export Corporation as the shipper and as the consignee. The following commodities were described in the bill of lading:

Item No.	*Commodity*	*Cubic feet*	*Weight in lbs.*
(1)	Integral Automobile Parts	26	340
(2)	Plastic Garden Hose		1, 225

Freight charges assessed and paid by complainant were:

134 cubic feet @ $94.50/14′—316.58

As to all commodities except those items numbered 2, 3, 4, and 5 in the bill of lading first above described, respondent assessed the N.O.S. rate of $94.50 W/M.

The request for permission to refund is based on an agreement between the Trust Territory of the Pacific Islands whereby respondent agreed to assess rates no higher than those in effect for shipments moving on Far East Line to the Trust Territory via Guam. When issuing its tariff in September, 1968, respondent listed only rates on commodities known to it to be moving in the trade, being to a degree handicapped by reason of destruction of certain records during Typhoon Jean. Subsequently, respondent found that certain commodities moving in the trade had been omitted from its September, 1968 tariff, and effective March 14, 1969, revised its tariff to include those items. Copper sheets under the revised tariff were assessed $72.00 per 2000 pounds; auto parts and accessories, N.O.S. were assessed at $62.50, both W/M.

Had respondent's tariff reflected its agreement with the Trust Territory at the time of the shipments, the rate of $72.00 per 2000 pounds would have been applied to the shipment of 3687 pounds of copper sheets, for a total charge of $132.73 or $41.48 less than the $174.21 collected by respondent from complainant. Applying the $62.50 per 40 cubic feet rate to the automobile parts measuring 26 cubic feet, the freight would have been $20.80 less than the freight charged and collected. The application does not demonstrate that any other commodities shipped on December 14, 1968 are subject to refund.

The application insofar as the shipments made on December 14, 1968, was timely filed. No other shipments of the commodities here involved were made during the same period. Respondent had filed a tariff showing the rates here sought to be applied prior to the date of the application for permission to refund and the rate applied was omitted from the tariff upon which the charges were based by reason of administrative mistake. Good cause appearing, respondent Interocean Line, Incorporated is authorized to refund to complainant Walter Plunkett & Company the total sum of $62.28 and shall publish the notice referred to in the statute above set forth and in 46 C.F.R. 502.92. The refund shall be made within 30 days after publication of such notice and within 5 days thereafter, respondent shall notify the Commission of the date of the refund and the manner in which payment was made. As to other matters set forth in the application, permission to refund is denied.

HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C., *September 24, 1969*

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 417

ENTERPRISE SHIPPING CORP.

v.

MICRONESIA INTEROCEAN LINE, INC.

October 22, 1969

Respondent is permitted to refund to complainant the sum of $33.18 as part of the freight charges assessed and collected for the transportation of brooms from San Francisco, Calif., to Truk, Trust Territory of the Pacific Islands, in February 1969.

Kai Angermann for applicant/respondent.

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

This is an application filed by Micronesia Line, Inc. (applicant), concurred in by complainant, for permission to refund to complainant the sum of $33.18 as part of the charges assessed and collected by applicant for the transportation of the cargo referred to below.

On February 24, 1969, at San Francisco, Calif., there was delivered to applicant by complainant, on behalf of Associated Cooperatives Inc., among other commodities not here involved, a shipment of 10 cases of brooms for carriage on applicant's vessel *Aase Nielsen* to Truk, Trust Territory of the Pacific Islands. On-board bill of lading No. SF/T-26 was issued therefor on February 27, 1969. Freight charges of $106.31 were assessed in accordance with the rate of $94.50 per ton, weight or measurement, contained in Item 140 of applicant's Tariff No. 1, FMC No. 1, applicable to nonharzardous cargo, NOS. The charges were paid by complainant to applicant on March 18, 1969.

By agreement between applicant and the Trust Territory of the Pacific Islands, the former's rates are to be no higher than those in effect for shipments moving via Pacific Far East Line to the Trust

[1] This decision became the decision of the Commission October 22, 1969.

Territory by way of Guam, or moving on vessels of other carriers serving the Trust Territory via Japan. When its tariff was issued in September 1968, applicant chose to use the same commodity items as shown in Trust Territory of the Pacific Agreement Tariff, Freight Tariff No. 2, applicable to the Trust Territory via Japan. In constructing its tariff applicant had attempted to obtain statistics showing commodities, etc., moving in the trade, but was unable to do so partly because of the destruction of records in Saipan as the result of typhoon Jean. Applicant thereafter learned that commodities other than those for which there were specific rates in its tariff were moving to the Trust Territory, whereupon new rates were established as applicant became aware of such shipments.

At the time of shipment there was no specific rate on brooms in applicant's tariff, for which reason there was assessed the rate of $94.50 for cargo, NOS. Upon ascertaining that brooms could move via another carrier at a lower rate, applicant amended its tariff, effective March 13, 1969, by publishing a specific rate of $65.00 per ton, weight or measurement, for "Brooms, Mops and Parts" (Item 110 of the tariff). At the new rate the charges on the instant shipment would have been $73.13. The difference between the charges assessed and collected ($106.31) and the charges which would have been assessed and collected under the new rate ($73.13) amounts to $33.18.

The failure to have on file a specific rate for brooms at the time the present shipment moved was, under the circumstances, an administrative error for which applicant and complainant should not be penalized. Applicant has complied with all of the preliminary requirements of the statute. In view of the foregoing, applicant hereby is authorized to refund to complainant the sum of $33.18, and it shall publish the appropriate notice referred to in the statute. Refund shall be made within 30 days of such notice. Within five days thereafter, applicant shall notify the Commission of the date of the refund and of the manner in which payment has been made.

(Signed) C. W. ROBINSON,
Presiding Examiner.

Washington, D.C., SEPTEMBER 29, 1969.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 408

CARLTON J. SIEGLER

v.

MICRONESIA INTEROCEAN LINE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER GRANTING REFUND

October 22, 1969

No exceptions having been taken 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 October 22, 1969.

It is ordered, That Micronesia Interocean Line, Inc., refund to Carlton J. Siegler the amount of $125.12.

