FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 487

U. S. DEPARTMENT OF AGRICULTURE

v.

WATERMAN STEAMSHIP CORPORATION

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

March 2, 1977

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 2, 1977.

It is Ordered, That applicant is authorized to waive collection of $3,271.26 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 487 that effective February 17, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 17, 1976 through August 20, 1976, the 'all inclusive' rate on 'Peanut Oil, In Cans' from New York to Hodeidah is $230.50 W, NSD, subject to all applicable rules, regulations, terms and conditions of said rate 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) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 487

U. S. DEPARTMENT OF AGRICULTURE

v.

WATERMAN STEAMSHIP CORPORATION

Adopted March 2, 1977

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Waterman Steamship Corporation seeks permission to waive collection of a portion of the freight charges on a shipment by the Commodity Credit Corporation, United States Department of Agriculture, of one hundred metric tons of Peanut Oil, Refined, in cans, from New York to Hodeiah, Yemen, on March 10, 1976. The rate applicable at the time of shipment was $230.50 per 2,240 pounds, NSD (not subject to discount) plus 12½% Hodeiah congestion surcharge.[2] This rate resulted in aggregate freight charges of $29,441.35. The rate sought to be applied is $230.50 per 2,240 pounds, NSD.[3] This rate would have resulted in total freight charges of $26,170.09. Therefore permission to waive collection of $3,271.26 is requested.

On January 5, 1976, Waterman booked the aforementioned shipment. On January 30, 1976, a 7½% Hodeiah congestion surcharge went into effect. On February 6, 1976, a 12½% Hodeiah congestion surcharge went into effect. On February 17, 1976, Waterman's tariff agent filed a negotiated rate of $230.50 per long ton, NSD, plus 12½% Hodeiah congestion surcharge. Through inadvertence the tariff agent was not informed that the rate was to be all inclusive, i.e., not to include the

[1] This decision became the decision of the Commission March 2, 1977.

[2] Item 4002, *Account U.S. Department of Agriculture*, Contract No. 9264-A—From New York to Hodeiah. Approximately 100 Metric Tons Peanut Oil, in cans. Rate includes Outport Arbitrary, Group I, $230.50 W, NSD. Waterman Steamship Corporation, Tariff No. 18-C, Section V Project Rates Red Sea—Aden. From: U.S. ATLANTIC AND GULF PORTS To: RED SEA, GULF OF SUEZ, AQUABA AND ADEN BASE PORTS. 16th Revised Page 116, Effective February 17, 1976.

[3] (R) Peanut Oil, in Cans, NEW YORK TO HODEIAH, Approximately 103 metric tons. Rate is all inclusive. Rate expires with September 19, 1976, GROUP 2, $230.50 W, NSD. Same Tariff. 10th Revised Page 101-E, Effective (T) August 20, 1976.

12½% Hodeiah congestion surcharge. On March 10, 1976, the cargo was shipped. On August 20, 1976, an all inclusive rate of $230.50 per long ton NSD went into effect.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications*, Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[4] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[5] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

It is therefore found that:

1. There was an error due to inadvertence in failing to file a new rate.

2. Such waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Waterman filed a new tariff which sets forth the rate on which such waiver would be based.

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[4] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[5] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, under *Purpose of the Bill.*

4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly permission is granted to Waterman Steamship Corporation to waive collection of a portion of the freight charges, represented by $3,271.26.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
February 1, 1977.

FEDERAL MARITIME COMMISSION

No. 75–53

REFRIGERATED EXPRESS LINES (A/ASIA) PTY., LTD., ET AL.

v.

COLUMBUS LINES, INC., ET AL.

NOTICE OF DETERMINATION NOT TO REVIEW

March 2, 1977

Administrative Law Judge Norman D. Kline served an order of dismissal in this proceeding February 3, 1977. While dismissing the complaint, he expressed his opinion that some regulatory purpose would be served by litigating the issue relating to past violations of section 15 of the Shipping Act. He acknowledged that it is the Commission that would make this determination.

Notice is hereby given that the Commission on March 2, 1977, determined not to review the order of dismissal of the Administrative Law Judge in this proceeding served February 3, 1977. The question of whether or not further proceedings are warranted on the issue of past section 15 violations will be considered apart from this complaint proceeding and need not affect the dismissal.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 75–53

REFRIGERATED EXPRESS LINES (A/ASIA) PTY., LTD., ET AL.

v.

COLUMBUS LINE, INC., ET AL.

DISMISSAL OF COMPLAINT WITH PREJUDICE

February 3, 1977

The respondent carriers in this proceeding, Columbus Line (Columbus),[1] Associated Container Transportation (Australia) Ltd., Australian Shipping Commission (Australian National Line) (ACT/ANL), and Farrell Lines, Inc. (Farrell), have filed a motion seeking dismissal of the complaint with prejudice and without award of costs or attorneys' fees. Complainant Refrigerated Express Lines (A/Asia) Pty. Ltd. (REL) has entered into a stipulation with respondents agreeing with the action requested in the motion. Hearing Counsel have filed a reply to the motion in which they state that they do not oppose the motion on the grounds that the Commission has given its approval to various agreements which have restored the trade to order. Hearing Counsel furthermore state that they do not believe further proceedings are warranted to determine the existence of possible unfiled agreements in the past and that no regulatory purpose would therefore be served by continuance of the proceeding.

The basis for the motion and stipulation is the fact that the parties have apparently settled their differences and have embodied this settlement in a series of agreements which have been filed with and approved by the Commission (Agreement Nos. 10245, 10247, 10248, 10250, 10250(A), and 10260). Some time after the Commission approved these agreements (approval occurring apparently on or about August and September, 1976), complainant and respondents executed a mutual release dated December 16, 1976, as provided by Agreement No. 10250 and the stipulation mentioned above, dated December 17, 1976.

The various agreements cited essentially establish an arrangement by which REL would be permitted to carry meat from ports in Northwestern

[1] Columbus Line is the trade name of Hamburg-Suedamerikanische Dampfschiffahrts-Gesellschaft, Eggert and Amsick.

and Eastern Australia to East Coast and Gulf ports of the United States as a breakbulk carrier from June 1, 1976, at least through the year 1977. REL is furthermore guaranteed a 15 percent allocation of the meat moving from the East Coast of Australia in the subject trade and in return for serving ports in Northwestern Australia will be given a premium of $25 per metric ton to defray costs of handling at those ports funded by contributions of all the lines serving the meat trade. The four respondent lines continue to be designated as the containerized carriers together with another carrier, namely, Trader Navigation Co. Ltd. (Atlantraffik Express Service) which line, however, is limited in its operations. The essentials of these arrangements are contained in Agreement No. 10250, which consists of separate letters from the chairman of the Australian Mean Board to each of the carriers involved together with the acceptances of each carrier. See Exhibit 4 attached to the Motion to Dismiss. The other agreements cited consist of agreements relating to loading, expenses at Northwestern Australian ports, coordination of sailings, the guaranteeing of REL's allocated share and other matters implementing the basic arrangement. The Australian Meat Board apparently plays a role in all of these arrangements, for example, by designating lines as breakbulk or containerized, collecting funds to pay REL the premium for servicing ports in Northwestern Australia, determining the amount of this premium (or "surcharge" as it is sometimes called) and calling the lines to meet with representatives of Australian exporters to arrange schedules and capacities "subject to approval by the appropriate U.S. and Australian authorities."

The above arrangements appear to settle the controversy between REL and the four respondents as well as between REL and the Australian Meat Board.[2] The complaint, as originally filed, alleged that the four respondent carriers entered into a "deal" among themselves and the Meat Board by which the four carriers would enjoy exclusive rights to the carriage of meat from Australia in the subject trade in return for observing maximum freight rates designated by the Board. REL further alleged that meetings were held between members of the Board and respondents following which respondents resigned from the Australia/Eastern USA Shipping Conference (FMC Agreement No. 9450) and filed tariffs simultaneously publishing identical maximum rates resulting in the exclusion of all other carriers from the carriage of meat after January 1, 1976. The complaint alleged that these arrangements demonstrated the implementation of agreements which had not been filed with the Commission for approval, in violation of section 15 of the Shipping Act, 1916 (the Act), and that pursuant to such alleged agreements, respondents had engaged in unlawful discrimination, preference, unfair devices, unfair

[2] REL had also commenced an action in the Australian Industrial Court under the Australian Trade Practices Act against the Australian Meat Board as well as respondents herein. See Ex. 7 (Mutual Relase) attached to the subject motion.

contracts and unreasonable rates, in violation of sections 14 Third and Fourth, 16 First, 17 and 18(b)(5) of the Act.

As shown by the agreements cited above, complainant REL has successfully negotiated a satisfactory resolution of its controversy, apparently resuming the carriage of meat under the terms and conditions arranged. The law and Commission rules of course, encourage settlements and engage in every presumption that such settlements are valid and lawful. *Consolidated International Corporation v. Concordia Line,* 14 SRR 1259, 1261 (1975), *Merck, Sharp & Dohme International a Division of Merck & Company, Inc. v. Atlantic Lines,* 14 SRR 232, 235, (1974), Rule 6(a), 46 CFR 502.91, Rule 6(d), 46 CFR 502.94(a)(1). This does not mean that the Commission must act as a rubber stamp in evaluating settlements especially when the settlements themselves require approval under section 15 of the Act. *Consolidated International Corporation v. Concordia Line,* cited above, *Massachusetts Port Authority v. Container Marine Lines, et al.,* 11 SRR 37, 40 (1969), *American Export Isbrandtsen Lines, Inc.,* 14 F.M.C. 82, 89 (1970), *Delaware River Port Authority et al. v. Puerto Rico Maritime Shipping Authority,* 14 SRR 1509, 1510 (1975). However, in this instance the Commission has evaluated the terms of the settlements and given its approval. Therefore the private controversy between REL and respondents can be deemed terminated and the complaint ought to be dismissed with prejudice as requested. It is so ordered. Before terminating all discussion, however, a few matters bear consideration relating to the remarks of Hearing Counsel in their reply to the subject motion.

As mentioned, Hearing Counsel stated that further proceedings would not be warranted to determine whether there had been a violation of section 15 because of the alleged failure to file agreements for approval in the past. Complainant, as mentioned, had alleged not only that it had suffered various types of harm stemming from alleged discrimination, prejudice, etc., but that respondents had entered into agreements which had not been filed with nor approved by the Commission. REL, furthermore, proffered evidentiary material and cited facts which are officially noticeable such as respondents' simultaneous resignations from the existing conference and tariff rulings showing similar rates on meat. See Preliminary Findings of Fact and Related Rulings, December 16, 1975; Requests in the Nature of Motions for Summary Judgment and Motions to Dismiss Denied, April 27, 1976, pp. 7–9. The record had reached a stage of evidentiary development so as to convince not only REL but Hearing Counsel to ask me to issue an initial decision finding respondents in violation of section 15 not only for failure to file but for carrying out agreements to monopolize the importation of Australian meat into the East Coast of the United States in return for maintaining fixed maximum rates. See Hearing Counsel's Opening Memorandum and

Proposed Findings of Fact, February 24, 1976, and Reply Memorandum and Reply to Motion to Dismiss, March 16, 1976.[3]

Notwithstanding these requests of Hearing Counsel and REL, I refused to issue an initial decision in the nature of a summary judgment which would have found respondents in violation of section 15 primarily because of factual denials by respondents and the need for full hearings with opportunity for cross-examination to test complainant's as well as respondents' evidence. See Requests in the Nature of Motions for Summary Judgment and Motions to Dismiss Denied, cited above, pp. 12–15. Subsequent appeals from my rulings were not pursued and negotiations for settlement which reached a successful conclusion have, of course, eliminated any incentive on REL's part to prosecute its complaint. Hearing Counsel have no apparent interest in pursuing the matter of past violations and conclude that under all the circumstances "no regulatory purpose would be served by further proceedings."

