FEDERAL MARITIME COMMISSION

Washington, D.C.

SPECIAL DOCKET NO. 446

COMMODITY CREDIT CORP.

v.

HELLENIC LINES LIMITED

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

February 9, 1973

No exceptions having been taken to the initial decision of the presiding judge in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 9, 1973.

It is ordered, That applicant is authorized to waive collection of $25,626.50 of the charges previously assessed Commodity Credit Corporation.

It is further ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

> Notice is hereby given, as required by the decision in Special Docket No. 446 that effective June 22, 1972, the rate on "Rice, in Bags" to Bangladesh for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from June 22, 1972 through August 11, 1972 is $68.00 w plus 15% surcharge, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff.

It is further ordered, That waiver of the charge shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

Special Docket No. 446

Commodity Credit Corp.

v.

Hellenic Lines Limited

Respondent is permitted to waive $25,626.50 in freight charges.

INITIAL DECISION OF ASHBROOK P. BRYANT, ADMINISTRATIVE LAW JUDGE[1]

This is an application by respondent under Public Law 90–298, 90th Cong. (Section 18(a) 3, Shipping Act, 1916) for permission to waive collection of $25,626.50 freight charges for transportation of the cargo referred to below.

On June 22, 1972, complainant shipped rice in bags totalling 1,122,589 lbs. from Lake Charles, Louisiana to Chittagong/Chalna, Bangladesh, Consignee UNROD; United Nations Relief Operations, Dacca, Bangladesh, via respondent's steamship *M/S Hellenic Pioneer.* Aggregate freight charges of $39,190.38 were actually collected by respondent on September 1, 1972 as per bill of lading No. 1, issued on June 22, 1972 at New Orleans, Louisiana. Freight was assessed and paid on the basis $68.00 w plus 15% surcharge. The rate applicable at the time of shipment for cargo N.O.S. was $90.00 w/m plus 15% surcharge according to Hellenic Lines, Atlantic & Gulf/India, Pakistan, Ceylon & Burma Freight Tariff FMC No. 28. The difference is accounted for by the fact that due to inadvertency the appropriate tariff had not been filed. An amended tariff establishing the lower rate was filed (22nd Rev., page 29, U.S. Atlantic & Gulf/India, Pakistan, Ceylon & Burma Tariff FMC No. 28) effective August 11, 1972. Due to an overload of traffic, vacations and insufficient personnel this matter had been turned over to a clerk who delayed in following through as instructed in filing with the FMC. As soon as the error became evident, steps were taken to rectify the mistake and the revision of the tariff was duly filed. Application for waiver was filed with the Commission within 180 days from the date of shipment.

[1] This decision became the decision of the Commission February 9, 1973.

Section 18(b)(3) of the Shipping Act, 1916, as amended by Public Law 90–298, referred to above, provides that the Commission may, in its discretion and for good cause shown, permit a common carrier by water in foreign commerce, or a conference of such carriers, to waive a portion of freight charges collected where it appears that there is an error in a tariff of a clerical or administrative nature, and that such refund will not result in discrimination among shippers. The application herein discloses facts and circumstances which fall within the purview and intent of the statute. Having complied with the requirements of the statute, and good cause appearing, applicant is permitted to waive collection of the sum of $25,626.50. The notice required by the statute shall be published in the appropriate tariff and waiver shall be made within 30 days of such notice. Within five days thereafter applicant shall notify the Commission of the date of the waiver and the manner in which it was made.

ASHBROOK P. BRYANT,
Administrative Law Judge.

Washington, D.C.
JANUARY 17, 1973

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

SPECIAL DOCKET NO. 447

COMMODITY CREDIT CORP.

v.

HELLENIC LINES LIMITED

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

February 9, 1973

No exceptions having been taken to the initial decision of the presiding judge in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 9, 1973.

It is ordered, That applicant is authorized to waive collection of $523.80 of the charges previously assessed Commodity Credit Corporation.

It is further ordered, That applicant shall publish promptly in its appropriate tariff, the following notice.

> "Notice is hereby given, as required by the decision in Special Docket 447 that effective May 5, 1972 the rate on 'soybean salad oil in cases' to Calcutta for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 5, 1972 through September 15, 1972 is $62.00 W including surcharge, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further ordered, that waiver of the charge shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 447

COMMODITY CREDIT CORP.

v.

HELLENIC LINES LIMITED

Respondent is permitted to waive the sum of $523.80 freight charges.

INITIAL DECISION OF ASHBROOK P. BRYANT, ADMINISTRATIVE LAW JUDGE[1]

This is an application under Public Law 90-298, 90th Congress [Sec. 18(a) (3), Shipping Act, 1916], for permission to waive the sum of $523.80 as part of freight for transportation of the cargo referred to below.

On May 5, 1972, complainant shipped 64,422 lbs. of soybean salad oil in cases from New Orleans, Louisiana, to Calcutta, India, via *M/S Hellenic Challenger* on bills of lading Nos. 3 and 4 dated May 5, 1972. Freight charges of $1,713.10 were assessed and actually collected on September 1, 1972, on the basis of $62.00 w. including surcharge. The applicable rate at time of shipment was $69.75 plus 15 percent surcharge as contained in Hellenic Lines U. S. Atlantic & Gulf/India Pakistan, Ceylon & Burma Freight Tariff FMC No. 28. Through inadvertency, revised tariff rates had not been timely filed. Due to overload of traffic, vacations and insufficient personnel, this matter was turned over to a clerk who delayed in following through as instructed in filing tariff revision with the F.M.C. As soon as the error was discovered, steps were immediately taken to rectify the error [25th Revised page 28, effective April 11, 1972]. Application for waiver was made after the filing had been made and within 120 days of the shipment as required by the statute.

Section 18(b) (3) of the Shipping Act, 1916, as amended by Public Law 90-298, referred to above, provides that the Commission may, in its discretion and for good cause shown, permit

[1] This decision became the decision of the Commission February 9, 1973.

a common carrier by water in foreign commerce, or a conference of such carriers, to waive a portion of freight charges collected where it appears that there is an error in a tariff of a clerical or administrative nature, and that such refund will not result in discrimination among shippers. The application discloses a set of facts and circumstances which fall within the purview and intent of the statute. Having complied with the requirements of the statute, and good cause appearing, applicant is permitted to waive collection from complainant $523.80 freight charges. The notice required by the statute shall be published in the appropriate tariff and refund shall be made within 30 days of such notice. Within five days thereafter applicant shall notify the Commission of the date of the waiver and the manner in which waiver has been made.

(S) ASHBROOK P. BRYANT
Administrative Law Judge

Washington, D. C.
JANUARY 17, 1973

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-15

HARRY KAUFMAN D/B/A INTERNATIONAL SHIPPERS CO. OF N.Y.—INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 35 AND FORWARDING ACTIVITIES OF IRVING BETHEIL AND STEPHEN M. BETHEIL

DOCKET NO. 71-47

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION—SUPREME SHIPPERS, INC.

ADOPTION OF INITIAL DECISION

February 9, 1973

BY THE COMMISSION: (Helen Delich Bentley, Chairman; Ashton C. Barrett and James V. Day, Commissioners)

The proceeding in Docket No. 71-15 was instituted by a Commission issued Order of Investigation and Hearing, dated February 18, 1971, to determine whether freight forwarder license No. 35, issued to Harry Kaufman d/b/a International Shippers Co. of New York (International), should be revoked on the grounds that the licensee (1) had failed to notify the Commission of a change in ownership and had transferred the license without prior approval by the Commission; (2) had permitted Irving and/or Stephen M. Betheil to use International's name and license; and (3) had accepted employment with Irving Betheil (Betheil) and permitted Betheil to control and direct the business of International in violation of General Order 4 [46 CFR 510.5(c), 510.8(d), 510.23(a), and 510.23(b)], after the freight forwarder rights and privileges of Betheil had been revoked. It was further ordered that a determination be made whether Betheil and/or Stephen M. Betheil (son of Irving), in carrying on the business of forwarding after January 1, 1969, without a license from the Commission, violated 46 CFR 510.3(a) and section 44 of the Shipping Act, 1916 (the Act) [46 USC 481(b)].

On November 12, 1970, Supreme Shippers, Inc. (Supreme) applied for a license as an independent ocean freight forwarder. The application shows that Stephen M. Betheil is Treasurer and 50 percent owner and Kaufman is Vice President and Secretary and 50 percent owner of the corporation, and asks that FMC license No. 35 be transferred from Harry Kaufman d/b/a International Shippers Co. of New York to Supreme. On May 3, 1971, the Commission ordered, pursuant to sections 22 and 44 of the Act, that a proceeding be instituted to determine whether the application of Supreme should be denied (Docket No. 71-47). Inasmuch as the grounds alleged for denial included several which were under investigation in Docket No. 71-15, the proceedings were consolidated. Also at issue was the question of whether Stephen M. Betheil furnished to the Commission's staff conflicting and misleading documents and statements regarding the acquisition and operation of the freight forwarder business of Kaufman by Stephen M. Betheil and/or Irving Betheil and/or Kaufman, and the establishment of Supreme.

A hearing was held in New York on January 24, and 25, 1972, presided over by Administrative Law Judge Ashbrook P. Bryant.

In his Initial Decision served June 29, 1972, the Administrative Law Judge found as follows:

(1) Harry Kaufman violated section 44 of the Act and section 510.23(a) of the Commission's Regulations (General Order 4) by permitting and assisting Irving Betheil to use Kaufman's license [FMC License No. 35] in performing freight forwarding services.

(2) Harry Kaufman transferred his freight forwarder license to Irving Betheil without the prior approval of the Commission, in violation of section 44 of the Act and section 510.8(d) of the Commission's Regulations (General Order 4).

(3) Harry Kaufman accepted employment to perform forwarding services on export shipments as an associate and/or employee of Irving Betheil, after Betheil's license as an independent ocean freight forwarder had been revoked by the Commission, in violation of General Order 4 (510.23(b)).

(4) Stephen M. Betheil, Treasurer and 50 percent stockholder of Supreme Shippers, Inc., applicant herein, has failed to demonstrate that he is a person

fit, willing, and able to properly carry on the business of freight forwarder in that (a) he has knowingly assisted Irving Betheid and Harry Kaufman in a course of conduct to enable Irving Betheil to engage in the business of ocean freight forwarder without a license, in violation of 46 CFR 510.3(a) and section 44 of the Act, and (b) that in the event the application is approved, he intends to associate Irving Betheil in the freight forwarder business of Supreme, in violation of section 510.23(b) of the Commission's Rules and Regulations.

(5) Harry Kaufman, Vice President, Secretary and 50 percent stockholder of Supreme, for the reasons stated herein is found not to be fit, willing, and able properly to carry on the business of freight forwarder.

The Administrative Law Judge thus concluded that freight forwarder license No. 35, issued to Harry Kaufman d/b/a International Shippers of New York, should be revoked, and the application of Supreme for a freight forwarder license should be denied.

With regard to the question of whether Stephen M. Betheil furnished to the Commission's staff conflicting and misleading documents and statements regarding the acquisition and operation of the freight forwarder business of Kaufman by Stephen M. Betheil and/or Irving Betheil and/or Kaufman and regarding the establishment of Supreme, the Administrative Law Judge concluded that there was not sufficient evidence upon which to base a finding of deliberate and willful misrepresentation by Stephen M. Betheil to the Commission's staff. He further stated that it appeared that Stephen M. Betheil was not a principal in International, but that his role seemed quite clearly to have been that of a subordinate or employee acting under his father's direction.

Respondents excepted to the Administrative Law Judge's finding of fact that Irving Betheil's application for an ocean freight forwarder's license, under the name of International American Forwarding Corporation (IAFC), was denied and the grandfather rights of S & C Forwarding Corporation (S&C) of which Irving Betheil was formerly President and sole stockholder, were revoked, inasmuch as Rule 13(f)(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.226(a)) requires that official notice may not be taken of a material fact not appearing in the record unless the fact of official notice is stated in the decision and opportunity is allowed the parties to show the contrary.

Respondents further contended that there was no evidence that Supreme had ever operated as an ocean freight forwarder.

Respondents excepted to the Administrative Law Judge's findings that Stephen Betheil knowingly assisted his father and Kaufman in a course of conduct that enabled his father to engage in the business of forwarding without a license.

Finally, Respondents denied that Harry Kaufman permitted his license to be used by Irving Betheil, transferred his license to Irving Betheil without prior Commission approval, and accepted employment to perform forwarding services as an associate and/or employee of Irving Betheil after the latter's license had been revoked.

Hearing Counsel's reply acknowledged that the Administrative Law Judge's third finding of fact, wherein he quoted from a letter written in 1964 by which the Commission notified Irving Betheil of its intent to deny his application for a freight forwarder's license and revoke the grandfather rights of his wholly-owned forwarding company, was entered without the Administrative Law Judge's taking official notice thereof as required by Rule 13(f)(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.226(a)). Hearing Counsel contended that the Administrative Law Judge's third finding of fact and the first sentence of the fourth finding of fact[1] should be stricken, and that a finding of fact which reflects the admissions of Respondents in their Answer to Request for Admissions dated November 29, 1971, be substituted.[2] This substituted finding would reflect the fact that Irving Betheil's wholly-owned and half-owned corporations had had, respec-

[1] The Administrative Law Judge in his Initial Decision (266) stated:

> 3. On April 28, 1964, the Commission revoked the grandfather rights of S&C and denied the ocean freight forwarder application of Betheil in connection with IAFC. On May 13, 1964, Betheil was informed that the grounds for the Commisison's action were:
>
> (1) you knowingly and wilfully made false statements on your application for an independent ocean freight forwarder license in violation of 18 U.S.C. 1001;
>
> (2) you knowingly and wilfully carried on the business of ocean freight forwarding on the basis of falsely obtained grandfather rights during the period August 1962, through December 1962 in violation of Section 44(a), Shipping Act 1916, (46 U.S.C. 841(b)).
>
> Betheil was advised that unless, within twenty days, he requested "opportunity to show at a hearing that denial of the application and the revocation of the grandfather rights is unwarranted," such denial and revocation would be fine'
>
> 4. Betheil did not request a hearing and on June 9, 1964, he was notified that the application of IAFC was denied and the grandfather operating rights of S&C were revoked . . . .

[2] On June 9, 1964, the "grandfather rights" of S&C Forwarding Corp. (FMB Registration No. 1414) were revoked and the ocean freight forwarder application of International Amercian Forwarding Corp. was denied. Irving Betheil was President and sole stockholder of S&C Forwarding Corp. at the time its "grandfather rights" were revoked. He was also President and 50 percent owner of International American Forwarding Corp. and managed its daily operations at the time its license application was denied.

tively, grandfather rights revoked and license application denied on June 9, 1964.

Inasmuch as the Administrative Law Judge did not find that Supreme had operated as an ocean freight forwarder, Hearing Counsel argued in reply that Respondents' exceptions based upon this contention were unfounded.

Further, Hearing Counsel contended that the Administrative Law Judge correctly found that Stephen Betheil asssisted Irving Betheil and Harry Kaufman in a course of conduct that would enable Irving Betheil to continue in the forwarding business after Irving Betheil's license had been revoked.

Finally Hearing Counsel submitted that the Administrative Law Judge correctly found that Harry Kaufman permitted his license to be used by Irving Betheil, transferred his license to Irving Betheil without prior Commission approval, and accepted employment to perform forwarding services as an associate and/or employee of Irving Betheil after Betheil's license had been revoked.

With regard to the first exception based upon Rule 13(f)(a) of the Commission's Rules of Practice and Procedure, we conclude that the Administrative Law Judge erred in including in his findings of fact matters not of record and of which he had failed to properly take official notice. We therefore serve official notice upon Respondents that we adopt as a substituted finding the following:

> On June 9, 1964, the "grandfather rigthts" of S&C Forwarding Corp. (FMB Registration No. 1414) were revoked and the ocean freight forwarding Application of International American Forwarding Corp. (IAFC) was denied on the grounds that Irving Betheil (1) knowingly and willfully made false statements on the application of IAFC for an independent ocean freight forwarder's license in violation of 18 U.S.C. 1001 and (2) knowingly and willfully carried on the business of ocean freight forwarding on the basis of falsely obtained grandfather rights during the period August 1962, through December 1962, in violation of Section 44(a), Shipping Act, 1916 (46 U.S.C. 841(b)). Irving Betheil was President and sole stockholder of S&C Forwarding Corp. at the time its "grandfather rights" were revoked. He was also President and 50 percent owner of International American Forwarding Corp. and managed its daily operations at the time its license application was denied.

Respondents shall be afforded thirty (30) days to show the contrary.

Upon review of the remaining exceptions, we conclude that they are but a restatement of the contentions already advanced before the Administrative Law Judge and that his findings and conclusions on these contentions were proper and well founded. Accordingly, we adopt the Initial Decision (a copy of which is attached to and made a part hereof), revised to the extent of inclusion of the substituted finding of fact set forth in the preceding paragraph.

We would also include the following proviso with respect to the application of Supreme Shippers, Inc. for an independent ocean freight forwarder license, that being that Supreme be allowed to reapply for a license at such time as the defects leading to this denial are cured.

Vice Chairman George H. Hearn concurring and dissenting, with whom Commissioner Clarence Morse joins.

I dissent from that portion of the majority report which adopts the Administrative Law Judge's conclusion that the application of Supreme Shippers, Inc., be denied. Supreme's application for a freight forwarder license should be granted now upon certain conditions.

The majority report finds defects in the application which require denial. At the same time, however, the majority announces that it will entertain a renewed application when those defects are cured. I cannot see how the applicant would be in any better position upon such reapplication than he could be if the application were granted now upon condition that the defects be cured within a specified time. Furthermore, it is now more than two years since Supreme filed its application; and the applicant has thus been compelled to suffer a delay sufficient to serve the purpose the majority seems to pursue in its action.

In addition, it appears that the only reason for finding Stephen M. Betheil unqualified to hold a license is that he would permit his father, Irving Betheil, to continue in the freight forwarding business. The Administrative Law Judge concluded that Stephen's "role seems quite clearly to have been that of a subordinate or employee acting under his father's direction." (Initial Decision at 275.) Consequently, the majority decision is finding Stephen M. Betheil guilty by association.

There is no reason why that association cannot be dissolved forthwith, thus curing the defects in Supreme's application and rendering it approvable upon that event. To now deny the application and require that it be filed anew will result in a redundant exercise of regulatory activity.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-15

HARRY KAUFMAN D/B/A INTERNATIONAL SHIPPERS CO. OF N.Y.—INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 35 AND FORWARDING ACTIVITIES OF IRVING BETHEIL AND STEPHEN M. BETHEIL

DOCKET NO. 71-47

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION—SUPREME SHIPPERS, INC.

ORDER

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

It is ordered, That independent ocean freight forwarder License No. 35, issued to Harry Kaufman d/b/a International Shippers of New York, is hereby revoked pursuant to section 44, Shipping Act, 1916, effective 30 days from the service date of this order, during which time respondent is directed to terminate his current business obligations, but shall not be authorized to solicit or accept any new business; and

It is further ordered, That the application for license of Supreme Shippers, Inc., is hereby denied pursuant to section 44, Shipping Act, 1916.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

No. 71-15

HARRY KAUFMAN D/B/A INTERNATIONAL SHIPPERS CO. OF N.Y.—INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 35 AND FORWARDING ACTIVITIES OF IRVING BETHEIL AND STEPHEN M. BETHEIL

No. 71-47

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE APPLICATION—SUPREME SHIPPERS, INC.

Supreme Shippers, Inc., found not to be fit, willing, and able to carry on the business of freight forwarding. The ocean freight forwarder license of Harry Kaufman d/b/a International Shippers Co. of N.Y. should be revoked because (1) he permitted the use of his license by another person, (2) he transferred his license to another person without Commission approval, and (3) he performed independent ocean freight forwarder services as an associate and/or employee of another person whose license as ocean freight forwarder had been revoked by the Commission.

Maurice A. M. Edkiss for respondents.
C. Douglass Miller and *Donald J. Brunner* as Hearing Counsel.

INITIAL DECISION OF ASHBROOK P. BRYANT, PRESIDING EXAMINER[1]

On February 18, 1971, the Commission served an order of investigation and hearing pursuant to sections 22 and 44 of the Shipping Act, 1916 (the Act), to determine whether freight forwarder license No. 35, issued to Harry Kaufman d/b/a In-

[1] This decision became the decision of the Commission February 9, 1973.

ternational Shippers Co. of N. Y. (International), should be revoked on the ground that the licensee (1) had failed to notify the Commission of a change in ownership and had transferred the license without prior approval by the Commission; (2) had permitted Irving and/or Stephen M. Betheil to use International's name and license; (3) that the licensee had accepted employment with Irving Betheil (Betheil) and permitted Betheil to control and direct the business of International, after the freight forwarder rights and privileges of Betheil had been revoked; in violation of General Order 4 [46 CFR 510.5(c), 510.8(d), 510.23(a) and 510.23(b)]. It was further ordered that a determination be made whether Betheil and/or Stephen M. Betheil (son of Irving), in carrying on the business of forwarding after January 1, 1969, without a license from the Commission, violated 46 CFR 510.3(a) and section 44 of the Act [46 USCA 841(b)].

On November 12, 1970, Supreme Shippers, Inc. (Supreme), the stock of which is owned in equal shares by Harry Kaufman (Kaufman) and Stephen M. Betheil, applied for a license as an independent ocean freight forwarder. The application shows that Stephen M. Betheil is Treasurer and Kaufman is Vice President and Secretary of the corporation, and asks that FMC license No. 35 be transferred from Harry Kaufman d/b/a Intenational Shippers Co. of N.Y. to Supreme. On May 3, 1971, the Commission ordered pursuant to sections 22 and 44 of the Act that a proceeding be instituted to determine whether the application of Supreme should be denied (Docket No. 71-47). As the grounds alleged for denial included several which were under investigation in No. 71-15, the proceedings were consolidated. Another facet of No. 71-47 concerns the question of whether Stephen M. Betheil furnished to the Commission's staff conflicting and misleading documents and statements regarding the acquisition and operation of the freight forwarder business of Kaufman by Stephen M. Betheil and/or Betheil and/or Kaufman, and the establishment of Supreme.

THE FACTS

1. When treasurer and 25 percent owner of the outstanding stock of Arista Shipping Co., Inc., Betheil with others were arrested in 1956 and charged in the U. S. District Court, Southern District of New York, with violation of the Bills of Lading Act (49 USC 81-124). When arraigned, Betheil pleaded

guilty to conspiracy, and on April 14, 1959, a sentence of a year and a day against him was suspended.

2. At or about the above time, Betheil was president and sole stockholder of S&C Forwarding Corp. (S&C), a forwarder operating with "grandfather rights" of the Federal Maritime Board, the Commission's predecessor. He formed a second corporation, International American Forwarding Corporation (IAFC), and applied for a license as an independent ocean freight forwarder in that name. He was President, Manager, and 50 percent owner of IAFC, and his wife Sylvia was Vice President, Secretary and 50 percent owner. Sylvia never took an active part in the day-to-day management of the company's affairs.

3. On April 28, 1964, the Commission revoked the grandfather rights of S&C and denied the ocean freight forwarder application of Betheil in connection with IAFC. On May 13, 1964, Betheil was informed that the grounds for the Commission's action were:

> (1) you knowingly and wilfully made false statements on your application for an independent ocean freight forwarder license in violation of 18 U.S.C. 1001: (2) you knowingly and wilfully carried on the business of ocean freight forwarding on the basis of falsely obtained grandfather rights during the period August 1962, through December 1962 in violation of Section 44(a), Shipping Act 1916, (46 U.S.C. 841(b)).

Betheil was advised that unless, within twenty days, he requested "opportunity to show at a hearing that denial of the application and the revocation of the grandfather rights is unwarranted," such denial and revocation would be final.

4. Betheil did not request a hearing and on June 9, 1964, he was notified that the application of IAFC was denied and the grandfather operating rights of S&C were revoked. Since June 9, 1964, Betheil has not applied for nor held an ocean freight forwarder license issued by the Commission.

5. During the latter part of 1968, Betheil was hired by Kaufman. Kaufman had operated International for about ten years when he became 65 years of age and he wanted to retire. On January 1, 1969, he entered into a contract to sell his business to Betheil. Jacob S. Schulman, an attorney who had previously represented Betheil, drew the contract of sale. Kaufman did not employ an attorney to represent him but relied on Schulman. The contract in effect transferred responsibility for the operation of the forwarding business to Betheil, who was to hold Kaufman harmless for any debts or obligations

of the business arising out of any transaction after January 1, 1969. All income after that date was to belong to Betheil, who was to pay all debts incurred after that date. The contract did not provide for the transfer of the license. Kaufman agreed, however, to cooperate in its "transfer" to the buyer by the Commission. The transfer was not guaranteed by Kaufman. There was no provision which would delay application for "transfer" of the license until the purchase price had been paid. The agreement provided that the buyer might assign it to a corporation already formed or to be formed, in which event the buyer "will deliver to his attorney all the stock certificates in the said corporation to be by him held in escrow until the said purchase price is fully paid."

6. The "first contract," dated January 1, 1969, shows the purchase price of Kaufman's business to be $25,000.00; $4,500.00 paid in January 1969; $4,500 to be paid before January 1970; $10,000.00 in weekly installments of $200.00; and $6,000.00 in 20 monthly installments of $300.00. It makes no mention of employment of Kaufman by Betheil and does not speak of salary. The 50 weekly installments of $200 each are clearly stated as part of the purchase price. The second contract which bears the same date shows the purchase price as $15,000.00 and provides for a weekly salary to Kaufman of $200.00 for one year.

7. The "first contract" was supplied by Betheil to the Commission's staff at the outset of the investigation. In this proceeding, respondents denied that this "first" contract expressed the whole agreement. The "second contract," which was identified by respondents as containing the entire agreement, among other things contained the following provision:

> 3. The Buyer hereby hires the Seller, and the Seller agrees to work for the Buyer, for one year from the date hereof, at a weekly salary of $200.00. The said seller will advise the Buyer as to operating the business herewith sold and will assist him in every way. Said Seller will devote his full time and attention to the operation of the business herewith sold and will not, while employed by said buyer, work anywheres (sic) else. After April 1st, 1969, either party to this contract may elect to terminate the said employment. Said cancellation shall be in writing addressed to the other party, and shall be sent by registered or certified mail, return receipt requested. Upon said cancellation there shall be no further obligation on the part of the Seller to work for said Buyer, or for said Buyer to employ said seller.

8. As of the date of the staff's investigation, Betheil had not paid the entire purchase price, but the accounts indicated

that initially, in January 1969, $4,500.00 was paid, and subsequently there were some other payments; Kaufman also received the $200.00 weekly payments as salary in addition to some monthly payments of $300.00. Betheil occasionally withdrew money for personal items such as clothing and automobile expenses.

9. In April 1970, Kaufman told the Commission's staff, in response to inquiry as to who was "running" his business, that he had entered into an agreement with Betheil to sell the business. About the same time, Betheil told the same staff representative that, as of January 1, 1969, he (Betheil) was the owner of the business. The staff representative testified that during a three-week period in April 1970 he visited the offices of Supreme about eight or nine times. On each occasion Betheil was in charge. The representative testified that:

> When I first went in I contacted Harry Kaufman. . . . There was an office in the front or on my right as I went in, and in the back was a desk that Harry had. There was another desk immediately outside the office which Stephen Betheil worked on it and a young lady, whom I believe is Lillian Alonzo.
>
> Irving was the one who would answer the telephone when it rang, would give the instructions to these people (who) were working in the office.
>
> Mr. Kaufman was in the back and you very seldom heard from him. In fact, after my initial contact on April 15, I no longer dealt with him. It was always Irving. Anyone that came in—always dealt with Irving Betheil and that give (sic) you the impression that this was Mr. Betheil's operation, that he ran it.

10. Betheil brought approximately 23 clients with him when he became associated with International. In April 1970, International had a total of 53 clients including those brought in by Betheil. Betheil told the Commission's investigator that in the year prior to April 1970 the company "handled three thousand shipments approximately" and that he himself handled about 1,300. Betheil determined how the work would be apportioned among those employed in the office, assigning the "commercial accounts" to his son Stephen, and the "GSA accounts" to Lillian Alonzo, a woman in his employ. Betheil would prepare shipping documents when he had time from his "other activities" in managing the business. A typical shipment involved preparing the bill of lading, presenting the invoice to the customer for freight forwarding charges, and preparing the shipper's export declaration.

11. Kaufman entered into a contract with General Services Administration (GSA) on July 1, 1969, to perform freight forwarding services. As the holder of the license from the Commission, Kaufman signed the contract as required by GSA. But the agreement was negotiated by Betheil. Stanley Wamil of GSA was in charge of making arrangements with International for processing shipments under the agreement. Although Miss Alonzo normally handled GSA shipments, Wamil dealt with Betheil when he had any problems under this agreement.

12. As previously mentioned, Stephen M. Betheil is the son of Irving Betheil and had from time to time been employed by International. He had recently graduated from business school. On July 24, 1970, the Commission received an application for an ocean freight forwarder's license in the name of Stephen M. Betheil d/b/a International Shippers Co. of N.Y., in which it was stated in answer to Item 11:

> We are buying a going business: The name is International Shippers Co. of NY FMC #35, 120 Liberty Street, New York, NY 10006.

In response to a request by the Commission's staff, Stephen M. Betheil wrote on August 17, 1970:

> I am purchasing from Mr. Harry Kaufman a foreign freight forwarding business known as International Shippers of NY. Mr. Kaufman operated under FMC No. 35. . . .
>
> I have very recently attempted to incorporate the above mentioned firm. Due to a name conflict, I have been unable to do so. Thus, please be advised that the ocean freight forwarding license I seek should be applied for under the name of Supreme Shippers Inc. This corporation of which I am president, was incorporated in,1969 under the laws of the state of New York, and will assume the business of International Shippers.

13. An agreement dated October 9, 1970, recites that Kaufman had agreed to sell International to Irving Betheil for $15,000.00, payable in installments, and that title to said business would remain with Kaufman until full payment of the purchase price. Under this agreement Kaufman acknowledged receipt of the full purchase price and stipulated that title to the freight forwarder business would transfer to Supreme "one day after the Federal Maritime Commission, transfers to said corporation the Independent Forwarders License (IATA & License #35) heretofore held by said Harry Kaufman or issues another license to said Supreme Shippers Inc. whichever is sooner." There is no specific provision in either of the two contracts of January 1, 1969, that title to the business would remain with

Kaufman until the full purchase price was paid. However, each contract does provide that in the event the contract is assigned to a corporation "already formed or to be formed" the buyer (Betheil) will deliver "to his attorney all the stock certificates in said corporation to be by him held in escrow until the entire purchase price is fully paid." This is the only mention in either the "first" or "second" contract of an escrow arrangement; the stock certificates do not appear to have been delivered to the attorney.

14. At the staff's request, Stephen Betheil met with them on November 12, 1970, to further explain the arrangements. At that time he filed a new application in the name of Supreme. The officers and directors shown on the application were Sylvia Betheil, President, Harry Kaufman, Vice President and 50 percent stockholder, and Stephen M. Betheil, Treasurer and 50 percent stockholder. The articles of incorporation of Supreme, attached to the application, showed that they were filed with the State of New York on February 13, 1969. The minutes of the first meeting of the board of directors of Supreme recite that it was formed to purchase International's freight forwarding business. They also reflect that Betheil assigned the business to Stephen Betheil on February 13, 1969, and he, in turn, assigned it to Supreme on the same day. The written assignment from Irving to Stephen is dated February 13, 1969, but the assignment from Stephen to Supreme is dated February 13, 1970. Stephen stated that the written assignment from his father to him had not been executed on February 13, 1969, but had only recently been written down to confirm a prior oral agreement. No explanation was made by respondents as to Kaufman's 50 percent stock interest in Supreme.

15. Stephen told the staff that he was running the business but that he would need his father's advice and participation in the business for an indeterminate time if and when the Commission approved the transfer of license No. 35.

16. Neither Kaufman, Irving Betheil, nor Stephen Betheil notified the Commission of any transfer of the business or license between January 1, 1969, and July 22, 1970.

17. The agreement of January 1, 1969, appears to have taken effect at the date of execution. Irving Betheil stated to the Commission's investigator that the reason he had not notified the Commission of the contract and his purchase of the business was because title had not passed. He said the "papers"

regarding the transfer were being held in escrow by attorney Jacob Schulman until the entire purchase price was paid. Schulman was asked during the investigation in the spring of 1970 to identify the "papers" which he was holding. He replied that he had only a copy of the contract and made no reference to stock being held in escrow. However, at the hearing, Schulman testified that he advised Betheil and Kaufman that the transaction could not be completed until the full purchase price was paid and that he agreed to act "as a sort of escrow agent" first to "hold the papers until the consideration had been paid" and "if the corporation was formed, to hold the stock of the corporation until the consideration was paid." Schulman "believes" that later he formed the corporation and held the stock in escrow.

DISCUSSION AND CONCLUSIONS

Section 44 of the Act imposes the duty on the Commission to see that access to the profession of freight forwarding is limited to those licensees who are found to be "fit, willing and able" to conduct their business in accordance with high standards of conduct. *Independent Freight Forwarder Application, Guy G. Sorrentino,* Docket No. 71-48, (15 FMC 127) March 3, 1972. See also section 44 of the Act. It is crucial to his "fitness" that it appear that the applicant intends to and will in good faith adhere to such "high standard" of conduct and that he intends to and will obey the Commission's rules and policies for the conduct of licensed freight forwarders. In *Dixie Forwarding Co., Inc., Application for License,* 8 F.M.C. 109 (1964), the Commission said at page 118:

> The business integrity of one who occupies the position of freight forwarder should be above reproach, and he should clearly demonstrate a complete awareness of and a willingness to accept the responsibilities that the preferred position imposes. * * * the philosophy of section 44 is such that the shipping public should be entitled to rely upon the responsibility and integrity as well as the technical ability of a freight forwarder.

The record in this case does not provide the necessary basis for an implied assertion to the public and the shipping community that the Commission has examined the applicant's conduct and found applicant "fully competent and qualified" to act in a forwarding capacity.

A freight forwarder's license may be revoked if the Commission finds that because of a "change of circumstances" he no longer is qualified, or that his conduct has rendered him unfit to carry on the business of freight forwarding. A license may be revoked for willful failure to comply with any provision of the Act or any rule or regulation promulgated by the Commission thereunder. The record herein establishes that Harry Kaufman is no longer "fit, willing, and able" properly to carry on the business of freight forwarder.

As stated earlier, since June 9, 1964, when his license was revoked, Betheil has not applied for, or obtained, a freight forwarder license. However, since at least January 1, 1969, he has been actively engaged in ocean freight forwarding using the name of International Shippers Co. of N.Y., the trade name of Harry Kaufman. His formal relationship with Kaufman is not entirely clear, but there appears to be little doubt that Betheil has for all practical purposes been the controlling person of International and has conducted and directed that business as if it were his own. He has made use of Kaufman's license with Kaufman's knowledge, assistance, and cooperation.

Respondents seek to explain and justify Betheil's management and control of International as those of a general manager and that Kaufman retained title to and control of the business until the full purchase price was paid. This is, of course, inconsistent with the claim that Kaufman became Betheil's employee. There is substantial doubt that either was the case. Kaufman's status in the business seems to have been purely formal.

As above stated, in April 1970, the Commission's representative interviewed both Kaufman and Betheil in detail as to the ownership, control, and operation of International. He was not told by either Kaufman or Betheil then or at any other time during the "approximately eight" visits he made to the company's offices over a three week period that Kaufman was an employee of Betheil. To the contrary, Betheil told him that International was "his business," that he owned it, that he had purchased the business from Kaufman; he produced the "first contract" dated January 1, 1969. No mention was made of any arrangement between Kaufman and Betheil other than that of seller and buyer as described in the "first contract" until, in response to Hearing Counsel's request for admissions in December 1971, Betheil provided a copy of the so-called "second contract." Be that as it may, the real situation appears to have been that Kaufman's connection with the business after January 1, 1969, was a pure formality presumably to enable Betheil to conduct an ocean freight forwarder business on the strength of Kaufman's license.

That such was the case is further indicated by the fact that, under the first contract as well as the second, Kaufman was relieved of responsibility for the debts of the business incurred after January 1, 1969, and was not to participate in the profits subsequent to that date. Betheil directed the day-to-day operations of the business during all of the period involved herein subsequent to January 1, 1969; he managed the office, made arrangements with prospective shippers, solicited accounts, and generally carried on business relationships. He brought a substantial number of his shipper-clients into the business, directed operations and policy, and apportioned the work in the manner heretofore mentioned. Betheil performed the executive duties usually associated with proprietorship and management. Kaufman was present in the office until he had a heart attack, but the record does not disclose that he performed any function in connection with the business other than to sign a freight forwarder agreement with GSA on which International had been the successful bidder. Kaufman acted because GSA required a licensed freight forwarder to sign. Except for this one occasion, which was the only contract of its kind entered inot by International since January 1969, the record does not disclose that Kaufman did more than sit in the back of the office.

In neither contract did Kaufman guarantee the transfer of his license to Betheil. He did agree to "cooperate" in the transfer of the license to Betheil or "his nominee" and to "sign all documents and consents required by" Betheil to "expedite" the transfer. Kaufman considered his customers "his greatest property right" in the business, but he was aware that "without the license, you can't operate the freight forwarding business." Kaufman testified that his understanding was that he would not turn over the business to Betheil until payment had been completed. There is nothing in either written agreement, however, to bear this out, or to indicate that ownership of the business did not pass at the time of execution of the contract on January 1, 1969, except possibly the provision that in the event the contract was *transferred to a corporation* its stock would be placed in escrow until the purchase price was fully paid. This provision, however, would appear merely to have been a means of securing the debt owing to Kaufman and did not impinge or confine Betheil's activities as an ocean freight forwarder. Indeed, such arrangement would appear to be entirely cosnistent with the assumption of operational and directional control and responsibility of International's business by Betheil.

At the time of his testimony on January 25, 1972, Kaufman had been paid the full purchase price and the only "condition" of the transaction which is "lacking" is the transfer of the license by the Commission. If the Commission does not approve the transfer of the license, Kaufman does not know what would happen to the freight forwarder business which he sold to Betheil. Either he (Kaufman) would have to "take it back or it is abandoned or something." In any event, however, he would not repay the purchase price to Betheil. It is apparent that in order to effectuate the agreement under consideration and to operate the business as contemplated by the contract, Betheil required a freight forwarder license which he did not have and presumably could not get. Betheil regularly drew money from the firm's account for his personal expenses and paid Kaufman $200.00 per week from the company's monies.

Whether the $200.00 weekly payments are considered to be installments on the purchase price of the business, under the "first contract," or as "salary" for services rendered as "employee" as described in the second contract, there can be no doubt that the business on or about January 1, 1969, was transferred from Kaufman to Betheil and that the business operations were carried on under License No. 35, issued to Harry Kaufman d/b/a International Shippers Co. of N.Y., with Kaufman's knowledge, cooperation, and consent. The arrangement was not disclosed to the Commission and constituted a transfer of the license to Betheil without prior consent of the Commission.

Stephen Betheil's role in the freight forwarding business of International was to assist his father. He was attending college during much of the time covered by the inquiry herein; he was present in the office during this period—on a part time basis at least some of the time; and he actively participated in the freight forwarder business being conducted and managed by his father. As above indicated, when asked by the Commission's staff for an explanation of his purchase of International, he simply said that he was purchasing the going business of Harry Kaufman operated under FMC License No.

35. He added that he had tried to incorporate but had encountered a name conflict. He said that he would apply in Supreme's name and would assume International's business. Stephen M. Betheil does not appear to have been a principal and the extent of his competence to take managerial control of the business cannot be resolved on the basis of the record herein. However, it appears that Irving Betheil, if the application were granted, would continue to exercise a predominant influence in the business. Stephen made it clear that he will employ his father and it may be assumed—indeed, it is contemplated—that for a substantial period Irving Betheil will continue in his present role as chief executive officer and real party in interest in the business. No adequate explanation was made by respondents to account for the lapse of a year between the assignment of the contract of sale from Irving to Stephen and the assignment from Stephen to Supreme. But, the close relationship between the parties and their intent to continue that relationship indicates the real nature of the transactions here involved. Their principal objective appears to be to enable Irving Betheil to continue in the freight forwarding business.

There is not sufficient evidence upon which to base a finding of deliberate and willful misrepresentation by Stephen M. Betheil to the Commission's staff. As above indicated, it appears that he was not a principal in International. His role seems quite clearly to have been that of a subordinate or employee acting under his father's direction.

SUMMARY

Harry Kaufman, Stephen M. Betheil and Irving Betheil have engaged in a course of conduct, the object and result of which was to enable Irving Betheil to engage in the freight forwarder business without a license. In particular, (1) the ocean freight forwarder license No. FMC 35, issued to Harry Kaufman d/b/a International Shippers Co. of N.Y., in practical effect was transferred with the knowledge, cooperation, and consent of the licensee to Betheil and/or his nominee without the knowledge or prior approval of the Commission; (2) Kaufman permitted his license to be used by Betheil, a person not employed by him; (3) Kaufman associated Betheil with himself in an ocean freight forwarder business conducted under a Commission license after the license of Betheil as ocean freight forwarder had been revoked; (4) Stephen Betheil acted in concert with his father Irving Betheil and Kaufman to enable Irving Betheil to conduct and to continue to conduct an ocean freight forwarder business without a license as required by section 44 of the Act and Commission General Order 4; and (5) if an ocean freight forwarder license is granted to Supreme, Stephen Betheil intends to employ his father in the business.

ULTIMATE CONCLUSIONS

(1) Harry Kaufman violated section 44 of the Act and section 510.23(a) of the Commission's Regulations (General Order 4) by permitting and assisting Irving Betheil to use Kaufman's license [FMC License No. 35] in performing freight forwarding services.

(2) Harry Kaufman transferred his freight forwarder license to Irving Betheil without the prior approval of the Commission, in violation of section 44 of the Act and section 510.8(d) of the Commission's Regulations (General Order 4).

(3) Harry Kaufman accepted employment to perform forwarding services on export shipments as an associate and/or employee of Irving Betheil, after Betheil's license as an independent ocean freight forwarder had been revoked by the Commission, in violation of General Order 4 (510.23(b)).

(4) Stephen M. Betheil, treasurer and 50 percent stockholder of Supreme Shippers Inc., applicant herein, has failed to demonstrate that he is a person fit, willing, and able to properly carry on the business of freight forwarder in that (a) he has knowingly assisted Irving Betheil and Harry Kaufman in a course of conduct to enable Irving Betheil to engage in the business of ocean freight forwarder without a license, in violation of 46 CFR 510.3(a) and section 44 of the Act, and (b) that in the event the application is approved, he intends to associate Irving Betheil in the freight forwarder business of Supreme, in violation of section 510.23(b) of the Commission's Rules and Regulations.

(5) Harry Kaufman, Vice President, Secretary, and 50 percent stockholder of Supreme, for the reasons stated herein is found not to be fit, willing, and able properly to carry on the business of freight forwarder.

Freight forwarder license No. 35, heretofore issued to Harry *Kaufman d/b/a International Shippers of N.Y., should* be revoked, and the application of Supreme for a freight forwarder license should be denied.

(S) ASHBROOK P. BRYANT
Presiding Examiner

Washington, D. C.
JUNE 28, 1972

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

SPECIAL DOCKET NO. 450

U.S. DEPARTMENT OF AGRICULTURE

v.

WATERMAN STEAMSHIP CORPORATION

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

February 23, 1973

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 23, 1973.

It is ordered, That applicant is authorized to waive collection of $78,983.77 of the charges previously assessed the U.S. Department of Agriculture.

It is further ordered, That applicant shall 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 450 that effective August 8, 1972, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from August 8, 1972 through January 8, 1973, the rate from Houston to Aqaba on 'Bulgar Wheat, in bags' is $51.15 W, subject to 25% surcharge, plus $3.00 per ton bunker surcharge, plus 3½% currency surcharge, and subject to all applicable rules, regulations, terms and conditions of said rates and this tariff."

It is further ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 450

U.S. DEPARTMENT OF AGRICULTURE

v.

WATERMAN STEAMSHIP CORPORATION

Respondent is permitted to waive $78,983.77 in freight charges.

INITIAL DECISION OF ASHBROOK P. BRYANT, ADMINISTRATIVE LAW JUDGE [1]

This is an application by respondent under Public Law 90-298, 90th Cong. [Section 18(a)(3), Shipping Act, 1916] for permission to waive collection of $78,983.77 freight charges for transportation of the cargo described below.