It is further ordered, That Micronesia Interocean Line publish promptly in its appropriate tariff the following notice:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 408, that effective February 7, 1969, the following rates were in effect from San Francisco, California to Majuro, Marshall Islands and Yap, Western Caroline Islands for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of Micronesia Interocean Line during the period from February 7, 1969, until March 13, 1969, subject to all other applicable rules, regulations, terms, and conditions of said rates and this tariff.

Commodity:	*Rate W/M*
Beds and Bed Parts	$75.50
Carpets, Carpeting, Rugs	$77.50
Linoleum	$68.00
Aluminum, N.O.S	$79.50
Insecticides	$84.25
Pads, Belts, and Napkins, Sanitary	$70.75
Brooms, Mops	$65.00

It is further ordered, That Micronesia Interocean Line notify the Secretary on or before November 22, 1969, of the date and manner in which the refund herein ordered was made.

By the Commission.

[SEAL]

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 408

CARLTON J. SIEGLER

v.

MICRONESIA INTEROCEAN LINE, INC.

Adopted October 22, 1969

Respondent permitted to refund to complainant the sum of $125.12 as a portion of freight charges assessed and collected on seven specified commodities shipped from San Francisco to Majuro, Marshall Islands and Yap, Western Caroline Islands.

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER [1]

Respondent Micronesia Interocean Line, Inc., a common carrier by water in the foreign commerce of the United States, has filed an application for permission to refund a portion of the freight charges collected from complainant Carlton A. Siegler on shipments of seven specified commodities via respondent's vessel from San Francisco to Majuro, Marshall Islands and Yap, Western Caroline Islands.

Public Law 90–298, 75 Stat. 764, authorizes the Commission in its discretion to:

> * * * permit a common carrier by water in foreign commerce * * * to refund a portion of freight charges collected from a shipper * * * where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund * * * will not result in discrimination among shippers: *Provided further*, That the * * * carrier * * * has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which said refund * * * would be based: *Provided further*, That the carrier * * * agrees that if permisison is granted by The Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the

[1] This decision became the decision of the Commission October 22, 1969.

Federal Maritime Commission may require, which give notice of the rate on which such refund * * * would be based, and additional refunds * * * as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application: *And provided further,* That application for refund * * * must be filed with the Commission within one hundred and eighty days from the date of shipment.

The application was transmitted to the Commission on May 5, 1969, and all of the four bills of lading involved [2] were dated February 7, 1969.

The shipments in question totaled 249 cu. ft. Respondent applied the N.O.S. rate of $94.50 per 40 cu. ft. and complainant paid the sum of $588.26. The request for permission to refund is based on an agreement between respondent and the Trust Territory of the Pacific Islands whereby respondent agreed to assess rates no higher than those in effect for shipments moving on Far East Line to the Trust Territory via Guam. Respondent, when issuing its tariff in September 1968, listed only rates on commodities known to be moving in the trade, being to a degree handicapped by reason of destruction of certain records by Typhoon Jean. Subsequently, it found that certain commodities moving in the trade had been omitted and in March 1969, in order to comply with its agreement, revised its tariff to include rates on other commodities as follows:

Commodity:	Rate W/M
Beds and Bed Parts	$75.50
Carpets, Carpeting, Rugs	$77.50
Linoleum	$68.00
Aluminum, N.O.S.	$79.50
Insecticides	$84.25
Pads, Belts and Napkins, Sanitary	$70.75
Brooms, Mops	$65.00

The omission of these commodities from the tariff at the time of these shipments was in the nature of an administrative error.

Had the above commodity rates been applied, the freight would have been $463.14 or $125.12 less than the amount paid by complainant.

Respondent filed its application within the 180 day statutory period and, prior thereto, amended its tariff to reflect the lower rates. The rate charged and collected having been due to administrative error, since corrected, respondent is authorized to refund to complainant the sum of $125.12. Respondent shall publish the appropriate notice referred to in the above set forth statute and in 46 C.F.R. 502.92 and the refund shall be made within 30 days of such notice. Within 5 days

[2] B/L Number SF/M-5, SF/M-41, SF/M-45, and SF/YAP-3.

thereafter, respondent shall notify the Commission of the date of the refund and the manner in which payment was made.

JOHN MARSHALL,
Presiding Examiner.

Washington, D.C., SEPTEMBER 26, 1969.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET NO. 414

I.G.E. EXPORT DIVISION

v.

MICRONESIA INTEROCEAN LINE, INC.

November 25, 1969

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER GRANTING REFUND

No exceptions having been taken to the initial decision of the examiner served November 4, 1969, in this proceeding and the Commission having determined not to review same, notice is hereby given that the decision became the decision of the Commission on November 25, 1969.

It is ordered, That Micronesia Interocean Line, Inc., refund to I.G.E. Export Division, the amount of $375.19.

It is further ordered, That Micronesia Interocean Line publish promptly in its appropriate tariff, the notice set forth at page 113.

It is further ordered, That Micronesia Interocean Line notify the Secretary on or before December 24, 1969, of the date and manner in which the refund herein ordered has been made.

By the Commission.

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 414

I.G.E. EXPORT DIVISION

v.

MICRONESIA INTEROCEAN LINE, INC.

November 25, 1969

Refund authorized of portion of freight charges collected because of error due to inadvertence in failure to file a new tariff item on shipment of insulated copper wire and cable, from San Francisco, California, to Koror, Palau, Western Caroline Islands.

C. F. Schlehner for complainant.
Kai Angermann for respondent.

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

This application under section 18(b)(3) of the Shipping Act, 1916, (the act), seasonably filed on May 23, 1969, by the respondent, and concurred in by the complainant, is for permission to refund to the complainant $375.19 as a portion of the freight charges collected on a shipment of insulated copper wire and cable on February 27, 1969, from San Francisco, Calif., to Koror, Palau, Western Caroline Islands.

An agreement between the Trust Territory of the Pacific Islands and the respondent calls for freight rates no higher than those in effect on shipments on vessels of the Pacific Far East Line via Guam or on vessels of various other carriers via Japan, to the Trust Territory. The shipment herein was charged on the bases of a cargo N.O.S. rate of $94.50 W/M, whereas it apparently could have been moved at a rate of $72 W/M via another carrier (Pacific Far East Line).