I have no problem in ordering dismissal of the complaint with prejudice as requested by the parties.[4] I do not believe, however, that I can agree with Hearing Counsel that no further proceedings are warranted and that no regulatory purpose would be served by further proceedings. Although complainant has settled its differences with respondents, the complaint raised issues which go beyond the confines of a private controversy and alleged, in effect, that a public wrong had been done. If, in fact, the record, if fully developed, would show that respondents had failed to file and had executed an anticompetive agreement for some period of time during the first several months of 1976 or before, a violation of section 15 of the Act would have occurred and the public interest as well as that of private parties would have been affected. Indeed, it was the public interest in such an issue that prompted Hearing Counsel to petition for leave to intervene in the first place.[5] Furthermore, I know of no doctrine of law that holds that once violators of law have ceased their unlawful practices, no harm has been done and appropriate law enforcement

[3] On the basis of the record developed as shown in my Preliminary Findings of Fact, cited above, Hearing Counsel stated in their Opening Memorandum that "Hearing Counsel submit that the Administrative Law Judge may find that an agreement exists among the parties respondent as is subject to the filing and approval requirements of section 15." Opening Memorandum, p. 3. Later Hearing Counsel stated: "There exists today in the Australia/U.S. East and Gulf Coast trade a *de facto* conference arrangement involving respondents. . . .," OM, p. 17, and "[b]ased upon all of the above, Hearing Counsel request the Administrative Law Judge to find that an agreement exists among the parties respondents . . . as is subject to the filing and approval requirements of section 15." OM, p. 20. On March 26, 1976, Hearing Counsel concluded: "Moreover, as we urged on Opening Memorandum and by this Reply, there exist compelling reasons for finding the instant agreement subject to section 15 at this stage of the proceeding where the Administrative Law Judge can agree . . . 2. There presently exists a *de facto* conference agreement in defiance of this nation's regulatory laws. We therefore request the Administrative Law Judge to find that the failure to file a memorandum of the agreement is a continuing violation of section 15 of the Shipping Act, 1916." Reply Memorandum, p. 12.

[4] The parties request also that no costs or attorneys' fees be awarded. It is not Commission policy to award such things as reparation except in most unusual circumstances, not present here. See Docket No. 76–5, *Ace Machinery Company v. Hapag-Lloyd Aktiengesellschaft*, Order, October 7, 1976, p. 5; same docket, Order Denying Motion to Vacate, August 4, 1976, p. 5, and cases cited therein.

[5] In their petition for leave to intervene, November 28, 1975, Hearing Counsel had expressed great concern over the possibility that an unapproved section 15 agreement would result in exclusion of three carriers from the trade, "a matter of great public interest." Petition, p. 1.

agencies are relieved of their obligation to enforce the particular law in question. This Commission has instituted investigations on far less provocation than that which exists in the present case.[6]

It is true that administrative or other proceedings have been discontinued when the activities under investigation have terminated and the cases have been deemed moot but there are many cases holding that such proceedings need not be terminated if the type of activity involved is likely to recur, if necessary principles or guidelines would result, if rights of outside parties are involved, if much time and expense in litigation has already been consumed, or for some other valid purpose. See, e.g., *Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trades*, 11 F.M.C. 168, 173 (1967); Docket No. 75–57, *Matson Navigation Company-Proposed Rate Increase, etc.*, Order on Appeal, January 14, 1977, pp. 6–8; *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 516 (1910); *Walling v. Haile Gold Mines, Inc.*, 136 F. 2d 102, 105 (4th Cir. 1943); *Walling v. Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331, 334–335 (8th Cir. 1944); *Boise City Irr. & Land Co. v. Clark*, 131 Fed. 415 (9th Cir. 1904);; *Rates on U.S. Government Cargoes*, 11 F.M.C. 263, 279 (1967).

The instant case provides an example of an issue that could very likely recur with enormously significant consequences, namely, that concerning the validity of the Act of State and related doctrines, which, if carried to their logical conclusions, would enable regulated carriers to obtain licenses from foreign governments authorizing them to ignore the requirements of the Shipping Act. Although I am convinced that these doctrines have no merit in the regulatory context and have so ruled (see Requests in the Nature of Motions for Summary Judgment and Motions to Dismiss Denied, cited above, pp. 29–42; Leave to Appeal to Commission Granted, May 5, 1976), respondents had vigorously argued that the Commission had been, in effect, ousted from jurisdiction or at least consideration of their past practices because of the participation of the Australian Meat Board. Because of subsequent negotiations, my rulings in this matter never reached the Commission on appeal. Any regulated foreign carrier therefore may resurrect the argument in case it wishes to prevent the Commission from questioning its activities, claiming that its government has ordered the action in question. This is so even though respondents have since filed agreements for approval including participation of the Meat Board, a curious development considering their earlier position that the Meat Board's participation and "ukases" removed all of these matters from the Commission's consideration. The status of Act of State and related defenses is therefore unsettled. Consequently one could argue that

[6] See the discussion below concerning an investigation initiated by the Commission in Docket No. 76–42 following dismissal of the complaint in Docket No. 76–5, the *Ace* case, cited above.

a determination of the validity of these doctrines by the Commission would serve a useful regulatory purpose.[7]

Whether any regulatory purpose would be served by pursuing the issue of past violations of section 15, however, is not for me or Hearing Counsel but for the Commission to determine since only the Commission can institute investigatory proceedings or otherwise instruct its staff to inquire into the matter. In some instances, the Commission has refused to institute investigatory proceedings following settlement of differences between complainant and respondent despite Hearing Counsel's petition that such a proceeding be instituted in order to determine a novel jurisdictional issue. See Docket No. 73–30, *American Warehousemen's Association v. The Port of Portland,* Order, November 11, 1974. In other cases, cited above, the Commission has continued to pursue issues concerning rates long since canceled in order to establish guidelines and to protect the rights of shippers who may wish to file complaints subsequently. See Docket No. 75–57, *Matson Navigation Company, etc.,* Order on Appeal, cited above. In still other instances the Commission has dismissed a complaint which it had found to be frivolous in which a consignee had alleged that a carrier's heavy lift charge on a shipment moving to Chicago, Illinois, in August 1974, was unlawful but apparently as a result of the allegations in the complaint, initiated a separate investigation not only of that carrier's heavy lift charge at Chicago but also similar charges of approximately 10 other carriers for a five-year period covering Atlantic and Great Lakes ports. See Docket No. 76–5, *Ace Machinery Company v. Hapag-Lloyd Aktiengesellschaft,* Order, October 7, 1976; same docket, Order Denying Motion to Vacate, August

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[7] If one is seeking other possible regulatory purposes, one could note that Commission determination of issues concerning alleged unapproved, concerted carrier activity may affect rights of other parties under antitrust laws. See *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213 (1966). Moreover, Hearing Counsel have themselves argued in other cases that issues ought to be litigated to conclusion even if parties have settled their private differences or rates under investigation have been canceled in order to establish guidelines, protect rights, utilize principles in later cases, or merely to protect the Commission's regulatory function. See, e.g., Docket No. 73–30, *American Warehousemen's Association,* cited below (determine novel jurisdictional issue); Docket No. 75–57, *Matson Navigation Company-Proposed Rate Increase, etc.,* Order on Appeal, January 14, 1977 (protect possible shipper rights to reparation and utilize findings in later case); Docket No. 74–30, *Sea-Land Service, Inc.,—General Increases in Rates in the U.S. West Coast/Puerto Rico Trade,* Hearing Counsel's Exceptions, July 21, 1976, p. 10 (protect Commission's "rate regulatory function"). In Docket No. 75–57, cited above, incidentally, the Commission announced its policy of not discontinuing investigations of canceled rates because the parties "have spent a good deal of time and money in attempting to determine the lawfulness of the rates at issue" and "there is the possibility of reparation actions by shippers pursuant to section 22." Order on Appeal, pp. 6, 7.

Ironically, in Docket No. 74–30, cited above, Hearing Counsel found a regulatory purpose when urging the Commission to continue a proceeding in order to find that rates long since canceled had been just and reasonable on the ground that such action was necessary to protect the Commission's "rate regulatory function" which would be "destroyed" by the carrier's cancelation of the rates under investigation. In the instant case, however, Hearing Counsel apparently see no destruction of the Commission's regulatory function if parties who may have operated concertedly in violation of section 15 and the antitrust laws have ceased doing so and therefore the matter of past violations is not to be pursued by the Commission.

4, 1976, pp. 5, 6;[8] Docket No. 76-42, *Heavy Lift Practices and Charges of Hapag-Lloyd Aktiengesellschaft, The North Atlantic Westbound Freight Association and its Member Lines and Europe Canada Lakes Line (Ernst Russ) in certain United Kingdom Trades,* Order of Investigation and Hearing, August 4, 1976.

CONCLUSIONS

Complainant REL and four respondent carriers have negotiated a successful resolution of their controversy and have obtained Commission approval of all of their agreements embodying this resolution, pursuant to which complainant has executed a release and stipulated that the complaint should be dismissed with prejudice. Hearing Counsel do not oppose dismissal and state furthermore that no further proceedings are warranted to determine whether there had, in fact, been a violation of section 15 as the complaint had alleged.

It is axiomatic that the law favors settlements. In this case, furthermore, the Commission has given its specific approval to the terms and conditions contained in the various documents embodying the settlement. The complaint is therefore dismissed with prejudice and without award of costs or attorney's fees.

I cannot agree with Hearing Counsel's statements that no regulatory purpose would be served by litigating the issue relating to past violations of section 15. A violation of section 15 does not become moot merely because the parties involved have terminated the alleged practices in question. There are numerous cases in which the Commission has continued cases or pursued issues even when they were arguably moot in order to establish guidelines and principles or to protect the rights of outside persons or for other reasons. It is clearly established, however, that it is the Commission and not this judge nor Hearing Counsel which makes the determination as to whether further proceedings are warranted.

(S) NORMAN D. KLINE,
Administrative Law Judge.

[8] If there be any doubt as to the Commission's feelings regarding the fact that it and not the presiding judge decides whether to initiate investigatory proceedings, any such doubt is dispelled by the Commission in the pages cited. In the *Ace* case, although agreeing with the presiding judge that the complaint was frivolous and was correctly dismissed, the Commission took exception to the judge's statement there was no reason for the Commission to launch an investigation upon its own motion and proceeded to launch such an investigation on the basis that the complaint had pleaded "several potential Shipping Act violations. . . ."

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–13

LYKES BROS. STEAMSHIP CO., INC.

v.

FAR EAST CONFERENCE, ET AL.

ORDER ON APPEAL OF DISMISSAL

March 7, 1977

This proceeding arose upon the complaint of Lykes Bros. Steamship Co., Inc. (Lykes), which alleged that the Far East Conference's condonation of westbound mini-land bridge (minibridge) activities[1] violates section 15, 14b, 14 Third, 16 First and 17 of the Shipping Act, 1916 (Shipping Act or Act).[2] Administrative Law Judge Stanley M. Levy granted a motion to dismiss after receiving arguments from both sides.[3] Lykes has filed an "Appeal from Dismissal of Complaint" to which the respondent carriers (Respondents) have replied.

BACKGROUND

Lykes is a subsidized American Flag carrier primarily serving the U.S. Gulf. The terms of its operating subsidy agreement with the Maritime Administration prevent Lykes from making vessel calls at U.S. West Coast ports. The ability to call at Pacific Coast ports is necessary to engage in westbound minibridge service and Lykes does not offer minibridge transportation to the Far East.

Lykes also belongs to the Far East Conference (FEC or Conference), an association of some 15 ocean carriers organized to promote stability of service and uniformity of rates in the U.S. Atlantic and Gulf/Far East Trade.[4] The Conference publishes a tariff offering an *all water* service to

[1] Westbound or Far East minibridge service is a type of intermodal transportation wherein containerized cargo is tendered to ocean carriers at U.S. Atlantic or Gulf Coast port cities and transported by rail to West Coast ports where the containers are loaded aboard ocean vessels for carriage to destinations in the Far East. *Westbound minibridge service did not begin until early 1972.*

[2] 46 U.S.C. 814, 813a, 813 Third, 815 First and 816, respectively.

[3] "Motion to Dismiss Complaint Granted," served June 30, 1976 (Order of Dismissal).