On August 8, 1972 complainant shipped 14,332 pkgs. of Bulgar Wheat aggregate weight 721,976 lbs. (Est. measurement 28,764 cu. ft) from Houston, Texas to Aqaba, Jordan, consignor Commodity Credit Corporation (USDA), consignee UNDP Resident Representative, via SS *Noonday* of Waterman Steamship Corporation on B/L No. 3 dated August 8, 1972.

On May 30, 1972 respondent booked the movement of the cargo above described and agreed to establish a rate of $51.15 w plus 25 percent surcharge, plus bunker surcharge of $3.00 per ton and currency surcharge of 3½ percent to be applied to this shipment. Through error respondent failed to file the appropriate amendment to its tariff (Waterman Steamship Corporation Freight Tariff No. 18—U.S. Atlantic and Gulf Ports/Red Sea Gulf of Suez, Aqaba and Aden Base Ports). It is not until after billing had been submitted to the Department of Agriculture for freight charges that the error was discovered.

The only applicable tariff rate on the commodity in question at the time this shipment moved was $106.50 W/M for Cargo, N.O.S., as published in said Tariff No. FMC 18, plus surcharges as above stated. Respondent says the Cargo N.O.S. rate is unquestionably high for this carge.

[1] This decision became the decision of the Commission February 23, 1973.

Effective July 7, 1972 through July 31, 1972 a rate of $51.15 was established on flour from Houston to Aqaba. Respondent intended to establish the same rate on Bulgar Wheat from Houston to Aqaba to cover the August 8 shipment here involved.

On January 8, 1973, Revised Page 119 of the said tariff was duly filed establishing the rate of $51.15. On January 26, 1973 this application was made to the Commission to waive collection of the difference between the rate of $51.15 (plus surcharge) and the Cargo N.O.S. rate of $106.50 W/M.

Section 18(b)(3) of the Shipping Act as amended by Public Law, referred to above, provides that the Commission may, in its discretion and for good cause shown, permit a common carrier by water in foreign commerce, or a conference of such carriers, to refund or waive a portion of the freight charges where it appears that there is an error in the tariff of an administrative or clerical nature, or an error due to inadvertance in failing to file a new tariff, and that such waiver or refund will not result in discrimination among shippers. The application herein discloses facts and circumstances which fall within the purview of and intent of the statute.

Having complied with the requirements of the statute and good cause appearing is permitted to waive collection of the sum of $78,983.77. The notice required by the statute shall be published in the appropriate tariff and waivers shall be made within 30 days of such notice. Within five days thereafter respondent shall notify the Commission of the date of the waiver and the manner in which it was made.

(S) ASHBROOK P. BRYANT
Administrative Law Judge

Washington, D.C.
JANUARY 31, 1973

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

SPECIAL DOCKET NO. 451

U.S. DEPARTMENT OF AGRICULTURE

v.

WATERMAN STEAMSHIP CORPORATION

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

February 23, 1973

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on February 23, 1973.

It is ordered, That applicant is authorized to waive collection of $21,961.41 of the charges previously assessed the U.S. Department of Agriculture.

It is further ordered, That applicant shall 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 451 that effective September 8, 1972, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from September 8, 1972 through January 8, 1973, the rate from New Orleans, La. to Aqaba on 'Flour, in bags' is $55.42 W, subject to 25% surcharge, and subject to all applicable rules, regulations, terms and conditions of said rates and this tariff."

It is further ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 451

U.S. DEPARTMENT OF AGRICULTURE

v.

WATERMAN STEAMSHIP CORPORATION

Respondent is permitted to waive $21,961.41 freight charges.

INITIAL DECISION OF ASHBROOK P. BRYANT, ADMINISTRATIVE LAW JUDGE [1]

This is an application by respondent under Public Law 90-298, 90 Cong. [Sec. 18(a)(3), Shipping Act, 1916], for permission to waive collection of $21,961.41 freight charges for transportation of the cargo described below.

On September 8, 1972, complainant shipped 4,000 bags of flour, aggregate weight 201,320 lbs. (estimated measurement 8,000 cu. ft.), from New Orleans, Louisiana, to Aqaba, Jordan, consignee UNRWA c/o Port Officer, consignor Commodity Credit Corporation (U.S.D.A.), via respondent's steamship SS *Citrus Packer* on B/L No. 4 issued by respondent dated September 8, 1972.

On July 24, 1972, respondent booked the above shipment on the understanding that the ocean freight rate would be $55.42 per 2,240 lbs. plus 25 percent surcharge. Based on this understanding and in good faith, complainant moved the cargo to respondent's piers where it was loaded on the above vessel and transported to destination. However, through error respondent failed to establish the rate agreed upon with complainant. Through inadvertance, respondent failed to file an appropriate revision of its tariff [Waterman Steamship Corporation No. 18B]. However, respondent billed freight at the new agreed rate.

It was not until after the billing had been made that it was discovered that respondent had failed properly to amend its tariff to provide for the rate of $55.42 w. plus surcharge. The only applicable rate on the commodity in question, at the time of shipment, due to respondent's error, was the Cargo N.O.S. rate of $112.75 W/M, as provided in Waterman Tariff 18A, FMC 69, which, respondent states, constitutes an unreasonable rate for this movement.

Respondent filed effective January 8 [Item 4602 of its Freight Tariff 10-B, FMC 73, Page 119], an appropriate amendment to its tariff establishing the rate agreed upon with complainant. The complaint was filed on January 26, 1973.

From August 9, 1972, through September 13, 1972, respondent had in effect a rate of $55.42 (plus surcharge) on flour from Galveston to Aqaba and subsequently that rate was extended to apply from Galveston, Beaumont and Houston to Aqaba. It had been the intention of respondent to provide the same rate from New Orleans but, as above stated, through inadvertance, this was not accomplished.

Section 18(a)(3) of the Shipping Act, 1916, as amended by Public Law 90-298, referred to above, provides that the Commission may, in its discretion and for good cause shown, permit a common carrier by water in foreign commerce, or a conference of such carriers, to waive a portion of freight charges where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertance in failing to file a new tariff, and that such refund will not result in discrimination among shippers. The complaint herein discloses facts and circumstances which fall within the purview and intent of the statute.

Having complied with the requirements of the statute and good cause appearing, complainant is permitted to waive collection of the sum of $21,961.41.

The notice required by the statute shall be published in the appropriate tariff and waiver shall be made within 30 days of such notice. Within five days thereafter respondent shall notify the Commission of the manner in which it was made.

(S) ASHBROOK P. BRYANT
Administrative Law Judge

Washington, D. C.
JANUARY 31, 1973

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-9

BOLTON & MITCHELL, INC.—INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 516

REPORT ON RECONSIDERATION

March 7, 1973

BY THE COMMISSION: (George H. Hearn, Vice Chairman; James V. Day and Clarence Morse, Commissioners)

On June 9, 1972, the Commission issued its decision in this proceeding and allowed respondent, Bolton & Mitchell, Inc. (BMI), subject to certain conditions, to retain its license as an independent ocean freight forwarder. BMI was required to cease and desist from certain activities and to submit a timely report to the Commission setting forth the manner of compliance. On July 28, 1972, respondent filed a petition for reconsideration urging, *inter alia,* that the Commission reconsider and reverse its findings that:

1. BMI is not independent of shipper connections.
2. BMI violated section 16 First of the Shipping Act, 1916, by obtaining transportation by water at less than the applicable rates.
3. BMI violated various provisions of General Order 4. (46 CFR 510)

Alternatively, respondent requested clarification of the reasoning behind the Commission's conclusion that BMI was shipper-connected. Respondent urges that in reaching this conclusion, the Commission in rejecting the testimony of BMI's only witness, Spencer, gave no indication in the report that the Commission had considered the written and sworn evidence and exhibits corroborating of Spencer's testimony.

On July 25, 1972, Hearing Counsel also filed a petition for reconsideration of the Commission decision in this case.

Hearing Counsel's total argument, simply stated, is that the Commission correctly determined that BMI was guilty of all specifications as cited, but erred in (1) concluding that respondent acted in good faith on advice of counsel when it violated the pertinent statutes, and (2) allowing respondent BMI to retain its license.

The Commission granted both the petitions and directed the filing of appropriate replies. Respondent's request for further oral argument was denied.

The facts and applicable law in this case are set forth in our prior report served June 9, 1972, and will not be repeated here. The issues here are the same as were previously considered and resolved by the Commission in that report. They are:

1. Does BMI's conduct render it free from shipper connections as required by statute?
2. Does BMI's conduct merit retention or revocation of its license as an independent ocean freight forwarder?
3. Has respondent violated section 16 First of the Act by obtaining transportation by water at less than the applicable rates as a result of its receiving compensation on its own shipments?
4. Has respondent violated certain portions of General Order 4, to wit:

    Sec. 510.5(e)—failing to show license number on invoices and shipping documents;

    Sec. 510.23(d)—imparting false information to its principals;

    Sec. 510.23(e)—withholding information as to actual price of merchandise;

    Sec. 510.23(f)—failing to promptly account to its principals;

    Sec. 510.23(h)—filing false documents;

    Sec. 510.23(j)—failing to use invoices which stated separately the actual amount of ocean freight, price of merchandise; and

    Sec. 510.9(c)—willfully making false statements in connection with an application for a license or its continuance in effect.

In our opinion, nothing has come to light upon reconsideration of this case to materially alter the conclusions we reached and the position we adopted in our previous report; we still find respondent in violation of all sections of the Shipping Act, 1916, as previously determined, and we also continue to be constrained not to revoke respondent's license because we feel that BMI has acted in good faith on advice of counsel in this matter. We do, however, order respondent to cease and desist from the activities complained of and submit the proper report as required in the order accompanying our report of June 9, 1972.

Accordingly, we approve and adopt verbatim our report and order of June 9, 1972, (15 FMC 248) and make it a part hereof.

Helen Delich Bentley, Chairman and Ashton C. Barrett, Commissioner, dissenting

We dissent.

The reconsideration of this case presented the Commission with an unique opportunity to rectify an error in judgment fraught with potential for future harm.

We have here a freight forwarder who fails to even approach the statutory definition.*

We have no complaint with the majority's opinion as far as it went, but unfortunately it did not go far enough. The majority found respondent guilty of nine separate violations of the Act, yet they were somehow "constrained" not to take BMI's freight forwarder license. It is with this conclusion we take issue. The facts in this case speak for themselves. A Commission investigator found respondent's books to indicate that for the period reviewed fully 63 percent of BMI's total cash disbursements went for merchandise purchases totalling 1.2 million dollars. At the same time, respondent's account ledgers showed that 66 percent of its total sales disbursements were for merchandise—an obvious buy-sell business operation.

In the various transactions surveyed in this case, a series of "constants" show up regularly. The most unwholesome practice appearing regularly is the retention by respondent of the discount it received on the bulk purchases, while invoicing the full individual price to the consignee—and the record demonstrates this without the consignee's positive knowledge or acquiescence. Another interesting practice is respondent's charges for "start up" service which consisted of nothing more than placing the order and processing same for the consignee.

Along with that charge, respondent assessed his principles a "finders fee" and required payment for "purchasing work". The only distinction between a start up charge and a finders fee is that the latter was acceptable to Peruvian officials for dollar exchange arrangements and allowed the foreign consignees to obtain U.S. dollars at a more favorable rate of exchange.

* Section 1, Shipping Act, 1916, specifies the criteria for independent ocean freight forwarders as follows:

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

Interestingly, the moneys paid and collected from the consignees for the "finders fee" were redeposited in the consignee's private account or refunded "under the table", thus effectively assisting the consignee to possibly violate International Currency Exchange laws.

Respondent also charged its customers a "finance" fee for the funds it utilized in purchasing allegedly for the clients account. Additional charges crop up from time to time, fees for "purchasing services", "technical services" and "buying commissions" which were all charged to consignees.

Additionally, nowhere on any of the documents used in the transactions does this forwarders FMC license number appear, making virtually certain that BMI's suppliers had no inkling that BMI might be purchasing for anyone but its own account. Perhaps if they had, they would not have been as inclined to grant the discounts to BMI.

Throughout the testimony and transcript of interviews, there are inconsistent statements by Spencer, BMI's president, which attempt to explain away the proven facts of record and which indeed strain the limits of our credulity. The majority would appear equally unimpressed with them.

Lastly, there is the admission of Spencer that in addition to the buying, selling, financing and retaining secret profits, BMI collected ocean freight brokerage on the same shipments. The only explanation for this is that the company could not sustain itself on sales commissions alone and needed the additional revenue from the freight forwarding operation. And, as if all this were not enough, Spencer further admitted giving false statements to the Commission's investigators.

With all of this the majority, of course, does not quarrel; indeed it cannot since the record stands uncontroverted. How then can the majority allow BMI to retain its license? By the simple expedient of shifting the responsibility for the violations to respondent's counsel, the majority concludes that BMI acted in good faith upon "advice of counsel" and should be allowed to retain its license and incidentally to continue its relationship of trust with its clients. The Shipping Act, of course, does not excuse violations committed on advice of counsel; but we presume that the majority is unable to find the requisite "willfullness" on the part of BMI and thus is constrained to continue its license in effect. We have no such difficulty.

BMI when licensed by the Commission was found "fit, willing and able". That BMI was "willing" is amply demonstrated by its zeal in concocting schemes to exact "fees" from its shipper clients; but it is the presumed "fitness" that should give the majority pause as it does us. A freight forwarder holds a unique position of trust and responsibility. He must act as a fiduciary, and in that capacity his conduct and integrity must be above reproach. The Commission addressed itself to that responsibility in *Dixie Forwarding Co., Inc. Application for License,* 8 F.M.C. 109 at 115 when it said:

> The record in this proceeding reveals that forwarders frequently have in their possession large amounts of their clients' funds. They also frequently hold negotiable documents for others. Moreover, forwarders have access to confidential business secrets. Anyone acting in such a fiduciary capacity should of his own initiative, seek to attain the highest degree of business responsibility and integrity.

(See also, *Compania Antonima Venezolana De Navigacion* v. *A. J. Perez Export Company,* 303 F.2d 692 (CA 5, 1962) cert. den., 371 U.S. 942 (1962).)

When we review the record, we do not find that the respondent has displayed the high degree of business responsibility and integrity required of a freight forwarder. Therefore, it is our view that Bolton & Mitchell is not fit to carry on the business of freight forwarding.

We are also troubled concerning BMI's "ability" to remain in business. A licensee of this Commission is charged with the ability to carry on the business of forwarding and no small part of the proper conduct of that business is sufficient knowledge of the law to insure that the business is carried on within the confines of that law. How then can lack of knowledge and acceptance of erroneous advice by counsel excuse violations of the kind here spread over the record? We, of course, think it cannot for ignorance of the law is not now and has never been an excuse. More seriously perhaps to allow BMI to retain its license appears to us to forever foreclose this Commission's ability to police the industry. How do we hereafter find any freight forwarder guilty of any violations of sufficient gravity to warrant revocation of a license? Under the majority's doctrine violations will not result in revocation, for if and when a forwarder is charged with a violation he need only plead "advice of counsel".

We, of course, did not take this stand in the earlier Commission report. We could have refrained from doing so now if it were not for our sober reconsideration of this case and our grave concern for future efforts by the Commission at regulating the forwarder industry. We would revoke the license.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 452

ASIATIC PETROLEUM CORPORATION

v.

STATES MARINE LINES

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

March 8, 1973

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on March 8, 1973.

It is ordered, That applicant is authorized to waive collection of $21,477.30 of the charges previously assessed Asiatic Petroleum Corporation.

It is further ordered, That applicant shall 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 452 that effective November 29, 1972, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from November 29, 1972 through December 22, 1972, the rate to Mena Al Fahal on 'steel casing, subject to a minimum tonnage of 1,000 payable tons from one shipper on one vessel' is $40.50 W/M (including 17½% surcharge), subject to all applicable rules, regulations, terms and conditions of said rates and this tariff."

It is further ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 452

ASIATIC PETROLEUM CORPORATION

v.

STATES MARINE LINES

Application to waive a portion of freight charges granted.

INITIAL DECISION OF HERBERT K. GREER, ADMINISTRATIVE LAW JUDGE [1]

States Marine Lines, Inc. (applicant), a common carrier by water in the foreign commerce of the United States, has applied for permission to waive collection of a portion of the freight charges on a shipment of steel casings carried for Asiatic Petroleum Corporation (shipper) from New Orleans, Louisiana, to Mena Al Fahal, Sultanate of Muscat and Oman, pursuant to a bill of lading dated November 29, 1972. At the time of the shipment applicant's tariff on file with the Commission for the commodity shipped was $52.50 W/M plus a surcharge of 17½ percent ("8900" Rate Agreement No. 2, FMC-2). The shipment measured 37,398 cubic feet and weighed 2,270,402 pounds.

Prior to the shipment and on November 3, 1972, the Secretary of the "8900" Group advised the shipper that a special rate of $34.50 W/M plus a 17½ percent Cape Surcharge was offered through December 31, 1972. On November 6, 1972, booking of the cargo on applicant's vessel was confirmed. On November 29, 1972, a forwarder acting on behalf of the shipper presented documents to applicant's agent in New Orleans, Louisiana, covering the cargo and at a rate of $34.50 W/M plus the surcharge. The agent was unable to verify this

[1] This decision became the decision of the Commission March 8, 1973.

rate in the "8900" Group tariff and by telephone contacted applicant's office at Stamford, Connecticut. The tariff was checked by that office and as the rate change was not in the files, it was assumed that the correction pages had been delayed by mail. The $34.50 rate was nevertheless confirmed.

The cargo was loaded aboard applicant's vessel which sailed on November 30, 1972. During December of 1972, applicant discovered that the shipper had failed to advise the "8900" Group of its booking and that the agreed reduced rate on steel casings had not been filed with the Commission. The records further disclosed that the shipper had paid $41,164.92, the charges applicable at the reduced rate, the rate which applicant had intended to apply but had inadvertently failed to timely file.

Public Law 90-298 authorizes the Commission, for good cause shown, to permit a common carrier by water in the foreign commerce of the United States to waive collection of a portion of the freight charges when there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in filing a new tariff. The facts demonstrate an inadvertent failure to file the rate of $34.50 W/M plus a 17½ percent surcharge, a situation within the purview of Public Law 90-298. The application was filed within 180 days of the date of the shipment and no other shipments of the same or a similar commodity moved on applicant's vessels during approximately the same time as the shipment here involved. No other proceeding involving the same rate situation is now pending.

Good cause appearing, and applicant having complied with the provisions of Public Law 90-298, permission to waive collection of $21,477.30, the difference between the rate inadvertently not filed and the rate on file at the time of the shipment, is granted. The waiver of the charges here authorized shall be effectuated within 30 days of service of this notice and applicant shall within five (5) days thereafter notify the Commission of the date and manner of effectuating the waiver. Applicant shall publish the proper notice in its tariff as required by the statute.

(S) HERBERT K. GREER
Administrative Law Judge

Washington, D. C.
FEBRUARY 8, 1973

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-71

AGREEMENT NO. 9932—EQUAL ACCESS TO GOVERNMENT-CONTROLLED CARGO AND INTERIM COOPERATIVE WORKING ARRANGEMENT

AGREEMENT NO. 9939—POOLING, SAILING AND EQUAL ACCESS TO GOVERNMENT-CONTROLLED CARGO AGREEMENT

March 20, 1973

Agreement No. 9939 not found to be discriminatory or unfair as between carriers, shippers, exporters or ports, or between exporters from the United States and their foreign competitors, or detrimental to the commerce of the United States, or contrary to the public interest or otherwise in violation of the Shipping Act, 1916.

Agreement No. 9939 approved.

Odell Kominers and *Stephen F. Eilperin* for Prudential-Grace Lines, Inc.

Richard G. Ashworth and *John J. Reilly* for Compania Peruana de Vapores S. A.

Gilbert C. Wheat, Thomas E. Kimball and *Richard E. Gutting, Jr.* for Westfal-Larsen & Co. A/S.

Donald J. Brunner and *Paul J. Kaller* as Hearing Counsel.

REPORT

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

This proceeding is before us upon exceptions to the Initial Decision of Administrative Law Judge Ashbrook P. Bryant (ALJ). The proceeding was instituted to determine whether Agreement Nos. 9932 and 9939 should be approved under section 15 of the Shipping Act, 1916.[1] The Administrative Law Judge would disapprove Agreement 9939. Exceptions to the Initial Decision were filed by the parties to Agreement No. 9939, Prudential-Grace Lines (PGL) and Compania Peruana de Vapores (CPV), and by Hearing Counsel.

FACTS [2]

Agreement No. 9939 between PGL and CPV covers sailing requirements, equal access to government cargoes, and pooling of revenue (with certain cargo excluded) carried southbound under local bills of lading from U.S. West Coast ports to ports in Peru. This U.S. West Coast/Peru trade is but a part of the overall U.S. West Coast/South America trade.

PGL serves the West Coast/Peruvian trade by alternating six C-3 vessels via the East and West Coasts of South America. The southbound West Coast of South American service (which includes Peru) serves British Columbia, the full range of U.S. West Coast ports, Mexico, Central America, the West Coast of South America and the East Coast of South America to Rio de Janiero, where the vessels turn homebound and serve the same range of ports in reverse order northbound. PGL, under an operating-differential subsidy contract, operates the only U.S.-flag liner service between the U.S. West Coast and Peru and has been in this trade for close to one hundred years. PGL's plans for the future call for 12 to 18 sailings a year, substituting modern C-4 vessels for the C-3's now in service.

CPV, the other party to Agreement 9939, is owned by the Peruvian government and is an instrument of Peruvian governmental policy. It is not primarily profit motivated. CPV owns and operates twelve modern cargo vessels and has additional vessels under time charter. It became active in the southbound trade in about March of 1971. CPV's U.S. West Coast to Peru service is part of a triangular Japan/California/Peru service in which CPV employs three vessels southbound

[1] Agreement No. 9932 was an "interim" agreement filed with the Commission in the form of a letter of intent. No. 9932 expired by its own terms and was superseded by No. 9939. Its approval is no longer sought, and No. 9932 will be discussed only insofar as it sheds light on the provisions of 9939.

[2] Exceptions to certain of the Administrative Law Judge's findings were taken by PGL. However, they were directed to the failure of the Administrative Law Judge to "detail" or amplify certain matters presented by PGL. Our findings take care of the basic objections of PGL, and in view of our decision, it is unnecessary to deal in detail with the factual exceptions of PGL.

to Peru on a monthly schedule. It would appear that CPV has now placed two vessels in a monthly shuttle service between Peru and the full range of U.S. West Coast ports.[3]

Westfal-Larsen & Co. A/S (WL) is a Norwegian company which owns seven tankers, seven bulk carriers and nine dry cargo vessels. Under a general agency agreement with General Steamship Company, Ltd., WL maintains a liner service in the southbound U.S. West Coast/South America trade with six dry cargo vessels comparable in speed and cubic capacity to the vessels now operated by PGL and CPV. WL's voyage pattern in the U.S./South America trade includes calls at British Columbia and U.S. West Coast ports, thence to Mexico, down the West Coast of South America through the Straits of Magellan, then northbound to East Coast of South America ports, returning through the Panama Canal to U.S. West Coast and British Columbia ports. WL does not offer a northbound service from Peru. In its southbound service, WL covers the same general range of ports as PGL, and in addition WL regularly serves Coos Bay, Oregon, where it picks up 80 percent to 90 percent of its lumber cargoes to Peru. Lumber represents about half of its U.S. West Coast/Peru cargo.

The U.S. West Coast to Peru trade has generated an estimated $3,000,000 annually in freight revenues on a movement by liner vessels of from 44,000 to 48,000 tons of cargo. The respective participation of the three active carriers (PGL, CPV and WL) for the period available has been as follows:

	1968	1969	1970
PGL	60.8%	52.3%	48.1%
WL	24.9%	31.7%	44.8%
Flota [4]	13.8%	10.5%	7.0%

The best estimate is that the current level of traffic will continue with perhaps a modest increase. Among the principal commodities shipped from U.S. West Coast ports are lumber,

[3] This is based on advertisements appearing in the Pacific Shipper (Nov. 15, 1971 and March 27, 1972). We are asked by PGL to take official notice of them. WL and Hearing Counsel object, arguing that Rule 13(f) (46 CFR 502.226) does not permit official notice of a "mere advertisement" apparently because CPV should have introduced "evidence" at the hearing of its then future plans. We will take official notice of the advertisements themselves—their existence is not questioned. Our experience shows that a line rarely, if ever, advertises sailings that it does not intend to make, and a reasonable inference is that CPV will in all probability expand its service as advertised. However, this inference is not necessary to our conclusions in this decision.

[4] Prior to CPV's entry into the trade, Flota Mercante Grancolumbiana provided liner service in the trade.

wood pulp, alkane, mining machinery, newsprint, beans, peas and lentils, and flour and wheat. More than 75 percent of the lumber moves through Coos Bay, destined to Callao, Peru; there is a lesser volume to Paita, Peru. Portland accounts for virtually all of the remainder of the lumber traffic to Peru.

The U.S. West Coast/Peru segment is but a part of WL's overall Pacific Coast/South America trade. WL's revenues from this segment were eight and nine percent, respectively, of its service revenues in 1969 and 1970.

Since 1962, the Government of Peru has sought to maintain a program for the development of a national-flag merchant marine. This was done through the issuance of a series of decrees, which culminated in the conditions instrumental in producing Agreement 9939. On January 9, 1962, Peruvian Law No. 13836 declared the shipbuilding industry a public utility and enacted a variety of promotional measures, including the establishment of a ship construction fund aimed at fostering the construction of a national-flag fleet. In February of 1962, Law No. 13996 established a Peruvian National Commission, among the duties of which was that of periodically proposing to the Executive Power the percentages of import and export cargo to be carried in Peruvian national-flag ships. On January 25, 1966, by Supreme Decree No. 3, there was established a requirement reserving 20 percent of all import and export cargoes to Peruvian ships, with provision for increasing that percentage to 50 percent as Peru's fleet increased. These percentage restrictions were restated in May of 1966 by Supreme Decree No. 12. Other measures designed to promote the Peruvian merchant marine were soon to follow.

Supreme Decree No. 13, issued in August of 1967, provided that contracts with the government and government-controlled entities contain a provision requiring the contractor to comply with cargo reservations in favor of the Peruvian merchant marine. Supreme Decree 221-H of September 1, 1967, required that all purchases by government-controlled entities be carried by Peruvian ships unless none were available. Next, Supreme Decree No. 2-H of January 5, 1968, authorized exemptions from custom duties on private import cargoes provided they were brought in aboard CPV ships or any other Peruvian vessel. If national-flag ships were not available, ships of "associated" lines could be used.[5]

[5] Associated lines are those that have an agreement with CPV approved by the Peruvian government.

The earlier decrees were modified and amplified by Supreme Decree No. 016-69-TC, issued in December of 1969. This decree established the order of vessel precedence for cargoes exonerated from customs duties: (1) vessels of Peruvian national lines; (2) foreign-flag vessels chartered by Peruvian-flag lines; (3) where ships of the first two categories were unavailable on ships of foreign lines associated with Peruvian-flag lines. Exempted from this decree were cargoes from ports in geographical areas not regularly served by Peruvian ships or when there were international agreements on flag preferences. Supreme Resolution No. 003-70-TC/AC included within the meaning of "international agreements" on flag preference an "equal access" agreement if approved by Peru's Minister of Transport and Communications.

As matters stood in December 1970, just prior to CPV's entry into the trade, 50 percent of the import cargoes were reserved to Peruvian vessels, and for the most part only cargoes shipped on those vessels could be exonerated from customs duties. On the other hand, and by another decree, an indeterminate percentage of the cargo apparently could be exonerated in full, or relieved in part, from customs duties through decision of the Peruvian Ministry of Industry and Commerce (PMIC). These requirements were not mutually exclusive, however. The extent of the customs relief and the conditions upon which such relief would be granted might change from time to time. According to PGL, this was well illustrated when PMIC ruled in September 1971 that the Peruvian-flag preference requirements for customs exoneration affected only imports exonerated completely from customs duties. Since, under the Peruvian industrial law, no cargoes are exonerated in full from Peruvian customs duties, but rather on a sliding scale of 20 to 90 percent, based on an evaluation made by the Peruvian Minister of Transport and Communications of the commodity's end use, the decree requiring cargo exonerated from Peruvian customs duties to be carried on Peruvian-flag ships currently has no impact. In any event, however, Peruvian decrees now require 50 percent of Peru's imports to be carried by Peruvian-flag vessels. In addition, if the customs exoneration decrees become effective through changed interpretation by the Minister of Transport and Communications, some 60-65 percent of the imports would require routing on Peruvian-flag vessels. The 50 percent reservation affects talc and purchases by Peruvian government-controlled companies and contractors. Beyond this, the record does not identify particular commodities included in the 50 percent reservation decrees, nor does it identify which commodities would receive a customs duties advantage should the Minister of Transport and Communications rescind its present interpretation of the customs exoneration decrees.

PGL first felt the impact of the Peruvian decrees not in the trade here involved, but in the U.S. Atlantic/Peru trade and the U.S. Gulf/Peru trade, and in 1967 PGL and the Gulf and South American Steamship Company (G&SA), the two U.S.-flag carriers in these trades, negotiated an equal access agreement which this Commission approved on October 17, 1967. Peru, however, failed to act on the agreement. The situation in Atlantic and Gulf/Peru trades worsened as CPV's service increased. Further attempts were made to secure Peru's approval of the equal access agreement, and on February 24, 1970, the approval was granted for 150 days, during which time two pools were negotiated. Agreement No. 9849, between PGL and CPV in the U.S. Atlantic/Peru trade and Agreement No. 9865, between G&SA and CPV in the U.S. Gulf/Peru trade, were approved by this Commission and the Government of Peru in July of 1960.

Six months after the approval of Agreements 9849 and 9865, PGL learned of CPV's intention of establishing a direct service between Peruvian and Japanese ports, calling homeward from Japan at U.S. West Coast ports to lift cargo for Peru. CPV had by then taken delivery of its 12 new ships and had additional tonnage under time charter. This, together with the decrees effecting cargo reservations, created the climate in which the agreement in issue was negotiated. In such a climate, PGL could have either negotiated a pool or sought some sort of counter-balancing regulations from the Commission under section 19 of the Merchant Marine Act of 1920 (46 U.S.C. 876). Of course, PGL could have done nothing, thereby possibly suffering fatal detriment; and consequently, PGL felt some positive action was called for. PGL felt that the issuance of regulations under section 19 would "exacerbate the already tense diplomatic relations between Peru and the United States" and chose the agreement as the less troublesome alternative.

As above stated, Agreement No. 9939, between PGL and CPV, covers sailing requirements, equal access to government-controlled cargo and pooling of revenue on all cargo (with certain cargo excluded) carried southbound under local bills of lading from West Coast U.S. ports to ports in Peru. The cargo is to be freighted and carried in accordance with the contract/noncontract rates, rules and regulations of the Latin America/Pacific Coast Steamship Conference (Agreement No. 8660, as amended), of which both PGL and CPV are members. The agreement has the obvious bilateral characteristics which have become familiar in similar agreements in Latin American trades. PGL is a party to several agreements of this type.

PGL is accorded the status of a Peruvian-flag line southbound; CPV shall have the right to participate equally with U.S.-flag carriers in the carriage of cargo controlled by the U.S. government; and PGL agrees to support applications for waivers to place CPV on a basis of equal opportunity with PGL with respect to such cargo. The parties agree to request that the competent authorities of their respective countries publicize among their representatives the status of the association of these carriers which are accorded equal access to cargo by the agreement.

Each party may transfer part of its pool share, sailing, and space requirement to other national-flag carriers. Pool accounting arrangements, exchange of manifests and/or freight lists, and provisional and final statements of pool revenues are to be prepared and delivered by each party to the other.

Nothing contained in the agreement shall limit the right or duty of either carrier to provide service at any U.S. Pacific port or Peruvian port where suitable cargo is offered or available, or to carry all of the cargo offered or available. The carriers will use their best efforts to encourage and promote commerce in the trade, and to resolve any differences that may arise under the agreement; they agree to consult at least once a year. Any controversy or claim arising under the agreement will be settled by binding arbitration in Lima or San Francisco in accordance with the Rules of Procedure of the Inter-American Commercial Arbitration Commission.

The pool shares of PGL and CPV shall be 50 percent each of the total cargo carried (with certain cargo excluded). If either party should earn a gross revenue in excess of its pool share, then, subject to a $50,000 deductible, the overcarrying party shall pay over to the other party 20 percent of the gross revenue obtained in excess of its pool share. These pooling arrangements were included at the insistence of CPV on prompting by its government. Without inclusion of the "pool" it appears highly improbable that there would have been any agreement.

Article 10 embodies the "equal access" agreement and provides in pertinent part:

EQUAL ACCESS TO CARGO

10) a. As a condition of this agreement, PGL shall be accorded the status of a Peruvian-flag line with respect to the carriage of southbound cargo in the foreign commerce of Peru from the West Coast of United States.

* * * *

c. In view of the fact that the United States government has granted to carriers of other naitons the right to carry government controlled cargo exported from the United States, CPV has the right, subject, to any act or policy of the government of Peru, to participate equally with United States flag carriers in the carriage of government controlled cargo moving from United States ports in the Pacific Coast of USA to ports in Peru, which include charitable cargoes and those cargoes controlled by the following firms:

Agency for International Development AID
Care Inc.
Catholic Relief Services
Church World Services
Lutheran World Relief, Inc.
Seventh Day Adventist Welfare Service Inc.
World Food Program
World Relief Commission Inc. or others.

PGL will support, and will not contest, applications for waivers which shall place Peruvian flag vessels owned or operated by CPV on a basis of equal opportunity with PGL vessels with respect to the total carriage of such cargo.

U.S. government-controlled cargoes approximate 10 percent of the U.S. West Coast southbound cargoes to Peru. Quite naturally the predicted effect of the agreement on the trade and the lines in it is hotly disputed. On the one hand, WL urges that the agreement will leave it with little if anything but its lumber carryings (something less than half of its past carryings) and that it cannot survive in the trade without a reasonable "mix" of cargoes. On the other hand, PGL vigorously contends that the agreement will have little or no effect on WL's position in the trade. We will deal with this question when we discuss the reasons behind our approval of the agreement.

The ALJ also found that WL "produced evidence tending to show" that the agreement between CPV and PGL as to the associate status of the latter had been effectuated prior to approval *by the Commission.* (Initial Decision, pages 13, 14.) However, he neither discusses the evidence nor draws any conclusions from it. Our review of the record demonstrates that this evidence can more readily be interpreted as showing unilateral action on the part of the Peruvian government in routing cargoes pursuant to its decrees.

In the order instituting this proceeding, the inclusion of a reporting requirement as a condition of approval was suggested. The requirement would provide that copies of all quarterly provisional and final pool statements, pursuant to Article 8 of the agreement, be furnished the Commission; also that a new Article 18 be included to read as follows:

> *Further Agreement of the Parties*—Any further agreement or understanding of the parties, pursuant to or giving effect to Articles 5, 11 and 17 shall not be effective or implemented prior to the time that an appropriate amendment with respect thereto has been filed with and approved by the Federal Maritime Commission pursuant to Section 15 of the Shipping Act, 1916.

The parties have stipulated to its inclusion, and it will be so ordered.

DISCUSSION AND CONCLUSION

Section 15 of the Shipping Act, 1916, requires that we disapprove Agreement 9939 if we find that it will be discriminatory or unfair as between carriers or shippers, operate to the detriment of the commerce of the United States, be contrary to the public interest or otherwise be in violation of the Shipping Act. If the agreement is approved, those activities of the parties which are within its scope are exempted from the antitrust laws. This exemption has given rise to an "antitrust test" to be used in determining whether to approve a given agreement. Under this test we must

> . . . scrutinize the agreement to make sure the conduct thus legalized does not invade the antitrust laws any more than is necessary to serve the purposes of the regulatory statute. (*Isbrandtsen Co.* v. *U.S.*, 211 F.2d 51 (C.A.D.C. 1954)).

This scrutiny of course requires information or data if it is to produce an intelligent judgment on the approvability of the agreement; and

> Almost uniformly the kind of information necessary to this judgment is in the hands of those seeking approval of the agreement . . . it is incumbent upon those in possession of such information to come forward with it. (*Mediterranean Pools Investigation,* 9 F.M.C. 264, 289-90 (1966)).

Once the proponents of the agreement have produced their case it is equally incumbent upon any person protesting approval of an agreement to come forward with all relevant information in his possession which would bear upon the agreement's disapproval. The weighing of the case presented by the proponents of approval against the case made by those protesting approval, of course, resolves the question of whether the ultimate burden of proof has been sustained. In this case, the ALJ concluded that the parties to Agreement 9939 had failed to "clearly demonstrate" that the agreement was not "discriminatory as between carriers or shippers, was not detrimental to the commerce of the United States and was in the public interest." The key to this conclusion would appear to lie in two general propositions: (1) the "nationalistic" nature of Agreement 9939; and (2) the "finding" that it "appears reasonably probable" that approval of No. 9939 would have a "substantial adverse effect on the carryings and opportunities" in the trade.

No one seriously challenges the motives of CPV and the Government of Peru[6] in negotiating the agreement. It is designed to bring to some fruition Peru's cherished aspirations to status as a maritime nation by securing a larger portion of the carriage of its imports and exports for CPV. To achieve this, Peru has utilized the medium of "government-controlled" or "government-impelled" cargo which can be loosely defined as any cargo over which and for whatever reason the government controls the routing or booking. There is nothing novel in this concept. It is utilized by virtually all the Latin American maritime countries; and in our own country Public Resolution 17 and section 901(b) of the Merchant Marine Act, 1936 give the government control over the routing and booking of certain government-impelled cargoes. Agreement 9939 is designed to give each of the parties "equal access" to the cargoes controlled by their respective governments.

The Administrative Law Judge found the "bilateral intent" of the agreement clear, noting that CPV "made no bones" about its wanting a "bilateral" pooling agreement, thereby "excluding" WL from the pool. The Administrative Law Judge concluded that "bilateralism" or national intent was not a proper "fulcrum" for approving an agreement. Bilateralism is currently a much used and frequently abused tag in some segments of our foreign trade, and it bears some reexamination in view of the misconceptions apparently attending it.

[6] To all intents and purposes, they are one and the same.

Complete bilateralism would mean simply that all cargo moving in a trade is by some means (probably governmental) reserved for carriage by the national-flag lines of the trading partners, i.e. the countries at either end of the trade. No U.S. trade has yet become so bilateralized. Bilateralism is considered a panacea by developing countries and as an anathema by maritime nations whose carriers are traditionally third-flag lines or cross-traders. Whatever the economic or political merit of bilateralism, our concern is the validity and extent of its application under the statutes we administer. Of more relevance, however, is the role of bilateralism as a product of the "national interest factor" in the development of a particular commercial agreement.

In this foreign trade, as in many foreign trades, there are two "pools" of cargo moving. One pool consists of cargo moving in normal commercial trade channels, and all common carriers engaged in the trade normally have access to that commercial cargo. The other pool consists of government-owned or government-controlled cargo, and only those common carriers in the trade selected or designated by that government have access to that cargo. In the United States we have government-controlled cargo under PR 17, PL 664, and PL 480, which moves in our foreign commerce on liner vessels. The government of Peru, as elsewhere detailed herein, has identified certain categories of import cargo which it declares is government-controlled cargo. The routing of government-controlled cargoes can be and is directed by the government(s) involved. If the involved government decrees that a third-flag vessel shall not participate in the carrying of that government-controlled cargo, then that cargo ceases to be a part of the commercial pool and is no longer accessible to third-flag vessels. That is the problem and "facts of life" confronting WL. Peru, by decrees and otherwise, has reduced the pool of commercial cargo to which WL once had access and has placed much of that cargo in the government "pool" to which WL does not have access. Whether we approve or disapprove the agreements before us does not decrease or have any effect on the pool of cargo inaccessible to WL.

We are told, by WL quite naturally, that approval of the agreement here will "involve the United States in 'national interest' discrimination." This particular piece of hyperbole is grounded on a poor choice of words. By approving Agreement 9939 we are not adopting bilateralism as part of the maritime policy of the United States (see *Revenue Pools, U.S./Brazil Trade,* 14 F.M.C. 149 (1970)); and neither are we giving our endorsement to another government's expression of national interest in the carriage of its cargo for the purpose of enhancing its merchant marine. WL's concern is its exclusion from the carriage of the cargoes covered by the agreement. But this may not be unlawful discrimination. As we understand discrimination, there must first be a right enjoyed and that right abrogated before there can be discrimination. We can find no such right of WL to the cargo covered by Agreement 9939. WL certainly has no right to cargo controlled by the Peruvian government, unless that government says it has, and of course Peru has expressly denied any such right. The same holds true for cargoes controlled by our own government. Public Resolution 17 authorizes the Maritime Administration to grant waivers for cargoes shipped under it to the national-flag carriers of the countries receiving those cargoes. Indeed, to the extent that Public Resolution 17 restricts waivers to those granted to the national-flag carriers of the recipient nations, it embodies a form of bilateralism. Section 901(b) of the 1936 Act leaves to the discretion of the Maritime Administration the grant of waivers to particular flags. Discretionary action vests no rights. Since WL enjoys no right to the cargoes in question, there can be no discrimination as between carriers, in the statutory sense at least. Consequently, all we are doing here is judging an agreement under the criteria of section 15 of the Shipping Act. If the agreement meets those criteria, it should be approved, whatever nationalistic motives may have engendered it.

We are also told that approval of Agreement 9939 would be detrimental to the commerce of the United States within the meaning of section 15. This detriment would come from the elimination of WL from the U.S. West Coast/Peru trade, which WL says is the purpose of the agreement and the possible result of any approval of it. WL reminds us that our duty to accord all carriers, regardless of flag, equal treatment under the Shipping Act demands that we preserve WL's service in this trade. *Inter-American Freight Conference,* 14 F.M.C. 58 (1970). In other words, WL has a "right" to preserve its "share" of the trade. Even if any nation's carriers can be said to enjoy a right to participate in the commerce of another sovereign nation, such a right is in no sense an unlimited one.

Any right granted to WL to participate in this country's commerce is enjoyed subject to the limitations imposed by the Shipping Act and any other relevant federal law. It stems from the proposition that since carriers as well as cargoes are part of the commerce of the United States, anything detrimental to carriers may be detrimental to that commerce. But this proposition is grounded upon a very practical reality. Rarely, if ever, has any one country had a merchant fleet sufficient to carry its total foreign commerce. The insufficiency is made up from ships of the fleets of other maritime nations. It is for this reason that third-flag or cross traders are considered an important part of the commerce of the United States. And what we say here should not be taken as demonstrating any diminishing of our concern for their well being. It is simply that they are but one of many interests, all of which are owed our concern and protection. It is impossible to completely satisfy all of those interests. All that this Commission can do is balance the interests and reach our best judgment under the laws we administer.

Under section 15 we must and do give the same measure of fair protection to a third-flag vessel that we do to an American-flag vessel. This does not necessarily mean that the third-flag vessel always receives identical treatment, for that third-flag vessel may be burdened by handicaps or impediments not burdening an American-flag vessel. Thus, WL cannot qualify to become an "associated" line of CPV because it, WL, unlike PGL, cannot assist CPV in obtaining access to U.S. government-controlled cargo, whereas PGL can do so. In this, we find nothing startling for even vessels under U.S. flag do not operate with identical rights and privileges. Thus, foreign-built vessels (with minor exceptions) may not operate in our coasting trades (46 U.S.C. 11). Thus, foreign-flag vessels which are placed under U.S. flag must be documented under U.S. flag for a period of three years before they become eligible to carry government-impelled cargo (46 U.S.C. 901(b)(1)).

We think it abundantly clear that the Shipping Act is not an insurance policy granting unqualified protection to all carriers serving our commerce at any given point in time. The Act only affords protection to a carrier from those statutorily prohibited actions of others. Agreements between carriers are, of course, permitted by section 15 of the Act, and it is an agreement which WL asserts may cause its elimination from this trade. While we do not from the record before us think that WL will leave the trade, WL asserts that its departure standing alone would create such a detriment to commerce as would warrant disapproval of the agreement. We think not. "Detrimental to the commerce of the United States" is but one of the criteria of section 15. While a contrary finding under any one of the four criteria of section 15 can support disapproval, all of the parts make a legislative whole and must be considered. The Shipping Act itself and section 15 especially is the prime example of this necessary balancing of interests. The antitrust laws represent a national policy of this country which is considered to be in the public interest. Section 15 provides an exemption from those laws, but only if the agreement exempted is not found, *inter alia,* detrimental to the commerce of the United States. And so, any grant of the exemption must be scrutinized to insure that it does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the Shipping Act. Just so must detriment to commerce be tested against the public interest.