Based on the respondent's newly established rate of $72 W/M, effective March 13, 1969, and using the measurement rate per 40 cubic

[1] This decision became the decision of the Commission November 25, 1969.

feet and the measurement of 667 cubic feet of the shipment, the freight charges would be $1,200.60, instead of the charges actually collected of $1,575.79, and the respondent now seeks approval to refund the difference of $375.19. No other shipment of copper wire or cable moved on respondent's line during this period in issue, and the authorization of the refund will not discriminate among any shippers. Section 18 (b)(3) of the act permits the Commission in its discretion and for good cause shown to permit a refund of a portion of the freight charges collected as in the circumstances herein provided that, among other things, the carrier shall publish in its tariff the appropriate notice referred to in statute, giving notice of the rate on which the refund is based. This notice shall be as follows:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 414, that effective February 27, 1969, the rate on insulated copper wire and cable from San Francisco, California, to Koror, Palau, Western Caroline Islands for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of the respondent from February 27, 1969, until March 12, 1969, inclusive is $72.00 a ton W/M, subject to all other applicable rules, regulations, terms and conditions of the said rate and of this tariff.

Good cause shown, the respondent hereby is authorized to refund to the complainant $375.19, provided that the respondent upon receiving final permission to make this refund publishes in its tariff the appropriate notice required by the statute. The respondent shall notify the Commission within 30 days after the date of final decision herein of the date and manner in which the refund herein authorized was made.

CHARLES E. MORGAN,
Presiding Examiner.

WASHINGTON, D.C., *November 4, 1969.*

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET NO. 415

DISCAL CORPORATION

v.

MICRONESIA INTEROCEAN LINE, INC.

November 25, 1969

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER GRANTING REFUND

No exceptions having been taken to the initial decision of the Examiner served November 6, 1969, in this proceeding, and the Commission having determined not to review same, notice is hereby given that the decision became the decision of the Commission on November 25, 1969.

It is ordered, That Micronesia Interocean Line refund to Discal Corporation, the amount of $11.96.

It is further ordered, That Micronesia Interocean Line published promptly in its appropriate tariff the notice set forth at page 116.

It is further ordered, That Micronesia Interocean Line notify the Secretary on or before December 24, 1969, of the date and manner in which the refund herein ordered has been made.

By the Commission.

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 415

DISCAL CORPORATION

v.

MICRONESIA INTEROCEAN LINE, INC.

November 25, 1969

Refund authorized of portion of freight charges collected because of error due to inadvertence in failure to file a new tariff item on shipment of automotive storage batteries, from San Francisco, California, to Saipan, Mariana Islands.

Carroll Heath for complainant.
Kai Angermann for respondent.

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

This application under section 18(b)(3) of the Shipping Act, 1916, (the Act), seasonably filed on May 14, 1969, by the respondent, and concurred in by the complainant, is for permission to refund to the complainant $11.96 as a portion of the freight charges collected on a shipment of automotive storage batteries on February 7, 1969, from San Francisco, California, to Saipan, Mariana Islands.

An agreement between the Trust Territory of the Pacific Islands and the respondent calls for freight rates no higher than those in effect on shipments on vessels of the Pacific Far East Line via Guam or on vessels of various other carriers via Japan, to the Trust Territory. The shipment herein was charged on the basis of a cargo N.O.S. rate of $94.50 a ton of 2,000 pounds, whereas it apparently could have been moved at a rate of $86.00 W/M via another carrier (Pacific Far East Line).

Based on the respondent's newly established rate of $86.00 W/M, effective March 13, 1969, on the per ton basis on the shipment of 3,600 pounds, the freight charges would be $154.80, instead of the charges

[1] This decision became the decision of the Commission November 25, 1969.

actually collected of $166.76, and the respondent now seeks approval to refund the difference of $11.96. No other shipment of automotive storage batteries moved on respondent's line during this period in issue, and the authorization of the refund will not discriminate among any shippers. Section 18(b)(3) of the Act permits the Commission in its discretion and for good cause shown to permit a refund of a portion of the freight charges collected as in the circumstances herein provided that, among other things, the carrier shall publish in its tariff the appropriate notice referred to in statute, giving notice of the rate on which the refund is based. This notice shall be as follows:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 415, that effective February 7, 1969, the rate on automotive storage batteries from San Francisco, California, to Saipan, Mariana Islands for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of the respondent from February 7, 1969, until March 12, 1969, inclusive is $86.00 a ton W/M, subject to all other applicable rules, regulations, terms and conditions of the said rate and of this tariff.

Good cause shown, the respondent hereby is authorized to refund to the complainant $11.96, provided that the respondent upon receiving final permission to make this refund publishes in its tariff the appropriate notice required by the statute. The respondent shall notify the Commission within 30 days after the date of final decision herein of the date and manner in which the refund herein authorized was made.

CHARLES E. MORGAN,
Presiding Examiner.

WASHINGTON, D.C., *November 6, 1969.*

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET NO. 409

INTERNATIONAL MATERIALS CORP.

v.

MICRONESIA INTEROCEAN LINE, INC.

December 2, 1969

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER GRANTING REFUND

The initial decision of the examiner in this proceeding was served September 30, 1969. In the absence of exceptions, we issued our notice of intention to review the decision on October 24, 1969.

After careful review of the decision, we conclude that the examiner's disposition of the application herein was correct and, accordingly, adopt his decision as our own.

It is ordered, That Micronesia Interocean Line, Inc., refund to International Materials Corp. the sum of $19.18.

It is further ordered, That Micronesia Interocean Line publish promptly in its appropriate tariff, the following notice:

Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 409 that, effective December 21, 1968, the rate on tiles, N.O.S., from Los Angeles, California, to Koror, Palau, W.C.I., for purposes of refunds or waivers of freight charges on any shipments which may have been shipped on vessels of Micronesia Interocean Line during the period from December 21, 1968, until March 13, 1969, is $83.50 per short ton, subject to all other applicable rules, regulations, terms and conditions of the said rate and this tariff.

It is further ordered, That Micronesia Interocean Line notify the Secretary on or before January 9, 1969, of the date and manner in which the refund herein ordered was made.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

428-264—71——9

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 409

INTERNATIONAL MATERIALS CORP.

v.