[4] The FEC operates under an express conference agreement (FMC No. 17), filed with and approved by the Commission as required by Shipping Act section 15.

the Far East and maintains a Commission approved "dual rate" contract pursuant to Shipping Act section 14b.[5]

The FEC does not have express authority to adopt and file rates for any type of intermodal service to the Far East.[6] However, several FEC member lines provide a Far East minibridge service under *individually published tariffs*.[7] These minibridge carriers make direct vessel calls at Pacific Coast ports in order to provide such service and are also members of the Pacific Westbound Conference.

Some of the minibridge carriers offer intermodal rates equal to or lower than the FEC's all water contract rates. No minibridge carrier offers a discount to FEC contract shippers who use its intermodal service. Lykes has demanded that the FEC prohibit Far East minibridge operations by its member lines on the theory that minibridge service, or at least the lower rates charged for such service, violate the FEC Conference Agreement and the FEC Merchants Rate Contract. The Conference has refused to take action against the minibridge carrier.[8]

Close examination of Lykes' complaint reveals three separate, but related, charges of illegality: (1) Respondents are implementing a modified and unapproved version of Agreement No. 17 in violation of section 15 by failing to impose sanctions against the minibridge carriers; (2) Respondents are similarly employing a modified and unapproved version of the FEC Merchants Rate Contract in violation of sections 14b and 14 Third; and (3) Respondents' failure to take action against the minibridge carriers, *even if consistent with Agreement No. 17*, still results in unjust prejudice to Lykes and to the FEC's contract shippers, in violation of sections 15, 16 and 17.

Lykes alleges that Respondents' conduct has caused it substantial business losses and prays for the disapproval of Agreement No. 17. Alternatively, Lykes requests that the FEC be ordered to cease and desist from allowing its members to: (1) participate in both all water and minibridge service; *or* (2) offer minibridge rates lower than the FEC's all water rates.

The Presiding Officer rejected Lykes' arguments as a matter of law. His Order of Dismissal held that Agreement No. 17 applies only to all water shipments and that the FEC's acquiescence in the minibridge activities of some of its members was therefore not a *de facto* modification

[5] The FEC Merchants Rate Contract provides a 15% discount to signatory shippers who pledge in return to confine their shipments to conference lines.

[6] The Commission has approved a section 15 agreement whereby the Pacific Westbound Conference (PWC) would fix intermodal rates for Far East cargo passing through Pacific Coast ports for an eighteen month period effective September 20, 1976. *Agreement No. 57-96 (FMC Docket No. 72-46)*, 16 S.R.R. 159 (1975). An amendment to the FEC Agreement authorizing intermodal operations with vessel loadings at Atlantic and Gulf Coast ports is now being examined in FMC Docket No. 74-53, *Agreement No. 17-34*. There is a substantial overlap (about 12 lines) in the membership of the FEC and the PWC and their activities are coordinated to a large extent by FMC Agreement Nos. 8200 and 10135. *Lykes does not belong to the PWC, but all nine of the FEC "minibridge carriers" do.*

[7] The PWC intermodal amendment (see note 7, *supra*) permits PWC member lines to separately engage in minibridge and other intermodal services until such time as a conference intermodal service is implemented. The PWC has yet to establish such a service.

[8] In November 1975, Lykes unsuccessfully proposed an amendment to the FEC Conference Agreement which would have prohibited member lines from offering minibridge service (Complaint, at 12).

of Agreement No. 17 or the dual rate contract promulgated thereunder. *Disposition of Container Marine Lines,* 11 F.M.C. 467, 486–491 (1968) was relied upon for the proposition that the FEC would have acted beyond the scope of Agreement No. 17 had it attempted to either curtail or encourage intermodal activities by its members, regardless of the competitive impact such activities might have upon the FEC's all water business.

The Presiding Officer further held that in the absence of allegations that the Respondents were concertedly attempting to establish FEC rates or practices in a manner injurious to nonminibridge carriers, Agreement No. 17 could not be found to unfairly discriminate against Lykes or FEC contract shippers.

POSITION OF THE PARTIES

A. *Lykes' Arguments.* Lykes begins by stating that it is not attacking the lawfulness of westbound minibridge service *per se,* [9] but only the compatibility of this service with FEC membership.

Lykes' principal assignment of error is that the Presiding Officer failed to recognize that the 1968 *Container Marine* decision, *supra,* concerned intermodal service between *interior inland points* and not between *ports;* it was not on its facts a "minibridge case." *Container Marine* is also allegedly distinguishable from the FEC situation because the conference agreement construed therein was expressly limited to "transportation by sea," whereas the FEC Agreement applies to "transportation between . . . ports." In Lykes' view, it therefore follows that Agreement No. 17 requires *all* rates on freight moving from Atlantic and Gulf Coast *ports* to be uniform, regardless of the manner in which the goods are conveyed. Lykes states that the FEC's permissiveness towards minibridge competition by its own members will destroy the very benefits the Conference and its dual rate system were created to confer. [10]

Lykes also alleges that the Presiding Officer erred in describing minibridge as a new service, different from the type of "port to port" transportation encompassed by Agreement No. 17, without explaining how he reached this conclusion. Lykes states that transcontinental rail/water service has existed from the turn of the century, albeit under combination rather than joint rates; the only "new" feature about minibridge service is that increased containerization has made such intermodal transportation financially attractive. In any event, Lykes contends that "newness" alone does not determine whether an activity is within the scope of an approved section 15 agreement. *E.g.,* when the

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[9] This issue is already before the Commission in FMC Docket No. 73–35. Lykes has also challenged U.S. Gulf to Europe minibridge service as an unfair competitive device in FMC Docket No. 72–42 *et al.* See *State of Texas v. Seatrain International, S.A.,* 518 F.2d 176 (5th Cir. 1975).

[10] *I.e.,* frequent, regular service at stable, predictable rates which allowed forward selling, calculation of laid down costs, freedom from speculative risks and competitive equality in the market. *Alexander Report,* Vol. 4, 63d Cong., 2d Sess., at 295–303 (1914); *Isbrandtsen Co. v. North Atlantic Continental Freight Conference,* 3 F.M.B. 235, 238 (1950); *Agreement No. 8765—Gulf/Mediterranean Trade,* 7 F.M.C. 495, 499 (1963).

Panama Canal was opened, FEC members previously using the Suez Canal to reach the Far East were deemed to have Commission approval to operate via Panama.

Another Lykes exception is that the Presiding Officer misunderstood its argument that the minibridge carriers *released* FEC contract shippers from their obligation to exclusively patronize FEC vessels by offering "cut rate" minibridge service to non-contract shippers.[11] It is consistent with established principles of contract law to assert that FEC contract shippers are free to employ minibridge carriers while also asserting that the carriers offering minibridge service to contract shippers are in "breach" of the FEC Merchants Rate Contract.

Finally, Lykes claims its complaint should not have been dismissed without first permitting leave to amend. Lykes is now prepared to submit an amended complaint alleging that it has offered the FEC membership specific rate reductions on raw cotton intended to meet minibridge competition which were defeated along minibridge/nonminibridge lines.

B. *Arguments of the Respondents.* Respondents contend that Lykes' allegations all depend upon a finding that Agreement No. 17 presently gives the FEC authority to control the minibridge rates of its member lines.[12] Respondents believe such a finding cannot be made as a matter of law because: Agreement No. 17 does not expressly include intermodal transportation; true intermodal transportation was unknown when the FEC Agreement was first approved by the Commission; and to interpret Agreement No. 17 to include rate controls over unknown competitive factors would contravene the result in *Joint Agreement—Far East Conference and Pacific Westbound Conference.*[13]

Respondents state that control over intermodal rates of any type is not an "interstitial" matter which might routinely come within the scope of a conference agreement without additional section 15 approval; language in the *Container Marine* decision indicates that the Commission's action there rested upon policy matters as well as particular facts, 11 F.M.C. 489–490. This policy is further reflected in the Commission's decision to approve Far East intermodal service by the PWC instead of the FEC. *Agreement No. 57–96, supra,* at 166–167.

Respondents also claim that no independent significance can be given the FEC Merchants Rate Contract. If a conference agreement does not apply to minibridge traffic, that conference's dual rate contract is similarly limited in scope. *Contract Routing Restrictions,* 2 U.S.M.C. 220 (1939); *Swift & Co. v. Gulf & South Atlantic Havana Conference,* 6 F.M.B. 215

[11] Paragraph 1(d) of the FEC Merchants Rate Contract states:

The Carriers agree that they will not provide rates to anyone not bound by a shippers rate agreement with the Carriers . . .

[12] Respondents are not quite correct in this regard. Lykes alternatively claims that Agreement No. 17 is unfairly discriminatory because it *does not* allow minibridge rates to be controlled.

[13] 8 F.M.C. 553, 558 (1965). The Commission there found a section 15 violation to have occurred in part because a conference agreement did not describe in detail the procedures and arrangements under which allegedly approved concerted activities were to take place; an agreement must itself notify a reader of its scope without resort to extrinsic sources of information. See also *Investigation of Overland/OCP Rates,* 12 F.M.C. 184, 208–209 (1969).

(1961). The FEC further notes that conferences routinely apply for approval of agreements extending their contract systems to intermodal traffic once their section 15 agreements are similarly extended. *E.g.*, FMC Docket No. 76–11, *Agreement Nos. 150–DR–7 and 3103–DR–7.*

Finally, Respondents argue that the "open conference" requirement of section 15 should be interpreted to allow any all water operator to join the FEC with full voting rights, regardless of its other competitive interests. Respondents state that Lykes' inability to compete in the minibridge arena is voluntary in that it stems from a private business decision to operate as a subsidized carrier under the Merchant Marine Act of 1936. Respondents suggest Lykes would be best served by seeking relief from the Maritime Administration's subsidy restrictions, a procedure suggested in *States Marine Corp.—Subsidy, Tricontinent, etc., Services,* 5 F.M.B. 537, 549 (1959).

Discussion and Conclusions

Lykes has not described the type or amount of cargo it is allegedly losing to the minibridge carriers, but we shall assume for purposes of this appeal that Lykes is indeed suffering "substantial" business losses because it cannot influence the Conference majority on minibridge matters.[14] Despite these losses, we fully agree with the Presiding Officer's dismissal of Lykes' complaint as a matter of law.

Minibridge transportation is a full fledged intermodal service. As such, it differs in kind from the all water service historically offered by the FEC under Agreement No. 17. The FEC may not itself engage or prevent its members from engaging in any type of intermodal transportation without first receiving Commission approval of an express amendment to Agreement No. 17. Lykes' arguments to the contrary conflict with our decisions in *Disposition of Container Marine Lines, supra,* and *Agreement No. 57–96, supra.*[15] Lykes' first two charges against the FEC are therefore 180 degrees off base. Had the FEC acted to curb, encourage or regulate minibridge competition by its members, the lines joining in such action would have violated Shipping Act section 15, and possibly sections 14 Third and 14b.

Lykes' alternative argument, which assumes a conference agreement limited to all water transportation, also fails. In claiming that Agreement No. 17 discriminates unjustly against nonminibridge carriers, Lykes

[14] Lykes' post-dismissal offer to prove it has proposed rate reductions on raw cotton which were defeated by the Conference membership voting along mini-bridge lines, not only comes too late, but is irrelevant in light of Lykes' failure to claim that the minibridge carriers are *conspiring* to use Agreement No. 17 as an anticompetitive tool against nonminibridge lines. Lykes has alleged only that there are sufficient minibridge carriers in the Conference to *potentially* block anti-minibridge measures. Appeal, at 9 and 36–37. The *potential power* of the FEC's minibridge majority is not disputed. If Lykes believes the minibridge carriers have *actually exercised* their conference voting power in a concerted manner, dismissal of the instant complaint will not bar a subsequent action to prove such contentions.