The public interest in intergovernmental harmony is clear. That Agreement 9939 is a factor in continuing harmonious relations between our government and the government of Peru seems equally clear. But it is nevertheless asserted by WL that the agreement is contrary to the public interest because it will reduce competition without any showing that the agreement is designed to secure important public benefits.

In this case we have a series of decrees patently demonstrating that Peru has embarked upon the same course as that taken by most other Latin American maritime nations. Our experience has shown that, absent commercial resolution through agreements such as No. 9939, or otherwise, governmental confrontation follows. When no agreement can be reached between the carriers, the trade is disrupted, malpractices ensue and virtually everybody suffers. The public interest dictates that this state of affairs is to be avoided wherever possible. Here, the agreement between the national-flag carriers has been reached. The prospects for continued harmony are good, thus the agreement would appear to be in the public interest. Certainly, this result is not contrary to the public interest.

The Administrative Law Judge's conclusion that the agreement would have a substantial adverse effect on WL is based on the testimony of WL's witnesses, all of whom admitted that control over the future of WL was in the exclusive control of the home office in Norway. No witness from the home office testified. The same witnesses agreed that in a reasonably accurate forecast of WL's future in the Peru trade consideration must be given to the overall operation of WL, i.e. not only the southbound Peru trade, but the southbound trade to all of South America plus the wayport cargo between South American countries plus the northbound trade. No such evaluation of the overall trade had been made by any of the witnesses. The conclusion that WL would be harmed appears to be based on the testimony quoted at page 15 of the Initial Decision:

> It is I think a fairly safe statement that no line serving in this trade around South America could survive on nothing but base cargo . . . any line that operates must have a reasonable mix of base cargoes and the higher rated cargoes which are available in order to make a reasonable return.
>
> * * * *
>
> . . . in order to maintain our service we are going to have to be able to participate in the other cargoes that do move, the other better paying cargoes that move.

One can hardly quarrel with this truism; the difficulty lies in finding support in the record for the forecasted exclusion of WL from the better paying cargoes. The Administrative Law Judge admits that the record here is insufficient to allow an accurate forecast as to what cargoes will be left to WL if the agreement is approved, and we agree with him. We do not, however, agree that the reasonable probability of substantial adverse effect on WL has been shown. That there will be some cargo lost to WL everyone seems to admit, but on how much there is wide disagreement. On balance, we conclude that WL has failed to demonstrate such a reasonable probability of harm sufficient to warrant disapproval when weighed against the benefits gained by approval of the agreement. In sum, we cannot find from this record that approval of Agreement 9939 will be discriminatory or unfair as between carriers, detrimental to the commerce of the United States or contrary to the public interest.

However, our Brother Morse, notwithstanding his arrival at this same conclusion, doubts WL's future survival in the trade and would condition his approval on "the requirement that PGL obligate itself to initiate and maintain adequate and regular service to those shippers of lumber and woodpulp now served by WL in the event WL withdraws from the trade during the existence of Agreement No. 9939." We think the imposition of any such future operational requirement ill advised. We see no difference between the disapproval of agreements because of future "speculative possibilities" [7] and the imposition of operational requirements as a condition to approval because of "doubts" as to what the future holds for a line in the trade. But more importantly perhaps, we do not see, and neither would it appear does our Brother Morse,[8] the nexus between approval of No. 9939 and the future "demise" of WL. If it should turn out that WL withdraws from the trade for reasons other than the agreement, it is hardly just to require PGL to undertake the abandoned service without regard to either PGL's operational needs and desires or the needs and desires of the shippers under the guise of "conditioning" our approval of the agreement. If, on the other hand, the reasonable likelihood arises that WL is to be forced out of the trade because of the future impact of the agreement (an event we view as entirely unlikely) then is the time to reexamine the agreement and take whatever action is required.

The Administrative Law Judge further concludes that if approved, Agreement 9939 would subject the "particular traffic involved to undue or unreasonable prejudice or disadvantage" in violation of section 16 of the Shipping Act. Presumably, this conclusion is grounded on some detriment to shippers of the traffic involved who are now using WL and would not be able to do so if the agreement is approved. This in turn is presumably predicated, at least in part, upon WL's abandonment of the trade. We say presumably because the Administrative Law Judge does not preface this conclusion with any of his reasons for it. However, we do not think on the basis of the record before us that any particular traffic will be unduly prejudiced by approval of the agreement.

There remains the issue of whether approval of the agreement would be contrary to the terms of the 1928 Treaty of Friendship, Commerce and Navigation between the United States and Norway, Article 7 of which provides in relevant part:

> All articles which are or may be legally imported from foreign countries into ports of the United States or are or may be legally exported therefrom

[7] See *Alcoa S.S. Co. Inc.* v. *Cia. Anonima Venezolana,* 7 F.M.C. 345 (1962); *West Coast Line, Inc.* v. *Grace Line, Inc.,* 3 F.M.B. 586 (1951).

[8] In his concurring opinion, Commissioner Morse says, "Whether Agreement No. 9939 is approved or disapprover, I am not convinced W-L will be unable to survive in the trade provided the existing level of 'unreserved' cargo is not materially reduced."

> in vessels of the United States may likewise be imported into those ports or exported therefrom in Norwegian vessels, *without being liable to any other* or higher duties or charges whatsoever than if such articles were imported or exported in vessels of the United States; . . . .

We conclude that our approval of the agreement does not violate the Treaty. Our obligations under the Treaty are not enlarged by the action of the Peruvian government in establishing cargo preference rules. The Treaty provisions are limited to prohibiting restrictions imposed by the signatory governments, and do not prevent this Commission from approving a commercial agreement although it may be precipitated in part by restrictions of another trading partner. WL's status in the oceanborne commerce of the United States is effected not by the Commission's action on the agreement, but by the action of the government of Peru. In any event, there is another controlling factor. While treaties and federal statutes are on equal footing under the Constitution as the supreme law of the land, the latest action expresses the controlling law. *Tag v. Rogers,* 267 F.2d 664 (C.A.D.C. 1959). The treaty with Norway was proclaimed in 1932, while Public Resolution No. 17 was enacted in 1934, and section 901(b)(1) of the Merchant Marine Act, 1936, was enacted in 1954. Thus, the latter two control and the treaty is not violated by our approval.

On the basis of the foregoing, we conclude that Agreement 9939 should be approved under section 15 of the Shipping Act, 1916. An appropriate order shall be entered.

Commissioner Clarence Morse concurring.

In concurring with the majority to approve Agreement No. 9939, I do so subject to the following comments and conditions.

It is to be noted that Agreement No. 9939 is so drawn that W-L, as a third-flag operator, cannot qualify for admission.

The aggregate tonnage carried annually in the years 1968, 1969, and 1970 ranged from 44,000 to 48,000 tons. In 1970, lumber aggregated 11,122 tons, and therefore all other cargo constituted 36,811 tons. The record does not disclose which commodities were "reserved cargo", but, bearing in mind that W-L carried nearly 90% of the lumber in 1970, it is reasonable to assume that little or no lumber was in the "reserved cargo" category. Accordingly, if we apply the 50% (the minimum estimate) for "reserved cargo" to the 36,811 ton figure, it is obvious that no more than 18,405 tons of cargo is not "reserved". This 18,405 tons of unreserved cargo which is fully accessible on a competitive basis to all three competing lines is to be compared with W-L actually carrying in 1970 11,357 tons of cargo exclusive of its lumber carrying, and it is unlikely that W-L will be able to obtain this high proportion of the unreserved cargo if Agreement No. 9939 is approved.

We are faced with the question whether the Agreement under consideration is *unjustly* discriminatory or unfair to W-L. Section 15 does not authorize us to disapprove an agreement merely because the agreement is discriminatory or unfair to an American-flag vessel or is discriminatory or unfair to a Norwegian-flag vessel. Section 15 authorizes disapproval only if the agreement is *unjustly* discriminatory or unfair. Here the *unjust* discrimination or unfairness stems immediately from the Peruvian laws and decrees—not from our approval of Agreement No. 9939. Here undoubtedly there will be some additional minor discrimination or unfairness to W-L if we approve Agreement No. 9939, but in my opinion neither the pooling of revenues nor the provision obligating PGL to assist CPV in obtaining access to U.S.-impelled cargoes nor the provisions relating to sailings constitute *unjust* discrimination or unfairness to W-L. The revenue pooling affects only CPV and PGL, not W-L. The sailings provisions of Agreement No. 9939 do affect W-L, but not in an unjust degree. They confront W-L with a more rationalized competition, but not with a substantially greater degree of competition. Heretofore W-L has had access to such "reserved" cargo which CPV itself was unable to carry. CPV is now placing additional vessels in the trade, and thus CPV will carry more "reserved" cargoes itself, so that prospectively there would be much less opportunity for W-L to gain access to any such cargo even absent Agreement No. 9939. Hence, enabling PGL to become an associate of CPV may prejudice W-L, but it does not unduly prejudice W-L. The access by CPV to U.S.-impelled cargoes affects W-L only in a minor way, for all U.S.-impelled cargoes are but 10% of the trade and, at most, W-L has had access to but half thereof.

Lumber and wood pulp. Because of the possibility that W-L may withdraw from the trade and thereby leave a void insofar as shipping services to U.S. exporters of lumber and wood pulp are concerned, I condition my approval of Agreement No. 9939 with the requirement that PGL obligate itself to initiate and maintain adequate and regular service to those shippers of lumber and wood pulp now served by W-L in the event W-L withdraws from this trade during the existence of Agreement No. 9939.

Over the years W-L has provided a needed and efficient service to this Pacific Coast export commerce of the United States. Its elimination from the trade could impair that commerce. Until the Congress or the Executive Branch adopts the principle of bilateralism as a policy, it is my view that this Commission should endeavor to make some accommodations to assure the opportunity of established third-flag vessels in our trades to survive. The majority makes no attempt toward such an accommodation. That accommodation exists, by agreement of the involved parties, in Agreements 10027, 10028, and 10029, covering the trades from Brazilian ports to U.S. Atlantic and Gulf ports, which we approved on January 30, 1973. That type of accommodation would be consistent with the philosophy of section 15.[9]

We would be "buying a pig in a poke" to accept the Peruvian decrees as a fact of life and to unconditionally approve an agreement granting to the two national-flag carriers equal access to Peruvian "reserved" (U.S. export commercial) cargo, the tonnage of which and the commodities covered determined or to be determined solely by existing or by future Peruvian decrees and actions. I would reconsider my approval if I thought that the Peruvian laws and decrees are or will be so implemented that substantially less than 50% of the aggregate cargo

[9] Agreement No. 9939, in my mind, is inextricably intertwined with Peruvian laws and decrees and is one of the means utilized to accomplish Peruvian shipping goals. But equal access to our commercial cargoes is the shipping philosophy the Congress has expressed in our many treaties of friendship, commerce, and navigation. We are not here dealing with a simple agreement between two commercial interests. We are dealing with an agreement virtually dictated by the Peruvian Government acting through CPV (See Footnote 6). It is unlawful to carry out that agreement absent our approval. When this Commission approves an agreement under section 15, it places the Government's "thumb of (approval) upon the scales." *PUC* v. *Pollak*, 343 U.S. 451, 462 (1952). Hence, when this Commission approves that agreement we are not too far removed from establishing a government-to-government agreement. Thus, the question arises whether this Commission, at its level in Government, is authorized to take action which would appear to run counter to our treaty obligations. Hence, the question arises whether this Commission, at its level in Government, has jurisdiction under section 15 to approve an agreement which departs from our treaties' shipping philosophy or, alternatively, whether that philosophy is but one of many factors, as, for example, the antitrust laws, which we must take into consideration under section 15 in reaching a decision to approve or disapprove. *Sacramento-Yolo Port District* v. *PCEC*, 15 F.M.C. 15, DKT 70-18 (1971). *Isbrandtsen Co.* v. *U.S.*, 211 F.2d 51, 57 (CA DC 1954).

is classed as "unreserved" cargo accessible to W-L and the other two carriers. The concept of full bilateralism by the unilateral action of one of two trading partners to the exclusion of third-flag operators is one which I am not prepared to accept as a basis for approval of section 15 agreements. Our concept of equal access to commercial cargoes should compel some reasonable accommodation between the desires of countries striving to build up their national merchant fleets and the rights of U.S.-flag and third-flag operators.

We must grant the same even-handed justice to W-L which we would grant to an American-flag line or to a Peruvian-flag line. We must do this not only because of the directives of the Shipping Act, 1916, but also because of our Treaty with Norway. In actions taken under section 15, we need not treat W-L any more favorably than we would treat an American-flag operator suffering under the same impediments which apply in this trade to W-L, i.e., the inability to assist CPV in gaining access to carry U.S. Government-controlled cargo. Hence, I ask myself, "Would I approve Agreement No. 9939 if the opponent were an American-flag operator subject to the same impediments which are applicable to W-L?" My answer to that question, for the reasons herein stated, is "Yes, subject to the condition and the reservation herein mentioned."

It must always be remembered that the major impediments to W-L are the increased number of Peruvian-flag vessels in the trade and the Peruvian laws and decrees—not Agreement No. 9939. Whether Agreement No. 9939 is approved or disapproved, I am not convinced W-L will be unable to survive in the trade provided the existing level of "unreserved" cargo is not materially reduced. It is urged by PGL that if we approve the Agreement the Peruvian laws and decrees will be enforced in a manner not seriously impairing the opportunities of W-L. That remains to be seen. We have little control over the increase in the number of Peruvian-flag vessels in the trade. Likewise, the Peruvian laws and decrees are actions taken by a sovereign in its self interest. But we do have available to us section 26, Shipping Act, 1916 (46 U.S.C. 825), which could be utilized on behalf of PGL, and we also have available section 19, Merchant Marine Act, 1920 (46 U.S.C. 876) which enables us to make rules and regulations to "adjust or meet general or special conditions unfavorable to shipping in the foreign trade . . . and which arise out of or result from foreign laws, rules, or regulations . . ." The options available to us are to approve the Agreement (with or without conditions or modifications) or to disapprove the Agreement and resort to sections 19 or 26. I have opted to approve the Agreement, but with the caveat that Peruvian laws and decrees be not implemented in a manner which burden W-L beyond that degree which in practice presently exists. We, by our actions, must not unjustly worsen the position of W-L, and this with reservations I conclude we do not do.

Attached as an Appendix to the Initial Decision (Apr. 5, 1972) is a listing of approved pooling agreements. With the exception of Agreements 9020, 9233, 9847, and 9848, the Agreements were not protested. A few of these agreements are true bilateral agreements—others are multi-party agreements including third-flag lines. In my opinion, the approval of a pure bilateral agreement, absent any protest, does not establish, ipso facto, Commission policy to approve all such agreements. Such agreement, had protest been filed, would have proceeded through a contested hearing in which facts and circumstances may have been developed, and which were not developed where no protest was filed, compelling disapproval under section 15. Hence, I find policy is not necessarily established by an approval, absent any protest.

If my condition relative to W-L is not adopted I would disapprove Agreement No. 9939.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-71

AGREEMENT NO. 9932—EQUAL ACCESS
TO GOVERNMENT-CONTROLLED CARGO AND
INTERIM COOPERATIVE WORKING ARRANGEMENT

AGREEMENT NO. 9939—POOLING, SAILING AND EQUAL ACCESS
TO GOVERNMENT-CONTROLLED CARGO AGREEMENT

ORDER

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

It is ordered, That Agreement No. 9939 is hereby modified to add to Article 8 a requirement that copies of all quarterly provisional and final pool statements, pursuant to Article 8 of the agreement, be furnished the Commission; also that a new Article 18 be included to read as follows:

> *Further Agreement of the Parties*—Any further agreement or understanding of the parties, pursuant to or giving effect to Articles 5, 11 and 17 shall not be effective or implemented prior to the time that an appropriate amendment with respect thereto has been filed with and approved by the Federal Maritime Commission pursuant to Section 15 of the Shipping Act, 1916.

It is further ordered, That Agreement No. 9939, as so modified, is hereby approved under section 15 of the Shipping Act, 1916.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 455

MAGNOLIA FORWARDING COMPANY

v.

DELTA STEAMSHIP LINES, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

April 10, 1973

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on April 10, 1973.

It is ordered, That applicant is authorized to waive collection of $2,513.00 of the charges previously assessed Magnolia Forwarding Company.

It is further ordered, That applicant shall 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 455 that effective February 19, 1973, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 19, 1973 through February 26, 1973, the rate on 'Boats, viz. Aluminum' is $32.50 W/M, subject to all applicable rules, regulations, terms and conditions of said rates and this tariff."

It is further ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 455

MAGNOLIA FORWARDING COMPANY

v.

DELTA STEAMSHIP LINES, INC.

Application to waive a portion of freight charges granted.

INITIAL DECISION OF HERBERT K. GREER, ADMINISTRATIVE LAW JUDGE[1]

Delta Steamship Lines, Inc., a common carrier by water in the foreign commerce of the United States, has applied for permission to waive a portion of the freight charges on a shipment of aluminum boats for Magnolia Forwarding Company from New Orleans, Louisiana, to Puerto Cortez, Honduras, pursuant to a bill of lading dated February 19, 1973. The shipment weighed 2,868 pounds and measured 2,365.18 cubic feet.

Prior to the shipment, applicant's tariff on file with the Commission provided no specific rate for boats and the Cargo N.O.S. rate of $75.00 W/M was applicable. On or about February 1, 1973, Magnolia Freight Forwarding Company offered applicant 16 aluminum boats destined for Puerto Cortez but stated they were unable to pay the $75.00 W/M rate which would result in an exhorbitant charge. Applicant, realizing that the rate applied to the commodity involved would be excessive, agreed to carry the boats at a rate of $32.50 W/M. Applicant intended to file this rate with the Commission but through inadvertence it failed to do so, and the applicable rate on file at the time of the shipment was $75.00 W/M. When applicant became aware of its oversight, it promptly filed 3rd revised page 57, effective February 26, 1973, to its tariff which specified:

[1] This decision became the decision of the Commission April 10, 1973.

Boats, viz:		
Aluminum	W/M	32.50

The difference between the freight collectible at the rate on file at the time of the shipment and the freight which would be collected at the rate applicant intended to file is $2,513.00, the sum sought to be waived.

The facts demonstrate a situation within the purview of Public Law 90-298 which authorizes the Commission, for good cause shown, to waive collection of a portion of the freight charges when there is an inadvertent failure on the part of a carrier to file a new tariff. The application was filed within 180 days of the days of the date of the shipment and no other shipments of the same or a similar commodity moved on applicant's vessels during approximately the same time as the shipment here involved. No other proceeding involving the same rate situation is now pending.

Good cause appearing, and applicant having complied with the provisions of Public Law 90-298, permission to waive collection of $2,513.00 of the freight charges on the shipment above described is granted. Applicant shall publish notice in its tariff as required by the statute. The waiver of the charges here authorized shall be effectuated within 30 days of the service of the notice and within 5 days thereafter applicant shall notify the Commission of the date and manner of effectuating the waiver.

(S) HERBERT K. GREER
Administrative Law Judge

Washington, D.C.
MARCH 21, 1973

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-6

IN THE MATTER OF AGREEMENT NO. T-2719

Louis Dreyfus Corporation determined not to be an "other person" subject to the Shipping Act, 1916, within the meaning of section 1 of that Act. Accordingly, Agreement No. T-2719 found not to be agreement between two persons subject to the Shipping Act, 1916, which must be filed for approval under section 15 of that Act.

William E. Stapp, Clifford W. Youngblood and *Max Hendrick III* for Port of Houston Authority.

John H. Perkins, Jr. for Louis Dreyfus Corporation.

Judah Best for Cook Industries, Inc.

Robert Eikel for West Gulf Maritime Association.

Donald J. Brunner and *Patricia E. Byrne* as Hearing Counsel.

REPORT

April 20, 1973

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

By Order served February 26, 1973, the Port of Houston Authority (PHA) and the Louis Dreyfus Corporation (Dreyfus) were directed to show cause why (1) Dreyfus should not be found to be an "other person subject to the Act", as defined in section 1 of the Shipping Act, 1916, and (2) Agreement No. T-2719 between PHA and Dreyfus should not be found subject to section 15 of the Act. The Commission's Order to Show Cause limited the proceeding to the submission of affidavits and memoranda of law and replies thereto and, further, the procedure to be followed by any party requesting an evidentiary hearing.

Respondents Dreyfus and PHA have now filed memoranda of law and affidavits of fact to which Cook Industries, Inc. (Cook) and Hearing Counsel have replied. Cook, in accordance with the procedure set forth in the Commission's Order, has also submitted a request for an evidentiary hearing,[1] to which PHA and Dreyfus have filed responses in opposition.[2]

FACTS

This proceeding was prompted by the filing of an agreement, subsequently designated Agreement T-2719, between Dreyfus and PHA, whereby PHA will lease the grain elevator facilities at Houston, Texas, to Dreyfus for a period of ten years.

The lease provides, *inter alia,* that Dreyfus will operate these facilities as a grain elevator in connection with shipments to and from Houston, will receive prior right to use the berths and breathing facilities in conjunction therewith, will not be required to hire PHA employees, or to assume any employee agreement that pre-existed the lease, and will establish rules and regulations governing the operation of the grain elevator and the use of the berths and berthing facilities.

Finally, the Agreement is subject to a prior lease of a portion of the facilities to the I. S. Joseph Company (Joseph), which is engaged in pelletizing ". . . a number of different soft or powdery substances or ingredients" and in exporting the pelletized product. Presently, PHA loads this pelletized product into vessels, including common carriers, calling at the elevator facility.

Dreyfus has heretofore filed a proposed tariff provision which provides, *inter alia,* that:

> Common carriers by water, as defined by the Shipping Act of 1916, shall not be accepted for loading at the elevator.

Mr. Burton M. Joseph, President of the I. S. Joseph Company, has filed an affidavit on behalf of his company advising that "it would be bound by the provision in the proposed

[1] West Gulf Maritime Association (WGMA) has filed a document in support of Cook's request for evidentiary hearing and has, alternatively, requested permission to intervene herein. While the petition to intervene was not timely filed we will nevertheless grant it. Accordingly, any discussion directed to Cook's request for evidentiary hearing will apply equally to WGMA.

[2] To the extent Dreyfus' "Response to Request for Evidentiary Hearing" improperly constitutes a reply to the formal Replies filed by Cook and Hearing Counsel, it is stricken from the record and not subject to consideration by the Commission in its disposition of this proceeding.

Dreyfus tariff that common carriers are excluded from the elevator facility" and that, accordingly, it "will *not* use common carriers for shipping its products from this elevator facility" once the lease between Dreyfus and PHA becomes effective.

DISCUSSION AND CONCLUSION

Section 15 of the Shipping Act, 1916, requires, in pertinent part, that:

> Every common carrier by water, or other person subject to . . . [the Act] . . . shall file immediately with the Commission a true copy . . . of every agreement with another such carrier or other person subject to this Act . . . to which it may be a party . . . .

An "other person" subject to the Act is defined in section 1 thereof as being:

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

The Port of Houston Authority is clearly such an "other person". It operates terminal facilities at Houston, including at the present the grain elevator in question here, and as a result furnishes wharfage and other services in connection with common carriers for which it has terminal tariffs on file with this Commission.

Since there is no reason to believe that Dreyfus is a "common carrier by water" the basic issue to be resolved in this proceeding remains whether Dreyfus is an "other person" within the meaning of the Act. If Dreyfus is in fact such an "other person", then Agreement No. T-2719 between it and PHA, is one between two "persons" subject to the Act which must be filed and approved by the Commission pursuant to section 15 prior to its effectuation. Thus, the jurisdictional issue presented here is very narrow and turns entirely on Dreyfus' status under the Act.[3]

[3] In making this determination we have rejected as being wholly without merit Dreyfus' alternative contention that even were it found to be a "person" subject to the Act, the Commission nevertheless lacks jurisdiction over the agreement under section 15 because the agreement is a "simple landlord tenant lease" and does not contain and provisions which would require Dreyfus to act in a restrictive, discriminatory or anticompetitive fashion. In cases too numerous to mention, the Commission has found arrangements of the type reflected in the lease between PHA and Dreyfus to be subject to the requirements of section 15.

Section 15 requires, *inter alia*, filing of the agreements which provide for:

[Footnote continued]

On this point we find the Commission's decision in *New Orleans Steamship Association* v. *Bunge Corporation,* 8 F.M.C. 687 (1965) to be controlling. In that case the Commission held that an operator of a terminal grain elevator who had filed a tariff indicating that common carriers would not be served at that facility was, as a result, no longer subject to the Act, because it was not furnishing services "in connection with a common carrier by water", and therefore was not required to file certain agreements for Commission approval. The situation here closely parallels the one existing in *Bunge,* and the distinctions that might be drawn between the two are not, we believe, material.

The determinative factor here is that neither Dreyfus, nor Joseph, the holder of a lease to which Agreement T-2719 is made subject, intends to serve common carriers by water at the grain elevator facilities under consideration herein. Under the proposed tariff filed by Dreyfus, to which Josephs has stipulated it would be bound, common carriers "shall not be accepted for loading at the elevator". Since this is the identical wording of the exclusionary tariff provision which was found to oust this Commission of jurisdiction in *Bunge,* and since we see no reason to distinguish the two cases on other grounds, we conclude that Dreyfus is *not* an "other person" subject to the Act within the meaning of sections 1 and 15 thereof. As we have heretofore indicated, this determination alone is disposi-

[3] [Continued]

> . . . fixing or regulating transportation rates or fares: giving or receiving special rates, accommodations or other special privileges or advantages: . . . or in any manner providing for an exclusive, preferential or cooperative working arrangement.

Agreement T-2719 falls squarely within the three above listed catagories determinative of section 15 agreements.

As Hearing Counsel have so succinctly pointed out, since the agreement at issue provides for (1) an *exclusive arrangement* whereby only Dreyfus will occupy and operate the grain elevator at Houston, and (2) a *preferential* arrangement whereby Dreyfus is given prior right to use the berthing facilities at such elevator, it is clearly one providing for "special accommodations or privileges" and for an "exclusive" or "preferential working arrangement" within the meaning of section 15. Moreover, since PHA under the Agreement agrees not to "increase dockage fees at the Leased Premises above its published dockage fee applicable at all public wharf facilities" at the Port, Agreement T-2719 would also appear on its face to provide for the "fixing or regulating of transportation rates" as used in that section. In addition, the Commission has by interpretative rule (46 CFR 530.6(c)) required the filing of agreements between persons subject to the Act which, *inter alia,* deviate from established tariff charges through fixed rental in lieu of tariff rates. Since the rentals provided in the lease here are fixed and are in lieu of the otherwise applicable terminal tariff rates, Agreement T-2719 would under the Commission's own clear and unambiguous ruling be required to be submitted for approval, given two persons subject to the Act.

Thus, contrary to Dreyfus' assertions, the Commission's jurisdiction over the *subject matter of the* Agreement at issue here is supported by any one of a number of reasons.

tive of the jurisdictional issue before us. Accordingly, Agreement T-2719 is found not to be one subject to the provisions of section 15 which must be submitted to the Commission for approval.

The fact that Agreement T-2719 does not itself preclude Dreyfus from serving common carriers at the leased facilities does not sway us from this view. There is nothing in the Shipping Act, 1916, or, specifically, section 15 thereof, which militates against our going outside the provisions of an agreement to determine the status of the parties thereto. Indeed, in *A. P. St. Philip, Inc.* v. *Atlantic Land & Improvement Co.,* 13 F.M.C. 166 (1969), the Commission, in reviewing a terminal lease agreement, found it "necessary to go beyond the specific provisions of the lease" to ascertain whether Atlantic, one of the parties thereto, was a "person" subject to the Shipping Act. Although the lease under consideration in *A. P. St. Philip, supra,* indicated on its face that Atlantic was not a furnisher of terminal facilities within the meaning of section 1 of the Act and therefore not an "other person" subject to the Act, the Commission, relying on "Atlantic's own admissions and its actual activities" found that Atlantic was in fact such an "other person".

Dreyfus here has posted an appropriate exclusionary tariff provision and otherwise made it clear that common carriers by water will not be served at the lease facilities. The Commission simply cannot ignore this tariff nor the affidavits which have been submitted, indicating that common carriers will not be served at the lease premises. These matters are determinative of Dreyfus' status under the Act upon which our jurisdiction is dependent, and, therefore, must be considered by the Commission along with the Agreement itself. Certainly, if the Commission can, as it did in *A. P. St. Philip, supra,* go outside the provisions of an agreement to find a party therto a "person" subject to the Act, the obverse also applies and the Commission should consider matters extrinsic to an agreement, even if they should serve to oust it of jurisdiction.

While it may conceivably be argued that the Commission cannot take into consideration in this proceeding the proposed tariff provision that no common carriers will be served at the subject grain elevator because Dreyfus presently lacks the control over the lease facility necessary to issue such a tariff, such an argument clearly evades the issue. The fact is that

Dreyfus and Joseph, which has elected to be governed by Dreyfus' tariff provision, have served notice that common carriers will *not* be accommodated at the grain elevator. The obvious intentions of these parties in this regard can not be disregarded. To do so and require the Agreement under consideration to be subjected to a hearing solely because it does not, on its face, preclude the serving of common carriers at the leased facilities is not only to overlook the realities of the situation but also to impose on the Commission the performance of a meaningless act. Since Dreyfus and Joseph have already formally advised that they do not intend to load common carriers at the elevator facility, we fail to see why the parties to this proceeding and the Commission should be subjected to the lengthy and costly hearing,[4] which the approval of Agreement T-2719 might entail, only to have Dreyfus *subsequently* oust the Commission of section 15 jurisdiction through the filing of an appropriate tariff. In this era of enlightened regulation, we can conceive of no purpose to be served by such an exercise.

While not conceding that the Dreyfus tariff or the Joseph affidavit are relevant to the Commission's consideration of Agreement T-2719, Cook has taken the position in this proceeding that even if these matters are considered, they are not sufficient to support the conclusion that the terminal facilities will not be open to common carriers by water. In support of its argument that the matters indicating that Dreyfus is *not* an "other person" subject to the Act are inconclusive, Cook contends that the jurisdictional question presented herein raises "disputed material issues of fact" which can only be resolved in a full evidentiary hearing. Accordingly, we have been requested to consolidate this proceeding for hearing with the investigation now under way in companion Docket No. 73-7.[5] Specifically, the disputed "material issues of fact" which Cook maintains can only be resolved through an evidentiary hearing

[4] This is not to mention the possible needless hardship and financial detriment which a delay in reaching the necessary conclusion in this proceeding occasioned by any unnecessary evidentiary hearing might inflict on the parties o the Agreement.

[5] The Commission instituted Docket No. 73-7 to determine:

1. Whether Agreement T-2719, if found subject to the requirements of section 15, should be approved, disapproved, or modified pursuant to that section;

2. Whether the implementation of Agreement T-2719 will result in any practice which will subject any person, locality or description of traffic to undue or unreasonable prejudice or disadvantage in violation of section 16 of the Shipping Act, 1916, and/or;

3. Whether the implementation of Agreement T-2719 will result in any practice which is unjust or unreasonable in violation of section 17 of the Shipping Act, 1916.

are whether, under the Agreement, the subject terminal facilities (1) are open to use by common carriers by water, or (2) will be used by common carriers by water. In support of the proposition that the terminal facilities are open to common carriers and will be used by such carriers, Cook states that it intends to prove that (1) PHA's residual rights under Agreement T-2719 to use the berths will keep the subject terminal facilities open to common carriers; (2) the Joseph Lease "will require" or "will in fact result in" use of the elevator by common carriers; (3) the rights of PHA or Dreyfus under the subject Agreement "will inevitably result in" use by common carriers; and (4) there is sufficient likelihood that Dreyfus itself will resort to common carriers, notwithstanding its own tariff.

We cannot agree that an evidentary hearing is necessary to resolve the narrow jurisdictional issue presented in this proceeding. We have carefully reviewed the basis of Cook's request for evidentiary hearing, and we find that the matters which it would allegedly develop at a hearing are either already established to the contrary, irrelevant to the present inquiry [6] or wholly speculative in nature and not "facts" which could be adduced at a hearing.

The matters upon which Cook urges the need for a hearing are for the most part not "facts" at all, but rather challenges directed to the intentions of Dreyfus, as expressed in its proposed tariff provision, and to the veracity of the Joseph affidavit. Thus, Cook, in questioning the bona fides of the parties to Agreement T-2719, is in effect presenting facts not yet in existence, and then disputing them. In this regard, we agree with Dreyfus that "[n]o issue of fact is presented by Cook's bald assertion that Dreyfus does not intend to do what it has bound itself to do." We find, therefore, that Cook has identified no material issue of fact upon which a hearing is necessary. To direct such a hearing then would be wholly unjustified under the circumstances. Accordingly, we remain of the opinion that the facts are such that the Commission

[6] Thus, one of the "material facts" which Cook "intends to prove" if a hearing is held is that PHA's right to use the berths adjacent to the elevator will keep the subject terminal facilities open to common carriers. An examination of Agreement T-2719, and the map annexed thereto and made a part thereof, clearly indicates that the berths are *not* part of the leased property. Since the facility in question is the grain elevator and the berths referred to by Cook are not part of those leased premises, no hearing is necessary to establish that fact, and any suggestion that the leased facilities *will* be open to common carriers is purely speculative.

can, as it has, resolve the jurisdictional question presented as a matter of law.[7]

We might point out, however, that in finding that Dreyfus is *not* an "other person" subject to the Act, we have done so with the understanding that Dreyfus will in fact place in effect its proposed tariff provision excluding common carriers from the lease facilities and abide thereby. If it should happen, however, that the tariff provision upon which our decision herein is primarily based, is cancelled or common carriers are served, either directly or indirectly,[8] at the lease facility in question, notwithstanding that tariff provision, then the Commission will take appropriate action as it does in any case involving an unapproved section 15 agreement.

An appropriate order will be entered.

Chairman Helen Delich Bentley dissents.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

Chairman Helen Delich Bentley, dissenting:

The ultimate result reached by the majority in this proceeding, i.e., that Agreement T-2719 need not be filed with the Commission for approval pursuant to section 15, is based on the singular finding that Dreyfus, one of the parties to the terminal lease agreement, is not an "other person" subject to the Act within the meanings of sections 1 and 15 thereof. While it may well be that in the final analysis Dreyfus is in fact not an "other person", I cannot agree that this determination can be made on the basis of the facts and information presently before the Commission.

I cannot agree with the majority decision as I believe it is based on an unduly strict and narrow interpretation and application of section 15. The logic of the majority appears to be that if a lessee of a terminal facility announces in a *proposed* tariff that common carriers will not be served at the facility once the lease agreement is executed, this is, without

[7] In view of our findings and conclusion herein, Cook's request for an evidentiary hearing and its request for oral argument are both denied.

[8] This should serve to allay the fears implicit in Hearing Counsel's support of Cook's request for hearing that common carriers who are not served directly at the grain elevator may be served indirectly elsewhere at the Port.

adducing any further probative evidence as to the lessee's status, sufficient to remove such person from the regulatory ambit of section 15. With all deference to my fellow Commissioners, there are, in my opinion, sufficient material issues of fact in this proceeding regarding Dreyfus' status under the Act to necessitate a full evidentiary hearing.

It has long been the established policy of this country that full and open competition is to be encouraged and that concerted action by members of all segments of our business community is to be avoided, but if permitted, strictly and strongly regulated. In enacting section 15 and thereby permitting certain forms of concerted activity which would otherwise be unlawful under the antitrust laws, Congress confided in this agency extensive powers of approval and control as the condition precedent to the carry out of any of such concerted activities covered by the section's rather all inclusive language.

While section 15 admittedly had for its primary purpose the recognition of anticompetitive combinations of common carriers in our waterborne foreign commerce along lines which would eliminate the evils flowing therefrom, the legislative history of the Shipping Act makes it clear that Congress was also seriously concerned with terminal lease agreements. Indeed one of the specific recommendations of the so-called "Alexander Committee", which recommendations were generally followed in framing the Shipping Act, 1916, was that terminal owners "be required to make their terminal facilities available to water carriers on equal terms. . . ."

Section 15, therefore, in investing terminal leases (and this would particularly apply to those involving *public* facilities) with a strong public interest clearly imposed on us the duty of insuring that those who are permitted to enter into such agreements, and thereby engage in activities which would otherwise be unlawful, satisfy its statutory standards at the time that they file as well as continuously thereafter. *In Re: Pacific Coast European Conference,* 7 F.M.C. 27, 35 (1961). As the court explained in *Isbrandtsen Co. Inc.* v. *United States,* 211 F.2d 51 (D.C. Cir. 1954):

> The condition upon which such authority [under section 15] is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute. (211 F.2d at page 57)

To now hold, as the majority has done, that a party to a terminal lease agreement can avoid the Commission's scrutiny over such leases by the single simple expedient of proposing a so-called "exclusionary tariff clause" is to emasculate one of the very powers which Congress intended the Commission to have in order to more properly supervise the shipping industry. I submit that more is required to oust this agency of jurisdiction over an agreement which on its face meets the applicability criteria of section 15. To rule as the majority has done here is to provide a vehicle for parties to agreements otherwise subject to section 15 to manipulate the Commission's authority under that section. To the extent that it will allow for such manipulation, I am seriously concerned with the breadth of the majority's action.

As I interpret today's action by the majority, it means that mere representations by a party will be conclusive as to that party's status under the Act regardless of the fact that such status is not supported by the clear and uncontested language of the agreement in question or otherwise established on the record. The Commission has afforded Dreyfus in this proceeding ample opportunity to supply whatever facts and/or information were necessary to support its position regarding its non-person status under the Act. Rather than responding in particulars, Dreyfus has been content to rely on its exclusionary tariff provision and the Joseph affidavit, which states that Joseph will not use common carriers at the grain elevator facility. While Joseph in that same affidavit also indicates that it "will, in all likelihood, continue to make some use of common carriers at Houston . . .", "intend[s] to load such vessels at other facilities in the Port," absolutely no explanation is offered as to how this will be accomplished. As noted by the Commission's own Hearing Counsel, "[w]ithout this factual information, the Commission cannot determine whether Dreyfus will be obligated to serve common carriers by water because its lease is subject to the Joseph lease."

Clearly, if Joseph intends to service common carriers by loading grain from the Dreyfus elevator into such carriers elsewhere at the Port, then such action will reflect on Dreyfus' status under the Act. Confronted with this possibility, the majority summarily dismisses it with the threat of future "appropriate' action" if the situation turns out to be different than what it "understands" it to be. Thus, rather than investigating the matter thoroughly before denying jurisdiction, the majority is content to adopt a "wait-and-see" attitude and indulge in some "Monday morning quarterbacking". Somehow I don't believe that this regulation-in-retrospect approach is what Congress contemplated when it enacted section 15 and vested its administration in this agency. The mandates of section 15 are not to be taken so lightly.

In conclusion, therefore, I must reiterate that while I do not necessarily disagree with the conclusion reached by the majority, I do disagree with the means used to achieve that result. My opinion is that there exists in this proceeding material issues of fact, as yet unresolved, which require a full evidenitary hearing for their ultimate disposition. Absent the information that this hearing would elicit, especially the effect of Joseph's operations on Dreyfus' status under the Act, the Commission cannot make the necessary findings and determinations in this proceeding.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-6

IN THE MATTER OF AGREEMENT NO. T-2719

ORDER

This proceeding having been initiated by the Federal Maritime Commission and the Commission having this day made and entered a report stating its findings and conclusions herein, which report is made a part hereof by reference,

It is ordered, That this proceeding be and hereby is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

SPECIAL DOCKET NO. 454

COLORADO BEVERAGE CO., INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

May 8, 1973

NOTICE OF ADOPTION OF INITIAL DECISION

No exception having been taken to the initial decision in this proceeding, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on May 8, 1973.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 454

COLORADO BEVERAGE CO., INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

May 8, 1973

Application to waive a portion of freight charges granted.

INITIAL DECISION OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE [1]

This application filed February 26, 1973, by respondent Lykes Bros. Steamship Co., Inc., asks permission to refund a portion of the ocean freight charges on 2,925 cases of rosé wine, listed on three bills of lading, shipped in three forty-foot containers (975 cases in a container), from Bilbao, Spain, via Bremerhaven, Germany, to Houston, Texas, on August 31, 1972. From Houston the wine was transported by rail piggyback to the complainant, Colorado Beverage Co., at Denver, Colorado. The charges for inland transportation are not in issue.

The applicable rate on wine when the three shipments moved was on the weight basis of $70.15 per ton of 1,000 kilos. But, this rate was subject to rule 18.2C of the tariff, which provided that the minimum ocean freight per container was $27.00 per cubic meter based on the inside measurement of the container in the case of transshipped cargo (as distinguished from direct call cargo where the similar container minimum was $21 per cubic meter). The cargo in issue herein was precarried by the SS *Cometa* from Bilbao to Bremerhaven, and there transshipped onto the SS *Ashley Lykes*.

[1] This decision became the decision of the Commission May 8, 1973.

The three containers were furnished by Lykes Bros. Two of the containers apparently each measured about 67.3 cubic meters, and the third container measured about 66.9 cubic meters, all being inside measurements. The bills of lading indicate freight charges, on the basis of rule 18.2C, respectively, of $1,817.10, plus 5.5 percent currency surcharge of $99.94, or a total of $1,917.04 for each of two of the containers; and $1,806.30 plus $99.35, or a total of $1,905.65 for the third container. The total charges for the three containers based on the bill of lading figures is $5,739.73. The application, however, states that the aggregate freight charges actually collected were $5,702.70.

The consignor of the wine was Hiram Walker Europa, S.A. The consignee of the wine is the complainant. At the time of the rate quotation, the consignee-complainant was not informed of the existence of rule 18.2C above and of the consequent minimum container charge in the tariff. Complainant based its costs and sales prices for the wine erroneously on the rate of $70.15 per 1,000 kilos.

Since the complainant's shipments moved, the rate on wine has been reduced, in that there became effective on December 11, 1972, a lump sum minimum of $1,450 per container when the wine is shipped in carrier supplied forty-foot long containers. This new minimum applies to the same rate of $70.15 per 1,000 kilos.

The application seeks a refund based on the new $1,450 container minimum, which makes charges of $4,350 on three forty-foot containers of wine. The refund sought is $1,352.70, the difference between $5,702.70 and $4,350.

This is not an instance of an inadvertent error in the tariff, but it is a situation where the tariff has been changed after the shipments moved. The present application is not the type provided for under section 18(a)(3) of the Shipping Act, 1916. Carriers must charge their lawfully published rates.

Accordingly, the application for permission to refund a portion of the ocean freight charges is denied.

(S) CHARLES E. MORGAN
Administrative Law Judge

Washington, D. C.
APRIL 12, 1973

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-9

ROSS PRODUCTS, A DIVISION OF NMS INDUSTRIES, INC. AND TAUB, HUMMEL & SCHNALL, INC.—POSSIBLE VIOLATIONS OF SECTION 16, FIRST PARAGRAPH, SHIPPING ACT, 1916

ADOPTION OF INITIAL DECISION

May 30, 1973

This proceeding is before us on exceptions to the Initial Decision of Administrative Law Judge John Marshall, served October 16, 1972, in which the Administrative Law Judge concluded that the record did not demonstrate that the practice of Taub, Hummel & Schnall, Inc. (Taub) of showing indifference to apparent discrepancies of descriptions as between shipping documents was of such a degree to constitute a violation of section 16 First of the Shipping Act, 1916, 46 U.S.C. 815 (the Act). Further, the Administrative Law Judge found that the record did reveal that Ross Products (Ross), as a consignee, did violate section 16 First of the Act, indirectly, by knowingly and willfully consenting to the misdescription by the foreign shippers of various commodities on the bills of lading in order to obtain transportation by water of those articles at rates less than those which would otherwise be applicable.

Hearing Counsel excepted to the Initial Decision, while Taub supported the Administrative Law Judge's decision. Ross did not file an exception to the Initial Decision.