MICRONESIA INTEROCEAN LINE, INC.

December 2, 1969

Respondent permitted to refund to complainant the sum of $19.18 as a portion of freight charges assessed and collected on a shipment of tiles from Los Angeles to Koror, Palau, Western Caroline Islands.

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER [1]

Respondent Micronesia Interocean Line, Inc., a common carrier by water in the foreign commerce of the United States, has filed an application for permission to refund a portion of the freight charges collected from complainant International Materials Corp. on a shipment of tiles via respondent's vessel from Los Angeles to Koror, Palau, Western Caroline Islands.

Public Law 90–298, 75 Stat. 764, authorizes the Commission in its discretion to:

> * * * permit a common carrier by water in foreign commerce * * * to refund a portion of freight charges collected from a shipper * * * where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund * * * will not result in discrimination among shippers: *Provided further*, That the * * * carrier * * * has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which said refund * * * would be based: *Provided further*, That the carrier * * * agrees that if permission is granted by The Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund * * * would be based, and additional refunds * * * as appropriate shall be made with respect to other shipments in the man-

[1] This decision became the decision of the Commission December 2, 1969.

ner prescribed by the Commission in its order approving the application: *And provided further*, That application for refund * * * must be filed with the Commission within one hundred and eighty days from the date of shipment.

The application was transmitted to the Commission on May 26, 1969 and the shipment involved was under bill of lading dated December 21, 1968. In Special Docket No. 406 the Commission held that, in accordance with rule 8(f), applications deposited in the United States mail within 180 days of the date of shipment are timely filed.[2]

Complainant's shipment of tiles totaled 3,488 lbs. Respondent applied the N.O.S. rate of $94.50 per short ton and complainant paid the sum of $164.80. The request for permission to refund is based on an agreement between respondent and the Trust Territory of the Pacific Islands whereby respondent agreed to assess rates no higher than those in effect for shipments moving on Pacific Far East Line to the Trust Territory via Guam. Respondent, when issuing its tariff in September, 1968, listed only rates on commodities known to be moving in the trade, being to a degree handicapped by reason of destruction of certain records by Typhoon Jean. Subsequently, it found that certain commodities moving in the trade had been omitted and in March, 1969, in order to comply with its agreement, revised its tariff to include rates on other commodities, including a rate of $83.50 per short ton for tiles, N.O.S. The omission of tiles from the tariff at the time of the shipment here involved was in the nature of an administrative error.

Had the $83.50 per short ton rate been applied to this shipment, the freight would have been $145.62 or $19.18 less than the amount paid by complainant.

Respondent filed its application within the 180-day statutory period and, prior thereto, amended its tariff to reflect the lower rate. The rate charged and collected having been due to administrative error, since corrected, respondent is authorized to refund to complainant the sum of $19.18. Respondent shall publish the appropriate notice referred

[2] The statute is remedial * * * being intended to provide shippers some equitable relief from the rigid provisions of section 18(b)(3) of the Shipping Act, 1916. It does not provide that applications must be received by the Commission before filing is accomplished. In the absence of statutory provision to the contrary, the Commission is free to consider applications filed when mailed. 71 C.J.S. 847. If such a requirement were to be imposed, applicants not willing to hazard the fallibilities of the postal service would be forced to hand carry applications to Washington or perhaps to a regional office of the Commission.

These applications are pleadings in the nature of complaints, albeit the complainant is hand in hand with a friendly respondent, and are subject to the Commission's Rules of Practice and Procedure. Rule 8(f) has been consistently applied to filing requirements such as those for exceptions and replies set forth in rule 13(g). General Order 13 concerns the filing of tariffs and is in no way relevant to the filing of special docket applications or any other pleading.

to in the above set forth statute and in 46 C.F.R. 502.92 and the refund shall be made within 30 days of such notice. Within 5 days thereafter, respondent shall notify the Commission of the date of the refund and the manner in which payment was made.

JOHN MARSHALL,
Presiding Examiner

WASHINGTON, D.C., *September 30, 1969.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 69–33

ATLANTIC & GULF/WEST COAST OF SOUTH AMERICA CONFERENCE AGREEMENT NO. 2744–30, ET AL.

REPORT

December 15, 1969

Agreement whereby respondent conferences are authorized to agree to and establish through intermodal arrangements with other modes of transportation approved for a period of eighteen months provided prohibition of negotiation on such matters by individual lines is removed.

John R. Mahoney and *Jose A. Cabranes* for Respondent Conferences.

Raymond P. Demember and *Howard A. Levy* for the Freight Forwarders Institute.

John Mason and *Robert L. Dausend* for Sea-Land Service, Inc.

Fritz R. Kahn, *Arthur Loback*, and *Raymond M. Zimmet* for the Interstate Commerce Commission.

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

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

This proceeding was instituted to determine whether nine conferences serving the U.S. South American trades could amend their basic agreements by adding the following clause:[1]

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*Chairman Helen Delich Bentley did not participate.

[1] The nine respondent conferences are: Atlantic & Gulf/West Coast of Central America and Mexico Conference (Agreement No. 8300–8); Atlantic & Gulf/West Coast of South America Conference (Agreement No. 2744–30); East Coast Colombia Conference (Agreement No. 7590–16); Leeward & Windward Islands & Guianas Conference (Agreement No. 7540–18); U.S. Atlantic & Gulf-Haiti Conference (Agreement No. 8120–8); U.S. Atlantic & Gulf-Jamaica Conference (Agreement No. 4610–13); U.S. Atlantic & Gulf-Venezuela and Netherlands Antilles Conference (Agreement No. 6190–23); U.S. Atlantic & Gulf-Venezuela and Netherlands Antilles Conference—Oil Companies Contract Agreement (Proprietary Cargo) (Agreement No. 6870–77); West Coast South America Northbound Conference (Agreement No. 7890–5).

No provision of this agreement shall be deemed to prohibit the Conference from agreeing to, and establishing, through rates by arrangement with other modes of transportation; or to prohibit the publication and filing of through rates by the Conference, in conformity with any such rate agreement, or to prohibit the issuance by the member lines of through bills of lading pursuant to a published Conference tariff embodying through rates or the adoption by the member lines of any uniform through bill of lading which may be agreed upon, and formally adopted, by the Conference. However, no member line, either individually or in concert with any other member line or lines or any non-member line or lines, may negotiate, establish, publish, file or operate under any through intermodal transportation rates or issue any through bills of lading otherwise than pursuant to the formal action and authorization of the Conference.