[15] The latter decision conditionally approved PWC's intermodal agreements for 18 months and necessarily rejected the possibility that the FEC Agreement included the initiation or regulation of Far East minibridge transportation. See notes 7 and 8, *supra.*

ignores the fact that overland competition from PWC lines—the majority of which are also FEC members—has existed for over 50 years. See *Investigation of Overland/OCP Rates,* 12 F.M.C. 184, 189–204 (1969). Carriers belonging to both the PWC and FEC have regularly obtained cargoes under preferential PWC "overland" tariffs from territory commonly served by the FEC without such competition being considered discriminatory against exclusively FEC carriers such as Lykes. *Id.,* at 204–226. At the heart of Lykes' complaint is its dissatisfaction with being philosophically outnumbered within the FEC on intermodal questions and other matters concerning the PWC. Yet, only Lykes' own business judgment causes it to lose business to the majority of FEC lines who serve Pacific Coast ports. This type of economic "favoritism" is not unfair or unjustly discriminatory within the meaning of sections 15, 16 and 17. Conference members can be expected to differ on matters of competitive importance. For one viewpoint to prevail, even on a consistent basis, is not alone a Shipping Act violation. There is no unfairness in a carrier independently and openly voting on conference issues in a manner which best serves its private economic interests. Neither should conference members be prevented from competing with each other or the conference itself by separately providing services not encompassed by the conference agreement. Mere competition is not actionable, even if all conference members are unable to offer the alternative service in question.

Lykes' contention that Agreement No. 17 unjustly discriminates against contract shippers by providing a low cost alternative service to their noncontract competitors borders on the frivolous. The FEC Merchants Rate Contract is limited to all water service, and contract shippers desiring to use this service continue to receive a preferential discount not available to their noncontract, all water competitors. Far East minibridge service is available to contract and noncontract shippers on a completely equal basis. There is neither discrimination nor disadvantage present in such an arrangement. Moreover, a section 14b dual rate contract is not intended to *prevent* noncontract shippers from "reaching foreign markets at an advantageous rate," as implied by Lykes, but only to provide a reasonable economic incentive for those shippers who do patronize conference vessels exclusively.

To force nine minibridge carriers to elect between conference membership or intermodal operation would be to order the tail to wag the dog. A single FEC carrier cannot be allowed to stifle the nonconference activities of other conference lines simply by refusing to participate in them.

WHEREFORE, IT IS ORDERED, That the "Appeal from Dismissal of Complaint" of Lykes Bros. Steamship Co., Inc., IS DENIED.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–14

AGREEMENT NO. 10116–1—EXTENSION OF POOLING AGREEMENT IN THE EASTBOUND AND WESTBOUND TRADES BETWEEN JAPANESE PORTS AND PORTS IN CALIFORNIA, OREGON AND WASHINGTON

SUPPLEMENTAL ORDER

March 7, 1977

This is an investigation, commenced by Commission Order of March 5, 1976, the purpose of which is to determine whether Agreement No. 10116 shall continue in force and effect through December 31, 1978. The six lines party to the Agreement were named Respondents in the proceeding.[1] The Marine Cooks and Stewards Union was named Petitioner. The investigation was limited to the submission of affidavits of fact and memoranda of law, unless the Commission determined that an evidentiary hearing was required.

Respondents filed an affidavit and a memorandum of law. After resolution of an interlocutory dispute regarding Respondents' unsuccessful attempt to prevent the disclosure of some of the financial data contained in Respondents' affidavit, Petitioner filed an affidavit and a memorandum of law; and Hearing Counsel filed a memorandum of law. Respondents also moved for permission to file a rebuttal to Petitioner's and Hearing Counsel's affidavits. Petitioner opposed that motion, and Hearing Counsel supported Respondents. None of the parties to the proceeding requested oral argument.

Agreement No. 10116 was made in Tokyo, Japan on January 30, 1974, and filed with the Commission in Washington the next day. By that Agreement, the six Respondents pool the revenue derived by each Respondent from the carriage of cargo eastbound and westbound between ports in Japan and ports in the States of California, Oregon, and Washington, including overland common point cargo.

As originally filed, the Agreement provided for a term of three years from the date of approval. Sea-Land Service, Inc., filed comments with the Commission urging the Commission to limit the Agreement to a term

[1] Japan Line, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Mitsui O.S.K. Lines, Ltd.; Nippon Yusen Kaisha; Showa Line, Ltd; and Yamashita-Shinnihon Steamship Co., Ltd.

of one year, so that the effect of the Agreement could be monitored. Instead of approving the Agreement, the Commission determined to subject it to investigation, and commenced a formal proceeding to that end, *Agreement No. 10116—Pooling Agreement In the Eastbound and Westbound Trades Between Japanese Ports and Ports in California, Oregan and Washington,* Docket No. 74-47. Respondents petitioned the Commission to reconsider the investigation. No one replied to that petition. Thereupon, the Commission discontinued the formal investigation, and approved the Agreement for a term of one year, through March 6, 1976.

Respondents filed Agreement No. 10116-1 on January 20, 1976. By that amendment, Agreement No. 10116 would continue in effect through December 31, 1978. Petitioner protested the approval of that amendment, and asserted that it was unjustly discriminatory and unfair as between carriers, and contrary to the public interest. Petitioner's objections to Agreement No. 10116 were that the Agreement permitted the strongest Respondent to sustain the weakest Respondent, thereby eliminating all competition among Respondents, which would permit Respondents to concentrate their economic power upon the other carriers in the trans-Pacific trades.

Because Petitioner's protest was somewhat vague, and time was short, the Commission granted interim approval to Agreement No. 10116-1, through March 6, 1977, and ordered an investigation into the approvability of the Agreement for the full term.

The evidence of record in this proceeding consists of a joint affidavit executed by six high executive officials of Respondents, an affidavit executed by Petitioner's counsel, the record in *Agreements Nos. 9718-3 and 9731-5,* Docket No. 75-30, decided by the Commission on November 1, 1976, and those matters noticed by the Commission.

Respondents are six steamship companies flying the flag of Japan. Among other enterprises, Respondents engage in the carriage of goods between the Pacific Coast of the United States and Japan. The trade between those two nations is carried by vessels flying many flags in addition to the flag of Japan, including the flag of the United States. This Agreement, among the only Japanese flag liner carriers in those trades, might have ramifications affecting the many nation states engaged in the trans-Pacific trades.

Petitioner asserted that Agreement No. 10116-1 is unjustly discriminatory and unfair as between carriers because it permits Respondents to perpetuate the monopoly of the U.S. Pacific-Japan trades achieved by reason of Respondents' several other agreements, to wit: their terminal agreements, and Agreement Nos. 9718, 9731, and 9835. Argued Petitioner, Agreement No. 10116-1 is unjustly discriminatory and unfair because those other agreements are unjustly discriminatory and unfair.

On November 1, 1976 the Commission held that Petitioner had failed to prove that Agreement Nos. 9718, 9731, and 9835 were unjustly discrimi-

natory or unfair as between carriers, and had failed to prove that Respondents had a monopoly of the trades between Japan and the Pacific Coast of the United States. *Agreements Nos. 9718-3 and 9731-5,* Docket No. 75-30 (November 1, 1976); "Agreement No. 9835-2, Order of Approval" (November 1, 1976). Petitioner has not adduced in the instant proceeding any further evidence bearing upon monopoly or unfairness. Since the Commission has already rejected the premise upon which Petitioner bases its conclusion in this proceeding, it follows that, there being no other premise offered, the conclusion has not been established. Consequently, the Commission finds that Petitioner has failed to prove that Agreement No. 10116-1 is unjustly discriminatory or unfair as between carriers.

Petitioner also argued that the pool, Agreement No. 10116, provides the cushion which keeps each Respondent participating in the space sharing, sailing rationalization, and terminal operation consortia, and that the pool permits the strongest Respondent to sustain the weakest. Respondents denied this, and argued that each Respondent carries so many revenue tons in the trades that they wouldn't think of leaving such a lucrative venture. In 1975, Showa Line, which carried the fewest number of revenue tons in the trades, carried 436,000 revenue tons. Kawasaki Kisen Kaisha carried the greatest number of revenue tons, 646,000. Even so, Nippon Ysen Kaisha received $1,024,176 from the pool and Kawasaki Kisen Kaisha received $553,610.00 in the final accounting for the period March 7, 1975 through March 6, 1976. In that period the other four carriers each contributed monies to the pool, ranging from $118,000 for Japan Line to $694,000 for Showa line.[2] The word "sustain" means supporting a carrier which would otherwise fail. Petitioner has not proved its allegation that the strongest Respondent sustains the weakest. Even though Nippon Ysen Kaisha received over a million dollars from the pool, it nevertheless grossed in excess of $33,000,000 and had net pool revenue in excess of $23,000,000, in the year ending March 6, 1976, more than any other Respondent.[3] The line which contributed the most money to the pool, Showa Line, carried the least amount of cargo.

Petitioner also argued that, after Respondents' pool went into effect, Respondents' market share rose at a steady pace, and, by January 1976, was 65.5 percent, higher than at any time during the preceding 22 months. Respondents argued that it has been the experience of Respondents to have higher cargo movements at the end of the year than at the beginning of the year, and point to the figures for 1974 to demonstrate that. Petitioner further replied that 1974 cannot be a proper measure as Respondents added three vessels to the trade between March and May of 1974, and that the increased cargo carryings in 1974 merely reflected the additional cargo attracted to Respondents by reason of the added vessels.

[2] The pool report of Respondents quoted was not offered by the parties to this proceeding, but is found in the files of the Commission, and is officially noticed.

[3] Nippon Yusen Kaisha received a distribution because it has a larger share than any other Respondent.

In fact, Respondents added the *Yamashin Maru* to the trades in March of 1974, the *Lions Gate Bridge* in April, the *Hakawa Maru* in May, and the *Beishu Maru* in October of 1974. As those vessels were placed in service older vessels were withdrawn from the trade. An examination of the data in this record shows that the percentage of each year's carryings, carried by each Respondent in each month in 1974 and 1975, when compared with similar data for all other carriers in the Trans-Pacific Freight Conference of Japan/Korea as a group, does not show that Respondents' experience in cargo carrying patterns is significantly different from all other conference carriers as a group. The data shows that in both 1974 and 1975 Respondents generally carried approximately 45 percent of each year's cargo in the first six months of that year. The other conference carriers, as a group, experienced approximately 51 percent of their cargo carryings in the first half of 1974 and about 46 percent in 1975.

Further, Petitioner neglected to mention that, although Respondents' share of the eastbound conference trade was 65.5 percent in January of 1976, it dropped to 60.4 percent in February of that year. Respondents carried approximately 62.4 percent of the Trans-Pacific Freight Conference of Korea cargo in each of the months of January and February of 1975. The data in the record does not demonstrate any consistent pattern of cargo carryings by or conference shares of Respondents. Respondents' share of the conference carryings in the years 1974 through 1976 are as follows:

Year	*Percentage of Trans-Pacific Freight Conference of Japan/Korea Cargo Carried by Respondents*		
	In Jan./Feb.	*In First Half of Year*	*In Whole Year*
1974	55.55%	54.63%	57.72%
1975	62.45%	56.49%	58.18%
1976	62.72%	?	?

That data will not support an inference that Respondents increased their share of conference cargo for all of 1976. Consequently, Petitioner has not established that Respondents have acquired a greater share of the conference trades as a result of Agreement No. 10116.

Petitioner has not proven that it has actually been injured by the Agreement. However, the record in this proceeding does not illuminate the full reach of all of the possible ramifications of the Agreement. So that the Commission may be assured that its decision will most fully serve the public interest, the Commission will conduct further inquiry into the subject matter of this investigation. In order to maximize the quantity of the pertinent information which the Commission will acquire by reason of this further inquiry, it will be conducted as a full scale evidentiary hearing under the supervision of an Administrative Law Judge of the Commission's Office of Administrative Law Judges. To further ensure a complete and useful record at the conclusion of this further inquiry, Hearing

Counsel is adjured to use the processes of the Commission to the fullest extent so as to *investigate* the subject of this proceeding, and to lay on the record the kind of detailed, reliable and probative evidence which will assist the Commission in making a proper disposition of this proceeding.

Because the Commission's concern with this Agreement has continued for some time now, this further inquiry shall, consistent with the fullest development of the facts, procede with the utmost expedition. That expedition is particularly necessary in this case because, in order to maintain the existing situation pending the completion of this further inquiry, the interim approval of Agreement No. 10116-1, heretofore granted, will be continued pending the completion of that further inquiry.