The exceptions fall into three distinct categories. The first is a disagreement with the conclusion of the Administrative Law Judge that there is no evidence of record to substantiate that Taub (being the expert) was not in possession of sufficient facts that a misclassification of cargo may have resulted in an improper assessment of freight rates.

The second relates to the standard of duty imposed on Taub. Hearing Counsel contend that Taub, who holds itself out to be qualified to render valuable service to an importer, would have the working knowledge of Customs' tariff schedules and definitions to conclude that the commodities in question should not have been classified as "toys".

The third is directed at Taub's assertion that it is a large corporation with many clerks who simply do not compare information on various documents which were handled by them. Hearing Counsel argue not only is the case law clear that a corporation (such as Taub) is not exculpated because the action which resulted in a violation of law was performed by its employees, but also that the record reflects no evidence presented by Taub that it is a large corporation with many clerks or that more than one such clerk prepared and/or filed documents on behalf of Ross by "simply copying" information from one document to another without knowledge as to the documents' contents.

We find that the exceptions of Hearing Counsel are essentially a reargument of contentions which were exhaustively briefed and considered by the Administrative Law Judge in his Initial Decision. Upon careful consideration of the record, and the exceptions, we conclude that the Administrative Law Judge's factual findings and his conclusions with respect thereto were well supported and correct. Accordingly, we hereby adopt the Initial Decision as our own and make it a part hereof.

Therefore, it is ordered, That this proceeding, as to Taub, will be discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

No. 71-9

Ross Products, A Division of NMS Industries, Inc. and Taub, Hummel & Schnall, Inc.—Possible Violations of Section 16, Opening Paragraph, Shipping Act, 1916

Ross Products found to have violated section 16, opening paragraph, of the Shipping Act, 1916. Taub, Hummel & Schnall, Inc., not so found.

Seymour Kligler and *David R. Kay for respondent* NMS Industries, Inc.

Albert Adams for respondent Taub, Hummel & Schnall, Inc.

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

Initial Decision of John Marshall, Administrative Law Judge[1]

By Notice of Investigation and Hearing, served January 22, 1971, the Commission initiated this proceeding pursuant to sections 16 and 22 of the Shipping Act, 1916 (46 USC 815, 821), to determine whether Ross Products, a division of NMS Industries, Inc., and/or Taub, Hummel & Schnall, Inc., violated section 16, opening paragraph, of the Shipping Act, 1916 (the Act), by obtaining transportation by water for shipments of mirrors, immersion heaters, photo albums, glass animals, window chimes, and grass beach mats, at less than the applicable rates by misclassifying the shipments as toys.

The Facts

1. Ross Products (Ross), an importing firm located in New York City, was the consignee of the nine shipments here in-

[1] This decision became the decision of the Commission May 30, 1973.

volved. NMS Industries, Inc. (NMS), is a corporation of which Ross is a division. Taub, Hummel & Schnall, Inc. (Taub), is a customhouse broker and independent ocean freight forwarder (FMC License No. 143), who entered and endeavored to clear these shipments with the Bureau of Customs (Customs).

2. The bills of lading, all of which were within the period April through October 1969, and all of which described the contents of the nine shipments involved in the Commission's Order of Investigation and Hearing as "toys," were prepared in Japan by either Kansai Glass Industries Co., Ltd. of Osaka, Japan, or Far East Trading Corp. of Osaka, Japan, and/or their foreign freight forwarders Rengo Tsuun Co., Ltd. of Kobe, Japan, and Daido Soko Unyu K.K. of Kobe, Japan. As all of these parties are domiciled in Japan, they are, of course, outside the direct jurisdiction of the United States.

3. The Consumption Entry or C.E. and the Transportation Entry and Manifest of Goods Subject to Customs Inspection and Permit, otherwise known as the I.T., are the documents Customs uses for inspection. The C.E. is evidence of payment of the duty and is therefore required by Customs for release of the mechandise. The I.T. is a description of the merchandise and a statement as to the quantity in the shipment.

4. Taub prepared and filed the C.E. with Customs from information received from Ross. All of the C.E.s described the shipments as specific commodities and not as toys. The carrier prepared and filed the I.T.s with Customs from information contained in the bills of lading. All of the I.T.s with Customs form information contained in the bills of lading. All of the I.T.s therefore described the shipments as toys and not as specific commodities.

5. Customs does not inspect the cargo until the I.T. is received. Customs verifies the bill of lading description as conforming to the description in the C.E. when the billing covering payment of the duty is given back to the broker. However, Customs' examination of a shipment revealed that it consisted of specific commodities whereas the I.T.s described the merchandise collectively as toys. While the record is not conclusive as to the exact amount, it is clear that the proper rates applicable to specific commodities contained in the nine shipments totaled between $1,800 and $2,000 more than for toys.

DISCUSSION

Preliminarily, reference should be given to respondents' joint motion seeking the dismissal (actually discontinuance) of this investigation on the grounds that the Commission lacks authority to investigate violations of section 16 by consignees and/or customhouse brokers. Although the motion, which was coupled with a contingent request for leave to appeal to the Commission, was denied in its entirety by ruling of the Examiner prior to the hearing herein, and has not since been renewed, on brief or otherwise, the substance and arguments remain of some relevance.

The opening paragraph of section 16 provides as follows:

> That it shall be unlawful for any shipper, consignor, *consignee*, forwarder, *broker*, or other person, or any officer, agent, or employee thereof, knowingly and wilfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable. (Emphasis added.)

Section 22 provides:

> That any person may file with the board a sworn complaint setting forth any violation of this Act by a *common carrier by water, or other person subject to this Act*, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, or full reparation to the complainant for the injury caused by such violation.
>
> The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act. (Emphasis added.)

By definition contained in section 1 it is provided that:

> The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.
>
> The term "other person subject to this act" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

Respondents reason that since the shipments were consigned to Ross and since Taub was the customhouse broker, they are encompassed within the section 16 reference to "consignee" and "broker," respectively. It is then contended that section 22, in setting forth the Commission's jurisdiction in regard to investigations of alleged violations of the Act, permits a complaint to be filed only against "a common carrier by water" or "other person subject to this Act." As neither consignees or brokers are within the section 1 definitions of such common carriers or other persons, respondents conclude that they are not subject to complaints filed with the Commission pursuant to the first paragraph of section 22 and that the same jurisdiction limitation is applicable to the Commission's power to investigate a violation of the Act under authority of the second paragraph of section 22.[2]

Formal adjudication proceedings of the Commission, which include all section 22 proceedings, fall within two categories.[3] (1) There are *complaint cases* which are instituted by any person filing with the Commission a complaint in proper form setting forth alleged violations of one or more sections of the Act and usually, though not necessarily, seeking reparation for injury caused thereby, and (2) there are *investigation cases* which are instituted by order of investigation issued by the Commission. Such orders are customarily, as in this case, upon the Commission's own motion. This is the practice even though reference may be directed to protests filed by others.

Complaint cases originate, are processed and finally concluded in accordance with the provisions of the first paragraph of section 22. Investigation cases are completely and exclusively governed by the second paragraph of section 22. The fact that the second paragraph is spared needless repetition by using the proviso that the Commission "may in like manner and . . . with the same powers [as in the first paragraph] investigate

[2] The single case cited by respondents, *United States* v. *American Union Transport, Inc.*, 282 F. Supp. 700 (1964), is not relevant here insofar as it is addressed to the absence of exclusive primary jurisdiction in the Commission over conduct on which criminal charges are based. However, this decision, at page 702, does offer a severable finding which is in point, i.e., that "Sections [22 through 30 of the Act] empower the Commission to investigate, on the complaint of any person or on its own motion, any violation of the Shipping Act, 1916, including section [16], and to make, after a hearing, an order to remedy any violation found." Respondents' reliance on a portion of the legislative history of Public Law 87-346, as drawn from Senate Document No. 100, 87th Cong. 2d Sess., at page 185, is also misplaced. The reference there was to complaints claiming reparation against shippers. Moreover, the Commission's proposed legislation cited by respondents was, as found by the above mentioned prior ruling herein, for the purpose of obtaining clarifying legislation as to existing authority and not enabling legislation with respect to new authority.

[3] Special Dockets, which concern applications unrelated to section 22, are authorized by special legislation and are therefore not included.

any violation of this Act" does not result in the incorporation into the second paragraph of any further requirements or restrictions from the first paragraph. Had the second paragraph been written to provide that "the [Commission], upon its own motion, may investigate any violation of this Act in such manner and by such means, and, except as to orders for the payment of money, make such order as it deems proper" it would say nothing more or nothing less than it now says. It would apply, as it now does, to any violation of any section of the Act, including the opening paragraph of section 16, by anyone, including shippers, consignees and brokers,[4] perhaps more patently but no more certainly than in its present form.

Continuing emphasis must, however, be given to the equally certain fact that the *second paragraph* has no concern with complaint cases or provisions for the award of reparation. Reliance upon decisions or legislative histories having to do with such matters are therefore misplaced when applied to Commission investigations under this paragraph. At the time of the violations here in issue, decisions and legislative histories concerning penalties for violations were likewise inappropriate because the Commission had no authority to impose penalties. It was required to forward all cases involving findings of violations appearing to deserve penalties to the Department of Justice for whatever action the Department deemed fit.[5]

Beyond further question, the Commission's jurisdiction under the opening paragraph of section 16 and the second paragraph of section 22 extends to shippers, consignees, brokers and any and all "other persons." This is emphatically but unnecessarily confirmed by the cited amendment.[5]

The Evidence of Violations

By way of confession and avoidance, Ross argues that even if its actions are found to be within the Commission's jurisdiction, there would be no culpability because on the basis of the record there is no proof that it misclassified the shipments

[4] See *Luis (Louis) A. Pereira—Collection of Brokerage*, 5 F.M.B. 400 (1958); *Misclassification and Misbilling of Glass Articles*, 6 F.M.B. 155 (1960), aff'd in part, rev'd in part *sub nom Royal Netherlands Steamship Co.* v. *Federal Maritime Bd.*, 304 F.2d 938 (D.C. Cir. 1968); and *States Marine-Hohenberg Bros., Sec. 16 Violation*, 7 F.M.C. (1961).

[5] Public Law 92-416, 92nd Congress, HR 765, approved August 29, 1972, amends the Act by converting certain criminal penalties into civil penalties and providing that these may be either compromised by the Commission or recovered by the United States in civil actions. Section 16, in pertinent part, is specifically included.

knowingly and willfully. The record is typically diffuse and encumbered with irrelevancies regarding this legalism. Nevertheless there is sufficient evidence to find that Ross did violate the Act. This is because the Commission's interpretations of scienter as set forth in the statute require strict business propriety. It has been held that "persistent failure to inform or even attempt to inform himself by means of normal business resources might mean that a shipper (consignee) . . . was acting knowingly and willfully in violation of the Act. Diligent inquiry must be exercised by shippers (consignees) . . . in order to measure up to the standards set by the Act. Indifference on the part of such persons is tantamount to outright and active violation." (Parenthetical references added.) *Misclassification of Tissue Paper,* 4 F.M.B. 483, 486. Ross has indicated that it was familiar with the applicable rates. In the exhibits herein some of the Consumption Entries are copies from the files of the United States Customs Court, New York, N. Y. Decisions of this court are subject to official notice by this Commission. This includes decisions concerning protests instituted by importers of merchandise to challenge the appraisement or classification of imported goods or other decisions of the Bureau of Customs arising out of the administration of the tariff laws and schedules.

Appeals from the Customs Court are to the Court of Customs and Patent Appeals. A number of decisions of these Courts[6] indicate that Ross has been an established importer doing business since 1932[7] and that it has had long and profound experience with the problems of classification of cargoes.

The penchant for making a decision in one's own favor as the fundament of business "ethics" was legislatively recognized and is the essence of the offense here concerned. Regulatory recognition of this goes as far back as the year following the establishment of the Interstate Commerce Commission.

> Underbilling, in its devices and its fruits, must necessarily be participated in by the owner of the goods . . . . *Re Underbilling,* 1 I.C.R. 813, 821 (1888).

[6] *Ross Products, Inc.* v. *United States,* 62 CCR 688, CD 3849 (1969); *Ross Products, Inc.* v. *United States,* 52 CCR 51, CD 2485 (1964); *Ross Products, Inc.* v. *United States,* 45 CCR 290, Abs 64603 (1960); *Ross Products, Inc.* v. *United States,* 43 CCR 186, CD 2124 (1959); *Ross Products, Inc.* v. *United States,* 43 CCR 74, CD 2106 (1959); *Ross Products, Inc.* v. *United States,* 41 CCR 550, RD 9225 (1958); *Ross Products, Inc.* v. *United States,* 40 CCR 168, CD 1976 (1957); *Ross Products, Inc.* v. *United States,* 39 CCR 197, CD 1927 (1957); *Ross Products, Inc.* v. *United States,* 15 CCR 227, Abs 50329 (1957).

[7] Mr. Hyman Ross was a partner in a partnership which he established in 1932. It was incorporated in 1948 as Ross Products, Inc., and he became Chairman of the Board. 62 CCR 688, supra, at 689.

Title 19 USC 1202, Customs Duties, Tariff Schedules of the United States, Sched. 7, Part 5, 2, indicate: "For the purposes of the tariff schedules, a '*toy*' is any article chiefly used for the amusement of children or adults." If Ross had a doubt as to the proper tariff designation of its commodity, it had "a *duty* to make diligent and good faith inquiry of the carrier or conference publishing the tariff." (Emphasis added.) *Rubin, Rubin & Rubin Corp. et al.,* 6 F.M.B. 235, 239 (1961). "If [these questions are] presented, they have been brushed aside, in the race for business which absorbs the entire community." *Re Underbilling, supra,* at page 814. On this record, it is a fair conclusion that Ross has disregarded those means which normal business resource and acumen dictate as requiring reference in determining proper classifications. *Rates from Japan to United States,* 2 U.S.M.C. 426, 434 (1940). This is buttressed by the fact that where discrepancy was found, supplemental billing was paid without objection by Ross, or NMS. Moreover, Ross Products had imported mirrors FOB factory in Japan at over $1.20 a dozen for approximately the preceding two years. After such extensive and regular business experience, complete familarity with the applicable tariffs and proper interpretation thereof must be a certainty. It is beyond cavil that mirrors, immersion heaters, photo albums, glass animals, window chimes, and grass beach mats are no more toys than glass tumblers would be jars or glass cooking ware would be bottles. A construction which does such violence to the clear meaning of a tariff, at best, manifests such an indifference and lack of care in construing the tariff as to constitute a deliberate violation of section 16. See *Rates for United States to Philippine Islands,* 2 U.S.M.C. 535, 542 (1941). Otherwise stated, Ross knowingly and willfully . . . by means of false classification . . . obtained transportation by water at less than the rates or charges which would otherwise have been applicable.

With respect to Taub, however, there is insufficient evidence to sustain a finding that it violated the Act.

By definition, a customhouse broker is an agent who acts for merchants in entering and clearing goods and vessels. *Webster's Third New International Dictionary, of the English Language Unabbridged, 1967.* Customhouse brokers are licensed by the Secretary of the Treasury. Title 19 USC 1641. Licensing requires among other things that qualification to render valuable service to importers and exporters be considered. Licenses may be revoked or suspended on grounds of incompetency, disreputableness, or refusal to comply with the rules and regulations issued under the section, or with intent to defraud, to willfully and knowingly deceive, mislead or threaten any importer, exporter, claimant, or client, by word, circular, letter or advertisement.

As observed before, Taub is also a licensed independent ocean freight forwarder. While there is authority vested in the Commission over freight forwarders, there is no such authority over customhouse brokers. Nevertheless the functions of customhouse broker and freight forwarder overlap and blend into each other, i.e., "good and valuable service to importers." Moreover, in General Order 4 (Rev.), 46 CFR 510, 510.2(c), "Definitions," the term "freight forwarding service . . ." means a service which includes, among many other things, clearing shipments in accordance with United States Government regulations, etc. Accordingly, a customhouse broker's functions in this situation are congruent with those of a freight forwarder and it is this nexus or "area of concern" that settles the question of the Commission's jurisdiction in the affirmative, at least in this instance. See *Volkswagenwerk* v. *FMC,* 390 U.S. 261 (1968).

Testimony of the Customs witness indicates that Taub had the bills of lading in their possession. The record also indicates that the bills of lading were in the possession of the carrier. The source of information used by Taub in the preparation of the Summary of Entered Values is not revealed by the record. The C.E.s were prepared by Taub from information furnished by Ross. The Request for Return of the B/L was prepared by Taub from the B/L. It has been observed that:

> A freight forwarder, in following written instructions from its principal, is not thereby insulated from a finding of a violation of section 16 of the Act as to the forwarder. A registered freight forwarder holds itself out to the shipipng public as an expert in the handling of ocean freight, and its expertise includes a knowledge of applicable tariffs. . . . The forwarder has a duty to take reasonable steps to inform itself as to the nature of the cargo it is handling and to act lawfully with respect thereto. *Hazel-Atlas Glass So.—Misclassification of Glass Tumblers,* 5 F.M.B. 515, 520.

As observed in *Misclassification and Misbilling of Glass Articles, supra,* at page 159, "Section 16 is violated by shippers and forwarders if the false classification and the false billing were knowingly and willfully made." Whether Taub is considered as customhouse broker or freight forwarder, the outcome is the same. The record is insufficient to show that Taub was in *pari delicto* with Ross or that its acts were other than honest inadvertance or oversight. There is then no showing of scienter on the part of Taub. Hence, Taub did not knowingly and willfully participate in the false classifications of the shipments involved.

ULTIMATE CONCLUSIONS

Upon consideration of all the foregoing facts, it is concluded and found:

(1) that Ross Products, a division of NMS Industries, Inc., violated section 16, opening paragraph, of the Shipping Act, 1916, and

(2) that the record does not show that Taub, Hummel & Schnall, Inc., violated the Act.

(S) JOHN MARSHALL
Administrative Law Judge

Washington, D. C.
OCTOBER 16, 1972

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-28

GENERAL INVESTIGATION OF PICKUP AND DELIVERY RATES AND PRACTICES IN PUERTO RICO

June 5, 1973

Carriers' rate increases for pickup and delivery services in Puerto Rico found just and reasonable since they covered only the increase in carriers' fixed costs.

The practice of permitting shippers or consignees who elect to use the pickup and delivery service offered by the ocean carriers in Puerto Rico to select the truckers who will transport the shipments between ocean terminals and inland points found unlawful as constituting an unreasonable practice within the meaning of section 18(a), Shipping Act, 1916 and section 4 of Intercoastal Shipping Act, 1933, and respondents ordered to cease and desist from such practice.

Ambiguous tariff provisions with respect to area included within pickup and delivery point "Catano" found unlawful under section 2 of Intercoastal Shipping Act, 1933 and tariff amendment ordered.

A tariff provision which constitutes an offer to arrange pickup and delivery on behalf of shippers and consignees for shipments not accorded respondents' pickup and delivery service found not unlawful.

Transamerican Trailer Transport, Inc. and Sea-Land Service, Inc. found to have violated section 2 of the Intercoastal Shipping Act, 1933 by waiver of their tariff forced delivery rules.

Tariff provisions defining a trailerload as less than the capacity of a full trailer for pickup and delivery purposes found not unlawful.

Transamerican Trailer Transport, Inc. found to have violated section 2 of the 1933 Act by carrying out a special arrangement with a shipper contrary to its tariff; in providing service to a shipper contrary to its stop-off rule; and in failing to set forth in its tariff a description of the service whereby it arranges as shippers' agent for pickup and delivery for shipments not accorded the carriers' pickup and delivery service.

Warren Price, Jr., *R. L. Dausend* and *Frank Hiljer, Jr.* for respondent Sea-Land Service, Inc.

S. S. Eisen and *Joseph Hodgson, Jr.* for respondent Seatrain Lines, Inc.

George F. Galland, Amy Scupi and *David T. Stitt* for respondent Transamerican Trailer Transport, Inc.

Mario F. Escudero and *Dennis Barnes* for petitioner Commonwealth of Puerto Rico.

Amadeo I. D. Francis for intervener The Puerto Rico Manufacturers Association.

Donald J. Brunner and *Margot Mazeau,* Hearing Counsel.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman*; George H. Hearn, *Vice Chairman*; Ashton C. Barrett, James V. Day and Clarence Morse, *Commissioners*)

We instituted this proceeding to determine whether certain increased pickup and delivery charges in Puerto Rico, filed by respondents Sea-Land Service, Inc. (Sea-Land), Seatrain Lines, Inc. (Seatrain), and Transamerican Trailer Transport, Inc. (TTT) are unjust, unreasonable, or otherwise unlawful under section 18(a) of the Shipping Act, 1916 (the 1916 Act) and/or sections 3 and 4 of the Intercoastal Shipping Act, 1933 (the 1933 Act); and further, to determine whether the charges and practices of the respondents, related to their pickup and delivery services in Puerto Rico, may be in violation of section 18(a) of the 1916 Act and/or sections 2, 3 and 4 of the 1933 Act.

Administrative Law Judge Herbert K. Greer issued an initial decision in which he found that the carriers' rate increases for pickup and delivery services in Puerto Rico were not unjust, unreasonable, or otherwise unlawful, but held that certain practices of respondents relating to the services were unlawful. Exceptions to the initial decision have been filed by Sea-Land and Hearing Counsel, and replies thereto by Sea-Land, Hearing Counsel, TTT, and Seatrain. We have heard oral argument.

FACTS[1]

1. TTT, Sea-Land and Seatrain are common carriers by water, and in connection with ocean transportation they offer pickup and delivery service (the service) in Puerto Rico be-

[1] No exceptions were filed to the Administrative Law Judge's findings of fact, and we hereby adopt them as our own, omitting only quotation marks for convenience.

tween their terminals and the places of business of shippers or consignees, their tariffs providing charges for the service separate and apart from the ocean transportation rates.

2. Trailerload (TL) service, where not restricted by tariff, is optional; however, Sea-Land and TTT make delivery mandatory for certain less than trailerload (LTL) shipments.

3. The service is performed by independent Puerto Rican truckers, and the practice is to permit the shipper or consignee to designate the trucker.

4. Truckers performing the service are required by respondents to execute Trailer Interchange Agreements under the terms of which the trucker is required to carry (a) liability insurance, (b) comprehensive fire, theft, and damage, plus collision and upset insurance covering respondents' trailers, and (c) cargo insurance. The insurance under (b) and (c) may be provided by respondents under their own policies, and if so provided, a combined rate of 3% is deducted from payments due the truckers.

5. The rates for the service, as set forth in respondents' tariffs, vary according to zones on the island, which are numbered 1, 1A, 2, 3, 4, 5, 6, and 7. Prior to December 10, 1970, the rates ranged from $30.00 to $50.00 per trailerload depending upon the zone in which the pickup or delivery point is located. A "point" or "station" refers to a particular city, town, village, or other area, which is treated as a unit in applying the charges.

6. Respondents' tariffs provide for base points at San Juan, Ponce, or Mayaguez; however, they provide a substituted service through San Juan for cargo rated for Ponce and Mayaguez and absorb the cost of the substituted service.

7. For years after the institution of the service, the trucking of containerized cargo was stabilized by an agreement whereby respondents paid the charges assessed by truckers and in turn filed these charges with this Commission; however, as time passed truckers increased their charges for zones 3, 4, 5, 6, and 7, and until the increased rates here at issue were filed, respondents absorbed the excess over rates paid to truckers and the charges assessed by them to shippers or consignees.

8. The rate increases here under consideration are for the purpose of eliminating respondents' absorptions of trucker charges to zones 3 to 7, inclusive.

9. The Puerto Rico Public Service Commission requires truckers to file pickup and delivery tariffs; however, the requirement is not enforced. Machinery to enforce the requirement is being established and it is anticipated that in approximately one year trucker tariffs and cost information will be on file.

10. Pickup and delivery charges by Puerto Rico truckers, including the organized truckers, are not uniform. Truckers may provide the service at the rates set forth in respondents' tariff or may, and at times do, compete against other truckers by negotiating rates directly with the shippers/consignees, which are lower than respondents' rates.

11. The pickup and delivery charges for TL and LTL exceeding 8,000 pounds, which have been negotiated between truckers and shippers/consignees, were generally lower than the corresponding rates set forth in respondents' tariffs, truckers charging the lower rates considering volume, contract terms, and availability of backhaul.[2]

DISCUSSION AND CONCLUSIONS

The Increased Rates

No exceptions were taken to the Administrative Law Judge's disposition of the issue of the reasonableness of respondents' rate increases. We adopt the Administrative Law Judge's conclusions as our own. His discussion of the issue is set out below, and again quotation marks have been omitted.

There is no contention that the increased rates have been shown to be unlawful. Hearing Counsel point out that the failure of the Puerto Rico Public Service Commission to require submission by truckers of cost information is the reason this Commission has no basis for determining the reasonableness of the underlying trucker charges. However, the rates and practices of Puerto Rican truckers are matters over which this Commission has no jurisdiction since it has not been shown that the truckers engage in an activity covered by section 1 of the 1916 Act, which in part provides:

> The term "other person subject to this act" means any person not included in the term "common carrier by water," carrying on the business of for-

[2] To avoid undue repetition, the Administrative Law Judge made further findings of fact in the discussion portion of his opinion. Where necessary, we have adopted the same course.

warding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

Portalatin Velasquez Maldonado v. Sea-Land Service, Inc., 10 F.M.C. 362 (1967). The pickup and delivery charges and the zones to which they apply are negotiated by respondents with four trucking associations representing the Puerto Rican truckers. As Hearing Counsel state, citing *Matson Navigation Co.—Container Freight Tariffs,* 7 F.M.C. 480, 492 (1963), a rate established by means over which this Commission has no jurisdiction becomes a fixed charge to the ocean carrier. As the increased rates were filed for the purpose of equalizing the charges paid to the truckers by respondents and the amounts collected under the tariffs by respondents from shippers or consignees, it is concluded that they are not unjust or unreasonable or otherwise unlawful.

Pickup and Delivery Practices

1. *Designation of Truckers by Shippers and Consignees*

When shippers or consignees elect to use respondents' service, the practice is to permit them to select the Puerto Rican trucker who will transport the shipments between the ocean terminals and inland points. Hearing Counsel urge that the Commission order respondents to discontinue this practice because "it tends to foster and facilitate rebating between shippers/consignees[3] and truckers", and is thus in violation of section 18(a) of the 1916 Act[4] and section 4 of the 1933 Act.[5] The Administrative Law Judge, however, concluded that no violation existed. He found that elimination of the practice "would result in curtailment of the door-to-door service offered by respondents, an

[3] Unless otherwise specified or unless the context requires, "shippers" as used herein includes "consignees".

[4] Section 18(a) provides in pertinent part: "That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto . . . . Whenever the Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carriers is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice."

[5] Section 4 provides in pertinent part: "Whenever the Commission finds that any rate, fare, charge, classification, tariff, regulation, or practice demanded, charged, collected, or observed by any carrier subject to the provisions of this Act is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice . . . ."

intermodal system of transportation beneficial to Puerto Rico's commerce." The Administrative Law Judge found that the truckers were not the agents of respondents, and thus what Hearing Counsel was seeking to accomplish was the elimination of "rebating involving persons not subject to the shipping acts." We disagree with the Administrative Law Judge.

Respondents offer pickup and delivery service in Puerto Rico between their terminals at San Juan, Ponce and Mayaguez and the places of business of shippers/consignees pursuant to comprehensive tariff rules, regulations and charges. Since respondents' service is optional, shippers/consignees, in effect, have three choices: (1) to perform the pickup and delivery themselves, using their own equipment and personnel; (2) to hire independent truckers and pay them directly for the service, frequently at lower rates than those charged in respondents' tariff (Ex. 27, p. 3); or (3) to avail themselves of the pickup and delivery service offered by respondents. Shippers who choose to use respondents' pickup and delivery service are permitted to designate the trucker to be engaged by respondents to perform the service. Under the present practice, the shipper may reduce his overall transportation cost by designating a trucker who will agree to perform the pickup and delivery service at less than the respondents' tariff rates. The trucker then "refunds" to the shipper a portion of the charge paid him by the respondent carrier. Thus, respondents are "absorbing" a portion of the pickup and delivery charge; or, to put it another way, the shipper is receiving a "rebate" of a portion of the pickup and delivery charge.

We agree with Hearing Counsel that respondents' practice of providing for the designation by shippers and consignees of truckers to furnish the P/D (pickup and delivery) service which respondents are obligated under their tariffs to perform and for which they are responsible is an unreasonable practice within the meaning of section 4 of the 1933 Act and section 18(a) of the 1916 Act, and that respondents should be ordered under these statutory provisions to establish the reasonable practice of disallowing shipper or consignee designation of truckers who furnish a part of respondents' services.

Respondents' contention that the truckers furnishing respondents' pickup and delivery services are not their "agents" and thus they are not responsible for any "rebates by the truckers" is clearly erroneous. First of all, the significant consideration in this proceeding is not whether the truckers furnishing respondents' pickup and delivery service are "agents" in some abstract sense or for all purposes, but only whether they are agents in the sense that respondents must bear the responsibility of insuring that no portion of the rates paid for the pickup and delivery service is refunded or remitted.[6]

Respondents need not furnish any pickup and delivery service. However, if they choose to do so, such service is subject to the Commission's jurisdiction, and respondents must adhere to tariff rates filed with us for the service. *Sea-Land Service, Inc. v. Federal Maritime Commission,* 404 F.2d 824, 827 (D.C. Cir. 1968); *Alaska Steamship Company v. Federal Maritime Commission,* 399 F.2d 623, 627 (9th Cir. 1968); *Matson Navigation Co.—Container Freight Tariffs, supra; Certain Tariff Practices of Sea-Land Service,* 7 F.M.C. 504 (1963). Common carriers who undertake to perform a service cannot lawfully escape the responsibility for the proper performance of the service by the simple expedient of designating the person actually performing the service the agent of the shipper or consignee. *Bank of Kentucky* v. *Adams Ex. Co.*, 93 U.S. 174, 182 (1876). Respondents' tariffs covering their pickup and delivery services in fact state on their face that they are applicable only when respondents or their *agents* perform the pickup and delivery service. Respondents cannot insulate themselves from the responsibility for the proper performance of the service by attempting to relieve themselves of accountability for their agents' acts. *Unapproved Sec. 15 Agreements—Spanish/Portuguese Trade,* 8 F.M.C. 596, 609 (1965); *Hellenic Lines, Ltd.—Section 16 (First) and 17 Violations,* 7 F.M.C. 673, 676 (1964). The fact that remittances resulting in the obtaining of transportation at less than tariff charges may be made "indirectly" by agents who are not authorized to make them and even of whose conduct the carriers may be ignorant is immaterial to the question of the lawfulness of the carriers' conduct. Docket 68-44, *Malpractices—Brazil/United States Trade,* December 13, 1971, 15 FMC 55.

The fact that the interchange agreements which respondents have entered into with truckers who furnish P/D services state that the trucker "is not the agent or employee of the Lessor

[6] Section 2 of the 1933 Act forbids carriers to "refund or remit in any manner or by any device any portion of the rates, fares, or charges . . . specified [in their tariffs filed with the Commission]."

[respondent] for any purpose whatsoever" is inconsistent with both respondents' obligations and the wording of their own tariffs. The reason for this language in the interchange agreements appears to be that the same agreements are required by respondents from all truckers who pick up or deliver in Puerto Rico cargo carried by respondents, whether or not the pickup and delivery is performed as a part of respondents' transportation obligation. In other words, identical interchange agreements are executed by truckers who furnish respondents' P/D services, shippers and consignees who provide their own pickup and delivery using their own equipment and employees, and truckers who do not furnish P/D services under respondents' tariffs but are hired directly by shippers and consignees. Obviously, shippers and consignees and truckers who do not furnish pickup and delivery as part of respondents' P/D services are not respondents' agents for P/D purposes.

To insure that confusion does not arise in the future with respect to respondents' responsibility for the P/D services they undertake to perform, we will require that respondents amend the form of those interchange agreements they require of truckers who furnish P/D services respondents undertake to perform as part of their transportation obligations to remove any language which indicates that such truckers are not respondents' agents for the purpose of insuring that the rates paid by shippers and consignees for respondents' pickup and delivery services are those contained in respondents' tariffs.

Respondents' contention that the record does not show that rebating has actually occurred misses the mark. Where, as here, the practice is "potentially capable" of resulting in violations of our statutes, our role is "remedial and not punitive", and we need not wait until the potential evil has actually occurred. *Rates, Hong Kong-United States, Trade,* 11 F.M.C. 168, 175 (1967); Introductory Statement to F.M.C. Rules requiring filing of tariffs by terminal operators now contained in 46 CFR 533, printed at 30 F.R. 1268; Cf. *North Atlantic Mediterranean Freight Conference,* 11 F.M.C. 202, 220 (1967), reversed on other grounds *sub nom. American Export Isbrandtsen Lines, Inc. v. F.M.C.,* 409 F.2d 1258 (2nd Cir. 1969). It is, furthermore, well settled that activities which tend to foster and facilitate rebates of carriers' tariff rates are practices which we can and must order terminated. *Intercoastal Investigation, 1935,* 1 U.S.S.B.B. 400, 414 (1935).[7]

Finally, we are not persuaded by the argument that even if trucker designation is removed as a source of potential rebating, shippers and consignees will still find a way to employ truckers who will perform the pickup and delivery service at less than the tariff rates, and thus continue the practice under another guise which is entirely lawful.[8] Shippers and consignees are and should remain, insofar as this Commission is concerned, fully free in the matter of contracting for the services of any trucker they desire or to furnish their own trucking services for pickup and delivery purposes. We are not here concerned with pickup and delivery services performed by shippers and consignees or by truckers for them. We are rather concerned with the pickup and delivery service offered by respondents and have outlawed trucker designation when used as a part of that service because it facilitates a rebating for which respondents are, in law and under their own tariff representations, responsible.

The suggestion that shippers/consignees may devise other ways to achieve rebates of part of the rates for pickup and delivery service is hardly a reason for us to sanction the trucker designation practice. Having found the existence of the unreasonable practice, we are empowered to fashion the tools to correct it. *California v. U.S.,* 320 U.S. 577, 583-584 (1944). We believe that the elimination of trucker designation by shippers and consignees as a part of respondents' pickup and delivery service is a reasonable means of eliminating the rebates which can now occur. Shippers and consignees will no longer be able to utilize a feature of respondents' transportation service which we have found facilitates obtaining transportation at less than respondents' tariff rates for such service.

[7] That the present practice of respondents allowing shippers and consignees to designate the truckers they wish respondents to use in furnishing P/D does facilitate rebating cannot be seriously questioned. The Administrative Law Judge's finding that under the present practice the "[shipper or consignee] may reduce . . . [the] overall cost of transportation by engaging a trucker who will agree to perform the service at less than respondents' tariff rate and refund a portion of the charge paid to him by the ocean carrier" is also unchallenged. The record, moreover, in addition to this acknowledged "potential capability" of the practice of shipper and consignee designation of truckers respondents are to use in their P/D srvice, does reveal some evidence (in the form of a letter to the Commission and testimony by the then chairman of PROSA, a Commission-approved agreement concerned with, *inter alia,* enforcement of respondents' tariff rates for P/D services) indicating that the practice had actually resulted in such rebates.

[8] Presumably, they would use one of the two other options available to them.

Our action will not, moreover, result in any improper limitation of respondents' door-to-door intermodal system of transportation to and from Puerto Rico. Intermodal transportation with through rates and through responsibility is a goal which we encourage but one which we cannot allow to be achieved at the expense of a practice which is unreasonable under the statutes we administer. In ordering this practice abated we but adhere to the requirement we have made of those offering through intermodal service that the manner in which such service is offered is fully consistent with the dictates of our regulatory obligations.[9]

2. *Pickup and Delivery Service for Bacardi*

The Bacardi plant is located within the limits of the Municipio of Catano but outside the limits of the town of Catano. Respondents' tariffs designate "Catano" as the pickup and delivery point, with no distinction between the town and the municipio. The point for zone 3 is "Palo Seco". The Bacardi installation is physically situated in both Catano and Palo Seco. A trucker entering the installation through the main gate remains in zone 1A unless he picks up or delivers a shipment at a building located in zone 3. The back gate is in zone 3, but a shipment may be picked up or delivered in either zone. Bacardi insists that the zone 1A rate of $35.00 per trailer is applicable to its shipments, but the truckers demand the zone 3 rate of $45.00. For many years, respondents have acceded to both contentions and absorbed the $10.00 per trailer difference between the rate charged Bacardi and the amount paid to the trucker.

The Administrative Law Judge found respondents' tariff ambiguous and applied the rule that tariff ambiguities are to be resolved in favor of the shipper. He then concluded that there were no refunds or extensions of privileges contrary to the respondents' tariffs; nor were respondents violating section 2 by charging Bacardi a different compensation than required by their tariffs. The Administrative Law Judge also found the

[9] Thus, e.g., in *Disposition of Container Marine Lines*, 11 F.M.C. 476, 484-485, 492 (1968) we refused to sanction a through, intermodal service until the carrier providing such service had filed a specimen bill of lading, all the articles of which provided for common carrier liability for the through movement consistent with the holding out in the remainder of the carrier's tariff filing.

practice reasonable under section 18(a) of the Shipping Act, 1916. Hearing Counsel except to these conclusions.[10]

The fact remains, however, that the word "Catano" as used in respondents' tariffs is ambiguous since it fails to indicate whether the pickup and delivery point designated as "Catano" is intended to be the town or the municipio. Although we agree with the Administrative Law Judge that because of such ambiguity Bacardi was properly assessed the lower P/D rate, i.e. the rate for zone 1A, the ambiguity in the tariff itself is unlawful under section 2 of the 1933 Act. See e.g., *Intercoastal Lumber Rate Charges,* 1 U.S.M.C. 656, 658 (1937); *Puerto Rican Rates,* 2 U.S.M.C. 117, 129, 130, 132 (1939). Accordingly, we will require that language be added to respondents' tariffs to clarify the meaning of "Catano" as used therein.

3. *Definition of Trailerload*

The Administrative Law Judge found no violations resulting from the alleged disparity between respondents' tariff definition of "trailerload" and their actual practices when applying the definition to particular shipments. No exceptions were taken, and we adopt the Administrative Law Judge's conclusions as our own. They are set forth below.[11]

Prior to recent amendments, TTT's tariff defined a trailerload for purposes of the service as:

> . . . a shipment wherein the shipper loads the contents of the trailer and the consignee unloads the contents of the trailer, and the shipment weighs 8,000 pounds or more or measures 700 cubic feet or more.

Hearing Counsel refer to the definition as amended by Second Revised Page 69, FMC-F No. 1, note 2, effective August 16, 1970, which provides:

> A trailerload shipment is defined for purposes of this Rule as (a) a shipment that weighs 8,000 pounds or more or measures 700 cublic feet or more . . . .

This amendment further provides that TTT is not liable if loading or unloading is performed by the shipper or consignee. Hearing Counsel argue that:

[10] Subsequent to oral argument, Sea-Land informed the Commission and all the parties to the proceeding that the trucker used by respondents to serve the Bacardi plant had agreed that "the Bacardi plant is located in Catano (zone 1A)" and that all absorptions have been eliminated.

[11] Quotation marks have been omitted.

> TTT's recent amendment which deletes the loading and unloading requirement solves the specific problem, but creates a new one instead. The amendment is ambiguous in that it lends support to an argument that the carrier will load and unload *any* shipment as long at it exceeds the minimum weight and volume requirement. Hearing Counsel doubt that it was TTT's intention to provide free loading and unloading for all TL shipments.

TTT replies to this argument by reference to note 3 of an amendment effective January 10, 1971, prior to the close of the hearing, which provides:

> The truckload (per trailer) charges named herein include only the setting of the trailer by the carrier at a site designated by the shipper or consignee for loading or unloading . . . by the shipper or consignee.

This amendment, in providing that TL shipments will be loaded or unloaded by the shipper or consignee, removes the ambiguity alleged by Hearing Counsel.

The definition of a trailerload in the tariffs of Seatrain and Sea-Land are similar to TTT's present definition, and provide that the TL rate includes only the setting of the trailer at a site designated. Should any respondent load or unload a trailer, charging the TL rate would be contrary to the tariff. Hearing Counsel contend that, in practice, respondents so violated their tariffs, and thus failed to observe just and reasonable practices as required by section 18(a) of the 1916 Act. The record does not disclose incidents involving relieving a shipper or consignee of loading or unloading trailers.[12] The testimony referred to by Hearing Counsel does not establish such violations, but shows that for shipments of less than 8,000 pounds, which are LTL under the definition, the TL rate has been charged for delivery of a partial trailerload to a consignee when the consignee does unload the trailer. Seatrain, handling rail car shipments which at times exceed the capacity of one trailer, has a tariff provision that:

> When a shipment (see item 192, Note 3) subject to a rate predicated on a minimum quantity is loaded by the carrier or his agent, and such shipment equals or exceeds the minimum quantity specified, the rate will apply on the actual weight or measurement of the shipment without regard to the number of containers or trailers used.

The transaction of record was not in violation of this provision, but in accord with it.

[12] The allegation that The Stanley Works paid only TL rates but was accorded delivery is hereinafter discussed.

Hearing Counsel's position is:

> If, as the record suggests, practical considerations in performing the pickup and delivery service make it impossible to abide by the tariff requirements, the obvious answer is to change those requirements rather than to ignore them.

The record "suggests" difficulties. Under the tariff definition of a trailerload, a trailer with a capacity of 40,000 pounds may contain more than one trailerload or a trailerload mixed with LTL shipments. Several shipments may be loaded into one trailer at respondents' mainland terminals. When such a trailer is unloaded from the ship, it could be necessary to strip it at the terminal in Puerto Rico and make delivery on a trucker's equipment to various destinations. In that event, truckers would charge according to the service performed, applying the LTL rate and loading or unloading the shipment. As to actual practices, much is left to assumptions and speculations. There is, of course, the possibility that shippers or consignees may be charged the TL rate by respondents although, contrary to the definition, the truckers will load or unload the shipments.

Hearing Counsel propose that the Commission require respondents "to bring their practices in conformity with the tariff, either through a change in practice or change in tariff." Had the evidence persuasively demonstrated that it is respondents' practice to load or unload shipments carried in the service at TL rates, a cease and desist order would be justified. Various modifications of the definition of a trailerload are possible, but any increase in weight or measurement would serve to increase the cost of the service for shippers of more than 8,000 pounds or 700 cubic feet, but less than a full trailerload.

The definition as it now stands benefits smaller shippers, and the possibility, or even probability, that violations may occur is insufficient to warrant a finding that it is unreasonable.

4. *Forced Delivery Rule*

TTT and Sea-Land provide in their tariffs that all LTL shipments weighing less than 3,000 pounds and measuring less than 700 cubic feet must be accorded delivery service. Sea-Land began the practice of exempting Westinghouse Company from the rule and TTT adopted the practice for competitive reasons, extending it also to Pantasia. No monetary advantage accrued to the shippers. TTT admits that the practice of exempting

Westinghouse and Pantasia was in violation of its tariff but *states that the violation is only "technical" and that the waivers* were motivated by serious considerations of business efficiency. Sea-Land did not deny the exemption as to Westinghouse but sets forth similar reasons for the practice. TTT has withdrawn the rule.

The Administrative Law Judge concluded that Sea-Land and TTT violated section 2 of the 1933 Act in exempting Westinghouse from the forced delivery rule and ordered Sea-Land to cease and desist from continuing the practice. Sea-Land has excepted to the Administrative Law Judge's conclusions.

Sea-Land maintains that it did not exempt Westinghouse from the rule but merely held the shipments for Westinghouse's preferred trucker, paying the trucker the same amount it collects from Westinghouse. The only evidence that it excepted Westinghouse from its forced delivery rule, Sea-Land contends, is a statement by a TTT witness which is pure hearsay and not of probative value and thus should be disregarded. On the other hand, Hearing Counsel assert that the facts of record are sufficient to support the Administrative Law Judge's finding that Sea-Land unlawfully exempted Westinghouse from its forced delivery rule. However, Hearing Counsel urge, should we find that Sea-Land's practice with respect to Westinghouse does not constitute a violation, it should also exonerate TTT for its Westinghouse practice.