In addition each agreement would be modified to remove certain language clearly in conflict with the above.

Permission to intervene was granted to Sea-Land Service, Inc., the Gulf/Mediterranean Ports Conference, the Gulf/United Kingdom Conference, Gulf/Baltic & Scandinavian Sea Ports Conference, the Department of Transportation, the Interstate Commerce Commission, and the Freight Forwarders Institute. The proceeding was limited to affidavits, briefs and oral argument. The issues as framed in the order instituting the proceeding are:

1. Whether the concerted activities stated in the new paragraph to be added to each agreement are approvable in the form requested by the Conference.
2. The extent to which the Commission has jurisdiction to approve such agreements.
3. The extent to which the Commission may accept for filing under section 18(b) of the Shipping Act, 1916, the through rate tariffs and through bills of lading that appear to be contemplated by the agreements.
4. The extent of the antitrust immunity that would stem from approval of the agreements.

In *Disposition of Container Marine Lines*, 11 F.M.C. 476 (1968), Container Marine Lines (CML) filed tariffs which named rates between ports in the U.S. North Atlantic Eastport to Hampton Roads Range and inland points in the United Kingdom via the Port of Felixstowe. At the time CML was a member of the North Atlantic Westbound Freight Association and the North Atlantic United Kingdom Freight Conference. The conferences objected to the CML tariffs claiming that the transportation involved was subject to conference jurisdiction and only the rates in the conference's tariffs could lawfully be charged. The Commission held that the intermodal service offered by CML was not within the scope of the conference agreements and thus not subject to conference control.

The conferences have stated that it is to avoid the situation in the *CML* case that they have filed the proposed modification which would

allow the conferences to adapt to the intermodal developments with a minimum of confusion and conflict among the member lines.

DISCUSSION AND CONCLUSION

Before directing our attention to the substantive issues, it is necessary to deal with certain procedural allegations and arguments made by the Freight Forwarders Institute.

The Institute argues that included in this proceeding as "subsidiary issues" are such things as "the estimated tonnage involved" in operations under the proposed modifications, "the treatment to be accorded small shippers, the basis on which inland rates will be predicated and the manner in which interline arrangements will be established." The Institute calls for a public evidentiary hearing lest these subsidiary issues "be administratively determined without any discovery, any gathering of the facts, indeed without a scintilla of evidence to support the Commission's ultimate conclusions."

The "subsidiary issues" raised by the Institute are simply not presently before us. Questions such as how small shippers will be treated or how inland rates will be fixed will arise only when and if the conferences enter into actual intermodal arrangements. These arrangements must, of course, be preceded by meetings, discussions, and negotiations. Such meetings, etc. must be conducted by the conference within the framework and authority of the basic agreements. The proposed modifications are designed solely to insure that the concerted activity necessarily preliminary to any intermodal arrangement is in fact within the authority granted by us in the respective conference agreements. Any approval we may grant to the modifications here at issue would not, of course, extend to the particular intermodal arrangements arrived at by the conferences should those arrangements involve matters subject to section 15. Viewed in this light, the Institute's subsidiary issues are patently premature. They deal with questions aimed at facts and agreements which do not now exist. Thus, an evidentiary hearing on these questions is not warranted at this time.

The institute places its principal reliance in *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission* (D.C. Cir. No. 22,936, July 30, 1969). In *Marine Space Enclosures*, the Court of Appeals held that we erred in approving without any kind of hearing a contract for the construction and maintenance of maritime passenger terminal facilities and the Port of New York and a companion agreement between carriers and the Port of New York Authority for the use of the terminal. The case is simply not precedent applicable to the

issue here. The Institute's reliance on the *Marine Space Enclosures* case ignores the basic holding—namely, that "What the words of § 15 fairly indicate is that *an appropriate hearing* shall be held prior to either approval or disapproval." *Marine Space Enclosures*, *supra*, at 9 (emphasis ours). In this proceeding, which involves no discernible questions of fact, the receipt of memoranda of law and sworn statements and the hearing of oral argument will sufficiently develop the issues. (See, e.g., *The City of Los Angeles* v. *Federal Maritime Commission*, 388 F. 2d 582 (D.C. Cir. 1967); *Outward Continental North Pacific Freight Conference* v. *Federal Maritime Commission*, 385 F. 2d 981 (D.C. Cir. 1967).)

The conferences do not yet know the nature of any arrangements or tariffs which might emerge from the projected discussions with carriers of other modes of transportation. However, the conferences do recognize that any such arrangements and underlying facts and circumstances will be subject to the scrutiny of the Commission when such arrangements are submitted to the Commission at a later stage under sections 15 and 18(b) of the Act.

The renewed request for an evidentiary hearing is hereby denied.

1. *Approvability of the modifications in their present form.*

The respondent conferences, of course, urge that the modifications are approvable in their present form. They argue that the only purpose of the modifications is to permit the conferences to participate in the development of intermodal transportation by the use of through movements of freight between inland points in foreign countries and inland points in the United States. The modifications were filed, they say, as a result of the Commission's decision in the *CML* case and are designed to prevent unilateral entry of conference members into the movement of intermodal traffic—thereby avoiding the strain on the conference structure arising in the *CML* case. The respondent conferences stress that the modifications are necessarily broad so as to provide for the full development of intermodal transportation in the future even though the conferences have not at this time embarked upon any large scale containerized system of transportation in their respective trades. Accordingly, they are merely here seeking the authority to sit down with carriers and freight forwarders, subject to the Interstate Commerce Act, as well as foreign carriers and forwarders, to discuss arrangements for through intermodal routes and rates and related bill of lading provisions. The conferences realize that the results of these negotiations will have to be filed with us in appropriate tariffs or agreements.

However, Hearing Counsel would substitute the following language for that submitted by the conferences.