Since the Commission has herein ordered a further inquiry into this matter, Respondents' "Motion for Modification of Order of Investigation", wherein Respondents requested permission to file a rebuttal to the affidavits of Petitioner and Hearing Counsel, is moot, and will be denied as such.

In the further inquiry herein ordered the parties shall address themselves, evidentially and with specificity, to, among other things: overtonnaging in the trans-Pacific trades, and the effect of overtonnaging on stability in those trades; the existence of malpractice in those trades; the quantitative and qualitative effect of Agreement No. 10116, either alone or in connection with Respondents' terminal agreements and Agreement Nos. 9718, 9731, and 9835, upon overtonnaging and malpractices by members of the conferences in the trades, and by carriers not members of a conference in the trades; and how, why, and to what extent the self-policing provisions of those agreements creating the conferences in the trans-Pacific trades have not been effective to prevent the commission of malpractices in those trades. In addition to the matters referred to above, the parties to this proceeding are encouraged to develop that probative, reliable, and relevant evidence which will establish facts which will support the approval, modification or disapproval of Agreement No. 10116-1.

The evidence offered and accepted into the record in this further inquiry shall not be argumentative. Evidence offered by a party shall be internally consistent, or the inconsistencies shall be explained by a witness with personal knowledge of the explanatory facts. Statistics, and numerical data in general, shall be offered in such a way as to permit comparison. Where data is presented in different forms or is measured by different scales, evidence providing a method of conversion will be offered. Opinion evidence on matters within the expertise of the Commission is not desired, although the argument of counsel on those matters, in the brief, is encouraged.

THEREFORE, IT IS ORDERED, That the investigation herein, commenced by Commission Order of March 5, 1976, is referred to the Office of Administrative Law Judges of the Federal Maritime Commission for further inquiry and Initial Decision;

IT IS FURTHER ORDERED, That the affidavits and memoranda of Respondents and Petitioner and the record in Docket No. 75–30 shall continue to be part of the record of this proceeding;

IT IS FURTHER ORDERED, That the public hearings conducted pursuant to this order shall be held at a date and place to be determined and announced by the Presiding Administrative Law Judge, but in no event shall that hearing commence later than September 1, 1977;

IT IS FURTHER ORDERED, That the Federal Maritime Commission Order, dated March 5, 1976, entitled, *Agreement No. 10116–1—Extension of Pooling Agreement in the Eastbound and Westbound Trades Between Japanese Ports and Ports in California, Oregon and Washington,* "Order of Investigation", is modified by deleting, in the first ordering paragraph thereof, the words and numbers, ". . . for a term of one year, to and including March 6, 1977 . . .", and substituting therefor the words, ". . . pending the final order of the Commission in the proceeding instituted herein . . .";

IT IS FURTHER ORDERED, That Respondents' "Motion for Modification of Order of Investigation" is denied; and

IT IS FURTHER ORDERED, That this order be published in the *Federal Register.*

By the Commission.[4]

(S) JOSEPH C. POLKING,
Acting Secretary.

[4] Commissioner Casey dissents. Opinion will follow.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

Subchapter A—General Provisions

[GENERAL ORDER 16 AMDT *17*, DOCKET NO. 76-66]

Part 502—Rules of Practice and Procedure

March 11, 1977

Extraneous and Ex Parte Communications

This proceeding was instituted by notice of proposed rulemaking published in the *Federal Register* of January 4, 1977 (42 F.R. 817). The purpose of the proceeding was to amend those sections of the Commission's rules of practice relating to ex parte communications in order to conform them to the requirements set forth in Section 4 of the "Government in the Sunshine Act" (P.L. 94-409, September 13, 1976) (the Act), which amended the Administrative Procedure Act (5 U.S.C. 551 et seq.) in the area of ex parte communications.[1]

Comments were submitted by Mr. Leonard G. James of the law firm of Graham and James and by Mr. Wade S. Hooker, Jr., of the law firm of Casey, Lane & Mittendorf. Mr. James essentially asks for clarification of the proposed rules with respect to the role of the Commission's Bureau of Hearing Counsel in Commission proceedings. He states that the proposed rules do not clearly establish that Hearing Counsel will be treated like any other party as regards the prohibitions against making ex parte communications and that some confusion exists because Hearing Counsel are employees of the Commission as well as parties to proceedings. The comments submitted by Mr. Hooker also deal mainly with suggested clarifications. Mr. Hooker believes that the rules should make clear that they apply only to proceedings subject to 5 U.S.C. 557(a), that only ex parte communications prohibited by paragraph (b) of the proposed rules are forbidden, that reference to a person who is a "party" or "agent of a party" is superfluous as a result of the Act and furthermore confusing in certain respects, and other matters. We have carefully considered these

[1] For a fuller explanation of the purpose of the proposed amendments, see the notice of proposed rulemaking cited above.

comments and, as discussed below, have adopted one suggestion contained therein. Our discussion follows.

We do not believe that the comments submitted by Mr. James require any change to the proposed rules. Mr. James expresses apprehensions that the Commission's Bureau of Hearing Counsel may be given special treatment so as to engage in the type of activity prohibited by the Act and the proposed rules. There is nothing in the proposed rules which should cause any such apprehension. Under the present rules, Hearing Counsel is designated as a party to a proceeding and is given no special treatment by virtue of the fact that they may be employees of the Commission. See Rule 3(b), 46 C.F.R. 502.42. Furthermore, in the type of proceeding with which the Act and proposed rules deal, Hearing Counsel is not an "employee who is or may reasonably be expected to be involved in the decisional process." There is therefore absolutely no cause for concern that the rules will somehow authorize Hearing Counsel to engage in forbidden ex parte practices and consequently there is no need to add clarifying language to them. Our present remarks in this regard should furthermore suffice to allay any possible concern.[2]

The comments submitted by Mr. Hooker, as noted, also deal with suggestions for clarifying language. After carefully considering them, however, we are of the opinion that for the most part they are unnecessary and in certain respects may even contravene the purposes of the Act.

Mr. Hooker suggests that the rules should make clear that they are applicable only to proceedings which are subject to 5 U.S.C. 557(a) rather than to any proceeding as defined in section 502.61 (Rule 5(a)), as presently proposed. Mr. Hooker fears that the rule's prohibitions might be applied to proceedings other than adjudicatory or certain formal rulemaking which was not intended by Congress, citing Senate Report 94–1176, 94th Cong., 2d Sess., p. 29. We are not adopting this suggestion. The proposed limitation is too narrow and could permit ex parte activity in proceedings intended to be covered. The legislative history cited by Mr. Hooker is not clear because it defines the applicability of the prohibitions to "formal adjudicatory" proceedings and "a few formal rulemaking proceedings." Whatever the intended scope of the Act, it clearly goes beyond proceedings covered by 5 U.S.C. 557(a).

Mr. Hooker suggests that the proposed rules delete reference to a "person who is a party to or agent of a party to any proceeding" or "who directly participates in any such proceeding", i.e., to delete any reference to a "party", his "agent", or "direct participant in a proceed-

[2] A good deal of the comments of Mr. James consist of unsubstantiated remarks to the effect that Hearing Counsel have customarily engaged in ex parte activity. Moreover, Mr. James appears to complain over the fact that Hearing Counsel have communicated with interested persons outside the Commission. Not only are these remarks unsubstantiated but in certain respects they are based upon an erroneous understanding of the law with respect to ex parte communications. Since Hearing Counsel are not involved in the decisional process, there is no prohibition against their communicating with persons outside the Commission. Indeed, in the conduct of their duties Hearing Counsel often contact shippers and other persons outside the Commission in order to obtain relevant evidence necessary for the development of a full and complete record.

ing" in the proposed rules. He asserts that the language in question is "made superfluous as a result of the Act." Alternatively, he suggests that reference to any "agent" be deleted. He asserts that reference to "agents" leads to confusion and is merely a carryover from the present Commission rule.

In our opinion the deletion of specific references to parties, their agents, or participants in proceedings would not only be unhelpful but more confusing. It is certainly not the intention of the Act to permit any of these persons to engage in ex parte activity. Our present rules which we are proposing to amend have long specified that the prohibitions apply to parties and their agents. Furthermore, as we stated in the notice of proposed rulemaking, cited above, specific reference to "parties", their "agents", "interested persons outside the Commission", and direct participants in proceedings will insure that previous law on the subject as well as the amendments contained in the Act will be encompassed.

The remainder of Mr. Hooker's comments consist of further suggestions for clarification. For example, he suggests that reference to ex parte communications in paragraphs (b)(4) and (6) specify that the type of communication in mind is that prohibited by paragraph (b) of the rule. We see no need for such additional clarification and believe that it is self-evident as to the type of ex parte communication which is intended to be prohibited.

A final suggestion, however, has merit. Mr. Hooker suggests that reference to a violation of the rule which could lead to sanctions against a party specify that the violation must occur with respect to paragraph (b) of the rule. Since the rule also contains a paragraph (a) which does not deal with ex parte communications but rather with other pleadings or documents which are objectionable for reasons having nothing to do with ex parte activity, we agree that the rule should be clarified as suggested.

Therefore, pursuant to section 4 of the Administrative Procedure Act [5 U.S.C. 553], sections 22 and 43 of the Shipping Act, 1916 [46 U.S.C. 821, 841a], and section 4 of the "Government in the Sunshine Act" [5 U.S.C. 557(d)], Part 502 of Title 46, Code of Federal Regulations, is amended.*

Effective Date. Inasmuch as the expeditious adoption of these rules is desirable and inasmuch as they are essentially procedural in nature, they shall be effective upon publication in the *Federal Register* and shall be applicable to all ex parte activities occurring on or after the effective date.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

*The text of the amendment is reprinted in 46 C.F.R. 502.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 506

DOW CHEMICAL INTERNATIONAL, INC.

v.

FAR EASTERN SHIPPING COMPANY

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

March 10, 1977

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 10, 1977.

It is Ordered, That applicant is authorized to waive collection of $36,202.94 of the charges previously assessed Dow Chemical International, Inc.

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 506 that effective August 31, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from August 31, 1976, through October 7, 1976, the rate on 'Soda and or Sodium, viz: Caustic', minimum 500 tons per vessel is $50.00 per 1000 kilos, subject to a 5% freight forwarding commission and subject to all other applicable rules, regulations, terms and conditions of said rate 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) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 506

DOW CHEMICAL INTERNATIONAL, INC.

v.

FAR EASTERN SHIPPING COMPANY

Adopted March 10, 1977

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Far Eastern Shipping Company (Far Eastern or Applicant) has applied for permission to waive collection of a portion of the freight charges on a shipment of caustic soda, that moved from Freeport, Texas, to Singapore, under Far Eastern bill of lading dated August 31, 1976. The application was filed January 25, 1977.

The subject shipment moved under Far Eastern Shipping Company Ocean Freight Tariff No. 18, FMC No. 18, original page 117, effective June 6, 1976, under the rate for the item "Soda and/or sodium, viz.: . . . Caustic" (Item 5090). The aggregate weight of the shipment was 2,252,770 pounds. The rate applicable at time of shipment was $77.50 per ton of 2000 pounds (weight only). The rate sought to be applied is $50 per 1000 kilos (weight only) for shipments of a minimum of 500 tons per vessel, and subject to a 5% freight forwarding commission. Far Eastern Shipping Company Ocean Freight Tariff No. 18, FMC No. 18, 1st revised page 117, effective October 7, 1976, item 5090.

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $87,295.84. Aggregate freight charges at the rate sought to be applied amount to $51,091.90. The difference sought to be waived is $36,202.94. The Applicant is not aware of any other

[1] This decision became the decision of the Commission March 10, 1977.

[2] 46 U.S.C. 817, as amended.

shipment of the same commodity which moved via Far Eastern during the same time period at the rates involved in this shipment.