Both the language of TTT and Sea-Land's forced delivery rules and our treatment of Sea-Land's rule in *Charges, Delivery, Atlantic-Gulf/Puerto Rico Trade,* 11 F.M.C. 222 (1967), convince us that shippers do not have the power under these rules to utilize their own truckers, nor demand that shipments be held for truckers which the shippers wished respondents to use. The purpose of the forced delivery rule was to require removal of cargo subjected to such rule by the first available trucker. We therefore agree with the Administrative Law Judge's finding that TTT and Sea-Land's activities under their forced delivery rules were violative of section 2 of the 1933 Act, whether the carriers allowed shippers and consignees to arrange for their own pickup and delivery or only, as Sea-Land alleges it had done, requested that cargo be held for a certain trucker. In any event, however, our action with respect to trucker designation should remove any further problems with respect to forced delivery. To the extent respondents provide for any pickup and delivery service, including forced delivery, shippers and consignees who use such service will have no voice with respect to utilization of any particular truckers.

TTT has withdrawn its forced delivery rule from its tariff, and Sea-Land is free to do the same. We note, however, in this connection that in *Charges, Delivery, Atlantic-Gulf/Puerto Rico Trades, supra,* where we found Sea-Land's practice of providing forced delivery of minimum shipments to be lawful, we observed that the forced delivery rule "goes a long way toward eliminating a problem of congestion". (at 236). The choice is one we leave to the exercise of Sea-Land's operational judgment.

5. *TTT's Insurance Charges*

TTT was alleged to have violated section 18(a) of the 1916 Act by collecting from truckers a charge for insurance which in fact TTT did not provide. The Administrative Law Judge, over the objection of Hearing Counsel, accepted TTT's commitment to stop the practice. Hearing Counsel's concern was that TTT's commitment while "commendable" was not "legally enforceable". We, like the Administrative Law Judge, think the commitment sufficient.

6. *Abraham Nieves—Special Arrangement with TTT*

In the absence of exceptions, we adopt the Administrative Law Judge's conclusions on this issue as our own. They are set out below.

This shipper's plant is located at Guayama, which is between San Juan and Ponce but 15 miles closer to Ponce. TTT carries trailerloads of freight all kinds (FAK) for Nieves. The tariff restricts FAK delivery to zones 1, 1A, and 2, and if San Juan is the base port of destination, Nieves would be in zone 7 and not entitled to delivery. Nieves, like any other shipper, may designate either Ponce or San Juan as the port of destination. If Ponce is designated, Nieves would be required to transport the trailer to its place of business at a cost of $65.00. TTT, as do other respondents, utilizes a substituted service from San Juan to pick up and deliver cargo to inland points. If Ponce is the port of destination, the cost of trucking from San Juan to Ponce is $95.00. Thus the total trucking costs involved for a trailer destined for Ponce would be approximately $160.00.

In this situation, TTT and Nieves entered into an arrangement whereby Nieves would designate San Juan as the port of destination and TTT, acting as Nieves' agent for delivery of trailerloads, would arrange for a trucker to deliver the trailer direct to Guayama. The trucker would bill TTT for $50.00 which TTT would not charge Nieves. The trucker would bill Nieves for $25.00, TTT not being involved in that transaction. TTT saved $45.00 per trailerload under this arrangement; Nieves also made a saving.

Hearing Counsel contends, and TTT acknowledges, that this special arrangement violated section 2 of the 1933 Act. Nieves has been billed for the undercharges resulting from the arrangement and the bill has been paid by Nieves. The arrangement has been abandoned and a cease and desist order is unnecessary. Nevertheless, it is found that TTT violated section 2 of the 1933 Act when carrying out the special arrangement with Nieves.

7. *TTT's Stop-Off Rule*

Again, no exceptions were filed to the resolution of this issue by the Administrative Law Judge, and we adopt his conclusions as our own.

TTT's tariff provides:

> B. Puerto Rico:
>
> * * * (2) Delivery service as provided herein will be made on portions of a single truckload shipment to more than one address but not more than four different addresses, at destinations named herein, taking the same basing point, upon payment of the highest rated zone rate at which delivery is made, plus an additional charge of $14.56 for each delivery except the last. * * *
>
> C. No stopoffs for partial loading or unloading will be made unless all pickup points or all delivery points lie in a direct route over which operations are generally conducted between the carrier's terminal and the pickup or delivery point farthest from that terminal. * * *

TTT admits that, contrary to this rule, Plaza Provision received the service at TL rates although the delivery points did not lie in a direct regular route and were not from the same basing points. It considers the situation as showing only a "technical violation hurting no one" and resulting from geographic happenstance, with only one shipper and short distances involved, and questions "whether any regulatory benefits flow from regulation on this level of zealotry." The purpose of this investigation is to determine whether any respondent has violated specified sections of the shipping acts and not whether violations are merely "technical" or of such gravity as to warrant imposition of penalties. It is found that TTT violated section 2 of the 1933 Act.[13]

8. *Improper Rating of Bills of Lading by TTT for Stanley Works*

The Administrative Law Judge found that TTT's alleged unlawful charging of the Stanley Works the trailerload ocean rate rather than the less-than-trailerload ocean rate was outside the scope of this proceeding as this proceeding is limited to the rates and practices related to P/D service and does not concern rates and practices pertaining to water transportation. We agree with this conclusion and hereby adopt it as our own.

9. *Arrangements for Pickup and Delivery for Shipments not Entitled to the Service Under TTT's Tariff*

TTT's tariff provides that certain shipments are entitled to only limited pickup and delivery service or none at all. However, upon request of a shipper or consignee, TTT will arrange with a trucker to pick up or deliver the exempted shipments, advance the trucker's charge, and collect the amount advanced from the shipper or consignee, either by direct billing or by addition of the charge to the bill of lading. The trucker's charge may be less than the charge set forth in TTT's tariff for pickup and delivery to the zone involved. Prior to January 10, 1971, TTT's tariff did not include a provision for this service. Hearing Counsel contended that although TTT did not profit from the service, it had violated section 2[14] of the 1933 Act by rendering a service not provided for in its tariff. *Intercoastal Investigation, 1935, supra* at 440, 447.

The Administrative Law Judge concluded that TTT had violated section 2 of the 1933 Act and we agree. However, TTT

[13] The Administrative Law Judge ordered TTT to cease and desist from charging Plaza Provision less than required by the rule quoted above and related tariff provisions. Since, however, there is no evidence of continuing violation and since the language of the rule in the tariff has been modified substantially since the initial decision herein, we will enter no cease and desist order with respect to this matter.

[14] ". . . no person shall engage in transportation as a common carrier by water in intercoastal commerce unless and until its sechedules as provided by this section have been duly and properly posted . . . ."

in an amendment to its tariff filed to become effective January 10, 1972, adopted the following rule:

> SHIPMENTS NOT AFFORDED PICKUP AND DELIVERY SERVICE IN PUERTO RICO
>
> Transamerican Trailer Transport, Inc. on request of shippers or consignees will arrange for pickup and delivery of shipments which by specific rule or reference mark are not provided pickup and delivery service as provided in this tariff.
>
> TTT will advance the charges to the motor carrier performing such pickup and delivery service, which charges will be billed for the account of the shipper or consignee ordering the service. TTT as carrier will have no responsibility for the cargo on which such pickup or delivery service is arranged while such cargo is in the possession of the motor carrier performing such services. Transamerican Trailer Transport, Inc. Freight Tariff No. 1, FMC-F No. 1, Rule 565.

Hearing Counsel challenged the rule on the ground that "it permits shippers of cargo, which is accorded restricted or no delivery, to obtain lower rates than those charged for cargo moving in TTT's P/D service." Hearing Counsel would have amended the rule so as to provide that the rates under the rule would in any case be no lower than those charged under TTT's P/D service.

We see nothing wrong in principle, however, with tariff provisions whereby a carrier, as agent, offers to arrange for services in addition to those for which it is responsible. No legal obligation has been imposed upon respondents to furnish P/D services for all cargo, and they may, in the absence of unreasonable preference or prejudice to a particular description of traffic, limit the categories of cargo for which they provide such services. See *Charges, Delivery, Atlantic-Gulf/Puerto Rico Trades, supra.* As we have stressed in our discussion of the practice of shipper designation of truckers as a part of respondents' P/D services, there is a great difference between pickup and delivery offered as a part of respondents' services and pickup and delivery made by or on behalf of shippers and consignees. In the former, respondents bear the legal obligation of insuring that their tariff rate for such service is paid by shippers and consignees. In the latter, shippers and consignees bear the responsibility of paying whoever performs the service whatever he lawfully charges for such service. There is no reason in law why respondents should be obligated with respect to adherence to charges made for a service they do not undertake or why respondents may not offer to arrange for such service as agents. So long as respondents offer transportation under a system of rates which excludes, as well as under another system of rates which includes, P/D services, and so long as they publish and file tariff provisions indicating clearly what services are offered under each type of rate, no difficulty should arise.

Any matters raised by the parties to this proceeding not specifically discussed herein have been considered and rejected as immaterial or unnecessary for purposes of decision.

An appropriate order will be entered directing that respondents, within 60 days of the date of service of such order, cease and desist from engaging in certain practices herein found to be unlawful and include in their container interchange agreements and published tariffs filed with the Commission such amendments therein as we have here required.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-28

GENERAL INVESTIGATION OF PICKUP AND DELIVERY RATES AND PRACTICES IN PUERTO RICO

ORDER

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

Therefore, it is ordered, That within 60 days of the date of service of this order:

1. Respondents, Sea-Land Service, Inc. (Sea-Land), Seatrain Lines, Inc. (Seatrain), and Transamerican Trailer Transport, Inc. (TTT), cease and desist from the practice of permitting shippers or consignees who elect to use the pickup and delivery services in Puerto Rico which such respondents offer as a part of their transportation obligations to designate the truckers as such shippers or consignees wish to transport shipments between ocean terminals and inland points;

2. Respondents, Sea-Land, Seatrain and TTT amend the form of the Trailer Interchange Agreements which they use when entering into arrangements with truckers who furnish the pickup and delivery services such respondents undertake to perform as part of their transportation obligations to remove from the final sentence of paragraph 3.4 of such interchange agreements, as well as other places in such agreements, any language which indicates that such truckers are not respondents' agents for

the purpose of insuring that the rates paid by shippers and consignees for respondents' pickup and delivery services are those contained in respondents' tariffs; and

3. Respondents, Sea-Land, Seatrain and TTT amend their tariffs specifically to indicate whether the pickup and delivery point designated therein as "Catano" is intended to be the town or the municipio of that name.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-45

NORMAN G. JENSEN, INC.—INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 800

June 11, 1973

Respondent independent ocean freight forwarder found to control or be controlled by a person who is a shipper by virtue of its beneficial interest in shipments to foreign countries. Respondent allowed to retain forwarder license upon condition that it relinquish all control of or terminate all control by shipper within time specified.

Joe A. Walters and *Howard G. Feldman* for respondent.
Joseph B. Slunt and *Donald J. Brunner,* Hearing Counsel.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, Chairman, Ashton C. Barrett and James V. Day, Commissioners)[1]

This proceeding is before us upon respondent's exceptions to the June 19, 1972, Initial Decision of Administrative Law Judge John Marshall, to which Hearing Counsel replied. Oral argument was heard on March 15, 1973.

On November 24, 1970, the Commission served Notice of Investigation and Hearing to determine basically whether the financial connection between Norman G. Jensen, Inc. (respondent), a licensed independent ocean freight forwarder, and International Traders & Counsellors, Inc. (ITC) leaves respondent in the position of independence from shippers, or from those having a beneficial interest in shipments, to foreign countries, required by section 1 of the Shipping Act, 1916 (the Act) (46 U.S.C. 801). An ancillary issue is whether respondent willfully falsified its license application by failing to divulge the questioned financial connection.

[1] Commissioner Clarence Morse did not participate.

In his Initial Decison, Judge Marshall concluded that respondent is not independent, inasmuch as it controls and/or is controlled by ITC, a person both shipper connected and having a beneficial interest in shipments to foreign countries in violation of section 16 of the Act (46 U.S.C. 815). He further concluded that respondent had willfully concealed this relationship from the Commission by falsification of its license application, and thus that respondent's license should be revoked.

Respondent excepted to the entire Initial Decision, as well as to the Judge's ruling of April 29, 1971, denying its motion to dismiss the proceeding. Hearing Counsel replied in support of the Initial Decision.

Thereafter, on November 20, 1972, respondent filed a motion submitting an offer of settlement and termination of the proceeding. This offer of settlement contained the following provisions:

1. Gordon W. Jensen will resign as an officer and director of ITC, and he and his wife will sell to Bent Jensen or ITC all of their ITC stock.
2. Bent Jensen will resign as an officer and director of Norman G. Jensen, Inc. (Jensen).
3. Bent Jensen will retain his two shares of stock in Jensen, but will execute an irrevocable proxy to vote his stock the same way Gordon W. Jensen votes his stock.
4. An agreement will be entered into between Gordon W. Jensen and ITC whereby Gordon agrees not to compete with ITC for a 10-year period.
5. An employment contract will be executed between Jensen and Bent Jensen whereby Bent will be employed in a sales capacity. Bent Jensen will have no managerial duties and will be engaged solely in sales promotional activities.

Hearing Counsel filed a reply to this motion urging rejection because of the remaining connections between respondent and ITC as set forth in Items 3 and 5 above.

By Commission order, served January 9, 1973, the motion was denied and the proceeding continued.

Respondent's exceptions are essentially a reargument of contentions that were exhaustively briefed and considered by Judge Marshall in his Initial Decision. We concur in the Judge's denial of respondent's motion to dismiss, and upon careful consideration of the record, the exceptions, briefs, and argument of counsel, we conclude that the factual findings and conclusions with respect thereto as set forth in the Initial Decision were, except as hereinafter noted, well supported and correct. Accordingly, except as noted hereinafter, we adopt the Initial Decision as our own and make it a part hereof.[2]

We do not, however, agree with the Judge's conclusions in the following respect. Judge Marshall found that "respondent's relationaship with ITC was willfully concealed from the Commission by falsification of its application for the license." (I.D. 16 FMC 378) Although we consider the status of ITC to be that of a shipper and respondent's connection with ITC as an example of illegal, shipper-connected forwarding operations, we do not find sufficient evidence of record to warrant a conclusion that respondent was aware that the relationship was illegal, and therefore, that it intentionally withheld information pertaining to the existence of the relationship from the Commission. We, therefore, do not find that the record of the proceeding would justify a conclusion of "willful" falsification of the license application.

During oral argument before the Commission, counsel for respondent revealed that the transfer of stock which it had proposed in its offer for settlement had indeed been consummated. The remaining connection between respondent and ITC, according to counsel for respondent, is the two shares of stock in respondent owned by Bent Jensen, who is now the sole stockholder of ITC, in addition to the services of Bent Jensen as a director and compensated employee of respondent. As previously stated, the Commission has denied respondent's motion for settlement based upon this arrangement by an earlier order. Our decision with respect to that divestiture plan has not changed.

We are of the opinion, however, that respondent should be allowed the opportunity to totally eradicate the remaining connections between itself and ITC as an alternative to revocation of its license. Inasmuch as we have found that the respondent's failure to divulge the relationship between itself and ITC was not willful, we conclude that respondent should be allowed ninety (90) days in which to terminate all current relationships between its operations and those of ITC. This would include the transfer of the two shares of respondent's stock currently owned by Bent Jensen to some entity not connected with ITC or of similar persuasion, as well as the resignation of Bent

[2] That portion of the attached Initial Decision containing the headnotes and appearances has been omitted.

Jensen as both a director and an employee of Norman G. Jensen, Inc. This condition for retention of respondent's forwarder license meets the requirements of section 9(b) of the Administrative Procedure Act, which requires that a licensee be accorded the opportunity to achieve compliance with the lawful requirements of the applicable licensing statute before its license can be revoked in cases where, as here, the licensee's act or omission was not willful.

Should respondent fail to submit an affidavit witnessing compliance with the conditions set forth herein within the prescribed period, its license will be revoked.

An appropriate order will be entered.

Vice Chairman George H. Hearn, dissenting:

I do not agree with the majority's conclusion that the status of ITC is that of a shipper; and I would permit the respondent to continue its initial or voluntarily revised relationship and activities with ITC.

To find under the facts here that ITC has a beneficial interest in foreign shipments is to stretch the scope of the statute beyond any reasonable purpose behind its enactment. When the application of the statute becomes such as to hinder the commerce intended to be protected, it must be concluded that the statute is being applied in an arbitrary manner, inconsistent with our statutory obligations. We must not apply statutory provisions as if they operate in a vacuum, but rather as part of a statutory framework with an overriding public interest in the well being of the foreign waterborne commerce of the United States.

It is apparent from the record that ITC is performing a service valuable to the expansion of our foreign trade, and that in the absence of such services being available, our export trade efforts would be hampered. This, of course, is no reason to countenance a violation of the law should one exist. On the other hand, we should not seek to find violations where there are none, especially when to do so requires a strained statutory application, an overextension of the beneficial interest rule, and ultimately the creation of an obstacle to our foreign trade.

Furthermore, the evidence herein does not establish to my satisfication that ITC has a beneficial interest in foreign shipments. There is no evidence at all that ITC promotes sales, develops markets, negotiates sales or obtains any right, title or other interest in the shipments of its clients.

None of the cases cited by the majority are in point, but involve relationships directly between a forwarder and shipper. The Judge was compelled, therefore, to say that merely because ITC provides a remunerative service to its clients with respect to foreign shipments, it profits from the shipments. When carried to its logical extreme, that reasoning can be seen to require an unnatural application of the beneficial interest rule. If fully extended, the reasoning would prohibit a forwarder from also being a customhouse broker who provides services for the same client. Thus, if a shipper's exportation of manufactured goods deepnds on his importation of raw materials, then the customhouse broker profits from the export shipments by virtue of his being paid for brokerage services for imports which would not exist if the shipper did not have an export market.

This result is absurd, but necessarily follows from the majority's conclusion, and demonstrates the statutory overreaching exercised in the majority report.

Consequently, I would reverse the Administrative Law Judge on all issues.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-45

NORMAN G. JENSEN, INC.—INDEPENDENT[1] OCEAN FREIGHT FORWARDER LICENSE NO. 800

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER[2]

By Notice of Investigation and Hearing, served November 24, 1970, the Commission initiated this proceeding pursuant to sections 22 and 44 of the Shipping Act, 1916 (46 USC 821, 841b) (the Act), to determine:

(1) whether Norman G. Jensen, Inc. (respondent), continues to qualify as an independent ocean freight forwarder and whether its license should be continued in effect or revoked pursuant to section 44 of the Act and the Commission's General Order 4 (46 CFR 510.9);

(2) whether respondent is in fact independent of connections with shippers, consignees, sellers, or purchasers of shipments to foreign countries as defined by section 1 of the Act;

(3) whether any violation of section 16 of the Act was incurred by virtue of the relationship between respondent and International Traders & Counsellors, Inc. (ITC); and

(4) whether respondent willfully falsified its application for the forwarder license.

Restated, the basic questions go to whether respondent, through its connection with ITC, had or has any direct or indirect relationship with shippers, consignees, sellers, purchasers

[1] This proceeding was discontinued February 26, 1971, as to World Freight Forwarders, Inc., also named respondent in the Commission's Notice of Investigation and Hearing, upon finding that it had divested itself of all interest in other specified forwarders.

[2] This decision became the decision of the Commission June 11, 1973.

of shipments to foreign countries, or has any beneficial interest in such shipments.

Hearing Counsel, in accordance with Rule 13(a) of the Commission's Rules of Practice and Procedure, and at the request of respondent, filed a clear and specific statement of proposed findings of fact and conclusions. This was done for the purpose of enabling respondent to know with certainty the relevant facts and legal issues to which it should devote its defenses. Thereafter, simultaneous opening and reply briefs were filed by respondent [3] and Hearing Counsel.

THE FACTS

(1) Respondent, a Minnesota corporation, incorporated in 1942 and registered with the Commission in 1950, is a freight forwarder but primarily a U.S. custom house broker. It is connected with ITC, also a Minnesota corporation, incorporated in 1954, through common ownership and officers. It acts as the freight forwarder for ITC's ocean shipments except in those instances where, from past experience, ITC knows that another forwarder is involved.

(2) Gordon W. Jensen is the president and treasurer of respondent. Jointly with his wife he owns 74 of 150 shares of its stock. He also is the secretary and treasurer of ITC and, again jointly with his wife, owns 50 percent of its stock. Bent Jensen is the vice president and secretary of respondent. He owns 2 shares of the stock and, also jointly with his wife, owns 50 percent of the stock of ITC. Norman G. Jensen and his family own 74 of the outstanding 150 shares of respondent's stock.

(3) ITC states that "[i]n general terms [its] services consist of preparing certain documents required by importers or exporters and also translations of documents and correspondence." Further testimony indicates that it also advises its clients as to inland shipping arrangements. Export declarations and consular invoices are prepared by either the freight forwarder or ITC depending upon the circumstances of the shipment or the regulations of the consignee's country.

(4) ITC has four main clients, all located in Minnesota. These are the Lindsay Company, a manufacturer of water softening

[3] Respondent's reply was in the form of a letter.

and purifying equipment, the DeZurik Corporation, a manufacturer of industrial valves and controls for paper mills, Watkins Products, Inc., a manufacturer of feed supplements, spices, cosmetics and patent medicines, and Polaris Industries, a manufacturer of snowmobiles. The services performed for these clients are detailed hereunder.

(5) Ordinarily, ITC is compensated for services performed for its clients in one of two ways. One is pursuant to a retainer arrangement and the other a service fee per shipment computed on the basis of a percentage of the sales price of the merchandise. In either instance, it is reimbursed for certain out-of-pocket expenses.

(6) Respondent, or its correspondent forwarder at the port city, prepares the bills of lading, and books the cargo for shipment. It also arranges for inland transportation, marine insurance, and letters of credit if those services are requested by ITC. Gordon Jensen has a "general idea" but does not know what services, other than the above, may remain to be performed in an export shipment.

(7) Sixty to 70 percent of respondent's gross revenues are derived from custom house brokerage, while 5 percent is related to ocean freight brokerage and ocean freight forwarding fees combined, and the remaining 35 to 25 percent to air freight forwarding. It had total gross revenues in 1970 of $1,200,000. ITC related shipments constitute 5 percent of respondent's ocean forwarding activities. In 1969, it collected ocean brokerage payments of $1,490 and in 1970, $2,490. The ocean brokerage payments resulting from ITC related shipments were under $100 in 1969 and under $185 in 1970.

(8) Lindsay shipments: ITC performs, or has respondent perform, all required services in connection with the export of Lindsay products to its warehouse in Antwerp, Belgium. This includes the transportation from interior points in the United States; the completion of all necessary export documents; the submission of invoices, packing lists and serial numbers to Lindsay's European warehouse. In addition, ITC maintains records as to Lindsay's warehouse inventory and the value of the merchandise in the warehouse. While in the warehouse, the property, which usually moves in full container lots, remains the property of Lindsay.

(9) In 1969, Lindsay paid ITC 10 percent of the value of the goods exported. ITC paid respondent's full invoice and was

then reimbursed by Lindsay for ocean freight and miscellaneous charges. However, ITC did absorb respondent's forwarding fees on all Lindsay shipments. Lindsay currently pays ITC a retainer fee of $30,000 per year plus out-of-pocket expenses. ITC sends respondent's freight forwarder charges to Lindsay who remits a check to ITC which ITC in turn forwards to respondent.

(10) DeZurik shipments: ITC handles DeZurik exports when special forms or special handling is required. It also provides translation services, including the translation of DeZurik's replies to potential customers into Spanish. It then sends these replies direct to the customer using DeZurik's name but ITC's address. Thereafter, it receives the orders and forwards them to DeZurik. It also sends out the invoice to the customer, using DeZurik's name, and receives payment which it forwards to DeZurik.

(11) ITC makes the export arrangements for some, but not all, of the shipments it handles for DeZurik. DeZurik does not know which documentation and transportation functions are performed by ITC and which are performed by respondent or other ocean freight forwarder. ITC selects respondent as the ocean freight forwarder if the consignee does not designate another freight forwarder.

(12) ITC pays the ocean freight forwarders for their services and expenses. DeZurik reimburses ITC for these forwarder fees and expenses and, in addition, pays ITC a fee based on 10 percent of the value of the goods exported.

(13) Polaris shipments: Most of ITC's services for Polaris are related to the importation of engines from Japan for the snowmobiles which Polaris manufactures. It also performs export services and makes all arrangements in connection with the shipment of Polaris parts to Norway. Again ITC selects respondent as the ocean freight forwarder unless the consignee designates another. Polaris is not aware of which services ITC performs and which services the freight forwarder performs in connection with any particular shipment.

(14) ITC invoices the customers in the name of Polaris for the cost of the goods exported, and remits the payments to Polaris. If a payment is not received, Polaris consults ITC, and either ITC or Polaris then writes to the customer. ITC is paid a retainer fee of $7,200 per year by Polaris.

(15) Watkins shipments: ITC receives orders from buyers of Watkins products. It investigates the credit, size, and potential ability of prospective distributors for these products, but final decision rests with Watkins. Exports are handled in the same way it handles those of other clients. It makes all the necessary export arrangements and turns the shipments over to an ocean freight forwarder for further processing.

(16) It bills the customer for the cost of the exports, ana receives payments therefor from which it deducts forwarding fees, forwarders' expenses, distributors' commissions, and its own fee. It then pays these fees and expenses to the appropriate parties and remits the balance to Watkins. Watkins pays ITC a $20 service fee plus 10 percent of the net proceeds of each sale.

(17) Bent Jensen receives a salary from and participates in the profit sharing plans of both respondent and ITC. He was active in both from 1958 to 1965. Gordon Jensen is paid a salary by both respondent and ITC. He participates in profit sharing plans of both companies. Richard E. Gudmundson, presently respondent's controller and general manager, worked for both ITC and respondent from early 1964 until late 1967. He was paid by both firms. ITC now has two employees, in addition to Bent Jensen. One performs export work for its clients and the other is a secretary.

(18) Respondent's application for a license as an independent ocean freight forwarder was prepared January 10, 1962, by Norman Jensen, at that time its chief operating officer. ITC was functioning substantially as at present.

(19) In its application, respondent denied that any officer, director, or stockholder was an owner of, in control of, or associated or connected with any shipper, consignee, seller, or purchaser of shipments to foreign countries, or that any of the above persons carried on any activities related to shipping, selling or purchasing of exports to foreign countries.

Discussion and Conclusions

Respondent contends (1) that it is an independent ocean freight forwarder,[4] (2) that it does not control ITC nor does

[4] The Act, at 46 USC 801, defines the term "independent ocean freight forwarder" as follows:

> An "independent ocean freight forwarder" is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser

ITC control it, (3) that although both companies are controlled by the same individuals, they are operated and managed independently of each other, have their own employees and keep separate books and records, (4) that ITC is not a shipper or consignee or purchaser of shipments to foreign countries nor does it have a beneficial interest[5] in such shipments, (5) that ITC is neither directly nor indirectly controlled by or in control of a shipper or consignee or by a person having a beneficial interest in shipments, (6) that ITC does not perform any service involving or relating to sales promotion, sales representation or sales negotiations, and (7) that there is no evidence indicating that respondent willfully falsified its freight forwarder application or that its relationship with ITC has been employed to violate section 16 of the Act.

On October 6, 1969, Norman Harris, then District Investigator and now Deputy Director with the Commission's New Orleans office, interviewed Bent Jensen and Richard E. Gudmundson, the latter now General Manager and Controller of respondent.

Harris' abbreviated notes, made at the time of the interview, show that Gordon Jensen described the substance of ITC functions as sales promotion, sales representation and those of a shipper's export department. Compensation for such services was on a commission basis, usually a percentage of the sales or invoice value. At his request, Gordon Jensen was furnished a copy of Harris' notes made at the time of the investigation and raised no question as to any reference. However, at the hearing, he denied describing the functions of ITC as noted but testified, "I really don't have a clear recollection because it is a long time ago." Gudmundson testified that he learned how to handle sales correspondence while working for ITC. Having heard and observed all witnesses, and following study of the entire record, this Examiner accepts the testimony of Harris.

of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest.

[5] Beneficial interest is defined by the Commission's General Order 4 (46 CFR 510.21(1)) as follows:

> (1) The term "Beneficial interest" for the purpose of these rules includes, but is not limited to, any lien interest in; right to use, enjoy, profit, benefit, or receive any advantage, either proprietary or financial, from; the whole or any part of a shipment or cargo, arising by financing of the shipment or by operation of law or by agreement, express or implied, provided, however, that any obligation arising in favor of a licensee by reason of advances of out-of-pocket expenses incurred in dispatching of shipments shall not be deemed a beneficial interest.

Respondent urges that the prohibition of section 1 of the Act regarding the independence of forwarders disqualifies only those who are shippers, consignees, sellers, or purchasers of shipments or who have a beneficial interest therein. Thus, while confirming ITC's direct relationship with its shipper clients engaged in export trades, respondent takes the position that "what is off limits to an ocean freight forwarder is for the forwarder to be a shipper, consignee, seller, or purchaser of shipments or to have a beneficial interest in such shipments."

The Commission's definition of beneficial interest is held by respondent to be "so vague and indefinite and susceptible to different interpretations as to be violative of the Due Process Clause of the Fifth Amendment to the Constitution and the Sixth Amendment. *U. S. v. Cohen Grocery Store,* 255 U.S. 81, 89 (1921); *A. B. Small Co. v. American Sugar Refinery Co.,* 267 U.S. 233, 239 (1925); *Cline v. Frink Dairy Co.,* 274 U.S. 445 (1927)."

As Hearing Counsel point out, the issue involving the alleged vagueness of the Commission's definition of beneficial interest was resolved seven years ago in *New York Freight F & B Ass'n v. Federal Maritime Commission,* 337 F. 2d 289, 297 (1964), wherein the court stated:

> Although the challenged rule may limit some benign financing activities by forwarders, it provides a means to curb an evil Congress sought to correct—the collection of compensation from carriers by persons who have *any interest* in the goods being shipped. We hold that the rule is reasonable and necessary to prevent forwarders from selling goods under the guise of "financing" and then using this subterfuge to receive a discounted freight rate. Cert. denied 380 U.S. 910 (1965). (Emphasis added.)

The rule is not restricted to financing but applies to *any interest,* including the right to profit from shipments in foreign commerce. ITC clearly profits from, and therefore has a beneficial interest in, such shipments under its retainer and commission agreements. Because of its relationship with ITC, respondent shares this beneficial interest. Respondent further benefits from the freight forwarding business flowing from shippers served by ITC.

On opening brief, Hearing Counsel detail the history and background of section 44 of the Act (PL 87-254) for the purpose of emphasizing the intent of Congress to ban anyone not completely independent from being licensed, or maintaining a license, as an independent ocean freight forwarder. In conclusion, *License No. 790—North American Van Lines,* 14 F.M.C. 215, 221 (1971), is cited as follows:

> All of the legislative history points out clearly that exceptions to the clear and unambiguous language of the statute were to be excluded and that the inherent prohibition vis-a-vis control is absolute and we have so held in numerous proceedings. (See: *Application for Freight Forwarding License—Louis Applebaum,* 8 FMC 306 (1964); *Application for Freight Forwarding License—Wm. V. Cady,* 8 FMC 352 (1964); *Application for Freight Forwarding License—Del Mar Shipping Corp.,* 8 FMC 493 (1965); *Application for Freight Forwarding License—York Shipping Corp.,* 9 FMC 72 (1965).

In view of the above-found overlapping of officers and ownership between ITC and respondent, the contention that there is no present active or actual inter-company control, direct or indirect, cannot be accepted as satisfying the statutory requirement for independence. The Commission has consistently held that the mere possibility of control, which most certainly exists here, is sufficient to remove a forwarder from an independent status. Respondent's nonconformance with the Act in this regard is not cured by going through the motions of operating the two companies independently and maintaining separate books and records. It is settled law that corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose. *Schenley Corp. v. United States,* 326 U.S. 432, 437 (1945).

Going to the significance of nonexercise of control, the Commission held in *Cady, supra,* at 360, that:

> To license Cady . . . would continue the same structure, susceptible at any time of use in flagrant violation of the purpose of the statute. The present intentions of Cady and his employer are immaterial, since the statute makes licensing depend upon the existence of control and not upon its exercise or nonexercise.

In further urging that the Commission has ruled that the requirement that forwarders must be completely independent, regardless of the actual exercise of control, Hearing Counsel cite *Del Mar Shipping, supra,* at 497, a case quite parallel to the situation here at bar, wherein it was held that:

> In determining the applicable law, the principal fact herein is that Waldeck, the owner of an exporting firm, owns 50 percent of the stock of the respondent freight-forwarder. As owner of 50 percent of the stock Waldeck is in a position where he might exercise control over the forwarder. . . . Accordingly, it is concluded and found that respondent is not an independent ocean freight forwarder. The application should be denied.[6]

[6] See also *York Shipping, supra,* at 76.

Thus, the ban against the licensing of forwarders whose independence is subject to breach, either actual or potential, is absolute. There must be complete independence and respondent is not independent.

Respondent also contends that its relationship with ITC does not violate section 16 of the Act as it does not result in rebates to shippers. The fact, however, is that direct payment to the shipper or owner of the goods is not necessary. A forwarder who has any beneficial interest in a shipment and accepts brokerage thereon is guilty of accepting a rebate in violation of section 16. *New York Freight Forwarder Investigation,* 3 U.S.M.C. 157, 164 (1949). Also see *Brokerage on Ocean Freight —Max Le Pack, et al.,* 5 F.M.B. 435, 439-440 (1958), re the absence of evidence of payment to the shipper and the use of a corporate form or veil to evade a statute.

In *United States v. Braverman,* 373 U.S. 405, 406 (1963), the Supreme Court, in interpreting the Elkins Act as prohibiting rebates by rail carriers, as does section 16 by ocean carriers, held that:

> . . . the Elkins Act outlaws solicitations of rebates by any person whatever, no matter for whose benefit the rebate is sought. . . . Nowhere does the section [section 1 of the Elkins Act] say or imply that rebates are unlawful only it they are given to or are for the benefit of a shipper.

Despite respondent's generalized contention that it did not knowingly or willfully conceal from the Commission information a reasonable man could assume the Commission sought by its application form, the record herein requires the above findings of fact numbered 18 and 19 and offer no basis for finding that the false representations concerned were other than knowing and willful.

Ultimate Conclusions

1. Respondent is not independent in that it directly and indirectly controls and/or is controlled by ITC, a person who is shipper connected and, in addition, has a beneficial interest in shipments to foreign countries.

2. Respondent's relationship with ITC is in violation of section 16 of the Act.

3. Respondent's relationship with ITC was willfully concealed from the Commission by falsification of its application for the license.

4. Respondent's license as an independent ocean freight forwarder should be revoked pursuant to section 44 of the Act and the Commission's General Order 4 (46 CFR 510.9).

(S) JOHN MARSHALL
Presiding Examiner

Washington, D. C.
JUNE 19, 1972

FEDERAL MARITIME COMMISSION

DOCKET NO. 70-45

NORMAN G. JENSEN, INC.—INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 800

ORDER

This proceeding was initiated by the Federal Maritime Commission to determine *inter alia* whether Norman G. Jensen, Inc. continues to qualify as an independent ocean freight forwarder and whether its license, No. 800, should be continued in effect or revoked, and the Commission has fully considered the matter and has 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. The Commission found that Norman G. Jensen, Inc. did not possess the required independence from shipper connections necessary to be an ocean freight forwarder but declined to revoke Norman G. Jensen, Inc.'s license as an independent ocean freight forwarder due to mitigating circumstances, but subjected the retentions of said license to certain specific conditions.

Therefore, it is ordered, That Norman G. Jensen, Inc. be allowed to retain its license as an independent ocean freight forwarder subject to the following conditions:

1. Norman G. Jensen, Inc. shall immediately terminate all relationships between its operations and those of International Traders and Counsellors, Inc. found in the Report to violate the Shipping Act, 1916, and certain Commission regulations or orders; and

2. Norman G. Jensen, Inc. shall submit in the form of an affidavit a full report to the Commission on the manner in which it has complied with the requirements to so terminate, as heretofore set out, within 90 days of service of the Report and Order. If Norman G. Jensen, Inc. fails to submit the required report, its license as an independent ocean freight forwarder will be revoked without further proceedings.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

DOCKET NO. 72-51

NEW YORK SHIPPING ASSOCIATION—
NYSA-ILA MAN-HOUR/TONNAGE METHOD OF ASSESSMENT;
POSSIBLE VIOLATION OF SECTIONS 15, 16, AND 17,
SHIPPING ACT, 1916

June 12, 1973

The assessment formula agreement between the New York Shipping Association and the International Longshoremen's Association is subject to the jurisdiction of the Federal Maritime Commission under section 15 of the Shipping Act, 1916.

The assessment formula agreement is not "labor exempt" from the requirements of section 15, Shipping Act, 1916.

No violations of sections 16 and 17, Shipping Act, 1916, appear from the record in this show cause proceeding.

C. P. Lambos, Donato Caruso, Thomas W. Gleason, Jr. and *Julius Miller* for New York Shipping Association, Inc. and International Longshoremen's Association, AFL-CIO.

John S. Rogers for Union Minerals and Alloys Corporation.

Alan F. Wohlstetter for Wallenius Line.

Marvin J. Coles and *Neal Michael Mayer* for Seatrain Lines, Inc.

Mario F. Escudero and *Robert J. Hickey* for the Commonwealth of Puerto Rico.

Ronald A. Capone and *Stuart S. Dye* for Transamerican Trailer Transport, Inc.

Joseph F. Kelly, Jr. for Daniels & Kennedy, Inc. and The Madden Corporation.

Philip Elman and *Bernard J. Wald* for Wolfsburger Transport-Gesellschaft.

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

Gerald A. Malia for Sea-Land Service Inc.

Stanley O. Sher and *Paul M. Tschirhart* for Prudential-Grace Lines, Inc.

REPORT

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

The New York Shipping Association and the International Longshoremen's Association [1] were ordered to show cause why the latest man-hour/tonnage formula,[2] contained in their collective bargaining agreement, was not subject to section 15 of the Shipping Act, 1916, and not in violation of sections 16 and 17 of that Act as well. Both the NYSA [3] and the ILA were made respondents in the proceeding.[4]

FACTS

Two affidavits furnish the background of this proceeding: (1) the affidavit of James J. Dickman, President of the NYSA; and (2) the affidavit of Thomas H. Gleason, Sr., the President of the ILA. The facts set forth below are drawn from the two affidavits.

The issue of assessments to fund collectively bargained fringe benefit programs has plagued the longshore industry since its advent in the 1968 collective bargaining agreement. Until July of 1971, the voting members of the NYSA were exclusively carriers, agents and charterers. The disputes between the voting members over the methods of assessing the various types of cargoes were frequent and bitter. This "internecine warfare" between competing modes of cargo movement during the last 2½ years of the 1968-71 labor contract almost "bankrupted" the longshoremen's fringe benefit fund. During the last contract period, several "monetary crises" developed which impaired and almost prevented the various fringe benefit funds from meeting their obligations to the employees.

In July of 1971, the NYSA passed a resolution transforming the NYSA from an association controlled by the carriers into

[1] They are variously referred to as NYSA or the Association; and the ILA or the union.

[2] The assessment formula is the agreement under which the monies necessary to fund the various fringe benefits agreed to by the Assoication and the union will be raised.

[3] The NYSA is a nonprofit, multi-employer bargaining association made up of both direct and indirect users of longshore labor in the Port of New York.

[4] Intervenors are Transamerican Trailer Transport, Inc.; Wolfsburger Transport-Gesellschaft m.b.H.; Union Minerals and Alloys Corp. d/b/a River Development Co., and Lipsett Steel Products, Inc., jointly; Wallenius Line; Seatrain Line, Inc.; Daniels & Kennedy, Inc., and The Madden Corp., jointly; Commonwealth of Puerto Rico; and Sea-Land Service, Inc.

an association where the voting power reposed in the major stevedores. The NYSA, as it is now structured, is a nonprofit membership corporation of a "bipartite" nature consisting of the major stevedoring companies, which are full-voting members, and ocean carriers, carrier agents, terminal operators and other maritime concerns operating in the Port of New York, which are nonvoting associate members.[5]

The NYSA hoped that the stevedores, as the direct employers of ILA labor, could bring "order out of chaos." The stevedores were deemed to be more intimately aware of the industry's labor problems, and thus better equipped to deal with the ILA in controlling the skyrocketing labor costs, especially in the area of the Guaranteed Annual Income (GAI). It was also hoped that the stevedores being neutral entities could develop a "fair and equitable formula" for allocating the fringe benefit costs. By this time, the ILA had made up its mind that when negotiations began on the new contract, it was going to demand full participation in the formulation of the assessment formula because, "Hard workers on the docks [were] going to have their welfare, clinics and GAI benefits protected." The ILA was determined to become "a full partner" in the assessment method.[6]

The bargaining began in September of 1971, and among the goals of the NYSA were: (1) finding some method of curtailing GAI costs, and (2) eliminating the "shortfall" concept and the forty million man-hour guarantee. To these ends, the NYSA proposed the end of "casual hiring" and demanded that every ILA employee become a "permanent employee" of some direct employer in the Port. The NYSA's primary objection was the payment of GAI benefits to the "indolent" worker who "would not accept work when work was available." Initially, the ILA vehemently opposed the "new employment system" and in turn demanded that the assessment formula itself become an issue of bargaining.

[5] It is virtually impossible to categorize the members of NYSA. Some stevedore members are also terminal operators. Some carrier members perform their own stevedoring functions. Suffice it to say that the members of NYSA consist of pure stevedores, pure carriers, pure terminal operators, pure agents, pure watching agencies, as well as hybrid organizations engaged in various maritime functions.

[6] Under the old collective bargaining agreement, the construction of a formula by which the NYSA would assess its members for the monies necessary to finance the fringe benefit programs was left in the exclusive province of the NYSA.

In November of 1971,[7] both sides agreed to certain basic principles which included: (1) GAI benefits would be available only to those employees who would accept work when it was available, and (2) the assessment issue would become the subject of bargaining with full ILA participation. Subsequently, the assessment formula presently before us was agreed to.

Discussion and Conclusions

This case is before us as a result of the Supreme Court's decision in *Volkswagenwerk* v. *Federal Maritime Commission,* 390 U.S. 261 (1968). Some understanding of that decision, its background and subsequent events is necessary to place the jurisdictional issues presented here in their proper perspective.

In late 1960, the Pacific Maritime Association (the PMA), a multi-employer bargaining association, and the International Longshoremen's and Warehousemen's Union (the ILWU) reached a milestone agreement, which it was hoped, would end a long history of labor discord on the West Coast waterfront. The ILWU agreed to the introduction of labor saving devices and the elimination of certain restrictive work practices. In return, the PMA agreed to create over the period from 1961 to 1966 a "Mechanization and Modernization Fund" of $29,000,000 (the Mech Fund), to be used to mitigate the impact upon employees of technological unemployment. The agreement specifically reserved to the PMA alone the right to determine how to raise the Fund from its members at the rate of some $5,000,000 a year. An assessment formula based solely on tonnage was ultimately adopted by PMA.

Volkswagen filed a complaint with this Commission,[8] alleging that the PMA was dominated by common carriers who had agreed upon the formula in order to shift a disproportionate share of the Mech Fund assessment onto Volkswagen, who did not patronize those common carriers. Volkswagen alleged that the Mech Fund assessment agreement was subject to the

[7] A strike was called by the ILA on October 1, 1971, which affected Atlantic and Gulf Coast ports, including the Port of New York. The strike continued for 57 days, until it was ended by injunctions under the Taft-Hartley Act.

[8] Originally, a member of the PMA brought an action in a Federal court against Volkswagen seeking to collect assessments against Volkswagen, which it had refused to pay. Volkswagen obtained a stay of the action to permit it to invoke the primary jurisdiction of the Commission.

provisions of section 15[9] of the Shipping Act, 1916 (46 U.S.C. 814), and had not been filed with the Commission, nor approved by it, and that the assessments on Volkswagen under the agreement violated sections 16 and 17 of the Shipping Act (46 U.S.C. 815, 816).