> Subject to approval under section 15 of the Shipping Act, 1916, the conference may enter into arrangements with other modes of transportation whereby through rates may be agreed to and established, and, in conformity with any such rate agreement, may publish and file such through rates. The member lines may issue through bills of lading pursuant to a published Conference tariff embodying through rates or pursuant to a uniform bill of lading agreed to by the member lines and formally adopted by the conference. However, no member line, either individually or in concert with any other member line or lines or any non-member line or lines, may negotiate, establish, publish, file or operate under any through intermodal transportation rates or issue any through bills of lading otherwise than pursuant to the formal action and authorization of the Conference at any time after the Conference has published and filed a through rate pursuant to any arrangement which may be entered into in accordance with this paragraph.

Hearing Counsel's main problem with the modifications as they are presently drafted concerns the possible misuse of the authority granted in them. Thus, while Hearing Counsel feel that the conferences have taken a step in the right direction, they feel that the conferences may by their refusal to act to stimulate the intermodal movement of cargo frustrate a progressive carrier member in its desire to establish a through intermodal movement on its own. Since the modifications in their present form provide that members may quote intermodal rates only pursuant to conference tariffs, a refusal by the conference to enter into intermodal arrangements would effectively prevent any member from doing so on its own initiative. Hearing Counsel would remove this impediment by providing each member with the right of independent action—achieved by adding language to the effect that no conference member may establish an independent intermodal service if the conference itself has already published and filed rates for such a service.

The conferences urge that the proposal to permit individual member lines of the conferences to take independent ratemaking action is based upon a fundamental misunderstanding of the purpose and function of conferences of steamship lines; ignores other well-established devices available to the Commission in the exercise of its regulatory functions; and would not in any event accomplish its intended purpose.

Hearing Counsel's proposal appears to the conferences to be based upon the erroneous notion that, as a result of the adoption of these proposals and amendments, the conferences' member lines would be "*giving up* * * * the right to independent action", and this mistakenly assumes that the proposed amendments would somehow withdraw from the member lines a right which they now possess.

The conferences contend the adoption of Hearing Counsel's proposal to "preserve to the individual members of the conferences the right of independent action", would actually have the effect of *establishing* that putative "right". The conferences further argue that Hearing Counsel's proposal ignores explicit Congressional repudiation of the "right of independent action" on the part of individual carriers within a single conference. Thus, at the time of the adoption of the Dual Rate Law, Public Law 87–346, 75 Stat. 762 (1961), it was proposed that section 15 of that Act be amended to prohibit the approval of agreements between carriers of 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 conferences) each conference retained "the right of independent action". The proposed amendment to section 15 was accepted only after both houses of Congress had agreed to limit the prohibition on carrier agreements to carriers not members of the same conference. The legislative history of the resulting provision in the second paragraph of section 15 is clear. In the words of the report of the Committee on Merchant Marine and Fisheries of the House of Representatives, this provision was "not meant to require the right of independent action on the part of the individual carriers *within a single conference*." [2]

We cannot agree with Hearing Counsel that a right of independent action is called for here. It could in fact do much more harm than good. Any conference is but a fragile balancing of conflicting competitive interests. Foremost in the mind of each member is, quite naturally, its own economic well-being. The conference is able to exist as an entity only by restricting the individual's right to go his own economic way. Thus, it is that rates are maintained at stable levels and frequent and reliable service is offered. Current forms of the intermodal concept are new and their fruition will occur, undoubtedly, only after some experimentation and much give-and-take among the parties in interest. It can come about only through the cooperation of all concerned. Thus, if each member of a conference is free to pursue his

[2] House Committee on Merchant Marine and Fisheries, *Providing for the Operation of Steamship Conferences*, H. Rep. No. 498, 87th Cong., 1st Sess., on H.R. 6775 (June 8, 1961) at 10 and *Index to the Legislative History of the Steamship Conference/Dual Rate Law*, Senate Doc. No. 100, 87th Cong., 2d Sess. at 121 (emphasis supplied), quoted with approval in Senate Committee on Commerce, *Steamship Conferences and Dual Rate Contracts*, S. Rep. No. 860, 87th Cong., 1st Sess., on H.R. 6775 (August 31, 1961) at 16 and *Index to the Legislative History of the Steamship Conference/Dual Rate Law, supra*, at 215. Sec, also, Conference Report No. 1247, *Index to the Legislative History of the Steamship Conference/Dual Rate Law, supra*, at 445, and 1961 *U.S. Code Cong. and Adm. News* 3108, 3145.

own way at any point in the midst of conference efforts, the possibility is very real that successful conference action would be frustrated.

We are not unmindful, however, of the problem pointed to by Hearing Counsel. A conference could through foot-dragging, inertia, opposition by a few members, or otherwise, effectively stifle the desire of its progressive members from instituting intermodal service. On the other hand it is not the policy of the Commission to compel carriers to offer any particular type of service when carriers deem commercial considerations not to warrant it. Thus, we must find a balance between the need to prevent inhibitions to progressive service and to not unduly interfere in commercial matters.

To accomplish this, we will approve the proposed agreement modifications with two limitations. First we will limit the duration of our approval; and, second we will grant a limited right of independent action.

The duration of our approval will be 18 months. During that time conference members will be able to act in concert toward the establishment of intermodal service, and, upon timely request, to seek renewed approval of the subject modifications. However, if during the first 12 months of the initial approval period, the conferences do not achieve any results from their negotiations (which will have to be filed with this Commission), then at the end of that first 12 month period the prohibition in the modifications against mere negotiation by an individual member will lapse.

Such limitation of the prohibition against mere negotiation will allow any individual member, in the face of the conference's failure, refusal or inability to move forward on its own, to at least preliminarily prepare itself for the institution of its own intermodal service should the conference's efforts fail completely. The imposition of a time limit on our approval should serve as an impetus to conference efforts. Furthermore, the independent efforts of individual members during the last six months could have some bearing on a request for renewed approval of the modifications.

Hearing Counsel's other language changes wording to cast the modifications in the "affirmative" rather than the "negative". The conferences, however, object to this. The conferences submit that their "negative" formulation ("No provision of this Agreement shall be deemed to prohibit * * *") is unobjectionable and preferable to the "affirmative" formulation proposed by Hearing Counsel. The "negative" formulation would preclude conflicting interpretations of any and all other provisons of the several organic agreements, including

the "port-to-port" language. Thus, other possibly conflicting provisions of the organic agreements need not be amended or altered in any way, including the "port-to-port" language to which Hearing Counsel refers.