Far Eastern offers the following as grounds for granting the application:

> Movement of this cargo had been discussed between our pricing and sales departments and agreement was reached to publish the rate of $50.00 per metric ton with a minimum of 500 tons per vessel subject to a 5 percent freight forwarding commission. This rate was to be published upon notification by the sales department that cargo could be secured at this rate. When cargo was in fact secured a memorandum was given to the pricing department, however this memo was inadvertently misplaced and the appropriate rate was not filed until after the vessel had sailed and our agents requested clarification regarding this rate which they are unable to find in our tariffs. This is not a normal type of occurrence and we ask the Commission's indulgence to allow us to make this rate retroactive to cover this shipment as cargo could not have been secured at tariff rates published. Since rates as per the agreement were not filed due to administrative error we respectfully ask that we be allowed to collect only on the basis of the agreed rates and not the higher rates.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to file the special rate for shipments of the subject commodity weighing a minimum of 500 tons per vessel, as had been promised to the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Far Eastern filed a new tariff which set forth the rate on which such waiver would be based.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) &(c).

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to Far Eastern Shipping Company to waive collection of a portion of the freight charges, specifically the amount of $36,202.94. An appropriate notice will be published in Far Eastern's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
February 16, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 504

UNITED STATES MAHOGANY CORPORATION

v.

SOLAR INTERNATIONAL SHIPPING AGENCY, INC., (AS AGENTS FOR) YANGMING MARINE LINE

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

March 10, 1977

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 10, 1977.

It is Ordered, That applicant is authorized to waive collection of $486.55 of the charges previously assessed United States Mahogany 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 504 that effective July 15, 1976, for purposes of refund or waiver or freight charges on any shipments which may have been shipped during the period from July 15, 1976 through September 17, 1976, the rate on 'Lumber—Rough Sawn, in Bundles' is $48.00 M, subject to all applicable rules, regulations, terms and conditions of said rate 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) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 504

UNITED STATES MAHOGANY CORP.

v.

SOLAR INTERNATIONAL SHIPPING AGENCY, INC., (AS AGENTS FOR) YANGMING MARINE LINE

Adopted March 10, 1977

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Yangming Marine Line (Yangming or Applicant) has applied for permission to waive collection of a portion of the freight charges on two shipments of lumber, that moved from Taiwan via Japan to New York, under Yangming bills of lading dated July 31, 1976 and September 9, 1976. The application was initially filed on January 7, 1977, with an amendment filed February 9, 1977. (The amendment corrected an error in computation.)

The subject shipments moved under Yangming Marine Transport Corporation Freight Tariff No FMC–6, which governs shipments from Taiwan, Republic of China, to Atlantic, Gulf Ports & San Juan, P.R., at page 101 (original), with an effective date of July 15, 1976. That page indicates that for "Lumber—rough sawn, in bundles, not exceeding 9 meters in length" the rate was to be $48 per cubic meter or $99 per 1000 kilograms, "whichever produces the greater revenue." On that basis, the two shipments (55.985 cubic meters and 30,575 kilograms, and 31.912 cubic meters and 18,028 kilograms) were billed total aggregate freight charges of $4,942.93, including bunker surcharges of $2.70 per ton of 1000 kgs. or 1 cubic meter, whichever is greater (Yangming Freight Tariff, FMC–6, at page 101 (orig.), effective July 15, 1976). The rate sought to be

[1] This decision became the decision of the Commission March 10, 1977.

[2] 46 U.S.C. 817, as amended.

applied is $48 per cubic meter (weight only) plus the same bunker charge of $2.70.

The Applicant had first filed for waiver of collection based at the $48 rate mentioned above, but through some misunderstanding in the contents of the filing and the complexities of several overlapping tariff page revisions ("temporaries" and "corrections"), was told that it appeared that a $51 per cubic meter rate (weight only) would have to be the basis of its claim for waiver of collection. Accordingly, the Applicant refiled with the Commission a new application based upon the $51 rate. After this $51 rate-basis filing and assignment of the case to an Administrative Law Judge, it became clear from a careful review of the pertinent tariff pages on file with the Commission, that only the $48 (weight only) rate could be used as the basis for any waiver of collection, in view of the sequence of the tariff filings (revisions) and taking into consideration the different time-notice requirements for increases and decreases in rates. Thereupon, the Applicant (Yangming) amended the computation in its application to reflect its original $48 per cubic meter rate-basis request.

Aggregate freight charges payable, pursuant to the rate applicable at the times of shipment, amounted to $4,942.93. Aggregate freight charges at the rate sought to be applied amounted to $4,456.38. The difference, collection of which is sought to be waived, is $486.55 (total for two shipments). The Applicant is not aware of any shipments of other than the complainant of the same or similar commodity, which moved via Applicant (respondent) during the same time period in which the tariff rates above-recited (original and requested) governed.

Yangming offers the following as grounds for granting the application:

> (4) This Special Docket Application is being submitted to waive collection of a portion of freight charges amounting to ($486.55)* on the referenced shipments.
>
> On July 15, 1976, Messrs, Yang Ming Marine Line filed rates for lumber—rough sawn, in bundles—at $48. per cubic meter, or $99.00 per 1000 kgs. This rate was filed under Yang Ming Marine Transport Corporation tariff FMC-6 and appeared at page 101 (see annexture).
>
> The rate of $99. per 1000 kgs, was filed in error but was subsequently deleted on September 17, 1976. (See annexture). On September 24, the rate was adjusted to its present amount (see annexture).
>
> As a result of this error Yang Ming Marine Transport Corporation received a complaint from United States Mahogany Corporation which has imported two shipments of lumber from Taiwan to New York on July 31 and September 9, 1976. The freight was charged at the rate of $99.00 per 1000 kgs. plus bunker surcharge of 2.70 per ton, which resulted in a 90% rate hike (see letter from U.S. Mahogany annexed hereto).
>
> In order to remedy the effects of this error, we are filing this Special Docket Application on behalf of Yang Ming Marine Transport Corporation to request the Commission's permission to revise the freight charges of the aforementioned shipments to ($48 per cubic meter plus $2.70 bunker surcharge).*

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90-298), and Rule 6(b), *Special Docket Applications*, Rules of

*Per amendment letter dated February 9, 1977.

*Per amendment letter dated February 9, 1977.

Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent filing of a "weight" rate in addition to the "measure" rate, when only a rate by measure had been intended, as was customary in the lumber trade.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Yangming filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within one hundred and eighty days from the date of the subject shipments.

Accordingly, permission is granted to Yangming Marine Line, to waive collection of a portion of the freight charges, specifically the amount of $486.55. An appropriate notice will be published in Yangming's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
February 15, 1977.

[3] For other provisions and requirements, see § 18(b)(3)and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 372(I)

YASUTOMO & CO.

v.

Y. S. LINES

NOTICE OF DETERMINATION TO REVIEW

March 10, 1977

Notice is hereby given that the Commission on March 10, 1977, determined to review the order of dismissal of complaint and discontinuance of proceeding served February 28, 1977 in this proceeding.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 373(I)

AVIVA ENTERPRISES, INC.

v.

Y. S. LINES

NOTICE OF DETERMINATION TO REVIEW

March 10, 1977

Notice is hereby given that the Commission on March 10, 1977, determined to review the order of dismissal of complaint and discontinuance of proceeding served February 28, 1977 in this proceeding.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–25

TWIN EXPRESS, INC.

v.

SEA-LAND SERVICE, INC., ET AL.

NOTICE OF DETERMINATION NOT TO REVIEW

March 11, 1977

Notice is hereby given that the Commission on March 11, 1977 determined not to review the order of discontinuance in this proceeding served February 10, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 74–25

TWIN EXPRESS, INC.

v.

SEA-LAND SERVICE, INC., ET AL.

ORDER DISCONTINUING PROCEEDING

February 10, 1977

The Complainant having requested that its complaint herein be withdrawn,

Ordered:

This proceeding is discontinued.

(S) STANLEY M. LEVY,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

No. 75-48

SEA-LAND SERVICE, INC.

v.

THE CITY OF ANCHORAGE, ALASKA AND TOTEM OCEAN TRAILER EXPRESS, INC.

No. 76-4

ANCHORAGE, ALASKA

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

March 11, 1977

Notice is hereby given that the Commission on March 11, 1977 determined not to review the order of dismissal of respondent and discontinuance of proceeding served in these proceedings February 11, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 75–48

SEA-LAND SERVICE, INC.

v.

THE CITY OF ANCHORAGE, ALASKA AND TOTEM OCEAN TRAILER EXPRESS, INC.

DISMISSAL OF COMPLAINT AND DISCONTINUANCE OF PROCEEDING

May 19, 1977

Complainant, Sea-Land Service, Inc. (Sea-Land), complained that its vessel *S. S. Mobile* was improperly evicted from Terminal No. 1 at the Anchorage City Dock in order that a vessel of respondent Totem Ocean Trailer Express, Inc. (Totem) could be berthed. Sea-Land further complained that the Totem vessel did cause a break in the bus bar conductor system which had the effect of precluding the movement of contained cranes at Terminal No. 3 of the Anchorage City Dock so that Sea-Land's vessels could not utilize dockside space at Terminal No. 3. Sea-Land sought reparations for the acts of Totem.

Sea-Land in its complaint joined the City of Anchorage as a respondent but by order dated February 11, 1977, the City of Anchorage was dismissed as a respondent.

The parties have now entered into a statement of satisfaction and settlement agreement whereby Totem has agreed to pay ten thousand dollars ($10,000.00) in satisfaction of the alleged claims upon dismissal of the complaint with prejudice.

The parties further agree that the settlement agreement shall not prevent either party from alleging or contending in any court that any conduct or acts alleged in any complaint or action before the Federal Maritime Commission constituted, or were part of, or were evidence of violation of any federal or state laws, provided, however, Sea-Land is precluded from seeking further relief in any action for the specific matters in its complaint in FMC Docket No. 75–48.

The parties have jointly requested that the complaint in Docket No. 75–48 be dismissed with prejudice and that the proceeding be discontinued.

Good cause appearing, the parties have settled the issue between them, and because no useful regulatory purpose would be served by continuing this complaint proceeding, it is hereby:

Ordered: The complaint herein is dismissed with prejudice and this proceeding is discontinued.

(S) STANLEY M. LEVY,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–10

FREIGHT FORWARDER BIDS ON GOVERNMENT SHIPMENTS AT UNITED STATES PORTS—POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916, AND GENERAL ORDER 4

Fees assessed GSA for ocean freight forwarding services found, in certain instances, to violate section 16 First, of the Shipping Act, 1916, and Commission General Order 4.

Freight forwarder services must be charged for uniformly to avoid giving unreasonable preference or advantage.

Issues of whether section 35 exemption should be granted or whether General Order 4 should be amended to include a rule governing the practices of forwarders bidding on GSA contracts and providing services thereunder held under advisement pending further review.

Frank J. Costello for Air-Sea Forwarders, Inc.

W. B. Ewers for Cobal International, Inc.

Thomas H. McGowan for Meyer Shipping Company.

Gerald H. Ullman for National Customs Brokers and Forwarders Association of America and New York Foreign Freight Forwarders and Brokers Association.

Francis X. Davis, Leonard Salters and *William Smith* for General Services Administration.

C. Douglass Miller and *C. Jonathan Renner,* Hearing Counsel.

REPORT AND ORDER

March 18, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

The Commission instituted this proceeding to determine: (1) whether the practices of Respondent ocean freight forwarders,[1] as they relate to bidding for forwarding contracts tendered by the Government Services Administration (GSA) of the United States and rendering services thereunder are in violation of section 16 of the Shipping Act, 1916 (the

[1] Air-Sea Forwarders, Inc. (Air-Sea); Alltransport Incorporated (Alltransport); Geo. S. Bush Co., Inc. (Bush); Cobal International, Inc. (Cobal); Gulf Florida Terminal Company (Gulf Florida); Meyer Shipping Company (Meyer); Ros Forwarding Services (Ros); and W. O. Smith and Co. (Smith).

Act), by subjecting a person, locality or description of traffic to unreasonable preference or prejudice or disadvantage; (2) whether such practices are contrary to section 510.24(b) of the Commission's General Order 4,[2] and; (3) whether the Commission's General Order 4 should be amended to govern the practices of forwarders bidding on GSA contracts and providing services thereunder, or possibly exempting such forwarder practices from Commission regulations under section 35 of the Act.[3] National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA) and GSA intervened in the proceeding.