The Commission held that although the Mech Fund assessment formula was a "cooperative working agreement" within the plain language of section 15, it nonetheless was not the kind of agreement required to be filed under that section. The agreement, it was thought, did not "affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or traveling public or their representatives." The Commission concluded that:

> What must be demonstrated before a section 15 agreement may be said to exist is that there was an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by terminal operators. (9 F.M.C. at 83)

The Supreme Court, in overturning the Commission's decision, thought that "too narrow a view had been taken of a statute that uses expansive language" and that the assessment formula was subject to section 15. The Court found that most, if not all, of the members of the PMA had "passed on" the assessments, and that competition was affected within the meaning of section 15. In concluding that the assessment formula was subject to section 15, the Court felt that it was necessary to emphasize that the only agreement before it was the one between the members of the PMA, and that:

> We are not concerned here with the . . . collective bargaining agreement between the Association [PMA] and the ILWU. No claim has been made in this case that either of those agreements was subject to the filing requirements of § 15. Those agreements, reflecting the national labor policy of free collective bargaining by representatives of the parties' own unfettered choice, fall in an area of concern to the National Labor Relations Board . . . But in negotiating with the ILWU, the Association insisted that its members were to have the exclusive right to determine how the Mech Fund was to be

[9] Section 15 requires every common carrier by water or other persons subject to the Shipping Act to file with and have approved by the Commission "every agreement . . . fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carrier; or in any other manner providing for an exclusive, preferential or cooperative working arrangement." The term "agreement" includes "understandings, conferences, and other arrangements."

assessed . . . That assessment arrangement, affecting only relationships among Association members and their customers, is all that is before us in this case . . . (390 U.S. at 278)[10]

In Docket No. 69-57, *Agreement No. T-2336—New York Shipping Association Cooperative Working Arrangement* (15 FMC 259) (June 14, 1972), the agreement of the NYSA membership providing for an assessment formula generically indistinguishable from the PMA agreement before the Court in *Volkswagen, supra,* was before the Commission.[11] However, in that case the question of the Commission's jurisdiction never arose.

However, in Docket No. 70-3, *United Stevedoring Corporation* v. *Boston Shipping Association* (16 FMC 7) (August 25, 1972), the Commission was confronted with another agreement involving a multi-employer bargaining association, except that this time the agreement in issue was a part of the collective bargaining agreement itself. Briefly, it was alleged that pursuant to Article 10 of the collective bargaining agreement between the Boston Shipping Association (BSA) and the ILA, the complainant, United Stevedoring, was being denied access to longshore labor. United charged that Article 10 and certain other agreements were subject to section 15, and since the agreements had neither been filed with nor approved by the Commission, they were unlawful. Activities under the agreement were also said to violate sections 16 and 17 of the Shipping Act.

In its first decision, served November 9, 1971, (15 FMC 33) the Commission found the BSA subject to its jurisdiction, and Article 10 and the other agreements subject to the provisions of section 15. That decision was appealed to the First Circuit Court of Appeals.[12] Seven maritime associations were granted leave to intervene, and the views of the Department of Labor and the National Labor Relations Board were presented to the Court in a brief filed by the Department of Justice, statutory respondent in the proceeding. Prior to oral argument, the Com-

[10] Justice Harlan, in a concurring opinion, discussed more fully the problem of reconciling multi-employer collective bargaining with the sometimes competing philosophies of Federal laws promoting and regulating competition, i.e. in the case of maritime labor regulations, the Shipping Act.

[11] The case involved the collective bargaining agreement and the assessment formula, which immediately preceded the one here under consideration.

[12] *Boston Shipping Assn., Inc.* v. *United States,* (No. 72-1004) decided May 31, 1972, U.S. Court of Appeals, First Circuit.

mission requested the Court to remand the proceeding to it for consideration of the views of the various government agencies and intervenors, none of which had appeared in the initial proceeding before the Commission. The motion was granted; and for the first time, the Commission was faced with the problem alluded to by Justice Harlan in *Volkswagen*—the problem of reconciling multi-employer bargaining with the sometimes competing policies of Federal laws promoting and regulating competition, i.e. the Shipping Act.

On remand, the Commission concluded that while the agreements were of a kind which fell within section 15, the national policy of fostering and protecting the collective bargaining process require that the agreements be declared "labor exempt". In that decision, served August 25, 1972, the Commission formulated a test for use in determining whether a labor exemption should be granted. Four criteria or rules of thumb were established:

> 1. The collective bargaining which gives rise to the activity must be in good faith. Other expressions used to characterize this element are "arms length" or "eyeball to eyeball".
>
> 2. The matter is a mandatory subject of bargaining, e.g. wages, hours, or working conditions. The matter must be a proper subject of union concern, i.e., it is ultimately related or primarily and commonly associated with a bona fide labor purpose.
>
> 3. The result of the collective bargaining does not impose terms on entities outside of the bargaining group.
>
> 4. The union is not acting at the behest of or in combination with nonlabor groups, i.e. there is no conspiracy with management. (*BSA*, *supra*, at page 8)

We shall have more to say about these criteria later in this report; and with this background, we turn to the issues at hand.

A threshold we must cross before the disputed agreement itself can be dealt with is the question of jurisdiction over the parties to the agreement. The argument against our jurisdiction is two-pronged: (1) since the NYSA is an association with some members who are "stangers to the Act", it is not subject to the Shipping Act; and (2) since one of the parties to the collective bargaining agreement is a union (the ILA) over which we have no jurisdiction, there can be no jurisdiction over the agreement. Both of these arguments have already been rejected,[13] and both are based upon the language of section 15 that submits to our jurisdiction only agreements which are between common carriers by water and/or "other persons" subject to the Shipping Act.[14]

Our jurisdiction over the NYSA is not dependent upon each and every member of the Association being either a "common carrier" or "other person". What we said in the *BSA* case is equally applicable here:

> Aside from the fact that some members of the BSA may not be subject to our jurisdiction, there are members of the BSA which clearly are subject to the Act. Whether or not stevedoring contractors are subject to the Act, terminal operators and steamship lines clearly are; thus we find members of the Association in their individual capacities to be subject to our jurisdiction. To argue that these individuals can band together and form an association which, although as an entity does not do any of the things enumerated in the section 1 definition of "other person" but does otherwise engage in matters which are or may be of Shipping Act concern would frustrate the entire purpose of the Act. (*BSA, supra,* at page 4, footnote omitted)

A moment's reflection will show that acceptance of any "mixed membership" theory of jurisdiction would effectively end any regulation of the myriad restrictive agreements which characterize this country's oceanborne commerce. The conference system itself would elude all regulation by the simple expedient of each conference adding a stranger to the Act, say a pure steamship agent, to its membership. The difference between the addition of a "pure stevedore" as a party to an agreement and the inclusion of a pure agent in conference membership is merely one of degree. To hang regulation of our foreign waterborne commerce on so slender a thread was most certainly not the purpose of Congress, nor is it the result of any language in the Shipping Act.

The assessment formula before us is for jurisdictional purposes at least the same as was before us in Docket 69-57, *supra,* except for the presence of the union.

The introduction of the ILA into the situation does not, however, alter the picture. Here again, whether or not there is any conceivable Shipping Act jurisdiction over a labor union, our

[13] See *United Stevedoring Corporation* v. *Boston Shipping Association, supra.*

[14] Section 1 of thę Shipping Act defines the term "other person" as "any person not included in the term 'common carrier by water' carrying on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water."

jurisdiction over the parties who are subject to the Act is sufficient. Thus, the inclusion of the ILA as a nominal party to the assessment formula agreement otherwise among persons subject to our section 15 jurisdiction, and the fact that there is a party on one side of the collective bargaining agreement who is not subject to such jurisdiction, are considerations of no legal significance. Our jurisdiction over those persons who are subject to the Act suffices so long as the agreement itself falls within one of those categories of agreements which section 15 submits to our regulation.[15] We cannot hold otherwise without emasculating the Congressional regulatory program for our waterborne commerce. If the agreement is not amenable to our surveillance (although within our section 15 jurisdiction), it will be because the national policy to encourage and protect collective bargaining requires the agreement to be declared labor exempt, not because it is included in a collective bargaining agreement with the union on one side or because the union is made a party.

The assessment formula before us was the product of negotiations between the union and the Association, and is incorporated into the basic collective bargaining agreement itself. This alone, it is urged, is enough to entitle the agreement to the labor exemption because *Volkswagen* is seminal authority for the principle that negotiated labor agreements ". . . reflecting the national labor policy of free collective bargaining . . . fall into an area of concern to the National Labor Relations Board . . ." (390 U.S. at 278), to the exclusion of any jurisdiction under the Shipping Act. Respondents' proposition, while valid in the abstract, must fail in the specific because of its inherent assumption that their particular agreement reflects, and is in furtherance of, the national policy of free collective bar-

[15] Several types of arrangements among persons subject and a person not subject to the Act have clearly been held subject to section 15; e.g., the incorporation papers of an association of carriers and stevedores, *United Stevedoring* v. *Boston Shipping Assn., supra;* understandings/agreements concerning interdependent rail/overland ocean rates between carriers and railroads, *Investigation of Overland/OCP Rates and Absorptions,* 12 F.M.C. 184, 216 (1969), affirmed *sub nom. Port of New York Authority* v. *F.M.C.,* 429 F.2d 663 (5th Cir. 1970); a requirements contract (not an interstitial operation under a conference agreement) between carriers and a shipper, *N. Atlantic Mediterranean Frt. Conf. and United Arab Co.,* 9 F.M.C. 431, 436, 437 (1966); a rate agreement (implementing an intercarrier dual rate system) between carriers and shippers, *Anglo Canadian Shipping Company* v. *United States,* 264 F.2d 405, 411 (1959). See also generally *Volkswagenwerk* v. *F.M.C.,* 390 U.S. 261, 275-76 (1967). Cf. *Wharfage Charges and Practices at Boston, Mass.,* 2 U.S.M.C. 245, 250, 251 (1940); *Agreement No. 7620,* 2 U.S.M.C. 749, 754 (1945); *Grace Line, Inc.* v. *Skips A/S Viking Line et al.,* 7 F.M.C. 432, 448 (1962); and *Portalatin Velazquez Maldonado* v. *Sea-Land Service, Inc.,* 10 F.M.C. 362, 363, 364 (1967).

gaining. *Volkswagen* does not stand for any absolute or total exemption of all collective bargaining agreements from other Federal laws. As Justice Harlan said in the *Volkswagen* case itself:

> Multi-employer collective bargaining must therefore be reconciled with the competing policies of Federal laws prompting and regulating competition, viz., the antitrust laws and, in this case of maritime labor relations, the Shipping Act. This is a problem on which Congress has provided relatively little guidance, but it is one of a kind that the Court has repeatedly grappled with since *Allen Bradley Co.* v. *Local Union No. 3, etc.*, 325 U.S. 797 . . . It is a problem of linedrawing.[16]

It was precisely in aid of the required "line drawing" that we set out the criteria or guidelines in the *BSA* case, *supra*. It is, of course, respondents' position and assurance that the assessment formula fully meet all the criteria of *BSA*. Intervenors and Hearing Counsel are equally sure that the agreement fails to meet some if not all of the criteria. Failure to meet any one of them is sufficient to consider withholding the exemption. We say "consider withholding" the exemption because, as we found in *BSA*:

> In the final analysis, the nature of the activity must be scrutinized to determine whether it is the type of activity which attempts to affect competition under the antitrust laws or the Shipping Act. The impact upon business which this activity has must then be examined to determine the extent of its possible effect upon competition and whether any such effect is direct or remote. Ultimately the relief requested or the sanction imposed by law must then be weighed against its effect upon the collective bargaining agreement.

This final analysis must await examination of the assessment formula under the criteria for the labor exemption.

Good faith in the bargaining between the NYSA and the ILA is somewhat grudgingly "assumed" by all the parties except Transamerican Trailer Transport, Inc. (TTT), who challenges the "good faith" of the respondents. TTT finds it inconceivable that certain members who have "with uncompromising" hostility fought and are still fighting Puerto Rico's "exempt" status under the old formula could have engaged in good faith, arms-length bargaining to preserve that status.[17] TTT

[16] Justice Harlan went on to say, "I see no warrant in assuming, in advance that a maritime agreement must always fall neatly into either the Labor Board or Maritime Commission domain; a single contract might well raise issues of concern to both."

[17] For a discussion of the "exempt" status of Puerto Rico under the old formula as modified by this Commission, see Docket 69-57, *Agreement No. T-2336—New York Shipping Association Cooperative Working Arrangement*, 15 FMC 259-261.

recognizes that resolution of the good faith issue would require an evidentiary hearing, and it requests one; but since our decision here does not turn on the issue of good faith, we will not order an evidentiary hearing and we reach no conclusions concerning the good faith of either the NYSA or the ILA during their negotiations.

Respondents seem inclined to skirt the question of whether the assessment formula is a mandatory subject of bargaining, i.e. whether the assessment formula itself concerns wages, hours or other terms and conditions of employment. Their whole argument appears to be included in the single sentence, "The Assessment Formula is a proper subject of bargaining of paramount concern since the ILA would be remiss if it permitted its members to lose the fringe benefits which they had obtained in the collective bargaining arena." The ILA's concern over the possible loss of fringe benefits stems from the NYSA members' failure to agree on a formula for the assessments necessary to fund the fringe benefits the Association was obligated to pay under the old collective bargaining agreement,[18] and the several "crises" which developed from the failure of the members to agree. Neither the amount nor character of the fringe benefits is at issue. They have already been negotiated and are not challenged by the NYSA. What is at issue between the ILA and the NYSA is the timely payment of the necessary monies, and the question remains whether that issue is a mandatory subject of bargaining.

The mandatory bargaining criteria stem from the proposition that Congress only intended to exempt from other Federal laws those collective bargaining agreements which dealt with legitimate employer-employee disputes, which in turn are subjects on which labor and management are required by law to bargain. This intention of Congress found expression in section 8(d) of the National Labor Relations Act (49 Stat. 452), which imposes the duty to bargain in good faith concerning "wages, hours, or other terms and conditions of employment." That unions and employers may bargain about other subjects is beyond doubt, but when they leave the area of the mandatory and enter other fields they run the risk that their agreements may violate other Federal laws. *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965). The assessment formula does not involve

[18] See our decision and the record in Docket 69-57, *supra*, note 16, for the lamentable history of disagreement under the old agreement.

wages and hours; nor does it, in our view, involve other terms and conditions of employment.

Fringe benefits themselves would, we think, quite clearly fall within "other terms and conditions of employment"; but, as we have already noted, we are not here dealing with the amount or kind of fringe benefits. What the ILA wants here is not some new agreement on fringe benefits as such, but a guarantee that fringe benefits already negotiated will in fact be timely paid. We have a great deal of sympathy for the ILA's concern —sympathy prompted by our experience with the old assessment formula—but we cannot let this sympathy lead us to grant a labor exemption to an agreement which is and should be subject to our jurisdiction.

In *Excello Dry Wall Company*, 145 N.L.R.B. 663 (1963), the union sought a security fund to insure the payment of wages and benefits because the need for such a fund had been clearly demonstrated by earlier evidence of delinquency on the part of the employer. The NLRB, citing over 20 years of precedent, found that the union had committed an unfair labor practice by insisting upon the security fund as a condition precedent to concluding a collective bargaining agreement. In short, security funds, performance bonds or other guarantees of payment are not mandatory subjects of bargaining.[19]

In this case the motivating factor in the union's (the ILA) demand of full participation in the assessment formula is solely its concern that the fringe benefits be paid for by the employer (the NYSA). We see nothing in the situation confronting us here to distinguish it from that confronting the NLRB in the *Excello* case, *supra*. Accordingly, we conclude that the assessment formula now before us did not result from negotiations concerning a mandatory subject of bargaining.

Respondents would also have us find that the assessment formula does not impose terms upon persons or entities outside the bargaining group because by its terms the assessment formula applies only to "cargo loaded or discharged by ILA members in the Port of New York." As respondents put it:

> The NLRB has certified that all longshore employees engaged in the loading and unloading of vessels in the Port of New York constitute the proper unit for collective bargaining. The assessment formula does not purport to apply to longshore employees in the Port of Philadelphia or any other port

[19] As the NLRB pointed out, "The statutory obligation to bargain is not just limited to financially responsible parties, whether employer or labor union." (145 N.L.R.B. at 664)

in the United States. It assesses only cargo that has enjoyed the services of ILA labor in the Port of New York, the area that the NLRB has certified to be the proper bargaining unit.

Of course, respondents completely miss the point, and in doing so misread *United Mine Workers of America* v. *Pennington et al.,* 381 U.S. 657 (1965). In the first place, the collective bargaining unit is not just the ILA. Nor is the whole Port of New York, regardless of who may be performing services there. The NLRB did not certify the area of the Port of New York itself, although the area covered by the bargaining unit is the Port of New York. It did certify both the ILA and the NYSA. These two associations taken together constitute the bargaining unit.

Pennington, supra, makes it glaringly clear that the bargaining group includes both sides of the table—the union and the employees. In *Pennington,* the union agreed to the rapid mechanization of the mines which would substantially reduce employment; and in return the large mining companies agreed, among other things, to increase wages as productivity increased. The wage increases were to be demanded from the smaller companies by the union, whether or not they were mechanized and without regard to their ability to pay. The purpose of the agreement was to eliminate the smaller companies. In concluding that the bargaining agreement was not entitled to a labor exemption under the antitrust laws, the Court said:

> There is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry . . . The union's obligations to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant.

The persons or entities upon whom the terms and conditions of the collective bargaining agreement were being imposed were also employers, not just the union.

Clause H of the collective bargaining agreement, entitled "Settlement of Port of Greater New York Conditions", provides in part:

> This agreement shall be executed by the ILA on behalf of itself and its affiliated locals and by the New York Shipping Association, Inc. for and on behalf of its employer members and by each contracting stevedore and vessel carrier who directly or indirectly utilizes the services of any employees covered by this agreement and who by such execution binds itself and its

> successors to each and every term and condition of the agreement, including without limitation, the contribution of its proportionate share of the hourly and tonnage contributions provided herein, and no contracting stevedore shall perform services for any carrier, private or govenmental, unless such carrier has subscibed to this agreement . . . .

Article 2 of the assessment formula provides:

> Any direct employer who performs work for any carrier who is not a party to the collective bargaining agreement shall be responsible for the tonnage assessment that should have been paid by such carrier.

In order to enforce this provision, the ILA/NYSA Contract Board has directed the execution of an agreement between direct employers and carriers who are not members of NYSA or parties to the NYSA/ILA collective bargaining agreement which binds the nonmember carriers to each and every term of the collective bargaining agreement, and by which the nonmember carrier "agrees without limitation that it will contribute its proportionate share of its contributions and assessments required to be paid by the carrier under the collective bargaining agreement."

Many if not all of the direct employers referred to are terminal operators, and it is unnecessary to even allude to the vital importance of terminal services to the common carrier. Under the above provisions, a nonmember carrier must, as a condition precedent to receiving terminal services at the Port of New York, sign an agreement levying assessments under yet another agreement in the negotiation of which he had played no part. Thus, it is clear that entities outside the bargaining group must either submit to the terms of the collective bargaining agreement and the assessment formula or incur the sanctions contained therein.

No party to this proceeding alleges any "conspiracy" between the NYSA and the ILA. Even TTT, which as noted charges a lack of good faith on the part of certain members of the NYSA, does not argue that they conspired with the ILA. The conspiracy criteria is really a corollary of the good faith criteria, and here there is no evidence of record of any conspiracy. For the same reasons that we found it unnecessary to order an evidentiary hearing to establish good faith or its lack on the part of respondents, we find it equally unnecessary to order such a hearing to determine whether any conspiracy existed—our disposition of this case turns neither on lack of good faith nor the existence of a conspiracy.[20]

As for whether in the final analysis the activity under the assessment formula is the type of activity which affects competition under the Shipping Act, that question would appear to have been answered in the affirmative in the *Volkswagen* case, *supra.* Just as the PMA members passed on their assessments under the Mech Fund agreement, so must the members of the NYSA pass on their levies under their assessment formula. Competition is thus affected. This effect on competition is not remote—it is the direct result of the agreement which we here find subject to section 15. In this area we agree with Hearing Counsel, who points out that the impact assumes greater proportions than appear from the mere fact that a total fund of over $100 million must be raised by some form of cargo "tax". The difference in productivity in the shipping industry makes the particular formula adopted of crucial importance. For instance, if a straight tonnage rate is chosen, cargoes such as newsprint or automobiles which move a relatively large volume of tons would bear the heaviest burden. Similarly, highly productive containerized or roll-on/roll-off operators would bear a greater proportion of the total obligation than breakbulk operators under a tonnage assessment. Some of these carriers may be able to absorb the assessments, others may be forced to pass them on to their shippers. It is obvious that the formula chosen has a direct impact upon their respective competitive positions.

We do not view our assertion of jurisdiction over the assessment formula as an unwarranted intrusion into the collective bargaining process. Respondents view the collective bargaining agreement, including the assessment formula, as part of a "complete package". We, of course, do not dispute this view. They are perfectly free to view their agreement in any light they desire. What we do disagree with is respondents' assertion that our jurisdiction over the assessment formula would preclude implementation of any part of the collective bargaining package. Admittedly, the assessment formula, here found subject to section 15, has not been approved by this Commission, and until it is approved the NYSA may not collect assessments

[20] It may well be that "conspiracy" is a misnomer. It is, of course, an antitrust test. Section 15, unlike the Sherman Act, speaks only of agreements, and it may be that something less than an actual conspiracy is needed under that section.

under it without violating section 15. The situation is a great deal like that which confronted us early in the proceedings of Docket 69-57, *supra,* where we granted an interim approval of Agreement T-2390 so as to allow the NYSA to continue to collect assessments necessary to fund the fringe benefits established in its contract with the ILA. The fact that the assessment formula in Docket 69-57 was not an actual part of the document comprising the collective bargaining agreement as it is here is of no significance. The assessment formula is severable.

We are not disposed to jeopardize relations between the NYSA and the ILA by withholding our approval of the assessment formula. If for no other reason, our experience under the old agreement would preclude such an action on our part. Labor peace is crucial to the well-being of our maritime industry, and we will take an action which disturbes that peace only when there are no other reasonable alternatives. Here, however, the course is clear, we will grant the assessment formula an interim approval just as we did in Docket 69-57, and we will condition our approval upon any adjustments which may be found necessary as a result of the proceeding which we have this day instituted.

We cannot accept intervenors' contention that the assessment should be disapproved because it violates sections 16 and 17 of the Act. In advancing this contention the intervenors point to the fact that the present assessment formula is in all essential respects the same as T-2390, which we found unlawful in Docket 69-57. It follows, therefore, to the intervenors at least, that the present assessment formula is also unlawful, and all we need to do is take official notice of the record in Docket 69-57 and find as a fact that the new agreement is indeed the same as the old T-2390, and thus conclude as a matter of law that the new formula is unlawful. It is not quite that simple.

Intervenors' theory rests upon an assumption which we think is clearly unwarranted—that the same circumstances and conditions in all the trades covered by the agreement as existed when we found T-2390 unlawful still exist today. This, although unlikely, may be the case; we would be remiss were we to assume such a crucial fact. Accordingly, any determination that the present assessment formula violates sections 16 and 17 under the circumstances and conditions existing in the various trades today must await the development of a fresh record clearly establishing those conditions and circumstances.

There remains only the charge that the assessment formula is within the exclusive jurisdiction of the National Labor Relations Board and thus beyond any jurisdiction under the Shipping Act. Respondents assert that we lack the "acute expertise and sensitivity in administering the National Labor Relations Act" which the NLRB has developed.[21] The Commission should not, we are told, usurp the jurisdiction of the NLRB; for should we impose another regulatory statute upon labor negotiations, we would present respondents with "problems which would almost be insurmountable." We must agree with the intervenors and Hearing Counsel in that we too find the respondents' arguments to be based upon several erroneous assumptions.

The basic misconception of respondents is that the NLRB has exclusive and unlimited jurisdiction over all matters which arise or may arise from collective bargaining. This is, of course, not the case as the Supreme Court has so clearly stated in *Meat Cutters* v. *Jewel Tea Co., supra.* In that case, the Supreme Court entertained the proposition that the question of what constituted a mandatory subject of collective bargaining was within the "exclusive primary jurisdiction" of the NLRB. In rejecting this contention, the Court said at page 687:

> . . . we must reject the union's primary-jurisdiction contention because of the absence of an available procedure for obtaining a Board determination. The Board does not classify bargaining subjects in the abstract but only in connection with unfair labor practice charges of refusal to bargain. The typical antitrust suit, however, is brought by a stranger to the bargaining relationship, and the complaint is not that the parties have refused to bargain but, quite the contrary, that they have agreed. . . . Agreement is of course not a refusal to bargain, and in such cases the Board affords no mechanism for obtaining a classification of the subject matter of the agreement. Moreover, even in the few instances when the antitrust action could be framed as a refusal to bargain charge, there is no guarantee of Board action. It is the function of the Board's General Counsel rather than the Board or a private litigant to determine whether an unfair labor practice complaint will ultimately issue. . . . And the six month limitation period of § 10(b)

[21] Respondents also would include the Department of Justice as one to whom jurisdiction over labor negotiation should be left; but the reason for this is unexplained. Obviously, respondents have in mind the inescapable fact that some labor agreements fall within the ambit of the antitrust laws which are under Justice Department jurisdiction. This, of course, weakens the basic premise that all labor negotiations and their consequences fall within the exclusive province of the NLRB.

of the Act . . . would preclude many litigants from even filing a charge with the General Counsel.

The analogy to *Jewel Tea, supra,* is clear. Here, strangers to the bargaining relationship are challenging the agreement; there can be no refusal to bargain charge; and it has been more than six months since the agreement was signed. There is no jurisdiction of the NLRB with which our decision here interferes.

The assessment formula embodied in Attachment B of the collective bargaining agreement entitled "Settlement of Port of Greater New York Conditions" is hereby assigned Commission No. T-2804, and is hereby approved; provided, however, the approval granted herein is subject to such additional adjustments as the ultimate decision in Docket No. 73-34, *New York Shipping Association—NYSA/ILA Assessment Formula Agreement,* demonstrates are required to render the assessment formula just and lawful under the Shipping Act.

Commissioner Clarence Morse, concurring and dissenting.

Concurring. Irrespective of the answer to the question whether, for section 15 purposes, NYSA is a "mixed membership" group, I concur in the majority's conclusion that the lawfulness of the assessment formula under sections 16 and 17 of the Shipping Act, 1916, must be tested under a fresh record establishing the conditions and circumstances as applicable thereto. It is implicit in such a conclusion that the assessment formula is not a mandatory subject of labor-management bargaining,[22] that labor-exempt status therefore does not automatically apply, and that whether we will or will not grant a labor exemption to the assessment formula turns on a resolution of a line-drawing problem as between the Shipping Act, 1916, and the National Labor Relations Act, which can be accomplished only after full exposure to the applicable facts.

[22] *Excello Dry Wall Company, supra.* Compare: *NLRB* v. *American Compress Warehouse,* 350 F.2d 365 (5 Cir. 1965), *cert. den.* 382 U.S. 982 (1965). *International Hod Carriers, Local 1082,* 150 NLRB 158 (1964), enf'd., *sub nom. International Hod Carriers* v. *NLRB,* 384 F.2d 55 (9 Cir. 1968), *cert. den.* 390 U.S. 920 (1968). *NLRB* v. *Davison,* 318 F.2d 550 (4 Cir. 1963). *Local 164, Brotherhood of Painters* v. *NLRB,* 293 F.2d 133 (D.C. Cir. 1961), *cert. den.* 368 U.S. 824. *Sylvania Electric Products, Inc.* v. *NLRB,* 291 F.2d 128 (1 Cir. 1961), *cert. den.* 368 U.S. 926 (1961); *Sylvania Electric Products, Inc.* v. *NLRB,* 358 F.2d 591 (1 Cir. 1966), *cert. den.* 385 U.S. 852 (1966).

If I were able to find the existence of proper parties to constitute a section 15 agreement, I would associate myself with the majority's statement that the assessment formula ". . . is hereby approved; provided, however, the approval granted herein is subject to such additional adjustments as the ultimate decision in Docket No. 73-34, *New York Shipping Association—NYSA/ILA Assessment Formula Agreement,* demonstrates are required to render the assessment formula just and lawful under the Shipping Act." Such review by the Commission compels a complete re-examination of the assessment formula in all its aspects, and as I view the matter the report in Docket No. 69-57, *Agreement No. T-2336—New York Shipping Association Cooperative Working Arrangement, supra,* is not controlling in such re-examination. Pending a final decision on the merits of the assessment formula, the parties must have this or some similar authorized vehicle under which they can be collecting funds with which to meet their contractual obligations. Otherwise there will be chaos.

Dissenting. This proceeding gives rise to two basic inquiries, one being our jurisdiction, and the other, assuming we find jurisdiction exists, whether we should grant labor-exempt status. The jurisdictional issue in turn has two aspects, one being whether an agreement exists which meets the standards of section 15 in respect to parties and subject matter, and the other being whether the agreement or the parties are subject to sections 16 and 17. It is clear to me that sections 16 First and 17 do apply. Hence, my difference with the majority exists only in respect to section 15. If we have jurisdiction under sections 15, 16, or 17, we are then confronted with the second basic inquiry, which is the question whether we should declare the matter is labor exempt as to one or all of those three sections of the Shipping Act. Docket No. 70-3, *United Stevedoring Corp.* v. *Boston Shipping Association, supra,* clearly and adequately declares our guidelines in determining whether to grant labor-exempt status.

There is little I need add relative to "mixed membership" and section 15 jurisdiction which I have not said in my concurring and dissenting opinions in Docket No. 69-57, *supra* (June 14, 1972) 15 FMC 285, and Docket No. 70-3, *supra* (August 25, 1972), 16 FMC 17-21 incorporated herein by reference.[23]

[23] The philosophy of *Federal Maritime Commission* v. *Seatrain Lines, Inc.,* 411 U.S. 726 (decided May 14, 1973), fortifies my views.

In the instant case, the majority asserts two propositions (mimeo decision—pages 10-11).[24] First, it states that the inclusion of the union as a nominal party to the agreement does not alter the application of section 15. That statement is misleading because it fails to distinguish between the labor-management agreement wherein NYSA and ILA are on opposing sides and the intra-NYSA agreement wherein the voting members of NYSA authorized NYSA to enter into the labor-management agreement with the ILA. The union is not a member of the intra-NYSA group or the agreement within that group. The union may be a party to the assessment formula agreement by reason of the inclusion of the formula in the NYSA/ILA contract, but the union is never a "party", nominal or otherwise, to the intra-NYSA group or agreement which preceded and authorized on behalf of NYSA the signing of the NYSA/ILA labor-management contract, and for our jurisdictional purposes this is the critical agreement. The intra-NYSA section 15 type agreement (See Docket 70-3, mimeo decision—footnote 8 on page 15 and footnote 11 on page 17) to enter into an agreement with the ILA can, itself, be a section 15 agreement provided only the intra-NYSA group is not "mixed membership" and the agreement meets any of the seven subject matter criteria of section 15.[25]

As I understand the majority report, the majority at no time contends that the collective bargaining agreement itself (the agreement to which the assessment formula is attached as Exhibit B) is a section 15 type agreement, because ILA is an essential party to that agreement and ILA is neither a common carrier by water nor another person subject to the Act. The majority contends that the intra-NYSA agreement to enter into the assessment formula (Attachment B of that agreement) is section 15 and the mere fact the assessment formula is a part of the collective bargaining agreement (thereby making ILA a

[24] At page 10 of mimeo decision it is stated: "The difference between the addition of a 'pure stevedore' as a party to an agreement and the inclusion of a pure agent in conference membership is merely one of degree." Not so. *Agreement No. 7602*, 2 USMC 749 (1945) and *In the Matter of Agreement No. T-2719* (Docket No. 78-6, mimeo decision served April 20, 1978). 46 CFR Part 522 and Part 528, our guidelines for filing of freight conference agreements, rate agreements, pooling agreements, etc., are clearly limited to filings of agreements between common carriers by water to the exclusion of "pure agents". In those instances where an agent has been accepted as a member of a section 15 type agreement, its acceptance has been on the sole premise that it is signatory thereto as alter ego for its principal, a common carrier by water or "other person".

[25] Compare *Transshipment Agreement, Indonesia/United States*, 10 FMC 183, 196. *Transshipment Agreement between S. Thailand and U.S.*, 10 FMC 199, 215.

"nominal party" to the assessment formula) does not alter the situation.

If one considers the entire membership of NYSA, both voting and non-voting members, it is obvious that there are some members who are neither common carriers by water nor "other persons subject to the Act." See Footnote 5, *supra.*[26] Hence, under such a test "mixed membership" exists. In my desire to find a controlling group to which "mixed membership" would not apply, I would even confine my examination to the members of NYSA which, after July 1971, were granted sole voting power for NYSA to approve or disapprove an agreement with ILA, namely, the major stevedores in the Port.[27] This is the furthest I am willing to go in seeking to find an approvable section 15 type membership. After July 1971, NYSA adopted a resolution transforming NYSA from an association controlled by the carriers into an association where the voting power reposed in the major stevedores in the Port. The seven voting stevedores are: International Terminal Operating Co., Inc., John W. McGrath Corporation, Maher Stevedoring Co., Inc., Nacirema Operating Co., Inc., Northeast Stevedoring Co., Inc., Pittston Stevedoring Corp., and Universal Terminal & Stevedoring Corp.[28]

Of the foregoing seven voting members, all but Northeast Stevedoring Co., Inc., have terminal tariffs on file with this Commission and therefore constitute "other persons" subject to the Shipping Act, 1916. Northeast Stevedoring does not have a terminal tariff on file with us and, unless it is operating a terminal without filing a tariff in violation of our General Order 15, there has been no showing that Northeast Stevedoring is "carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection

[26] Affidavit of James J. Dickman, Appendix, page 3a, fn 3, Respondents' Joint Memorandum of Law and Appendix, filed October 10, 1972, after naming the seven stevedoring companies which comprise the voting members of NYSA, including Northeast Stevedoring Co., Inc., states in part:

> ". . . In addition to the voting major stevedores, NYSA's membership also consists of non-voting associate members, comprised of ocean carriers, carrier agents, terminal operators, sugar stevedores, watching agencies, other stevedoring companies and other maritime concerns operating in the Port. Some stevedore members are also terminal operators at some or all of their waterfront facilities. Others are pure stevedores. Moreover some carrier members perform their own stevedoring functions. NYSA is truly a 'mixed membership' association."

[27] *Id.*

[28] *Id.*

with a common carrier by water." (Section 1, Shipping Act, 1916, 46 U.S.C. 801). While the fact that Northeast has the term "Stevedoring" as part of its name is of little significance in establishing the nature and scope of its business activities, the absence of a terminal tariff filing is significant. Furthermore, it is my understanding that Northeast Stevedoring is wholly owned by Lester Wolff and performs stevedoring services at Northeast Marine Terminal's facilities, which latter company does conduct a terminal operation, has a terminal tariff on file with this Commission, and is 50% owned by Lester Wolff and 50% by Mitsui O.S.K. Lines, Ltd. Northeast Stevedoring and Northeast Marine Terminal have a common address and telephone number. Had these two companies had a common parent or had there been a parent/subsidiary relationship, I might even have disregarded the corporate fiction and concluded that Northeast Stevedoring is conducting a terminal business by reason of its affiliation with Northeast Terminal, but I am unwilling to take that step here because of the diverse stock ownership in the two companies. Hence, I conclude that the present voting power in NYSA is vested in six stevedoring companies which also conduct terminal operations and thereby qualify as "other person subject to the Act" plus one stevedoring company—Northeast Stevedoring Co., Inc.,—which is neither a common carrier by water nor an "other person subject to the Act" and therefore we have a classical case of "mixed membership". Hence, I conclude that there is no approvable section 15 agreement intra-NYSA because of "mixed membership", but that the agreement is subject to sections 16 and 17, unless by "line drawing" we should grant labor exemption.

The second point made by the majority (mimeo decision—page 10) is the stated fear that "'mixed membership' theory of jurisdiction would effectively end any regulation of the myriad restrictive agreements which characterize this country's oceanborne commerce." [29] That comment is unsupported by the

[29] In Docket No. 78-6, *In the Matter of Agreement No. T-2719* (16 FMC 318 served April 20, 1978), the Commission ruled (Chairman Bentley dissenting) that the lease of a public port grain elevator from Port of Houston Authority to Louis Dreyfus Corporation was not subject to section 15, Shipping Act, 1916, because lessee was ruled to be not an "other person subject to the Act." In that case, after the lease was executed and after it was filed for our approval, but before lessee took possession under the lease, the lessee filed with this Commission a proposed tariff provision which stated, *inter alia*, "Common carriers by water . . . shall not be accepted for loading at the elevator." Absent such tariff filing, lessee would have been ruled to be an "other person" because of operation of a port facility serving common carriers by water. Compare the consistency of the above stated fear with the majority's ready acceptance in Docket No. 78-6 of a proposed tariff provision as being adequate basis for permitting lessee to escape our regulatory supervision.

records at this Commission. Where parties think they are subject to section 15 and realize they may be able to obtain immunity from antitrust laws by having agreements filed and approved under section 15 they hasten to do so. I know of no instances where parties have knowingly and voluntarily conducted their affairs so they would expose themselves to antitrust instead of so conducting their affairs that they could assert the exemption which section 15 affords against antitrust. The experience before the Congress of the railroads,[30] airlines,[31] truckers,[32] labor unions,[33] agricultural co-ops,[34] export trade corporations,[35] and others seeking to obtain a section 15 type umbrella against the application of antitrust laws in their industries is persuasive against the possibility that common carriers by water and "other persons" in this industry will rush to add a stranger to the Act as party to a section 15 type agreement in order to get out from underneath the umbrella of section 15. All one need do is ask common carriers by water if they want to dispense with section 15 protection from antitrust, and, instead, subject all their anticompetitive agreements to antitrust, and the answer is a resounding "NO". And even if there were to be such a rush to escape the protection of section 15, then, absent a basis for granting "labor exemption", the parties and their anticompetitive agreements would still be subject to the other applicable provisions of the Shipping Act, 1916, and, to them, an even much more frightening prospect, they would be exposed to the surveillance of the Federal Trade Commission and the Antitrust Section of the Department of Justice, each of which treat anticompetitive agreements in a much more critical and restrictive atmosphere and philosophy than that existing in this Commission. Finally, even if such a rush away from section 15 jurisdiction should occur, and I am convinced it would not, then section 15 could be readily amended by the Congress should it consider such action desirable. Hence, let us not be influenced by such a frivolous contention.

[30] 49 U.S.C. 5.

[31] 49 U.S.C. 1384.

[32] 49 U.S.C. 5.

[33] 15 U.S.C. 17, 29 U.S.C. 52 and 105.

[34] 15 U.S.O. 17, 7 U.S.C. 291, 292.

[35] 15 U.S.C. 62.

I conclude that because of "mixed membership" the assessment formula is not a section 15 type agreement and would dismiss all section 15 issues from the proceeding.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

DOCKET NO. 73-11

KRAFT FOODS

v.

PRUDENTIAL GRACE LINES

NOTICE OF ADOPTION OF INITIAL DECISION

June 13, 1973

No exceptions having been filed to the initial decision of the Presiding Judge 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 June 13, 1973.

It is ordered, That respondent pay to complainant the sum of $180.92, plus 6 percent interest per year if not paid within 30 days;

It is further ordered, That respondent notify the Commission promptly of the date and manner of payment.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

No. 73-11

Kraft Foods

v.

Prudential Grace Lines

Reparation awarded.

William Levenstein for Complainant.
D. J. Hartigan for Respondent.

Initial Decision of Ashbrook P. Bryant, Administrative Law Judge[1]

Complainant claims reparation in the amount of $180.92 from respondent on account of alleged overpayment of freight on 100 cartons of shortening shipped on B/L No. 37 dated July 22, 1971 via SS *Santa Cruz* from New York to Curacao, Netherlands Antilles. The commodity was rated as shortening in accordance with second revised page 126 of U. S. Atlantic & Gulf Venezuela and Netherlands Antilles Conference Tariff No. Ven-11, and freight charges of $305.59 were assessed and collected on the basis of 174 cu. ft. at the applicable rate of $69.00 per 40 cu. ft., plus surcharge. Complainant contends that the commodity comes within Item 415 of 11th Revised page 42A of the tariff, the applicable rate of which was $44.50 per 2,000 pounds, plus surcharge. At this rate the total charges would have been $124.67, making a difference of $180.92 in complainant's favor.

[1] This decision became the decision of the Commission June 13, 1973.

Complainant also has moved for summary judgment and asks for interest at 6 percent from date of payment of the freight.

The B/L describes the commodity as 100 CTNS. SHORTENING, GENERAL CARGO, and the shipper's export declaration likewise indicated simply that the shipment was 100 cartons of shortening. However, other evidence now submitted establishes that the commodity shipped was Kraft Red Label Shortening, and is composed of a mix of cottonseed oil and soyabean oil.

When presented respondent apparently denied the claim solely on the ground that it was "time barred" under the applicable provision of the conference tariff. Respondent points out that its rating personnel relied on the commodity description in the bill of lading and the dock receipt. Having no indication as to what type of shortening was involved in the shipment its personnel "had no choice but to assess the highest rate provided in the tariff for shortening."

The complaint was served on March 12, 1973, and, among other things, requested that the matter be heard under the Commission's shortened procedure provided by Rule 11 of the Commission's Rules of Practice and Procedure (46 CFR 502.181 to 187). On March 23, 1973, respondent, by letter, with a copy to "Kraft Foods", acknowledged receipt of the complaint and consented to the "claim being informally adjudicated in accordance with the provisions of Rules 19(a) to 19(d) (46 CFR 502.301 to 502.304)." By letter of March 26, 1973, to the presiding officer, respondent briefly stated its side of the story and submitted copies of relevant documents. Among other things it was said:

> We feel we rated the bill of lading correctly and we trust our explanation will assist you in determining if Prudential-Grace Lines, Inc. adhered to the rules and regulations in this respect.

On April 25, 1973, respondent was reminded by letter from the presiding officer that the complaint is a formal one and that complainant had requested that the matter be heard in accordance with the Commission's rules (46 CFR 502.181 to 502.187), which is a different procedure from that set out in Subpart S of the Rules—Informal Procedure for Adjudication of Small Claims (46 CFR 502.301 to 502.304)—to which respondent had consented in its letter of March 23. As a result, respondent agreed to the shortened procedure and submitted the appropriate verified consent.

Both parties having requested shortened procedure, and it appearing that this is an appropriate case for the use of that procedure, the request is granted and the matter has been considered and decided without oral hearing.

Discussion

Complainant's claim was originally denied by respondent on the basis that it was "time-barred" under the conference rule. However, the Commission has repeatedly held that in an action such as this which is brought under the Shipping Act, 1916, a claim arising from overcharge cannot be barred from a determination on the merits by a conference rule, if, as here, the claim is filed with the Commission within two years of its accrual. Hence, the actual description of the shipment as it appears now of record governs the determination of the issue.

The conference tariff has a listing in "Commodity Index" 2nd Revised page 126 of "SHORTENING viz: * * * Vegetable Oil (as Oil, Cottonseed, Peanut or Soyabean, Liquid, Packed, Item 415 N.O.S. as shortening, Vegetable Oil)." Item 415, 11th Revised page 42A, has a specific listing for oil with a special rate to Curacao, reading:

> OIL, Packed, Liquid, Flaked, Solid or Hydrogenated, viz:
>
> * * * *
>
> Corn, Cottonseed or Soyabean to Aruba and Curacao only.

The commodity here involved comes within this item.

The evidence supports the conclusion that the shipment should have been rated under Item 415 of the tariff, subject to the applicable rate of $44.50 per 2,000 pounds. Complainant was overcharged $180.92, which respondent is directed to pay, plus 6 percent interest per year if not paid within 30 days. The motion for summary judgment is moot. Complainant's request that interest be allowed from the date of payment of the freight is denied.

(S) Ashbrook P. Bryant
Administrative Law Judge

Washington, D.C.
May 22, 1973

FEDERAL MARITIME COMMISSION

DOCKET NO. 72-57

UNIROYAL INTERNATIONAL

v.

FARRELL LINES

NOTICE OF ADOPTION OF INITIAL DECISION

June 20, 1973

No exceptions having been filed to the initial decision of the Presiding Judge, and the Commission having determined not to review same, notice is hereby given that the Commission, on June 20, 1973, adopted the ultimate conclusion of the Presiding Judge in dismissing the complaint. Nothing herein shall be deemed to constitute adoption of the discussion or conclusion of the Presiding Judge with respect to assignment of the claim on which the complaint is based. The Commission takes no position in this proceeding on that issue.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

No. 72-57

UNIROYAL INTERNATIONAL
v.
FARRELL LINES

Complainant has standing as assignee to file claim.
Complaint dismissed.