There is nothing inherently wrong with phrasing a modification in the negative. Since we have limited our approval to 18 months, the negative casting eliminates the need to engage in extensive remodification should the present modification not receive continued approval.

Finally, intervenor Sea-Land would substitute the following for the conference's modification:

> No provision of this Agreement shall be deemed to prohibit the Conference from agreeing to, and establishing, through ~~rates~~ *routes* by arrangement with other modes of transportation; or to prohibit the publication and filing ~~of through rates~~ by the Conference *of rates applicable to such through routes, such rates to be a combination of the conference port to port rate and the rate applicable to such other mode of transportation;* ~~in conformity with any sch rate agreement;~~ or to prohibit the issuance by the member lines of through bills of lading pursuant to a published Conference tariff embodying ~~through rates~~ *rates applicable to through routes* or the adoption by the member lines ~~of any uniform through bill of lading~~ *of uniform practices* which may be agreed upon, and formally adopted, by the Conference *in connection with through bills of lading.* However, no member line, either individually or in concert with any other member line or lines or any nonmember line or lines, may negotiate, establish, publish, file or operate under any through intermodal transportation rates or issue any through bills of lading otherwise than pursuant to the formal action and authorization of the Conference.

Intervenor Sea-Land's position is that the proposed amendments "in their present form go further than needed" to accomplish their purpose. Sea-Land is apparently concerned that "the Conferences would be authorized to negotiate joint rates which would provide, as to the port-to-port segment of the joint transportation, a return to the ocean carrier which differs from the port-to-port ocean freight rates published by the Conferences." As we have already noted, the proposed amendments to the organic agreements of the several conferences merely permit the conferences to meet with freight forwarders and carriers of other modes of transportation to discuss arrangements for through routes and the rates and bills of lading related thereto. The kind of arrangements which may emerge from such discussions with carriers of other modes of transportation and freight forwarders are presently unknown. Any arrangement which the conferences might make under the proposed amendments would be reflected in agreements and tariffs filed with this Commission and in accordance with other appropriate statutes and rules.

Sea-Land is premature in raising the spectre of so-called "port equalization practices", which it apparently feels travels in the guise of so-called joint rates. The Chairman of the conferences, in an affidavit of July 29, 1969, has unequivocally stated that:

> The proposed amendments to the organic agreements of the several Conferences are in no way concerned with port equalization or absorption of inland transportation costs. The proposed amendments are not designed to approve or disapprove of either of these practices (Affidavit of Charles D. Marshall, July 29, 1969, paragraph 11).

The conferences argue that the questions raised by Sea-Land can and should be raised by it, and any other interested parties, when and if the practices feared by Sea-Land are embodied in through intermodal transportation arrangements submitted to the Commission and other regulatory agencies.

Sea-Land further asserts that the proposed amendments go "too far" in authorizing the conferences to agree upon and formally adopt a uniform through bill of lading. Sea-Land does not explain what conceivable interest it could have in the adoption under applicable law of a bill of lading governing the operations of other enterprises. Nor does Sea-Land explain or cite authority for its view that the particular provision referred to is in any way objectionable. Consequently, we will approve the provision as submitted provided prohibition of negotiations on such matters by individual lines is removed.

2. *Jurisdiction over the modifications.*

Only the Freight Forwarders Institute challenges our jurisdiction over the proposed modifications. Both Hearing Counsel and respondents point out that the parties to the agreements are subject to the Shipping Act, 1916, and the subject matter is appropriate to section 15. Thus, the two ingredients essential to our jurisdiction are present. They also contend that the inclusion of persons not subject to our jurisdiction in the actions taken under the agreements does not deprive us of our jurisdiction. We agree.

Section 15 of the Act, 46 U.S.C. § 814, requires that ". . . every common carrier by water or other persons subject to [the Act]" file with the Commission for approval certain kinds of agreements made with another such carrier or person subject to the Act. Under section 1 of the Act, 46 U.S.C. § 801, a "common carrier by water" means, *inter alia*, a common carrier by water in foreign commerce, which in turn, is defined as:

. . . a common carrier . . . 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 . . . .

It is clear that the conferences' member lines are persons subject to the Act and that the agreements—which envisage joint ratemaking action by persons subject to the Act—fall squarely within the Commission's jurisdiction under section 15. Thus, the only question which could possibly be raised regarding the Commission's jurisdiction to approve the agreements is that they contemplate through transportation arrangements which would include inland carriage in the United States. It is apparently the view of Freight Forwarders Institute that because any person providing any inland transportation service in the United States comes under the exclusive jurisdiction of the ICC such a person may not enter into any arrangement with a carrier subject to the Shipping Act. This view is patently wrong. In the absence of a showing that the two sister agencies claim jurisdiction over the same particular activity, the two agencies may exercise concurrent jurisdiction over the same *persons*. (See, e.g., *Alabama Great Southern Railroad Company* v. *Federal Maritime Commission*, 126 US App. DC 323, 379 F. 2d 100, 102 (1967)). Approval of the modifications or even of the conferences' subsequent through intermodal arrangements would leave unimpaired the jurisdiction of each agency over the matters assigned to its care.

There is nothing unusual about a situation in which arrangements for through transportation service are filed with more than one regulatory agency and each such agency limits its jurisdiction to a particular segment of the through transportation. There are any number of examples of carriers who hold authority from the ICC to operate as freight forwarders in inland transportation and file inland tariffs with the ICC while filing ocean tariffs with the Commission. (See, e.g., *Determination of Common Carrier Status*, 6 F.M.B. 245 (1961)). As the Court of Appeals for the District of Columbia Circuit has recently noted:

Where a person performs functions some of which are subject to regulation under the Shipping Act and others under the Interstate Commerce Act, the same person might be subject to the jurisdiction of one or the other Commissions depending upon the subject matter to be regulated. *Alabama Great Southern Railroad Company* v. *Federal Maritime Commission, supra,* at 102.

In a related case arising under the Act and the Intercoastal Shipping Act, 1933, the Commission has held that it is not precluded from asserting jurisdiction over a service offered by a common carrier subject

to the Act merely because a portion of that service is subject to the regulation of another agency.