Administrative Law Judge Stanley M. Levy issued an Initial Decision, wherein he concluded, *inter alia,* that the fees charged GSA for forwarding services by Respondents Air-Sea, Meyer, Cobal and Smith violated both section 16 First of the Act and section 510.24(b) of General Order 4. Further, he concluded that section 510.24(b) should be amended to clearly indicate that it is unlawful to render forwarding services to any government agency for less than the average forwarding fee charged other users of similar freight forwarder services. Finally, he recommended that the ocean freight forwarder licenses of Air-Sea and Meyer be revoked and those of Cobal and Smith be suspended for six (6) months and thirty (30) days, respectively. Exceptions to the Initial Decision and replies to exceptions have been filed by Air-Sea, Cobal, Meyer, NCBFAA, GSA and Commission Hearing Counsel. The Commission heard Oral Argument.

FACTS

Since Fiscal Year (FY) 1960, GSA[4] has, pursuant to its competitive bidding system,[5] awarded annual ocean freight forwarding contracts to Commission Licensed ocean freight forwarders based upon the lowest bids submitted. Under GSA's competitive bid procedure, a bidder, if he is awarded a contract which normally runs for one year, must be prepared not only "to perform the service normally required of a forwarder,"[6] but

[2] Section 510.24(b) of the Commission's General Order 4 (46 C.F.R. 510.24(b)) provides as follows:

> No licensee shall render, or offer to render, any forwarding service fee of charge or at a reduced freight forwarding fee in consideration of the licensee receiving compensation from ocean-going common carriers on the shipment; provided, however, that a licensee may perform freight forwarding services for recognized relief agencies or charitable organizations designated as such in the tariff of the ocean-going common carrier, free of charge, or at reduced fees.

[3] Section 35 authorizes the Commission to exempt activities of persons subject to its jurisdiction from the requirements of the Act where such exemption would not substantially impair effective regulation, be unjustly discriminatory, or be detrimental to commerce.

[4] GSA ships large volumes of ocean-going cargo of which a majority is for AID programs and utilizes ocean freight forwarder services in arranging such shipments.

[5] This system was initiated as a result of a 1958 decision of the Comptroller General that it was unlawful for GSA to continue its past practice of allowing forwarders to provide free forwarding services in consideration of anticipated brokerage from the carriers (37 Comp. Gen. 602 (1958)).

[6] Section 44 of the Act requires that in order for a forwarder to be entitled to brokerage he must solicit and secure cargo for the ship, book or otherwise arrange for space, and perform two of the following services:

> (1) The coordination of the movement of the cargo to shipside;
> (2) The preparation and processing of the ocean bill of lading;
> (3) The preparation and processing of dock receipts or delivery orders;
> (4) The preparation and processing of consular documents or export declarations;
> (5) The payment of the ocean freight charges on such shipments.

also to maintain logs of GSA shipments, submit weekly export shipping reports as well as monthly status reports to GSA, and to provide the Maritime Administration of the Department of Commerce with copies of the bills of lading.

A comparative study of the services offered by the forwarders on commercial shipments and GSA shipments revealed that forwarding services are, for the most part, similar. The forwarding services generally offered with respect to commercial shipments are: (1) arranging movement of cargo to port and pier; (2) booking cargo; (3) preparing and processing export declarations; (4) preparing and processing bills of lading, and; (5) arranging insurance. With respect to GSA shipments, forwarders: (1) coordinate service to effect the movement of shipments from origin to vessel; (2) confirm GSA tentative space reservations; (3) prepare and process shipper export declarations when required; (4) prepare and process consular documents when required; and (5) prepare and process bills of lading.

Notwithstanding the above similarities, a considerable disparity exists between fees and ocean brokerage received from commercial vis-a-vis GSA shipments. The following lists the successful bidders on GSA shipments for FY 1973 in designated geographical areas and sets forth the fees assessed and amount bid for the handling of commercial and GSA shipments, respectively, by these forwarders; also indicated is the brokerage received on these shipments.

Port	*Forwarder*	*Amount Bid Per Shipment to GSA*	*Average Commercial Fee*	*Average Brokerage on GSA Shipments*	*Average Brokerage on Commercial Shipments*
Los Angeles	Air-Sea	$ 0.05	$22.88	$40.68	$ 6.57
San Francisco	Air-Sea	$ 0.05	$27.25	$20.38	$ 7.16
Seattle	Bush	$ 2.50	$13.48	$ 4.24	$13.51
Baltimore	Cobal	$ 1.25	$ 7.50	$19.12	$27.86
Houston	Cobal	$ 4.00	$20.76	$50.78	$14.80
New Orleans	Cobal	$ 4.00	$ 8.65	$ 3.03	$10.80
Philadelphia	Cobal	$10.00	—	$18.16	—
Tampa	Gulf Florida	$ 4.50	$ 6.00	—	—
Miami	Ross Forwarders	$ 6.00	$12.61	$ 0.60	$ 1.75
Chicago	Alltransport	$15.00	$15.60	—	—
New York	Meyer	$ 0.045	$30.48	—	—

The specifications in the GSA bid form advise the bidder that Federal Maritime Commission regulations prohibit licensed ocean freight forwarders from rendering "any forwarding service . . . at a reduced . . . fee in consideration of the licensee receiving compensation from ocean . . . carriers on the shipments." The specifications further require the bidder to certify that its price is "fully compensatory" for the forwarding service rendered without regard to any compensation paid to the forwarder by the ocean carrier.

DISCUSSION AND CONCLUSION

Jurisdiction

Some Respondents' contend that the Commission lacks the jurisdiction to investigate the practices at issue because GSA is as an executive agency of the United States and the assessment of reduced forwarding fees to a part of the Federal sovereign cannot result in "undue or unreasonable preference or advantage to any particular person," as that phrase is used in section 16 First of the Act. Heavy reliance is placed on *U.S. v. Cooper Corp.*, 312 U.S. 600, 604 (1941), where the Supreme Court stated that "in common usage, the term 'person' does not include the sovereign," and "statutes employing the phrase are ordinarily construed to exclude it."

The *Cooper* decision is hardly conclusive, however, for the Court itself, conceded that "there is no hard and fast rule of exclusion" and that the "purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute . . . may indicate an intent . . . to bring state or nation within the scope of the law." In *Cooper,* the Court, after reviewing the scheme, structure and legislative history of the Sherman Antitrust Act, determined that the United States was not a "person" for purposes of bringing a treble damage action under that statute.

We have reviewed the language, purpose and legislative history of the Shipping Act, 1916, and find no similar indication that the United States or one of its agencies is, or was intended to be, excluded from the term "person" as used in section 16 First of the Act. In absence of a clear indication to the contrary, we shall continue to consider GSA and other governmental agencies as "persons" under section 16 of the Act. This is not only appropriate and consistent with public policy but also in keeping with our long-standing practice of treating such agencies as "persons" for the purpose of filing a complaint under section 22 of the Act.[7] See *Far East Conference v. U.S.*, 342 U.S. 570, 576 (1952).

Even if GSA were not a "person" within the meaning of section 16 First, however, that section may nonetheless have been violated under the facts presented here. The prohibition against uneven treatment embodied in section 16 First extends not only to "persons" but also to a "description of traffic." Thus, as the Presiding Officer found: "Since GSA shipments describe a particular kind of traffic, section 16 is applicable even if the GSA is not a 'person' within section 16."

Violations of Section 16 First

Air-Sea, on exception, reargues a point raised before the Presiding Officer, and we find, properly disposed of by him. Air-Sea believes that a

[7] See also *California v. U.S.*, 320 U.S. 577, 585–86 (1944), where the Supreme Court determined that states and municipalities which own and operate dock facilities are "other persons" subject to the Shipping Act, 1916 which can be proceeded against for alleged violations of that Act.

finding of a section 16 First violation cannot be made here because it has not been established that GSA actually competes with commercial shippers. The Presiding Officer, in dismissing the need for a competitive relationship in this case, relied on the court's decision in *New York Foreign Freight Forwarder and Brokers Ass'n v. F.M.C.*, 337 F.2d 289 (1964), *cert. denied*, 380 U.S. 910 (1965) and the Commission's subsequent decision in *Valley Evaporating Co. v. Grace Line, Inc.*, 14 F.M.C. 16 (1970). In the *New York Freight Forwarder* case the court specifically rejected the argument that before a section 16 violation can be found a competitive relationship *must* be established.[8] There the court held that while an unlawful discrimination in transportation charges requires a showing of competitive relationship between two shippers who are charged different prices, this was not the case with respect to forwarder charges where a competitive relationship need not be shown to establish a violation of section 16 First. In *Valley Evaporating* the Commission again found a section 16 violation in the absence of a competitive relationship. In so doing, the Commission explained that:

> . . . while an effective competitive relationship is a necessary part of liability under section 16 in situations where the allegedly preferential or prejudicial rates or charges are geared to transportation facts or the different characteristics of commodities, it is not required where the carrier's obligation to render a particular service is "absolute" and not dependent upon such factors or differences. (14 F.M.C. at 21).[9]

These decisions are controlling here. Given the same service, forwarding fees should not vary by commodity as do ocean freight rates. On this point, the Presiding Officer found, and we agree, that:

> . . . the record was devoid of any evidence which would indicate that the handling of GSA shipments is materially or substantially different from the handling of a shipment for a commercial shipper.

While evidence indicates that a forwarder may not have to perform all the forwarding services listed in a GSA contract, the fact remains that a forwarder is contractually obligated to provide any and all those services upon request. These services generally correspond to those offered commercial shippers. Hence, at any given time, a forwarder will be performing the same services for GSA as he would for commercial accounts. In fact, General Services Administration Circular No. 320 actually describes GSA Ocean Freight Forwarder Contracts as requiring

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[8] GSA argues that its shipments are not competitive for overseas markets with commercial shippers because the former are made in connection with development assistance programs. In this regard, GSA explains that it:

> . . . utilizes ocean freight forwarders only to provide a service on its own behalf and for other civilian executive agencies of the U.S. Government. It is a service organization and is not profit oriented. The greatest amount of GSA shipments are for AID programs, with tonnage figures for the past four years showing that 81 percent of the tonnage was shipped on behalf of the AID program. Other executive agencies of the U.S. Government utilizing GSA ocean freight forwarders were also acting largely on behalf of the AID program.

[9] The Commission reaffirmed this principle in *Violations of Sections 14 Fourth, 16 First, and 17, Shipping Act, 1916 in the Nonassessment of Fuel Surcharges on Military Sealift Command (MSC) Rates Under the MSC Request for Rate Proposals (RFP) Bidding System*, 15 F.M.C. 92 (1972). Citing *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525 (1966), the Commission there held that where a bunker charge had been assessed commercial cargo but not government cargo, no competitive relationship was necessary to establish a violation of section 16 First of the Act.

"the ocean freight forwarder to perform the service normally required of a forwarder engaged in this business."

Our finding that this record will not support the proposition that there are substantial differences between the amount of work required to handle a GSA shipment and that normally performed for commercial shippers further disposes of Air-Sea's argument that the GSA bids can be justified by factors of "cost, value of service or other transportation conditions." While, in practice, forwarders *may* do something less for GSA, we can think of no *single* forwarding function, (nor could GSA's own witness) which can be performed for the 5 cents per shipment bid made by Air-Sea. Clearly, the work involved in processing a GSA shipment is no less complex or time-consuming than with a commercial account. It follows that the costs involved in processing GSA and commercial shipments should be generally comparable. The simple fact of the matter is, however, that commercial clients are charged a substantially greater amount for essentially the same services than is GSA with no apparent transportation justification for the disparity.

One other explanation Air-Sea offers as to why GSA bids are so much lower than commercial fees is that because of the competitive environment it is allegedly a buyer's market for GSA as opposed to a seller's market for commercial shippers. We seriously question this unsupported contention considering the vast number of freight forwarders in the major ports as well as the large number of commercial shippers who could furnish a forwarder with more business than does GSA.[10]

Air-Sea also challenges the Presiding Officer's rejection of what he described as Air-Sea's "absorption theory." This "theory" which is advocated by Air-Sea and Meyer essentially holds that the cost and workload of processing GSA accounts can be absorbed without additional personnel and incurring any significant costs. Air-Sea argues that:

> . . . it is unfair and unrealistic to attempt to test these [forwarder] fees against some form of fully allocated cost standard. Apart from the impossibility of developing such a standard, the GSA business clearly generates incremental revenues which should be offset only against added out-of-pocket costs, costs which are *de minimis*.