William C. Whittemore for complainant.
Baldvin Einarson for respondent.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE[1]

This proceeding arises from a complaint filed by Uniroyal, Inc., through its Uniroyal International Division, served October 12, 1972. Complainant seeks reparation in the amount of $7,546.88, the difference between the freight charges of $21,231.88 assessable on 7,000 cubic feet of Miticide (Omite 30 W) under the commodity classification pesticide[2] and charges of $13,685.00 under the commodity classification insecticide.[3]

The position of respondent Farrell Lines, Inc., is that the complainant is not a real party of interest in this dispute and lacks standing to bring this complaint and further that the cargo involved was correctly rated as pesticide.

A hearing was held in Washington, D. C., on March 20, 1973.

[1] This decision became the decision of the Commission June 20, 1973.

[2] South and East Africa Conference Southbound Freight Tariff No. 1, F.M.C. No. 2, 3rd rev. p. 311, Item No. 2695.

[3] South and East Africa Conference Southbound Freight Tariff No. 1, F.M.C. No. 2, 3rd rev. p. 232, Item 1840.

Party in Interest

Respondent's argument that complainant is not the real party in interest is not well founded.

The shipper of the cargo was Fisons Pest Control. The terms of the sale of this cargo by Uniroyal were FAS. The assignment of the claim and Uniroyal's standing to bring this complaint was in the following terms:

> We hereby assign the claim and transfer all rights to claim for overcharges on shipment 600 fibre drums omite 30 which sailed on steamer SS African Dawn September 10, 1971 B/L number 2 from Baltimore USA to Capetown South Africa. . . .

This assignment is clearly sufficient for complainant to bring this action seeking reparation for the alleged overcharge. *Ocean Freight Consultants v. Bank Line Ltd.,* 9 F.M.C. 211 (1966). And this is so whether or not such assignment passes beneficial or equitable title since the assignee may recover damages in an action brought in his own name but for the benefit of an equitable owner of the claim. *Spiller v. Atchison, Topeka, and Santa Fe Railway Co.,* 253 U.S. 117 (1920).

The complainant having standing, the complaint is not dismissible for lack thereof, and accordingly, must be considered on its merits.

DISCUSSIONS AND CONCLUSIONS

The underlying shipping documents, i.e., the bill of lading and export declaration, described the product as "MITICIDE OMITE 30 W." The export declaration contained the additional description "(PESTICIDE PREPARATIONS)." Also contained on the export description was the United States Department of Commerce Schedule B Commodity Number "5992030." [4]

In the normal course of events Farrell's rate clerk rates the commodity based on the description on the bill of lading and when in doubt looks to the export declaration for aid and possible clarification. The bill of lading described the shipment as "Miticide Omite 30 W" without denominating it as either a pesticide or an insecticide. The export declaration described

[4] The commodity number, used as an aid in identifying product classifications, is titled "Chlorinated hydracarbon pesticidal preparations primarily for agricultural use, except aerosols, fly sprays and preparations containing DDT." Listed under this classification are some 19 different products under generic or trade names, many of which are insecticides, although the listing does not denominate the products as insecticides or pesticides or suitable as either.

the shipment as "Miticide Omite 30 W (Pesticide Preparations)." No conflict exists between the two documents, the export declaration merely containing a fuller description.

Pesticide is a broad generic term that means literally "to kill pests." As such it is a broader term than insecticide which is limited to insect pests.

Complainant in support of its position contends that *Webster's Third New International Dictionary of the English Language Unabridged* includes mites in its non-technical definition of insects although entomologically insects are limited to the class Insecta. It further contends that the Federal Insecticide, Fungicide, and Rodenticide Act, 7 USC, Sec. 36, for the purposes of administering that Act defines insecticides as including all preparations intended for preventing, destroying, repelling, or mitigating "any member of the Class Insecta or any classes in the Phylum Anthropoda, for example, products intended for use against . . . mites."

Thus a miticide intended to destroy mites of the class Phylum Anthropoda which are not insects would at least for the purpose of administering that Act be identified as an insecticide.

However, considerations for administration under one statute are not controlling when another statute is specifically concerned with the matter in issue. Section 18(b)(3) of the Shipping Act, 1916, provides that no carrier shall charge other than the compensation specified in the appropriate tariff filed with this Commission. That tariff provides different rates for pesticides and insecticides and hence it is within that framework that evidence as to the particular properties of the shipment must be sought.

In its application for a patent for Omite 30-W, Uniroyal stated, in pertinent part, that:

> The new compounds of the present invention are useful as insecticides, particularly for the control of mites.
>
> * * * *
>
> This example illustrates the effectiveness of the chemicals of the present invention for controlling mites. . . . The control of mites by the chemicals of the present invention at various concentrations is shown in the following table. . . .
>
> The chemicals of the present invention may be applied in various manners for the control of insects. . . . may be applied directly to loci to be protected against insects. . . . may be applied to loci to be protected against insects by the aerosol method. . . .

The chemicals may be used admixed with carriers that are active of themselves, for example, other insecticides, fungicides, or bactericides.

Having thus described our invention, what we claim and desire to protect by Letters Patent is:

1. The method of protecting plants against attack by insects which comprises applying to the plants a compound represented by the formula. . . .

From the foregoing it appears that complainant clearly intended the compound to be primarily a specific against certain species of mites which, as herefore set forth, are not insects. It further appears that complainant considered mites in the non-technical sense. Unquestionably complainant did not limit its application by specifically stating that its product was to be limited solely to combating mites but rather implying that it might well be utilized against other unnamed and unspecified insects either alone or in conjunction with other insecticides, fungicides or bactericides.

In seeking to determine the nature of the product in issue in this proceeding it is necessary to examine other material prepared by complainant. This material consists of the technical data sheet and advertising material circulated to potential users and the label placed on the product. These items refer only to Omite 30 W's utilization for the control of specified mite species. Thus, in a very real and practical sense, considering the patent application and other data prepared by complainant relating to Omite 30 W, complainant specifically produced and sold Omite 30 W for the control of mites.

Whether or not a miticide could be classified as an insecticide under tariff Item No. 1840, it certainly could be properly classified under tariff Item No. 2695 as a pesticide in that a mite is a pest within the class Phylum Anthropoda. In fact complainant so classified it in its shipping documents.

A shipper is not bound to pay the charges in a bill of lading without recourse, simply because they are based on a description provided by the shipper. The test is what a claimant can now prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the description in the documents supplied to the carrier by the shipper. *Johnson & Johnson International v. Venezuelan Lines,* Docket Nos. 71-46, 71-67, 13 S.R.R. 305 (1972).

The tariff clearly intended to distinguish between products denominated insecticides and those denominated pesticides. Where a product might be utilized in either category its chief effectiveness and utilization is certainly a reasonable basis for determining its commodity rating for application of proper freight charges.

The Commission has required a complainant seeking reparation to sustain a heavy burden of proof. *Colgate Palmolive Co. v. United Fruit,* Informal Docket No. 115(I), 11 S.R.R. 979 (1970). Complainant herein has failed to meet its burden, nor indeed has it established by any preponderance of the evidence that the shipment should have been rated as an insecticide.

Complaint dismissed.

(S) STANLEY M. LEVY
Administrative Law Judge

Washington, D.C.
MAY 24, 1978

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-37

PURCHASE OF SHIPS—MATSON NAVIGATION COMPANY, SEA-LAND SERVICE, INC., REYNOLDS LEASING CORP.

June 20, 1973

Respondents' failure to file for Commission approval their agreements for the sale and purchase of two uncompleted containerships did not violate section 15 of the Shipping Act, 1916.

Francis T. Greene and *Brian D. Fix* for respondent Matson Navigation Company.

Gerald A. Malia, Edward M. Shea, and *Brian P. Murphy* for respondents Sea-Land Service, Inc. and Reynolds Leasing Corp.

James L. Malone and *Donald J. Brunner*, Hearing Counsel.

REPORT

BY THE COMMISSION: (Helen Delich Bentley, *Chairman*; George H. Hearn, *Vice Chairman*; Ashton C. Barrett, James V. Day and Clarence Morse, *Commissioners*)

PROCEEDING

This is an investigation on our own motion to determine whether an agreement to sell two container vessels under construction without Commission approval violates section 15 of the Shipping Act, 1916. We ordered respondents Reyonlds Leasing Corp. (Reynolds), Sea-Land Service, Inc. (Sea-Land) and Matson Navigation Company (Matson) to show cause why the agreements among them regarding the sale and purchase of the two containerships under construction did not require our approval. The proceeding was limited to affidavits of fact and memoranda of law, with oral argument if requested or deemed necessary by the Commission. The order initiating this proceeding was published in the *Federal Register* (36 F.R. 7621 (1971)), and interested persons were invited to petition for intervention; none did.[1] The parties submitted extensive memoranda and affidavits, urging that the agreements were not subject to section 15. Neither an evidentiary hearing nor an oral argument was requested or found necessary.

BACKGROUND

In mid-1968, Matson decided to expand its Hawaiian and Far East services, and, as a consequence, new vessels were required. On July 24, 1968, Matson's Board of Directors authorized its management to negotiate with Bremer Vulkan Schiffbau und Maschinenfabrik (Bremer Vulkan) for the construction of two containerships for the trans-Pacific trade. Matson and Bremer Vulkan concluded two contracts, each for the construction of one containership, on August 23, 1968. The ships, designated Builders Hulls Nos. 957 and 958, were to be delivered in late 1970.

However, in early 1970, Matson's operations were comprehensively reviewed, and the Board of Directors of Alexander & Baldwin, Inc., Matson's parent corporation, decided to abandon the expansion effort. Matson's Board, on June 30th, authorized A. L. Burbank & Co., Ltd. (Burbank), ship brokers, to sell the vessels under construction, subject to its approval of terms.

There had been preliminary contact between vice presidents of Matson and Burbank on June 15, 1970, and Burbank contacted potential buyers, including Sea-Land, before formal approval of the brokerage by Matson's Board. At that time, Sea-Land indicated it was not interested in the hulls. Thereafter, Burbank contacted about 460 brokers and owners in an attempt to reach all possible buyers. Several were interested, and in August, Zim Israel Navigation Co., Ltd. (Zim) agreed to purchase the hulls for $13,250,000 (if the German construction subsidy was available, or $13,750,000, if not) each. Zim was unable promptly to secure financing, and on September 11, 1970, formally notified Matson through Burbank that it was unable to make the purchase.

Burbank then renewed contacts with other prospects, and during a routine check, Sea-Land expressed interest. A meet-

[1] American Export Isbtandtsen Lines, Inc. attempted to file after the expiration of time allowed, and subsequently withdrew its petition.

ing was held on October 2nd between Burbank and Sea-Land officials, and on October 5th, Reynolds presented an option letter and a deposit of $100,000 to Burbank, which was accepted on behalf of Matson. Up to this point, there had been no direct contact between Matson and Reynolds or Sea-Land. The option was exercised October 9th, and an agreement of sale (at a price of $13,750,000 each if Matson did not receive the German construction subsidy, or $13,250,000 if it did) formalized on October 30, 1970. Under the agreement, Matson had no continuing responsibility to or relationship with Sea-Land or Reynolds following delivery of the ships. Nor were there any side agreements, operating agreements, exclusive or preferential agreements, or covenants not to compete, either in general or in a particular trade.

The original intent was to effect a novation, but Bremer Vulkan was reluctant to have a new buyer at a late stage of construction, and retention of the German construction subsidy was uncertain. As a result, Matson's rights under the construction contracts were assigned to Reynolds, and title to the ships passed directly from Bremer Vulkan to Reynolds on delivery.[2]

DISCUSSION

Section 15 of the Shipping Act, 1916, requires the filing of a copy of memorandum of any agreement between a common carrier by water or other person subject to the Act and any other common carrier by water or other person subject to the Act, if the agreement:

1. Fixes or regulates transportation rates or fares;
2. Gives or receives special rates, accommodations, or any other special privileges or advantages;
3. Controls, regulates, prevents, or destroys competition;
4. Pools or apportions earnings, losses, or traffic;
5. Allots ports or restricts or otherwise regulates the number and character of sailings between ports;
6. Limits or regulates in any way the volume or character of freight or passenger traffic to be carried; or
7. In any manner provides for an exclusive, preferential, or cooperative working arrangement.

[2] Hull 957 was delivered December 31, 1970, and Hull 958 on March 16, 1971. The ships were chartered by Reynolds to Sea-Land for operation in the North Atlantic trade.

Prior to the recent decision of the Supreme Court in *Federal Maritime Commission* v. *Seatrain Lines, Inc., et al.*, 411 U.S. 726, May 14, 1973, section 15 arguably required the filing of the Matson-Reynolds agreement. The court in that case held the Commission without power to approve a one-time acquisition which left one party a paper corporation without physical assets. In so doing, the extent of the third and seventh section 15 categories was clarified, and limited to agreements which establish on-going activity requiring the Commission supervision.

While we recognize that the instant situation is not precisely equivalent to that in *Seatrain, supra,* we are convinced that the differences do not support the applicability of section 15. The absence of side agreements, covenants not to compete, or in fact, any obligation beyond the transfer of rights in the two incomplete vessels precludes Commission jurisdiction under the Supreme Court's reading of the Shipping Act, 1916, and its legislative history.

This proceeding is hereby dismissed.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

DOCKET NO. 71-37

PURCHASE OF SHIPS—MATSON NAVIGATION COMPANY, SEA-LAND SERVICE, INC., REYNOLDS LEASING CORP.

ORDER

This proceeding was initiated to determine whether section 15 of the Shipping Act, 1916, required filing of agreements between Matson Navigation Company, Sea-Land Service, Inc., and Reynolds Leasing Corp. for the sale and purchase of two containerships under construction. Full consideration having been given to the matters herein involved, and the Commission this day having entered a Report of its findings and conclusions, which Report is made a part hereof;

It is ordered, That these proceedings be dismissed.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

SPECIAL DOCKET NO. 444

INTERNATIONAL PAPER COMPANY

v.

DELTA STEAMSHIP LINES, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

August 24, 1972

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 initial decision became the decision of the Commission on August 24, 1972.

It is ordered, That applicant is authorized to refund $1,040.01 of the charges previously assessed International Paper Company.

It is further ordered, That applicant shall 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 444 that effective February 4, 1972, the rate basis on 'Tabulating Index Boards' for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 4, 1972, through May 10, 1972, is 'dollars per 2,240 lbs.', subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further ordered, That refund of the charge shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

(S) JOSEPH C. POLKING
Assistant Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 444

INTERNATIONAL PAPER COMPANY

v.

DELTA STEAMSHIP LINES, INC.

Respondent is permitted to refund to complainant the sum of $1,040.01 as part of the freight charges assessed and collected for the transportation of tabulating index boards.

E. R. Mooney for complainant.
Robert G. Hughes, Jr., for respondent.

INITIAL DECISION OF STANLEY M. LEVY, PRESIDING EXAMINER[1]

This is an application by Delta Steamship Lines, Inc. (respondent), for permission to refund[2] $1,040.01, being a portion of freight charges for the benefit of International Paper Co. (complainant) in connection with a shipment of tabulating index cards from New Orleans to Lobito, Angola, aboard respondent's vessel Delta Paraguay, per Bill of Lading No. 'RL-6, dated February 4, 1972.

The rate applicable at the time of shipment was $64.50 per 2,240 pounds or 40 cubic feet per American West African Freight Tariff 13 FMC-13, effective January 2, 1972. The shipment weighed 131,088 pounds and aggregated 2,933 cubic feet. Respondent collected $5,168.66 on a measurement basis and seeks permission to refund $1,040.01 by charging on a weight basis.

[1] This decision became the decision of the Commission August 24, 1972.

[2] Shipping Act, 1916, section 18(b) (3), as amended.

AWAFC Eastbound Tariff No. 13 FMC-13 became effective September 1, 1970, and for the goods of the type involved in this application the rate was assessed per 2,240 pounds only.

The conference on August 1, 1971, revised page 104 of its tariff. In so doing, inadvertently by printer's error and without intending to do so, the revision changed the rate from one computed on a weight basis only to a weight or measurement basis. As a consequence, computation on a measurement basis increased the cost for a shipment of the type involved herein by approximately 25 percent. The conference and shipper were unaware of the change and only when it was billed did the shipper realize what had occurred and brought it to the attention of the carrier. It was then recognized that the tariff should have continued to be based on weight only rather than on a weight or measurement basis. A new tariff was filed to eliminate measurement as a basis and restore weight as the sole basis for assessing charges[3] and waiver was applied for.

Section 18(b)(3) of the Shipping Act, 1916, as amended by Public Law 90-298, referred to above, provides that the Commission may, in its discretion and for good cause shown, permit a common carrier by water in foreign commerce, or a conference of such carriers, to refund a portion of freight charges where it appears that there is an error in a tariff of a clerical or administrative nature, and that such waiver will not result in discrimination among shippers. The application discloses a set of facts and circumstances which fall within the purview and intent of the statute. Having complied with the requirements of the statute, and good cause appearing, applicant is permitted to refund to complainant the sum of $1,040.01. The notice of waiver required by the statute shall be published in the conference tariff.

(S) STANLEY M. LEVY
Presiding Examiner

Washington, D. C.
JULY 26, 1972

[3] American West African Freight Conference, Eastbound Tariff No. 13 (F.M.C. No. 13), 4th revised page 104, effective May 10, 1972.

FEDERAL MARITIME COMMISSION
WASHINGTON, D. C.

No. 72-56

UNITED NATIONS CHILDREN'S FUND

v.

THE DELTA STEAMSHIP LINES, INC.

NOTICE OF ADOPTION OF INITIAL DECISION
November 9, 1972

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on November 9, 1972.

Copy of initial decision attached.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

FEDERAL MARITIME COMMISSION

No. 72-56

UNITED NATIONS CHILDREN'S FUND

v.

THE DELTA STEAMSHIP LINES, INC.

Rate charged found so unreasonably high as to be detrimental to the foreign commerce of the United States, and no bar found to the refund of $2,080.

E. F. Kenny for the complainant.
Thomas E. Stakem for the respondent.

INITIAL DECISION OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE [1]

By complaint served October 6, 1972, the complainant, United Nations Children's Fund, alleges that the freight charges on a shipment of 150 drums of DDT insecticide made on November 12, 1970, from Houston, Texas, to Iquitos, Peru, via Belem, Brazil, were based in error on the rate of $108.50 weight or measurement, rather than on the rate of $108.50 per long ton, that the charges were unlawful, and that the amount of $2,080 should be ordered refunded.

The respondent, Delta Steamship Lines, Inc., admits the allegations in the complaint and further states that the only shipment of DDT transported by the respondent under the erroneous rate was that shipped by the complainant on November 12, 1970, and that no other shipper has been overcharged or will be discriminated against if a refund is awarded the com-

[1] This decision became the decision of the Commission November 9, 1972.

plainant. Respondent desires that this proceeding be handled without oral hearing, and that the Commission issue an order authorizing the refund of $2,080 to the complainant.

The shipment herein was made by a charitable organization endeavoring to assist the underprivileged children of the world.

The facts stated in the complaint and admitted in the answer are a sufficient basis for a decision in this matter. The shipment weighed 32,100 pounds and measured 1,340 cubic feet, or 33.5 measurement tons. Based on the measurement rate of $108.50 per ton, the charges assessed were $3,634.75. Based on the long ton rate of $108.50 per 2,240 pounds, the charges would have been $1,554.75.

On or about October 25, 1970, the respondent quoted to the complainant the rate of $108.50 per long ton, but this quote was incorrect. The respondent's tariff had been copied from a Booth Line tariff filed with the Commission, but in transcription the Delta tariff was converted inadvertently from the straight "weight" basis published in the Booth Line tariff to the erroneous "weight or measurement" basis. Effective December 10, 1970, the respondent amended its tariff by changing the rate to a "weight" basis only.

The complainant had urged the respondent to file an appropriate special docket application, but the respondent failed to act timely, and the present complaint therefore was filed.

It is concluded and found that the rate charged the complainant was based on an error in the tariff, and that permitting the respondent to refund a portion of the freight charges will not result in discrimination among shippers. A finding under section 18(b)(3) of the Shipping Act, 1916 (the Act), cannot be made because an appropriate application was not made within 180 days of the date of the shipment.[2]

Under section 18(b)(5) of the Act the Commission is required to disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States which after hearing it finds to be so unreasonably high as to be detrimental to the commerce of the United States. While there has been no "oral" hearing in this proceeding the matter has been heard in the sense that a formal complaint and formal answer have been filed, and the parties have relied on the facts therein adduced, and have waived further formal proceedings.

[2] Special Docket Application No. 429, *Oppenheimer Intercontinental Corp. v. Moore-McCormack Lines, Inc.*, December 2, 1971.

Accordingly, hearing having been had, in all the circumstances it is concluded and found that the rate charged the complainant herein was so unreasonably high as to be detrimental to the commerce of the United States and therefore unlawful. It is further concluded and found that under section 18(b) (5) there is no bar to the refund by the respondent of $2,080 to the complainant, and that such a refund would not be detrimental to the commerce of the United States.

(S) CHARLES E. MORGAN
Administrative Law Judge

Washington, D. C.
OCTOBER 17, 1972

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 453

PHILIPP BROTHERS

v.

AMERICAN MAIL LINE LTD.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

April 3, 1973

Notice is hereby given that the Commission on April 3, 1973 determined to adopt the initial decision in this proceeding subject to the modification described hereinafter.

The initial decision authorized a refund of $1,521.49 based on a rate of $42.50/2000 lbs. said by applicant to be applicable to the carriage of "Manganese Metal". Review of the appropriate tariff indicates that the application and the initial decision are in error and that the correct applicable rate should be $40.50/2000 lbs. Computed on this basis the amount of refund would be $1,677.41.

It is ordered, That applicant is authorized to refund $1,677.41 of the charges previously assessed Philipp Brothers.

It is further ordered, That applicant shall 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 453, that effective August 23, 1972, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from August 23, 1972 through October 1, 1972, the rate from Japan on 'Manganese Metal' is $40.50W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further ordered, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five day thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[SEAL]

SPECIAL DOCKET NO. 453

PHILIPP BROTHERS

v.

AMERICAN MAIL LINE LTD.

Respondent is permitted to refund $1,521.49 in freight charges.

INITIAL DECISION OF ASHBROOK P. BRYANT, ADMINISTRATIVE LAW JUDGE [1]

This is an application by respondent under Public Law 90-298, 90th Cong. (section 18(b)(3), Shipping Act, 1916), for permission to refund $1,521.49 freight charges for transportation of the cargo referred to below.

On bills of lading Nos. JY-WS-5002 and JK-WS-5201 dated August 23 and September 13, 1972, issued by respondent, complainant shipped Manganese Metal of an aggregate weight of 156,044.63 lbs. via SS *Japan Mail* and SS *Philippine Mail* of American Mail Line, from Kobe and Yokohama, Japan, to Seattle, Washington. Total freight charges actually collected by respondent were $5,169.04. At the time of shipment the effective tariff rate was $62.00 per 2,000 lbs. Tariff Trans-Pacific Freight Conference of Japan No. 34, F.M.C.-3.

The amount of freight charges actually collected was due to error. Item 8040 which set a rate of $42.50 per 2,000 lbs. was inadvertently deleted from Trans-Pacific Freight Conference of Japan Tariff No. 34, FMC-3, on August 1, 1972, and was not reinstated until October 1, 1972. Aggregate freight charges at that rate, now sought to be applied to the shipments of Manganese Metal here involved, would be $3,647.55. As above indi-

[1] This decision became the decision of the Commission April 3, 1973.

cated, respondents assert that the higher rate was charged and collected through inadvertence, that discrimination will not result if relief is granted, and that equity and justice warrant the relief requested.

Section 18(b)(3) of the Shipping Act, 1916, as amended by Public Law 90-298, referred to above, provides that the Commission may, in its discretion and for good cause shown, permit a common carrier by water in foreign commerce, or a conference of such carriers, to refund or waive, as the case may be, a portion of the freight charges collected or assessed where it appears that there is an error in a tariff of a clerical or administrative nature, and that such refund or waiver will not result in discrimination among shippers. The application herein discloses facts and circumstances which fall within the purview and intent of that section. Having complied with the requirements of the statute and good cause appearing, applicant is permitted to refund to complainant the sum of one thousand, five hundred and twenty-one dollars and forty-nine cents ($1,521.49). The notice required by the statute shall be published in the appropriate tariff and 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 the manner in which it was made.

(S) ASHBROOK P. BRYANT
Administrative Law Judge

Washington, D. C.
MARCH 9, 1973

INDEX DIGEST

[Numbers in parentheses following citations indicate pages on which the particular subjects are considered]

ABSORPTIONS: See Pickup and Delivery Practices

AGREEMENTS UNDER SECTION 15: See also Terminal Leases

—In general

As to the articles of incorporation and by-laws (organic agreements) of maritime collective bargaining associations, the Commission concludes that no valid regulatory purpose would be served in requiring such agreements to be filed and approved pursuant to section 15 of the 1916 Shipping Act. However, to the extent that these agreements provide for purposes other than collective bargaining, no labor exemption from section 15 could apply to those portions of the agreements, and filing and approval of those provisions would be required. United Stevedoring Corp. v. Boston Shipping Assn., 7 (13–14).

Insofar as the Boston Shipping Association is primarily a collective bargaining unit, the labor exemption should be given effect and the organic agreements (articles of incorporation and by-laws) exempted from the requirements of section 15 of the 1916 Shipping Act. All other agreements concerning Shipping Act matters entered into by the members of the Association pursuant to its organic agreements must be filed for section 15 approval. Id. (14).

—Antitrust policy

The Commission adopts the following criteria for determining the labor exemption from the antitrust laws: (1) The collective bargaining agreement which gives rise to the activity in question must be in good faith; (2) the matter is a mandatory subject of bargaining, i.e., wages, hours or working conditions, and the matter must be a proper subject of union concern; (3) the result of the collective bargaining does not impose terms on entities outside of the collective bargaining group, and (4) the union is not acting at the behest of or in combination with nonlabor groups, i.e., there is no conspiracy with management. In the final alaysis, the nature of the activity must be scrutinized to determine whether it is the type of activity which attempts to affect competition under the antitrust laws or the Shipping Act. United Stevedoring Corp. v. Boston Shipping Asnn., 7 (12–13).

Since maritime employees are permitted to bargain as a group, and since they are required to bargain about certain subjects, the resulting agreements must have some exemption from the requirements of section 15. Further, each such agreement will be entitled to labor policy considerations on an ad hoc basis with respect to possible violation of sections 16 and 17 of the 1916 Shipping Act. Id. (13).

The original allocation of labor gangs following the "Final Shape," although that allocation of necessity had competitive overtones and effects, in actuality amounted to nothing more or less than the hiring by employers of employees. Because of the strong labor considerations involved and minimal and remote effects upon competition in the industry, the Commission finds that this unwritten allocation agreement between the Boston Shipping Association and the Union is exempt from the requirements of section 15 of the 1916 Shipping Act. Id. (14).

The mere fact that a certain agreement is part of a collective bargaining agreement does not automatically immunize it from the antitrust laws. In the same manner in which offensive collective bargaining agreements in general are challenged under the antitrust laws, collective bargaining agreements in the shipping industry can be challenged under the shipping laws, with due regard for labor policy considerations. However, first call-recall agreement as to allocation of labor gangs is entitled to a labor exemption from the provisions of section 15 of the 1916 Shipping Act. Although the agreement goes beyond the mere hiring of employees and provides for the assignment and reassignment of these employees strictly within the discretion of management and does in fact have some competitive effects and overtones, it nevertheless is a product of bona fide arm's length collective bargaining. Moreover, its subject matter is apparently a mandatory subject of collective bargaining, and no terms were imposed on entities outside the collective bargaining group. Id. (15).

Departure of a third-flag line, standing alone, due to an agreement between national-flag line carriers covering equal access to cargoes controlled by their government, would not create such a detriment to commerce as would warrant disapproval of the agreement. Detriment to commerce of the United States is but one of the four criteria of section 15. While a contrary finding under any of the criteria can support disapproval, all of the parts make a legislative whole and must be considered together. The antitrust laws represent a national policy of this country which is considered to be in the public interest. Section 15 provides an exemption from those laws, but only if the agreement is not found, inter alia, detrimental to the commerce of the United States. Any grant of the exemption must be scrutinized to insure that it does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the Shipping Act. Similarly, detriment to commerce must be tested against the public interest. Agreement No. 9932—Equal Access to Government—Controlled Cargo, 293 (306).

—*Assessment formula*

An assessment formula agreement contained in a collective bargaining agreement between the New York Shipping Association, an organization composed of various maritime industry interests, and the International Longshoremen's Association is subject to Commission jurisdiction under section 15 of the 1916 Shipping Act. Whether or not there is any conceivable Shipping Act jurisdiction over a labor union, the Commission's jurisdiction over the parties who are subject to the Act is sufficient so long as the agreement itself falls within one of these categories of agreements which section 15 submitted to Commission regulation. If the agreement is not amenable to Commission surveillance, it will be because the national policy to encourage and protect collective bargaining requires the agreement to be declared labor exempt. New York Shipping Associaion—NYSA–ILA Man-Hour/Tonnage Method of Assessment, 381 (388–389).

The fact that an assessment formula agreement between the New York Shipping Association and the International Longshoremen's Association was incorporated in the basic collective bargaining agreement is not enough, standing alone, to entitle the agreement to the labor exemption on the principle that negotiated labor agreements "reflecting the national labor policy of free collective bargaiuing . . . fall into an area of concern to the National Labor Relations Board," to the exclusion of any jurisdiction under the Shipping Act. Such proposition must fail because of the inherent assumption that the agreement reflects, and is in furtherance of, the national policy of free collective bargaining. Id. (389).

Assessment formula agreement, contained in the collective bargaining agreement between the New York Shipping Association and the International Longshoremen's Association, is not labor exempt where the issue between the parties was the timely payment of monies necessary to fund fringe benefits previously agreed to. That issue was not a mandatory subject of bargaining, since the formula did not involve wages and hours or other terms and conditions of employment. Id. (391–392).

Assessment formula agreement, contained in the collective bargaining agreement between the New York Shipping Association and the International Longshoremen's Association, is not labor exempt on the ground that terms are not imposed on persons or entities outside the bargaining group because by its terms the formula applies only to cargo loaded or discharged by ILA members in the Port of New York. The two associations taken together constitute the bargaining unit. Terms are imposed on nonmembers of the unit, e.g., a nonmember carrier must, as a condition precedent to receiving terminal services at the Port, sign an agreement levying assessments under yet another agreement in the negotiation of which it played no part. Id. (393–394).

Assessment formula agreement between the New York Shipping Association and the International Longshoremen's Association is subject to section 15 of the 1916 Shipping Act. Under tbe agreement the members of the NYSA must pass on their levies. Competition is thus affected which is the direct result of the agreement. The formula chosen has a direct impact upon the respective competitive positions of the carriers. Some carriers may be able to absorb the assessments, while others may be forced to pass them on to their shippers. Id. (395).

The Commission is not disposed to jeopardize relations between the New York Shipping Association and the International Longshoremen's Association by withholding approval of their assessment formula agreement contained in the collective bargaining agreement. The agreement will be granted interim approval, conditioned upon any adjustments which may be found necessary as a result of a further proceeding in the matter. Id. (396).

Assessment formula agreement between the New York Shipping Association and the International Longshoremen's Association, contained in the collective bargaining agreement, is not within the exclusive jnrisdiction of the National Labor Relations Board. The NLRB does not have exclusive and unlimited jurisdiction over all matters which arise or may arise from collective bargaining. Strangers to the agreement are challenging it; there can be no refusal to bargain charge; and it has been more than six months since the agreement was signed. There is no jurisdiction of the NLRB with which the Commission's decision here interferes. Id. (397–398).

—Government-controlled cargo

Complete bilateralism would mean simply that all cargo moving in a trade is by some means reserved for carriage by the national-flag lines of trading partners, i.e., the countries at each of the trade. Whatever the economic or political merit of bilateralism, the Commission's concern is the validity and extent of its application under the laws administered by the Commission. Agreement No. 9932—Equal Access to Government-Controlled Cargo, 293 (303).

By approving a pooling, sailing and equal access to government-controlled cargo agreement between a carrier owned by the Peurvian government and a U.S.-flag-carrier, covering government cargoes carried southbound from U.S. West Coast ports to Peruvian ports, the Commission is not adopting bilateralism as part of the United States maritime policy; nor is it endorsing another government's expression of national interest in the carriage of its cargo for the purpose of enhancing its merchant marine. Exclusion of a third-flag carrier from carriage of the cargoes involved may not be unlawful discrimination. There must first be a right enjoyed and that right abrogated before there can be discrimination. The excluded carrier has no such right to the cargo covered by the agreement. Thus, if the agreement meets the criteria of section 15 of the 1916 Shipping Act, it should be approved, whatever nationalistic motives may have engendered it. Id. (303–304).

A third-flag carrier has no right to cargo controlled by the Peruvian government in the U.S. Pacific/Peruvian trade, and the same holds true for cargoes controlled by the United States government. To the extent Public Resolution 17, which authorizes the Maritime Administration to grant waivers for cargoes shipped under it to the national-flag carriers of the countries receiving those cargoes, restricts waivers to those granted to the national-flag carrier of the recipient nations, it embodies a form of bilateralism. Section 901(b) of the 1936 Merchant Marine Act leaves to the discretion of the Maritime Administration the grant of waiver to particular flags. Discretionary action vests no rights. Since the third-flag carrier enjoys no right to the cargoes in question, there can be no discrimination as between carriers, in the statutory sense at least. Id. (304).

Under section 15, the Commission must and does give the same measure of fair protection to a third-flag vessel that it does to a U.S.-flag vessel. This does not necessarily mean that the third-flag vessel always receives identical treatment, for that vessel may be burdened by handicaps or impediments not burdening a U.S.-flag vessel. Thus, in reference to an agreement between a Peruvian government line and a U.S. line, covering equal access to government-controlled cargoes, the third-flag carrier cannot qualify to become an "associated" line of the Peruvian line because it, unlike the U.S. line, cannot assist the Peruvian line in obtaining access to U.S. government-controlled cargo, whereas the U.S. line can do so. Id. (305).

Departure of a third-flag line, standing alone, due to an agreement between national-flag line carriers covering equal access to cargoes controlled by their government, would not create such a detriment to commerce as would warrant disapproval of the agreement. Detriment to commerce of the United States is but one of the four criteria of section 15. While a contrary finding under any of the criteria can support disapproval, all of the parts make a legislative whole and must be considered together. The antitrust laws represent a national policy of this country which is considered to be in the public interest. Section 15 provides an exemption from those laws, but only if the agreement is not found, inter alia, detrimental to the commerce of the United States. Any grant of the exemption must be scrutinized to insure that it does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the Shipping Act. Similarly, detriment to commerce must be tested against the public interest. Id. (306).

As to the contention of a third-flag carrier that an agreement between a Peruvian government line and a U.S.-flag line, covering equal access to government-controlled cargoes, is contrary to the public interest because it will reduce competition without any showing that the agreement is degined to secure important public benefits, the Commission's experience has shown that, absent commercial resolution through such agreements, or otherwise, governmental confrontation follows. When no agreement can be reached between the carriers, the trade is disrupted, malpractices ensue and virtually everybody suffers. The public interest dictates that this situation should be avoided if possible. Here, an agreement has been reached. The prospects for continued harmony are good, thus the agreement would appear to be in the public interest. The third-flag carrier will lose some cargo, but how much is a matter of wide disagreement. On balance, it is concluded that the third-flag carrier has failed to demonstrate such a reasonable probability of harm sufficient to warrant disapproval of the agreement when weighed against the benefits to be gained by approval. In sum, the Commission cannot find from the record that approval will be discriminatory or unfair as between carriers, detrimental to United States commerce or contrary to the public interest. Id. (306–307).

The Commission will not condition its approval of an agreement between a Peruvian government line and a U.S.-flag line, covering equal access to government-controlled cargo, on the requirement that the U.S. line obligate itself to initiate and maintain service to those shippers of lumber and woodpulp now served by a third-flag line in the event the third-flag line withdraws from the trade during the existence of the agreement. The Commission sees no difference between the disapproval of agreements because of future "speculative possibilities" and the imposition of operational requirements as a condition to approval because of "doubts" as to what the future holds for a line in the trade. More importantly, the Commission does not see the nexus between approval of the agreement and the future "demise" of the third-flag carrier. If the third-flag carrier withdraws from the trade for reasons other than the agreement, it is not just to require the U.S.-flag carrier to undertake the abandoned service without regard to that carrier's operational needs and desires or the needs and desires of the shippers under the guise of "conditioning" approval. The agreement can be reexamined if the third-flag carrier is forced out of the trade because of the future impact of the agreement. Id. (307–308).

The 1928 Treaty of Friendship, Commerce and Navigation between the United States and Norway is not violated by approval of an agreement between a Peruvian government line and a U.S. line, covering equal access to government-controlled cargoes, and excluding a Norwegian line. The obligations of the United States are not enlarged by the action of the Peruvian government in establishing cargo preference rules. The treaty provisions are limited to prohibiting restrictions imposed by the signatory governments, and do not prevent the Commission from approving a commercial agreement although it may be precipitated in part by restrictions of another trading partner. The Norwegian line's status in our commerce is affected not by the Commission's action on the agreement, but by the action of the Peruvian government. In any event, there is another controlling factor. While treaties and federal statutes are on an equal footing under the

Constitution as the supreme law of the land, the latest action expresses the controlling law. The treaty with Norway antidates Public Resolution No. 17 and section 901(b) (1) of the Merchant Marine Act of 1936. Id. (308-309).

—Jurisdiction

The Boston Shipping Association, a nonprofit maritime trade association, is subject to the jurisdiction of the Commission under section 1 of the Shipping Act, 1916. The Association as an entity does not engage in any of the activities enumerated in the definition of "other person," but its individual members do. A court has rejected the theory that a conference is not an entity to which a section 21 order may be applied, holding that conferences are agents of their members. An "association" is indistinguishable from a "conference". Some members of the Association are terminal operators and steamship lines and thus are subject to Commission jurisdiction. United Stevedoring Corp. v. Boston Shipping Assn., 7 (9-10).

The New York Shipping Association, a nonprofit membership corporation consisting of stevedoring companies, ocean carriers, carrier agents, terminal operators and other maritime concerns, is subject to Commission jurisdiction, notwithstanding that some members are not common carriers or other persons subject to the 1916 Shipping Act. An opposite conclusion would lead to the result that conferences could elude all regulation by simply adding a stranger to the Act to their membership. New York Shipping Association—NYSA-ILA Man-Hour/Tonnage Method of Assessment, 381 (388).

Matson-Reynolds agreement for the sale and purchase of two container vessels under construction did not require approval under section 15 of the 1916 Shipping Act. The absence of side agreements, covenants not to compete, or any obligation beyond the transfer of rights in the vessels precludes Commission jurisdiction. Purchase of Ships—Matson Navigation Co., Sea-Land Service, Inc., Reynolds Leasing Corp., 415 (418).

—Mergers

Section 15 of the 1916 Shipping Act vests in the Commission jurisdiction over all agreements "controlling, regulating, preventing or destroying competition." An agreement to merge would clearly seem embraced within the quoted language. The Court in *Seatrain* concluded that an agreement calling for a "single discrete event" (a merger) is not included among those agreements which "destroy competition." This attaches to the word "agreement" a meaning distinctly different from that understood in common usage. The destruction of competition can be more readily accomplished by the single discrete event than by an ongoing agreement, and the inference that continuous operations are required in agreements destroying competition is not justifiable. Agreement of Merger No. 9827-1 Among R. J. Reynolds Tobacco Co., et al., 184 (195).

There is nothing in the relevant statutes which in any way limits the manner in which the Commission may implement its disapproval of an agreement. There being no limitation on the latitude of the Commission's authority to disapprove, cancel or modify an approved agreement, there can be no justifiable restriction on the scope of approval agreements based on the availability of an adequate remedy for violation of the approval. There is no lack of authority in the Commission to devise an appropriate remedy for the situation in which the terms of a merger approval are violated.

The Court's argument in *Seatrain* that a merger of carriers is not subject to Commission jurisdiction because there is no on-going agreement is inapposite to the merger agreement herein. As modified and conditioned, the agreement which the Commission is approving requires both the continued existence of United States Lines (the acquired carrier) and the retention by that carrier of all of its assets, thereby necessitating continuing Commission supervision to ensure that the approved anticompetitive activity remains within the bounds of the enabling agreement. The instant case does not involve a sale of assets without a sale of the corporate entity as in *Seatrain*, but rather a sale of the corporate entity with the requirement that the acquiring company maintain the assets and stock of the acquired company identifiable to insure the continuing operativeness of the assets and the constant availability of the stock for such disposition as the Commission might order as a remedy for violation of the terms of the acquisition. Id. (197–198).

The Commission disagrees that the construction of section 15 which would limit the Commission's jurisdiction to "on-going" agreements is reinforced by the legislative history. Inter alia, the Alexander Report makes it clear that the House Committee on the Merchant Marine and Fisheries was concerned with more than "understandings" and "arrangements" to the exclusion of "mergers" and "acquisitions". The Committee investigation included ownership "by other ship lines or companies". Opponents of the Commission's merger jurisdiction virtually ignore all but the last nine pages of the Alexander Report. The Committee, in fact, used the term "agreement" in discussing mergers and acquisitions. Id. (198–201).

The exclusion of mergers, acquisitions, etc., from the meaning of "agreements" as used in section 15, based on a supposed distinction between the on-going understanding or arrangement on the one hand and the single discrete merger, acquisition, etc., on the other, is not one which existed with the Alexander Committee. The Alexander Report twice refers to a merger as an "agreement". The Committee understood that effective legislation would have to include regulatory or supervisory control over acquisitions and transfers of ownership; and no distinction between domestic and foreign mergers or acquisitions can be engrafted on section 15 based on the Report or the work of the Committee. Id. (202–203).

The legislative history of the 1961 amendments to the Shipping Act lends abundant support for the Commission's jurisdiction over merger agreements. The Antitrust Subcommittee's use of the word "agreement" clearly and specifically included agreements of merger. Additionally, the word "agreement" was used in connection with the acquisition of the stock of one carrier by another. Congress was aware that section 15 had been construed to include merger jurisdiction, yet it made no attempt to redefine the word "agreement". Id. (205–207).

As to the relationship between antitrust and Shipping Act considerations in cases before the Commission concerning section 15 agreements, in the instant merger case, even though the antitrust laws embody at least a part of the public interest which the Commission considers in acting on section 15 agreements, in the last analysis the regulatory laws must take precedence. The Commission must apply its own laws and standards, not those of the antitrust laws. Id. (212).

The Commission provides the nexus for our basic national antitrust philosophy and the national maritime policy as expressed in the shipping statutes. The principles embodied in the antitrust laws are always present in Commission deliberations concerning, especially, agreements filed for section 15 approval.

The Commission strikes a balance by determining whether the public interest as set forth in its governing statutes will be served by sanctioning an anticompetitive activity in the interest of our maritime policy. Id. (213).

A supplemental agreement between Reynolds and Kidde providing that if a merger agreement is not approved, United States Lines shall be sold or liquidated is subject to Commission jurisdiction. The real parties in interest in the supplemental agreement are the two common carriers by water, United States Lines and Sea-Land. Inter alia, the agreement cannot be implemented, in some respects, except through the action of USL under Kidde's orders; Reynolds' primary consideration is to secure the USL fleet for the use of its subsidiary, Sea-Land; the agreement is a means by which Reynolds—and more importantly, Sea-Land—could acquire USL upon disapproval of the merger; the supplement agreement states that it embodies the merger agreement and related documents; and Reynolds has certain veto powers over the sale of USL. These considerations persuade the Commission that the supplemental agreement is within Commission jurisdiction under section 15, and further that the agreement should not be approved. Id. (219-220).

The Commission disagrees with the conclusion that the merger agreement should not be approved because of the recent improved financial condition of United States Lines, the carrier to be acquired. A financially sound USL is not, under existing circumstances, a viable alternative. Insufficient weight was given by the presiding officer to the possibility that regardless of USL's financial posture, Kidde is determined to be rid of USL. Consequently, the Commission has opted for approval of the agreement (as modified) which will include both a financially sound USL and the acquisition of USL by Reynolds. As to the financial condition of USL, the record supports a finding that its financial instability is basic and might very well continue as such in the future. Id. (221–223).