> We are merely subjecting to regulation a service authorized by the provisions of the Shipping Act offered by a common carrier subject to that Act. If a portion of that service is conducted by a carrier subject to another agency's regulation and the carrier performs that service in violation of the laws administered by that agency, that is a matter for the agency concerned. Practical difficulties and problems may arise but jurisdictional conflicts should not. *Matson Navigation Company—Container Freight Tariffs*, 7 F.M.C. 480, 491–492 (1963).

3. *Acceptance of intermodal rates.*

We published in the Federal Register the following proposed rule on October 18, 1969 (34 F.R. 16880):

> § 536.16 Filing of Through Rates and Through Routes
>
> Every common carrier by water in the foreign commerce of the United States, as defined in the Shipping Act, 1916, or conference of such carriers, shall file with the Commission tariffs of any through rates, charges, rules, and regulations governing the through transportation of freight between ports or points in the United States and ports or points in a foreign country in which such carrier or confrence participates. Such tariffs shall include the names of all participating carriers, the established through route, a description of the service to be performed by each participating carrier, and shall clearly indicate the division, rate, or charge that is to be collected by the water carrier subject to the Shipping Act, 1916, for its port-to-port portion of the through service, which division, rate or charge shall constitute a proportional rate subject to the provisions of the Shipping Act, 1916. Such tariffs will be filed and maintained in the manner provided in Section 18(b) of the Shipping Act, 1916, and this Part. A memorandum of every arrangement to which a carrier or conference of carriers subject to the jurisdiction of the Shipping Act, 1916, is or becomes a party, for transportation between a port or point in the United States and a port or point in a foreign country, establishing any joint rate which is offered in connection with any other carrier, shall be filed with this Commission concurrently with the filing of the through rate tariffs.*

At present we believe that the Federal Maritime Commission has the authority and regulatory responsibility to accept such rates for filing; but to avoid any uncertainty or confusion and to establish coordination of regulation, we instituted our rulemaking proceeding. Consequently, the determination of this issue must await the outcome of that proceeding.

4. *The extent of the antitrust immunity stemming from approval of the agreements.*

Section 15 of the Act provides that "Every agreement, modification, or cancellation lawful under this section . . . shall be excepted from the provisions" of the antitrust laws.

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*Arrangements subject to Section 15 of the Act must also be filed and approved in accordance with the requirements of General Order 24 (46 CFR 522).

As we have already noted, before the conferences' member lines may take the joint action contemplated by the agreements with immunity from challenge, either under the Act or under the antitrust laws, the agreements herein must be approved by the Commission under section 15 of the Act.

The only agreements now before us would, on the one hand, prohibit individual conference members from entering into intermodal arrangements on their own, while on the other, permitting the conferences to do so as a whole. The antitrust immunity which would flow from the approval of these particular agreements presents no novel or difficult problems. In its simplest terms it is merely an agreement among competing carriers to regulate the terms of competition among themselves. Thus, the conferences and their member lines would be exempt from the antitrust laws so long as they engaged in the concerted activity authorized under the approved agreements.

The question of the extent of the antitrust immunity which would flow from the actual intermodal arrangements which would be arrived at under the authority of the agreements before us now presents a different question, one which in large measure would appear to depend upon the precise terms of a particular arrangement. While both the conferences and Hearing Counsel would appear to argue that all parties to such arrangements would upon our approval of them be immune from prosecution under the antitrust laws, such a determination must await the filing of such arrangements.

For the foregoing reasons, we will approve the amendments to the agreements as proposed by the respondents for an 18-month period; provided, however, that if during the first 12 months of approval no results are achieved from negotiations as contemplated by the modifications then the individual members shall be free to enter into their own negotiations.

Any argument not specifically dealt with in this report has been considered and found to be either irrelevant, immaterial, or unnecessary to our decision herein.

JAMES V. DAY, *Commissioner*, dissenting:

Hearing Counsel, charged as we know with an advocacy for the public interest, had said that the Commission could simply disapprove the agreements as filed as being too vague in that they do not apprise an interested person of the scope of the activity contemplated thereunder, or approve them with modifications; coupling, however, any such approval with a strict interpretation of the meaning of the agreements so as to delineate precisely the activities which may be legally accomplished under them.

There are, indeed, questions preferably surveyed now; better explored early than late. The majority recognize this in their own choice of one possible answer with respect to safeguarding progressive carriers from frustration because of the manner in which such agreements might be implemented. The Freight Forwarders Institute is concerned about the effects on forwarders and seeks, therefore, the opportunity to develop underlying information and factual data.*

Hence, I would support an expedited hearing before the Examiner to ascertain the impact of such agreements with regard to the above-noted. An expedited examination will not unduly interfere with the general objectives of the agreements. The parties themselves are not unaware of the possible ramifications. Precipitous approval now can later cause greater delay to this, a most significant transport development—the intermodal concept.

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

*As the Court stated in *Marine Space Enclosures*, "antitrust issues do not lend themselves to disposition solely on briefs and argument. Even though there may be no disputed 'adjudicatory' facts, the application of the law to the underlying facts involves the kind of judgment that benefits from ventilation at a formal hearing." *Marine Space Enclosures, Inc.* v. *FMC et al.* (No. 22,936) United States Court of Appeals for the District of Columbia, D.C. Circuit 420 F. 2d 577 (July 30, 1969).

428-264—71——10

FEDERAL MARITIME COMMISSION

DOCKET NO. 69-33

ATLANTIC & GULF/WEST COAST OF SOUTH AMERICA CONFERENCE AGREEMENT NO. 2744-30, ET AL.

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 the modifications to the agreements under consideration in this proceeding are hereby approved subject to their amendment to provide that such arrangements shall continue only for a period of 18 months from the date hereof and if during the first 12 months of the initial approval period, the conferences do not achieve any results from their negotiations (which will have to be filed with this Commission), then at the end of the first 12-month period, the prohibition in the modifications against negotiation by an individual member shall be null and void.

It is further ordered, That such agreements shall be null and void unless the parties thereof submit appropriate modifications within 60 days of the date hereof.

By the Commission.

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