CUSTOMHOUSE BROKER: See Jurisdiction

DEVICES TO DEFEAT APPLICABLE RATES

The Commission's interpretations of scienter as set forth in section 16 of the 1916 Shipping Act (with respect to "knowingly and willfully") require strict business propriety. Persistent failure to inform or even attempt to inform himself by means of normal business resources might mean that a consignee was acting knowingly and willfully in violation of the statute. Diligent inquiry must be exercised by shippers and consignees in order to measure up to the standards of the law. Indifference is tantamount to outright and active violation. Consignee of goods which had been an established importer since 1932 and had long and profund experience with the problems of classifications of cargoes; and which disregarded those means which normal business resource and acumen dictate as requiring reference in determining proper classifications, knowingly and willfully violated section 16 by misclassifying commodities. The goods involved were mirrors, immersion beakers, photo albums, glass animals, window chimes and grass beach mats which the consignee classified as toys. A construction of the tariff which does such violence to its clear meaning, at least, manifests such an indifference and lack of care as to constitute a deliberate violation of section 16. Ross Products, a Division of NMS Industries, Inc. and Taub, Hummel & Schnall, Inc.—Possible Violations of Section 16, First Paragraph, Shipping Act, 1916, 333 (340–341).

Customhouse broker and licensed ocean freight forwarder did not knowingly *and willfully participate* in false classifications of shipments. The record was insufficient to show that its acts were other than honest inadvertence or oversight. Id. (343).

DISCRIMINATION: See also Rates; Practices

Where the carrier charged a tariff rate for tank parts transported from New Orleans to Antwerp, Belgium, destined for use by the Swiss Army and a higher tariff rate for tank parts transported from New Orleans to Antwerp, destined for use by the Austrian Army, the rate on the shipment of the tank parts destined for use by the Swiss Army was unduly discriminatory in violation of section 17 of the 1916 Shipping Act, and claimant, the Embassy of Switzerland was awarded reparation. Embassy of Switzerland v. Lykes Bros. Steamship Co., Inc., 5 (6).

With respect to the issue of rates of a stevedore for loaned labor being excessive, arbitrary, unfair or unreasonable, and subjecting the stevedore loaning the labor to undue or unreasonable prejudice or disadvantage within the meaning of section 16 First, and also constituting an unjust and unreasonable practice within the meaning of section 17 of the 1916 Shipping Act, the langnage of section 16 is specifically directed against every form of unjust discrimination against the shipping public. This principle of equality forbids any difference in service. The mere possibility of a variance between regulation and practice render both regulation and practice unreasonable where the issue is the difference accorded by respondent to itself as a stevedore, on the one hand, as compared with the treatment of the complainant stevedore on the other hand. However, the record with respect to labor loan rates did not reveal undue or unreasonable prejudice or a practice which was unjust or unreasonable. McCabe, Hamilton & Renny Co., Ltd. v. C. Brewer Corp., dba Hilo Transportation and Terminal Co., 49 (58-59).

FREIGHT FORWARDING

Respondent which engaged in the business of forwarding without a license over a substantial period of time beginning in December 1969 was not fit to carry on the business of forwarding, and its application for a license was denied. Explanation for the numerous instances of illegal forwarding between December 1, 1969, and January 28, 1971, as being unculpable, inasmuch as the forwarder appeared to be unaware of the Commission‘s licensing requirement, can be accepted. This is not to say that the illegal activities were excusable. However, on January 28, 1971, and again on March 31, 1971, respondent was cautioned about the illegal activities in which it was then engaged, yet it continued to illegally forward shipments until January 30, 1972. No business obligation that respondent felt it owed to its clients or their friends, by virtue of its warehousing activities, warrants an obvious disregard for provisions of the law. Alvarez Shipping Co., Inc.—Freight Forwarder License, 78 (81).

Section 44 of the 1916 Shipping Act imposes the duty on the Commission to see that access to the profession of freight forwarding is limited to those licensees who are found to be "fit, willing and able" to conduct their business in accordance with high standards of conduct. It is crucial to his "fitness" that it appear that the applicant intends to and will in good faith adhere to such "high standard" of conduct and that he intends to and will obey the Commission's rules and policies for the conduct of licensed freight forwarders. International Shippers Co. of N.Y.—Freight Forwarder License, 256 (271).

A freight forwarder's license may be revoked if the Commission finds that because of a "change of circumstances" the forwarder is no longer qualified or that his conduct has rendered him unfit to carry on the business of freight forwarding. A license may be revoked for willful failure to comply with any provision of the Act or any rule or regulation promulgated by the Commission. Id. (271–272).

Where a licensed freight forwarder (A) permitted and assisted another forwarder (B) to use his license in perfroming freight forwarder services; A transferred his license to B without prior approval of the Commission; A accepted employment to perform forwarding services on export shipments as an associate and/or employee of B, after B's license had been revoked; a 50% stockholder (B's son) of an applicant for a freight forwarder license, knowingly assisted A and B in engaging in the business of forwarding without a license and intends to associate B in the business of the applicant if the application is approved; and A is other 50% stockholder of the applicant, the license of A is revoked and the application for a freight forwarder license is denied, subject to reapplication if the defects leading to denial are cured. Id. (261, 276–277).

On reconsideration, the Commission continues to find respondent freight forwarder in violation of all sections of the 1916 Shipping Act, as previously determined [15 FMC 248], and also continues to be constrained not to revoke respondent's license because respondent has acted in good faith on advice of counsel. However, respondent is ordered to cease and desist from the activities complained of and submit a proper report as previously required. Bolton & Mitchell, Inc.—Freight Forwarder License, 284 (285).

The record did not support a conclusion of "willful" falsification of an application for a freight forwarder license where, although the forwarder's connection with a shipper was an example of illegal, shipper-connected forwarding operations, there was insufficient evidence to warrant a conclusion that the forwarder was aware that the relationship was illegal, and, therefore, that it intentionally withheld information pertaining to the relationship from the Commission. Norman G. Jensen, Inc.—Freight Forwarder License, 365 (367).

Arrangement under which the sole stockholder of a shipper would retain two shares of stock in a licensed freight forwarder and would be a director and compensated employee of the forwarder is not satisfactory as a divestiture by the forwarder of illegal shipper connections. However, the forwarder is given the opportunity to totally eradicate the connections between itself and the shipper. Id. (367).

Commission definition (in General Order 4) of "beneficial interest" in shipments to foreign countries applies to any interest, including the right to profit from such shipments. International Traders & Counsellors, Inc. clearly profits from, and therefore has a beneficial interest in, such shipments under its retainer and commission agreements with exporters. Because of the relationship with ITC, respondent forwarder shares this beneficial interest. Id. (376).

In view of the overlapping of officers and ownership between a corporation having a beneficial interest in shipments foreign and a freight forwarder, the contention that there is no present active or actual inter-company control, direct or indirect, cannot be accepted as satisfying the statutory requirement of independence of a freight forwarder from shipper connections. The mere possibility of control is sufficient to remove a forwarder from an independent status. Nonconformance with the law is not cured by going through the motions of operating the two companies independently and maintaining separate books and records. Corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose. Id. (377).

A forwarder who has any beneficial interest in a shipment foreign and accepts brokerage thereon is guilty of accepting a rebate in violation of section 16 of the 1916 Shipping Act. Id. (378).

GENERAL ORDER 4: See Freight Forwarding; Jurisdiction

JURISDICTION: See also Agreements under Section 15

The fact that the second paragraph of section 22 of the 1916 Shipping Act is spared needless repetition by using the proviso that the Commission "may in like manner and . . . with the same powers [as in the first paragraph] investigate any violation of this Act" does not result in the incorporation in its second paragraph of any further requirements or restrictions of the first paragraph. It applies to any violation of any section of the Act, including the opening paragraph of section 16, by anyone, including shippers, consignees and brokers. The Commission's jurisdiction under the opening paragraph of section 16 and the second paragraph of section 22 extends to shippers, consiguees, brokers and any and all "other persons". Ross Products, a Division of NMS Industries, Inc., and Taub, Hummel & Schnall, Inc.—Possible Violations of Section 16, First Paragraph, Shipping Act, 1916, 333 (338–339).

The Commission had jurisdiction in a case involving possible violation of section 16 First Paragraph, by a customhouse broker who entered and tried to clear shipments with Customs and who was also a licensed ocean freight forwarder. The Commission has no authority over customhouse brokers. Nevertheless, the functions of customhouse broker and freight forwarded overlap and blend into each other. Moreover, in General Order 4, the term "freight forwarding service" means a service which includes clearing shipments with U.S. government regulations. Accordingly, a customhouse broker's functions in the situation are in agreement with those of a freight forwarder and it is this nexus or "area of concern" that settles the question of the Commission's jurisdiction in the affirmative. Id. (342).

Rates and practices of Puerto Rican truckers are not subject to Commission jurisdiction, since it is not shown that the truckers are other persons engaging in any activity covered by section 1 of the Shipping Act, 1916. Pickup and Delivery Rates and Practices in Puerto Rico, 344 (347).

MISCLASSIFICATION OF GOODS: See Devices to Defeat Applicable Rates

OVERCHARGES: See Reparation

PICKUP AND DELIVERY PRACTICES

Carrier's rate increases for pickup and delivery services in Puerto Rico are not unjust or unreasonable or otherwise unlawful. The charges and the zones to which they apply are negotiated by the carriers with trucking associations representing the Puerto Rican truckers. A rate established by means over which the Commission has no jurisdiction becomes a fixed charge to the ocean carrier. As the increased rates were filed for the purpose of equalizing the charges paid to the truckers by the carriers and the amounts collected under the tariffs by the carriers from the shippers or consignees, they are not unlawful. Pickup and Delivery Rates and Practices in Puerto Rico, 344 (348).

Carriers' practice of providing for the designation by shippers and consignees of truckers to furnish the pickup and delivery service which the carriers are obligated by their tariffs to perform and for which they are responsible is an unreasonable practice within the meaning of section 4 of the 1933 Intercoastal Shipping Act and section 18(a) of the 1916 Shipping Act. Shippers who elect to use the carriers' service are permitted to designate the trucker to be engaged by the carriers. The shipper may reduce his overall transportation cost by designating a trucker who will agree to perform the service at less than the carriers' tariff rates. The trucker then "refunds" to the shipper a portion of the charge paid him by the carrier. Thus, the carriers are "absorbing" a portion of the charge paid him by the carrier. Thus, the carriers are "ahsorbing" a portion of the charge, or, the shipper is receiving a "rebate" of a portion of the charge. The carriers should establish the reasonable practice of disallowing shipper or consignee designation of truckers who furnish a part of the carriers' services. Id. (349).

Contention that the truckers in Puerto Rico furnishing carriers' pickup and delivery services are not "agents" of the carriers and thus the carriers are not responsible for any "rebate by the truckers" to shippers or consignees is erroneous. The significant consideration is whether they are agents in the sense that the carriers must bear responsibility of insuring that no portion of the rates paid for the services is refunded or remitted as prohibited by section 2 of the 1933 Intercoastal Shipping Act. Id. (349–350).

If carriers choose to furnish pickup and delivery service, such service is subject to the Commission's jurisdiction, and carriers must adhere to tariff rates filed with the Commission for the service. Common carriers cannot lawfully escape responsibility for the proper performance of the service by the expedient of designating the person (truckers) actually performing the service as the agent of the shipper or consignee. The fact that remittances made by the truckers to the shippers or consignees resulting in the obtaining of transportation at less than tariff rates may be made indirectly by agents who are not authorized to make them, and even of whose conduct the carriers may be ignorant, is immaterial to the question of the lawfulness of the carriers' conduct. Id. (350).

Carriers must amend the form of their interchange agreements with truckers who perform pickup and delivery services for the carriers to remove any language which indicates that such truckers are not the carriers' agents for the purpose of insuring that the rates paid by shippers and consignees for the services are those contained in the carriers' tariff (to eliminate rebates by truckers to shippers). Id. (351).

Where carriers' practice of permitting shippers or consignees, who elect to use pickup and delivery service offered by the carriers, to select the truckers is potentially capable of resulting in violation of the law, the Commission need not wait until such violation occur before ordering remedial action. Activities which tend to foster and facilitate rebates of carriers' tariff rates are practices which the Commission can and must order terminated. Id. (351–352).

Carriers' forced delivery rule (that all LTL shipments weighing less than 3,000 pounds and measuring less than 700 cubic feet must be accorded delivery service) convinces the Commission that shippers do not have the power to use their own truckers, nor demand that shipments be held for truckers which the shippers wished the carriers to use. The purpose of the rule was to require removal of cargo subject to the rule by the first available trucker. Activities of the carriers under the rule were violative of section 2 of the 1933 Intercoastal

Act, whether the carriers allowed shippers and consignees to arrange for their own pickup and delivery or only requested that cargo be held for a certain trucker. To the extent that carriers provide for any pickup and delivery service, including forced delivery (under the Commission's order that the carriers establish a practice of disallowing shipper or consignee designation of truckers who furnish a part of the carriers' services), shippers who use such service will have no voice with respect to the use of any particular truckers. The choice of whether to use a forced delivery rule is a matter of operational judgment of the carrier. Id. (356–358).

Carrier violated section 2 of the 1933 Intercoastal Shipping Act by carrying out a special arrangement with a shipper contrary to its tariff, with respect to inland delivery service in Puerto Rico. Id. (358–359).

Carrier violated section 2 of the 1933 Intercoastal Shipping Act by providing delivery service under its tariff stop-off rule at TL rates, although the delivery points did not lie in a direct regular route and were not from the same basing point, as required by the tariff rule. Id. (359–360).

Carrier violated section 2 of the 1933 Intercoastal Shipping Act where, at the request of a shipper or consignee, the carrier arranged with a trucker to pick up or deliver shipments, entitled to only limited pickup and delivery service or none at all, to advance the trucker's charge, and to collect the amount advanced from the shipper or consignee, either by direct billing or by addition of the charge to the bill of lading. The trucker's charge could be less than the charge set forth in the carrier's tariff for pickup and delivery to the zone involved. The carrier later amended its tariff to include these services, and there is nothing wrong in principle with tariff provisions whereby a carrier, as agent, offers to arrange for services in addition to those for which it is respousible. So long as carriers offer transportation under a system of rates which excludes, as well as under another system which includes, pickup and delivery, and so long as they publish and file tariff provisions indicating clearly what services are offered under each type of rate, no difficulty should arise. Id. (361–362).

PRACTICE AND PROCEDURE

—*Complaints and investigations*

Formal adjudication proceedings of the Commission, which include all section 22 proceedings fall within two categories: (1) complaints cases alleging violations of one or more sections of the Act and (2) investigations instituted by the Commission. Ross Products, a Division of NMS Industries, Inc. and Taub, Hummel & Schnall, Inc.—Possible Violation of Section 16, First Paragraph, Shipping Act. 1916. 333 (338).

—*Official notice*

The Administrative Law Judge erred in including in his findings of fact matters not of record and of which he had failed to take official notice. Accordingly, the Commission serves official notice on respondent of the adoption of a substituted finding and affords respondents 30 days to show the contrary. International Shippers Co. of N.Y.—Freight Forwarder License, 256 (260).

The Commissiion will take official notice of advertisements of sailings hy a carrier. Experience shows that a line rarely, if ever, advertises sailings that it does not intend to make, and a reasonable inference is that the carrier will in all probability expand its service as advertised. Agreement No. 9932—Equal Access to Government-Controlled Cargo, 293 (295).

—Parties

Under Rule 3(c) of the Rules of Practice and Procedure of the Commission, the presiding officer may (and does in this case) order an appropriate substitution of parties where it appeared that respondent was misnamed in a complaint. McCabe, Hamilton & Renny Co., Ltd. v. C. Brewer Corp., dba Hilo Transportation and Terminal Co., 49 (60). **PRACTICES:** See also Pickup and Delivery Practices; Stevedores

Although the allocation of labor gangs and the first call-recall agreements give special accommodations or other special privileges to certain members of the Boston Shipping Association, the record does not support findings that the practices are unjustly discriminatory or otherwise in violation of sections 16 and 17 of the 1916 Shipping Act. The special accommodations or privileges appear to be justified on the ground that the Union refused to hire another "walking boss" which was the criterion for receiving more gangs. In order to show prejudice under section 16 or unfair or discriminatory practices under section 17, a stevedoring company would have to show that it has more than one vessel in port on a given day, thus establishing a need for additional gangs, that all other gangs are unavailable because they have been called or recalled, and that at least one of the company's competitors is working only one vessel with all of its seven gangs. United Stevedoring Corp. v. Boston Shipping Assn., 7 (15–16).

PREFERENCE AND PREJUDICE: See also Rates

Although the allocation of labor gangs and the first call-recall agreements give special accommodations or other special privileges to certain members of the Boston Shipping Association, the record does not support findings that the practices are unjustly discriminatory or otherwise in violation of sections 16 and 17 of the 1916 Shipping Act. The special accommodations or privileges appear to be justified on the ground that the Union refused to hire another "walking boss" which was the criterion for receiving more gangs. In order to show prejudice under section 16 or unfair or discriminatory practices under section 17, a stevedoring company would have to show that it has more than one vessel in port on a given day, thus establishing a need for additional gangs, that all other gangs are unavailable because they have been called or recalled, and that at least one of the company's competitors is working only one vessel with all of its seven gangs. United Stevedoring Corp. v. Boston Shipping Assn., 7 (15–16).

With respect to the allocation of a stevedore's workforce (the stevedore employed the whole workforce in a particular port) and the associated issue of self-preference by the stevedore that gives undue or reasonable preference or advantage to itself and subjects another stevedore to undue or unreasonable prejudice or disadvantage, within the meaning of section 16 First of the 1916 Shipping Act, it is well settled that the existence of undue prejudice and preference is a question of fact which must be clearly demonstrated by substantial proof. The record did not reveal such proof where the allegedly prejudiced stevedore could recall only one period, in the year and a half before the hearing, where it had to fly longshoremen in during labor shortages. Statements, inter alia, that "a good deal of difficulty was encountered with the cargo," combined with the fact that the average number of longshoremen on loan labor basis was 12 to 14 men a day for about 26 days a month, almost a third of the preferred stevedore's workforce, did not evidence "undue" or "unreasonable" advantage. McCabe, Hamilton & Renny Co., Ltd. v. C. Brewer Corp, dba Hilo Transportation and Terminal Co., 49 (57).

With respect to the issue of rates of a stevedore for loaned labor being excessive, arbitrary, unfair or unreasonable, and subjecting the stevedore loaning the labor to undue or unreasonable prejudice or disadvantage within the meaning of section 16. First, and also constituting an unjust and unreasonable practice within the meaning of section 17 of the 1916 Shipping Act, the language of section 16 is specifically directed against every form of unjust discrimination against the shipping public. This principle of equality forbids any difference in service. The mere possibility of a variance between regulation and practice renders both regulation and practice unreasonable where the issue is the difference accorded by respondent to itself as a stevedore, on the one hand, as compared with the treatment of the complainant stevedore on the other hand. However, the record with respect to labor loan rates did not reveal undue or unreasonable prejudice or a practice which was unjust or unreasonable. Id. (58–59).

On the basis of the record the Commission does not believe that approval of an agreement between a Peruvian government line and a U.S.-flag line, covering equal access to government-controlled cargoes (excluding a third-flag carrier) will result in unduly prejudicing any particular traffic in violation of section 16 of the Shipping Act. Agreement No. 9932—Equal Access to Government-Controlled Cargo, 293 (308).

RATES: See also Pickup and Delivery Practices; Surcharges

Conference rate making is based on a number of factors in addition to costs, among which competition is of great significance. If every carrier's rates were geared only to its own costs, a conference system might be impossible. It is probable that for the sake of certain benefits in terms of frequency of service and stability of rates shippers may be paying higher rates than those which would exist if rate competition based on individual carrier's costs were to prevail. Rates, Practices, Rules and Regulations of North Atlantic Mediterranean Freight Conference Relating to the Movement of Heavy Lift Cargo, 68 (76).

Proposed new tariff rule providing that the total heavy-lift charges for pieces of cargo up to nine tones moving to certain ports will be fifty percent of the Conference's Rule 27 heavy-lift charges, and proposed rule providing for a positioning, lashing and securing charge equal to sixty-five percent of the heavy-lift charge to be assessed in lieu of heavy-lift charges on the carriage of wheeled or tracked road-building machinery and tractors to certain ports, notwithstanding the type of vessel used, are not contrary to the public interest, detrimental to U.S.-commerce, nor otherwise unfair, unreasonable, or unjustly discriminatory in violation of sections 15, 16, 17 and 18(b) (5) of the 1916 Shipping Act. The proposals are not an exact procedure calculated to pass on to ro/ro and container shippers the precise savings inherent in the carriage of heavy-lift cargoes on these new types of vessels. However, ro/ro and container shippers will benefit from the innovations present in these services as their heavy-lift charges will be reduced. In addition, all other conference shippers will share in the benefits of the new technology as all heavy-lift charges for cargoes nine tons and under will be reduced. Id. (69, 77).

The test of whether an improper rate has been charged and collected is not so stringent as to require proof "beyond a reasonable doubt". Rather, the proper test is for the claimant to sustain a "heavy burden of proof". Johnson & Johnson International v. Venezuelan Lines, 84 (85).

Proposed increased rates and charges of 12½ percent in the U.S. Pacific/Hawaiian Trade are not unjust or unreasonable or otherwise unlawful, including westbound general cargo (the Administrative Law Judge concluded that the increase on this cargo should be limited to 11 percent). Matson Navigation Co.—General Increase in Rates in the U.S. Pacific/Hawaiian Trade, 96 (97).

Assuming that Matson had the burden of proof for its entire rate increase in the U.S. Pacific/Hawaiian Trade, including that portion of the increased rates not under suspension, it demonstrated persuasively and with an abundance of evidence that the rates are justified. Id. (97).

As to the contention that Matson's rate increases in the Pacific Coast/Hawaiian Trade should be deemed unlawful because of fleet scheduling and vessel deployment, the Commission agrees that the record fails to support a claim of improper use of vessels. It was contended that Matson should operate direct shuttle service between Oakland and Honolulu rather than triangular service between Oakland, Los Angeles, and Honolulu. Cargo flow and port generated cargoes are not regular and triangulation is required. Furthermore, there are problems of possible congestion and shipper market disadvantages under the proposal for direct shuttle service. Id. (98, 113–115).

With respect to claims of mismanagement by Matson because of its decision in 1967 to build two new ships instead of one, allegedly resulting in the carrier turning to the rate payers for increased rates because the decision was a mistake producing excess capacity, the evidence produced by the carrier showed that even though there might be a slight overcapacity, it would only be a temporary situation because at the expected rate of traffic growth, the present fleet would be incapable of accommodating the demands of the trade involved by 1974. Id. (99, 117–118).

Automobiles that have to move in container slots are a legitimate factor in determining the overall container slot demand. Furthermore, even with the elimination of automobile carriage from container demand this would not result in establishing an excess capacity which could operate to burden the rate payer as to require a reduction of the rate base or adjustment of the rate of return for Matson in the U.S. Pacific/Hawaiian Trade. Id. (100, 121–122).

Matson should be allowed its requested 12½ percent rate increases on most westbound cargoes in the U.S. Pacific/Hawaiian Trade (rather than 11 percent as found by the Administrative Law Judge), and its hold down of eastbound container cargo rates (principally canned pineapple) was justified as a matter of business judgment on the back-haul nature of the cargo. Matson's decision not to increase eastbound general cargo rates was supported by the record evidence. Id. (103).

Although the establishment of a minimum load factor standard may be a useful tool to enable regulatory agencies to protect rate payers against situations where excess capacity and underutilization have developed over the years into serious problems, the record does not establish that a problem of such magnitude exists with regard to Matson in the Hawaiian trade. Even if the record had shown a history of excess capacity and underutilization which would constitute a significant burden on rate payers in the future, there was insufficient evidence to enable the Commission to determine a proper load factor. Id. (103).

Matson's rate increases in the Hawaiian trade were not subject to Price Commission regulations. The rates went into effect by operation of law prior to imposition of wage/price controls on August 15, 1971. A nine percent increase was approved by the Commission on March 6, 1971. The remaining three and a half percent increase became effective on June 20, 1971, at the expiration of the four-month suspension period. Id. (104).

Three factors are involved in determining fair rate of return: (1) what rate is necessary to attract and retain capital; (2) what rate is being earned by other enterprises; and (3) what are the relative risks of the subject company compared with other enterprises. On a rate base of $69,320,000, an overall return of 8.53 percent, with a resulting equity of 8.75 percent, as sought by Matson in the Hawaiian trade, would not be excessive. The Commission in 1962 found that a 10.59 percent return on rate base for Matson would not be excessive. Matson's capital structure at the time was about 67 percent equity and 33 percent debt—quite similar to the present structure—and its debt had an imbedded cost of 5.5 percent. With this capital structure, a 10.59 percent return overall would produce 13.1 percent on common equity. In a wide range of both regulated and unregulated industries the average rate of return on common equity is generally above 12 percent. As to the risks involved, in addition to competition of other carriers, Matson is subject to some risks of competition from its own ships, and has various other risks reflected in the variability of its earnings. The risks faced by the airline industry are comparable and they earned an average of 12 percent on equity in 1965–1969. The rate of return permitted airlines indicates that 8.53 percent, sought herein, is on the low side. Id. (124–127).

Matson's increase in minimum bills of lading charges in the Hawaiian trade ($6.86—$25.00) will undoubtedly discourage traffic moving under such charge and probably cause it to use other available services but, in consideration of the physical difficulty of handling very small shipments, the high incidence of damage and loss and disproportionately large claims which such traffic generates, the increase is found not to be unjust, unreasonable, or otherwise unlawful. Id. (128).

Carrier is permitted to refund to the shipper the difference between the rate charged for a shipment of $3,634.75 which was based on the tariff measurement basis and $1,554.75 which would have been the rate on a long ton basis which was quoted to complainant. A finding under section 18(b)(3) of the 1916 Shipping Act could not be made because an appropriate application was not made within 180 days of the date of shipment. However, under section 18(b)(5), the rate was so unreasonably high as to be detrimental to the commerce of the United States and the refund would not be detrimental to such commerce. United Nations Children's Fund v. Delta Steamship Lines, Inc., 423 (425–426).

REBATES: See Freight Forwarding; Pickup and Delivery Practices

REPARATION

Carrier is permitted to waive collection of freight charges in excess of the rate agreed upon with the shipper. While the parties violated the Act by not acquiring Commission approval of their action in settling the claim at the agreed rate, the application was in order and duly filed and was based on the type of administrative error, viz., inadvertent failure to file the agreed rate, contemplated by section 18(b)(3) of the Shipping Act, 1916. Commodity Credit Corp. v. San Rocco Line, 1 (3).

Where the carrier charged a tariff rate for tank parts transported from New Orleans to Antwerp, Belgium, destined for use by the Swiss Army and a higher tariff rate for tank parts transported from New Orleans to Antwerp, destined for use by the Austrian Army, the rate on the shipment of the tank parts destined for use by the Swiss Army was unduly discriminatory in violation of section 17 of the 1916 Shipping Act, and claimant, the Embassy of Switzerland was awarded reparation. Embassy of Switzerland v. Lykes Bros. Steamship Co., Inc., 5 (6).

Refund of a portion of freight charges was permitted where the carrier filed a tariff and failed, because of an administrative error, to reduce an arbitrary charge. The facts and circumstances fell within the intent and purview of section 18(b)(3) of the Shipping Act, 1916. Consul General of Indonesia v. Nedlloyd Inc., 38 (40).

Reparation was denied where a shipper failed to show with reasonable certainty that a shipment of plastic pipe should have been rated as plumbing supplies N.O.S., rather than cargo, general, N.O.S. The term "plumbing" appeared only in complainant's requisition of the articles shipped. The bill of lading referred to plastic pipe. The burden was on complainant to establish that the plastic pipe shipped may reasonably be included in the tariff item covering plumbing supplies, N.O.S. The fact that the individual preparing the requisition used the term "plumbing supplies", without more, would not constitute proof that the plastic pipe fell within that category, nor would the description in the GSA catalogue which demonstrates that the pipe is for use above or below ground in connection with cold water lines and many other uses including those obviously not properly classified as plumbing. The evidence relating to use of the pipe showed that it was intended for use for "village water systems". Whether the water system included indoor construction (the tariff item complainant would have applied included articles all clearly intended for indoor construction) and could reasonably be considered as plumbing was not established. On the contrary, evidence of a witness rendered doubtful that plumbing is found in a rural area such as that involved in the case. The shipment was not incorrectly described by the shipper as plastic pipe and the shipper was on notice of the provisions of the tariff and should have been aware that it did not provide a rate on such pipe. United States v. Farrell Lines, Inc., 41 (45–48).

A defense that the cause of action did not accrue within two years next before the filing of the complaint is insufficient to bar consideration of alleged violations of the Shipping Act two years or less antedating the filing of the complaint, which were of a continuing nature. Every time a stevedore did not receive the number of longshoremen it requested from another stevedore on a loan basis, that presumably constituted an accrual of action, with occurrences antedating two years being barred, and those subsequent thereto being a possible basis for award of reparation. However, the matter is academic since the practice of loaning labor was not found to be violative of the Act. McCabe, Hamilton & Renny Co., Ltd. v. C. Brewer Corp., dba Hilo Transportation and Terminal Co. 49 (60–61).

Carrier was permitted to refund a portion of freight charges where the charges collected were based on measurement which resulted in a charge more than 350 percent in excess of previous charges under tariffs which prescribed weight rather than measurement as the rate basis. The charge was an oversight by the carrier which clearly fell within the purview of section 18(b)(3) of the 1916 Shipping Act. Overseas Impex, Inc. v. Lykes Bros. Steamship Co., Inc., 62 (63).

Carrier was permitted to waive collection of certain terminal charges and seaway tolls where, prior to booking of the cargoes for shipment, it was understood between the shipper and carrier that the effective freight rate was to include the transfer charges and seaway tolls. Through clerical error the carrier's tariff filing agent failed to carry out the carrier's instuctions to file the tariff corrections needed to permit absorption of the added charges and tolls. U.S. Department of Agriculture v. Tropwood Lines, 65 (66).

Complaints seeking reparations for alleged overcharges are dismissed. The bills of lading were prepared and the commodity description "Surgical Dressing" were provided by claimant or by its freight forwarder and the carrier charged the rate for "Dressings, viz. Surgical N.O.S." Claimant contended that the articles were gauze sponges and should have been charged the lower rate for "Gauze, viz. Surgical." The goods had left the carrier's custody and control and the claimant had to establish his claim by clear and convincing evidence. After all the evidence is weighed there remained at least reasonable doubt, if not certainty, that the products in question may not rationally be considered surgical gauze, but are, indeed, surgical dressings as the carrier contended. Claimant's original interpretation of the tariff at a time when the controversy had not yet arisen may be given weight in deciding the correct description and rate now to be applied. Claimant failed to carry its heavy burden of proof to establish its claim. Johnson & Johnson International v. Venezuelan Lines, 84 (88–89, 93–94).

Carrier is permitted to waive collection of a portion of freight charges where, due to inadvertency, the appropriate tariff had not been filed. Due to an overload of traffic, vacations and insufficient personnel the matter had been turned over to a clerk who delayed in following through as instructed in filing with the Commission. Commodity Credit Corp. v. Hellenic Lines Ltd., 250 (251) ; 253 (254).

Carrier is permitted to waive collection of a portion of freight charges on a shipment of Bulgar Wheat from Houston to Aqaba, Jordon, where the carrier through error failed to file an agreed upon rate which was the same as the rate on flour to Aqaba. The carrier stated that the applicable rate at the time, the cargo N.O.S. rate, is unquestionably high for the cargo shipped. U.S. Department of Agriculture v. Waterman Steamship Corp., 278 (279).

Carrier is permitted to waive collection of a portion of freight charges on a shipment of flour from New Orleans to Aqaba, Jordan, where the carrier through inadvertence failed to file the agreed upon rate which was the same as the rate on flour from Galveston, Beaumont and Houston to Aqaba. U.S. Department of Agriculture v. Waterman Steamship Corp., 281 (282).

Carrier is permitted to waive collection of a portion of freight charges where the carrier inadvertently failed to file the rate which it had intended to apply to the shipment. Asiatic Petroleum Corp. v. States Marine Lines, 290 (291).

Carrier is permitted to waive a portion of freight charges where the carrier inadvertently failed to file the rate agreed upon for the shipment involved. Magnolia Forwarding Co. v. Delta Steamship Lines, Inc., 315 (316).

Carrier is denied permission to refund a portion of freight charges. Complainant, the consignee of the shipment was not informed of a tariff rule and of the consequent minimum container charge in the tariff, and based its costs and sales prices for the commodity involved on a lower charge. The case was not one of an inadvertent error in the tariff, but was a situation where the tariff was changed after the shipments moved. Carriers must charge their lawfully published rates. Colorado Beverage Co., Inc. v. Lykes Bros. Steamship Co., Inc., 330 (332).

Where the evidence established that the commodity shipped was a mix of cottonseed oil and soyabean oil and the carrier had a tariff item for oil with a special rate to the destination involved, reading "Oil . . . viz: Corn, Cottonseed or Soyabean," complainant was entitled to that rate rather than the higher rate collected for shortening, general cargo. Complaint was entitled to the difference in the amount involved, plus 6% interest per year if not paid within 30 days. Kraft Foods v. Prudential Grace Lines, 405 (407–408).

A claim arising from an overcharge cannot be barred from a determination on the merits by a conference rule if, as in the present case, the claim is filed with the Commission within two years of its accrual. Id. (408).

Assignee of the shipper of cargo had standing to seek reparation for an alleged overcharge. And this was so whether or not the assignment passed beneficial or equitable title since the assignee could recover damages in an action brought in its own name but for the benefit of an equitable owner of the claim. Uniroyal International v. Farrell Lines, 409 (411).

Carrier is permitted to refund a portion of freight charges collected where, in revising a page of its tariff, inadvertently by printer's error and without intending to do so, the rate on the cargo involved was changed from one computed on a weight basis only to a weight or measurement basis. International Paper Co. v. Delta Steamship Lines, Inc., 420 (422).

Carrier is permitted to refund to the shipper the difference between the rate charged for a shipment of $3,634.75 which was based on the tariff measurement basis and $1,554.75 which would have been the rate on a long ton basis which was quoted to complainant. A finding under section 18(b)(3) of the 1916 Shipping Act could not be made because an appropriate application was not made within 180 days of the date of shipment. However, under section 18(b)(5), the rate was so unreasonably high as to be detrimental to the commerce of the United States and the refund would not be detrimental to such commerce. United Nations Children's Fund v. Delta Steamship Lines, Inc., 423 (425–426).

Carrier is permitted to refund a portion of freight charges collected where the higher rate was charged through inadvertence. The lower rate which would have been applicable was deleted from the tariff inadvertently. Philipp Brothers v. American Mail Line Ltd., 427 (428–429).

STEVEDORES

Where stevedores engage in activities of a kind which independently makes them subject to the 1916 Shipping Act, such as operating a terminal facility, then such stevedores are deemed to be engaged in the furnishing of wharfage, dock, warehouse, or other facilities in connection with common carriers by water and are within the Commission's jurisdiction. McCabe, Hamilton & Renny Co., Ltd. v. C. Brewer Corp., dba Hilo Transportation and Terminal Co., 49 (56).

The practice of lending longshoremen by a stevedore employing the whole workforce in a port to another stevedore in the port that is not so advantaged is subject to regulation by the Commission. Id. (57).

With respect to the allocation of a stevedore's workforce (the stevedore employed the whole workforce in a particular port) and the associated issue of self-preference by the stevedore that gives undue or unreasonable preference or advantage to itself and subjects another stevedore to undue or unreasonable prejudice or disadvantage, within the meaning of section 16 First of the 1916 Shipping Act, it is well settled that the existence of undue prejudice and preference is a question of fact which must be clearly demostrated by substantial proof. The record did not reveal such proof where the allegedly prejudiced stevedore could recall only one period, in the year and a half before the hearing, where it had to fly longshoremen in during labor shortages. Statements, inter alia, that "a good deal of difficulty was encountered with the cargo," combined with the fact that the average number of longshoremen on loan labor basis was 12 to 14 men a day for about 26 days a month, almost a third of the preferred stevedore's workforce, did not evidence "undue" or "unreasonable" advantage. Id. (57).

With respect to the issue of rates of a stevedore for loaned labor being excessive, arbitrary, unfair or unreasonable, and subjecting the stevedore loaning the labor to undue or unreasonable prejudice or disadvantage within the meaning of section 16 First, and also constituting an unjust and unreasonable practice within the meaning of section 17 of the 1916 Shipping Act, the language of section 16 is specifically directed against every form of unjust discrimination against the shipping public. This principle of equality forbids any difference in service. The mere possibility of a variance between regulation and practice render both regulation and practice unreasonable where the issue is the difference accorded by respondent to itself as a stevedore, on the one hand, as compared with the treatment of the complainant stevedore on the other hand. However, the record with respect to labor loan rates did not reveal undue or unreasonable prejudice or a practice which was unjust or unreasonable. Id. (58–59).

With respect to a stevedore's accusation that another stevedore had a monopoly over longshore labor at the Port of Hilo which was unreasonable, the decision in *Calif. Stevedore*, 8 FMC 97, which condemned an agreement between elevators and a port district that established a stevedoring monopoly in a national port, preventing carriers from selecting stevedores of their choice, as prima facie unjust and unreasonable, that decision must be regarded as inapplicable for the reason that labor negotiations are beyond the reach of the Shipping Act. *Calif. Stevedore* involved an agreement between persons subject to the Shipping Act and the practice resulting therefrom was also subject to the Act. Here, the agreement between the stevedore which controlled the whole workforce and the union is not between persons subject to the Act, although the practice involved, labor lending, may be subject to the Act. The aggrieved party remains free to seek whatever remedy it may have under the antitrust laws in United States courts. Id. (59–60).

SURCHARGES

Where a Shippers Rate Agreement provided that "In the event of . . . currency devaluation by governmental action, regulation of any governmental authority pertaining thereto, or any other official interferences," the conference could impose a surcharge on 15 days' notice, a tariff filing, imposing a currency devaluation surcharge on less than 90 days' notice, was properly rejected without a hearing. The surcharge was filed when the Australian government appreciated the Australian dollar as against the United States dollar and the conference contended that governmental action or authority includes actions by governments other than the United States. However, the currency devaluation clause was an amendment to the Rate Agreement and came some time after official British devaluation of the pound. This direct relationship of the clause to the British experience is strong ground for restricting the operation of the clause to a situation where a country devalues its own currency. The Rate Agreement and the tariff were written in terms of United States currency and it was therefore highly unlikely that the devaluation clause was meant to refer to devaluation of that currency by a government other than the United States. Were the action of any government sufficient to invoke such clauses shippers would be buffeted by an unforeseeable number of short-notice increases—a result grossly out of harmony with the avowed purpose of dual rate contracts. Australia/U.S. Atlantic & Gulf Conference. Proposed Imposition of Currency Adjustment Surcharge, 27 (30–31).

TARIFFS

Were there are no disputed facts, an evidentiary hearing is not necessary to a valid rejection of a tariff filing which is a patent nullity. Australia/U.S. Atlantic & Gulf Conference, Proposed Imposition of Currency Adjustment Surcharge, 27 (29–30).

Reparation was denied where a shipper failed to show with reasonable certainty that a shipment of plastic pipe should have been rated as plumbing supplies N.O.S., rather than cargo, general, N.O.S. The term "plumbing" appeared only in complainant's requisition of the articles shipped. The bill of lading referred to plastic pipe. The burden was on complainant to establish that the plastic pipe shipped may reasonably be included in the tariff item covering plumbing supplies, N.O.S. The fact that the individual preparing the requisition used the term "plumbing supplies", without more, would not constitute proof that the plastic pipe fell within that category, nor would the description in the GSA catalogue which demonstrates that the pipe is for use above or below ground in connection with cold water lines and many other uses including those obviously not properly classified as plumbing. The evidence relating to use of the pipe showed that it was intended for use for "village water systems". Whether the water system included indoor construction (the tariff item complainant would have applied included articles all clearly intended for indoor construction) and could reasonably be considered as plumbing was not established. On the contrary, evidence of a witness rendered doubtful that plumbing is found in a rural area such as that involved in the case. The shipment was not incorrectly described by the shipper as plastic pipe and the shipper was on notice of the provisions of the tariff and should have been aware that it did not provide a rate on such pipe. United States v. Farrell Lines, Inc., 41 (45–48).

Complaints seeking reparations for alleged overcharges are dismissed. The bills of lading were prepared and the commodity description "Surgical Dressing" were provided by claimant or by its freight forwarder and the carrier charged the rate for "Dressings, viz. Surgical N.O.S." Claimant contended that the articles were gauze sponges and should have been charged the lower rate for "Gauze, viz. Surgical." The goods had left the carrier's custody and control and the claimant had to establish his claim by clear and convincing evidence. After all the evidence is weighed there remained at least reasonable doubt, if not certainty, that the products in question may not rationally be considered surgical gauze, but are, indeed, surgical dressings as the carrier contended. Claimant's original interpretation of the tariff at a time when the controversy had not yet arisen may be given weight in deciding the correct description and rate now to be applied. Claimant failed to carry its heavy burden of proof to establish its claim. Johnson & Johnson International v. Venezuelan Lines, 84 (88–89, 93–94).

Carriers' definition of a "trailerload" stands to benefit smaller shippers, and the possibility, or even probability, that violations may occur (so as to make the carriers' practices in applying the definition unreasonable under section 18(a) of the 1916 Shipping Act) is insufficient to warrant a finding that the definition is unreasonable. Pickup and Delivery Rates and Practices in Puerto Rico. 344 (355–356).

The word "catano" as used in carriers' tariffs as a pickup and delivery point is ambiguous since it fails to indicate whether the point is intended to be the town or the municipio in Puerto Rico. Such ambiguity is unlawful under section 2 of the 1933 Intercoastal Shipping Act. The language must be clarified. Id. (354).

Where the tariff provided different rates for pesticides and insecticides; *in its application for a patent for the commodity shipped, "Omite 30–W,"* complainant clearly intended the compound to be primarily a specific against certain species of mites which are not insects; the technical data sheet and advertising material circulated to potential users and the label placed on the product refer only to Omite 30–W's use for the control of specified mite species; and whether or not a miticide could be classified as an insecticide, it certainly could be properly classified as a pesticide and was so classified in the shipping documents, complainant failed to prove that the shipment should have been rated as an insecticide. The tariff clearly intended to distinguish between products denominated insecticides and those denominated pesticdes. Where a product mght be used in either category its chief effectiveness and use is a reasonable basis for determining its commodity rating for application of proper freight charges. Uniroyal International v. Farrell Lines, 409 (411 et seq.)

TERMINAL LEASES

Where the Port of Houston Authorlty entered into an agreement to lease the grain elevator facilities at Houston to a corporation; the agreement was subject to a prior lease of a portion of the facilities; the corporation filed a proposed tariff provision which provlded that common carriers by water, as defined by the 1916 Shipping Act, would not be accepted for loading at the elevator; and the lessee of a portion of the facilities advised that it would be bound by the exclusionary provision, the corporation leasing the grain elevator facilities was not an "other person" subject to the Shipping Act, and accordingly, the lease agreement was not subject to the filing requirement of section 15 of the Act Agreement No. T–2719, 318 (321–322).

An agreement between a port authority and a corporation, under which the port leased grain elevator facilities to the corporation is subject to section 15 insofar as the subject matter is involved. The agreement provided for an exclusive arrangement, a preferential arrangement, and for the fixing or regulating of transportation rates. Id. (320–321).

The fact that a lease agreement covering graiu elevator facilities at a port did not preclude the lessee from serving common carriers at the leased facilities did not require a finding that the lessee was subject to the Shipping Act, 1916. Nothing in the Act or section 15 thereof, militates against the Commission going outside the provisions of an agreement to determine the status of the parties thereto. In this case, the lessee had posted a tariff excluding common carriers by water from using the facilities and an affidavit had been submitted indicating that common carriers would not be served at the leased premises. These matters were determinative of the status of the lessee (as not an "other person" subject to the Act) under the Act upon which the Commission's jurisdiction was dependent. Id. (322).

An evidentiary hearing was not required to resolve the question of the status of the lessee of a port's grain elevator facilities, as an "other person" subject to the Shipping Act or the question of approvability of the agreement, where the lessee had served notice that common carriers would not be accommodated at the facilities. Approval of the agreement would result in the lessee subsequently ousting the Commission of jurisdiction by filing an appropriate tariff. Id. (322–323).

TERMINAL OPERATORS: See Stevedores