[10] The following chart represents a breakdown of GSA and commercial shipments handled by certain Respondent forwarders at particular ports for the six month period from July 1, 1972 through December 31, 1972.

Forwarder	*Ports*	*No. of GSA Shipments*	*No. of Commercial Shipments*
Air-Sea	Los Angeles	130	1053
Air-Sea	San Francisco	676	205
Bush	Seattle	39	1375
Gulf Florida	Tampa	0	9
Ros Forwarding	Miami	1	1337
Cobal	Baltimore	238	408
Cobal	Houston	9	459
Cobal	New Orleans	667	1099
Meyer	New York	529	143
Smith	Hampton Roads	196*	399*

* For the six month period from July 1, 1973 to December 31, 1973.

The fatal flaw in this so-called "absorption theory" is, as the Presiding Officer noted, its failure to be applied to commercial accounts.[11] Air-Sea and Meyer would justify their 5 and 4½ cent bids to GSA, respectively, on the ground that incremental pricing allows them to absorb the additional work load without additional personnel and with only a *de minimis* increase in costs.[12] All *commercial* fees, however, were priced well above this level. Indeed, Air-Sea's lowest commercial fee in fiscal year 1973 was $15.00. Meyer's average commercial fee for the same period was $30.48 per shipment. Obviously, as Hearing Counsel have pointed out, "Mr. Meyer never considered costing commercial shipments on an incremental basis even during those years when his employees were underutilized and he had no GSA contract." The record here clearly indicates that GSA is the only shipper that ever benefited from this incremental pricing approach. Respondents' failure to even consider the application of the "absorption" theory to its commercial accounts or to provide any explanation as to why incremental pricing is appropriate for GSA accounts but not for commercial accounts renders that approach unjustly and unlawfully discriminatory.

Whatever the merits of the "absorption" or incremental pricing approach in principle, it is beyond dispute, as we have indicated earlier, that the incremental costs associated with the processing of a GSA shipment necessarily amount to more than 4½ or 5 cents. In addition to the "normal" forwarding services which they have contracted to provide, forwarders handling GSA shipments must also maintain a log on each GSA transaction, furnish GSA with a monthly report on shipments handled, transmit copies of bills of lading to the Maritime Administration, and wait between 60 and 90 days to be paid (a longer time than on commercial shipments). We simply cannot accept the suggestion that all this work, whatever effort is made to minimize it, can be done for as low as 4½ cents. The Commission therefore concurs in the Presiding Officer's conclusion that the "absorption theory" is discriminatory as between shipper customers and his rejection of that theory as justification for the disparate forwarder fees assessed GSA vis-a-vis commercial shippers.

It is also argued on exception that continuing the present GSA bidding practices is in the public interest in that it has caused the Government to receive quality service at low rates while at the same injuring no one. This contention is without merit. By enacting section 16 of the Act, among other provisions, Congress has established the "public policy" to

[11] Hearing Counsel advise that none of the Respondents have ever considered incremental pricing with respect to their commercial accounts.

[12] On exception Meyer argues that it is "incorrect to refer to . . . [its] schedule fees as having been limited to 4½ cents for each shipment accomplished for GSA" because "most shippers" were allegedly charged "an additional $5 per shipment for securing dock receipts." This contention is not particularly persuasive. First, there appears to be some dispute between Meyer and GSA as to whether Meyer had a contractual right to charge and collect its $5 charge on FAS shipments or whether Meyer had an obligation to provide the receipts within the contract price of 4½ cents. Secondly, even assuming that Meyer could legally exact $5 for the issuance of the dock receipt on FAS shipments, and we certainly do not propose to decide this here, we cannot find on this record that the $5 fee was in every instance tacked on to the 4½ cents bid charge to GSA. In fact, that the $5 fee was, even according to Meyer, assessable only on FAS shipments would in and of itself indicate otherwise.

be the fair and even-handed treatment of similarly situated shippers and localities. Respondents are furnishing GSA unwarranted advantage in clear contravention of that policy. In this regard, the Presiding Officer's discussion is particularly appropriate and bears repeating:

> No one would seriously argue against the general proposition that the government should pay the lowest prices it can. But such proposition carries within it the inchoate covent [sic] "proper and appropriate in the circumstances." No one, for example, would suggest that the government should buy stolen goods because such goods can be obtained for less than the usual [and legal] price. Similarly, as here, the government should not obtain services at prices which violate public policy and the statutes and regulations enacted and promulgated in conformity therewith. Nothing Congress has mandated to GSA in its procurement responsibilities contains within it a prescription to violate other statutes and regulations, be a party to such violations, or aid and abet such violations.
>
> The public policy, to the extent it is expressed in sections 16 and 44 of the Shipping Act, 1916, establishes that no shipper should be given an unreasonable preference or advantage and forwarder services shall not be rendered at reduced rates in consideration of receiving brokerage from carriers. The prices bid to GSA in many instances reflect a direct violation of that policy.

Moreover, we do not necessarily agree with Air-Sea that the GSA bidding practices followed by certain Respondents here have injured no one. In fact, our findings would indicate otherwise. To the extent the low fees bid GSA for forwarding fees have not recovered the forwarders costs for performing such services, they have arguably made commercial customers pay costs attributable to GSA shipments. If a commercial shipper is called upon to subsidize any costs of processing GSA shipments it follows that such shipper has been financially injured to some degree. Clearly, Air-Sea's bid for 5 cents does not cover incremental costs, let alone distributed costs. Thus, a clear potential for subsidization exists. We cannot therefore, accept the conclusionary assurance that "simply no one has been even remotely injured" by its practices.[13]

Nor, as Air-Sea argues, will requiring forwarders to establish reasonable and equitable charges for the handling of GSA shipments run contrary to the public interest by "substantially restrain[ing] competition within the entire forwarder industry." Our decision here does nothing more than require Respondents to honor an obligation imposed on them by law, *i.e.*, that once a particular forwarding fee is established by a forwarder for a particular service based on the circumstances of his operation, this fee be made available to all shippers equally. In any event and as a practical matter, because it is extremely unlikely that all forwarders are so similar in their operations that they share the same costs and independently would arrive at same fees and charges, we fail to see how all competition on fees and services will be eliminated by our action here. Even if that were the result of our decision, however, that decision would be no less dictated by the requirements of the Shipping Act, 1916. Our authority to

[13] Even if it could be somehow shown that the low bids assessed GSA did not result in measurable financial losses, Respondents would not be absolved of the violations found. The potential for injury is clear and exists with or without finding of specific economic damage. The extent of injury is only critical in a reparation context.

take whatever action necessary to remedy discriminatory practices has long been recognized. See *California v. U.S.*, *supra,* at p. 583.

After review and consideration of the record in this proceeding, including the Initial Decision and matters raised on exception, we concur in the Presiding Officer's conclusion that the unjustified disparity of fees charged GSA and commercial shippers by Air-Sea, Meyer Cobal and Smith resulted in violations of section 16 First of the Act. The facts of record clearly establish that the bidding practices followed by the above-named Respondent forwarders during the period at issue herein resulted in the unwarranted preferential treatment of GSA over commercial shippers. Bids submitted on a per shipment basis were as low as 4½ cents (Meyer) and 5 cents (Air-Sea). In the case of Air-Sea, Meyer and Cobal,[14] there are wide variations between the per shipment charge to GSA and the average per shipment charge on commercial shipments.

While the variation between the level of the per shipment forwarding fees assessed GSA and commercial shippers by Smith would appear to be less substantial, the record discloses that the unit price per shipment charged GSA by Smith was less than the total forwarding fees collected for any single commercial shipment forwarded by it during the relevant period. Further, Smith has admitted that its GSA charges did not meet distributed costs although its commercial fees do reflect the reasonable value of services performed.

The pattern of fees assessed by forwarders found to be in violation of the Act reveals a clear pattern of reduction in fees charged GSA from those charged other shippers. This reduction is remarkable in every instance when one considers the aforementioned inherent similarity of the service obligations of a forwarder when handling GSA and commercial shipments. Under the circumstances, the Presiding Officer's findings of violations of section 16 First by Air-Sea, Meyer, Cobal and Smith are manifestly proper and well-founded.

With respect to the forwarding activities of Bush, Ros Forwarding, Gulf-Florida, and Alltransport, all of whom are licensed by the Commission, we agree with the Presiding Officer that the evidence of record does not sustain any violation of section 16 First by those Respondents.

Violations of Section 510.24 of General Order 4

Section 510.24(b)of General Order 4, as previously noted, prohibits forwarders from rendering forwarding services for a reduced forwarding fee in consideration of brokerage. Section 510.21(m) defines the phrase "reduced forwarding fees" as: ". . . charges to a principal for forwarding services that are below the licensee's usual charges."

The Presiding Officer concluded that those forwarders who violated

[14] The differences in GSA versus commercial forwarder fees assessed by Cobal were, $4.00 to $20.76 (Houston); $4.00 to $8.65 (New Orleans); and $1.75 to $7.50 (Baltimore). This is in spite of Cobal's admission that "services of a freight forwarder performed on GSA and commercial shipments are not basically different, as measured by the end product."

section 16 First with their appreciably lower GSA bids were *only* offering such bids in consideration of receiving ocean brokerage from carriers to cover their forwarding costs in violation of section 510.24(b) of Commission General Order 4. This conclusion was essentially premised on the finding that based on the relevant factors "the average charges may fairly and reasonably be deemed to be a reflection of . . . usual charges for freight forwarder services."

Air-Sea, Meyer and Cobal except to the Presiding Officer's conclusion. Air-Sea and Cobal argue in part that "average" cannot be made synonymous with "usual." Air-Sea believes "it it absurd to equate 'average' with 'usual' " and that by so doing, the Commission makes "all of the fees under the norm illegal." Cobal explains that since the Commission's section 21 Order issued in conjunction with this proceeding did not request any breakdown of the fees charged by type of service provided, be it "usual" or "accessorial," the responses submitted reflect only the aggregate of the fees charged commercial shippers in each port served. Since the "average" fee allegedly does not reflect what services were performed for a particular shipper in return for the fee, Cobal submits that the Presiding Officer's comparison is invalid.

We do not believe that in all instances the "average" commercial fee will be the forwarder's "usual" fee. However, given the fact that the service provided to GSA and to commercial shippers was basically similar, and the number of both GSA and commercial shipments were sufficiently large in number to be deemed a reliable sample, the Presiding Officer's determination on this record that the "average" commercial fee for a given port reflects the forwarder's "usual" fee for that port is not unfounded.

But however the "usual charge" is to be measured or determined, the GSA bids found violative of section 510.24(b) are below any usual level and were demonstrably pegged at that level to take advantage of large volumes of GSA shipments and the accompanying brokerage. This is evident when one compares Air-Sea's GSA bid of 5 cents for Los Angeles, with its correspondent average ocean brokerage return of $40.68. Air-Sea received over $19,000 in the first half of FY 1973 for handling government shipments, only $45.70 of which can be attributed to forwarding fees paid by GSA.

In FY 1973, Cobal provided GSA with forwarding services for $4.00 per shipment at Houston contrasting with their average commercial price per shipment of $20.76. Average brokerage received by Cobal on GSA shipments at Houston was $50.78 during the same period. For the Respondents found to be in violation of the Act and the Commission regulations, there is evidence in the record of significant variations between the level of the per shipment bids on GSA shipments and brokerage received. The Presiding Officer found this variation to be of sufficient magnitude to give rise to the reasonable probability that the low bids offered GSA by Air-Sea, Meyer, Cobal, and Smith were in

consideration of the licensees receiving compensation from carriers in violation of section 510.24(b) of General Order 4.[15] We concur in this finding as being consistent with the matters of record herein.

Sanctions

Virtually all the parties filing exceptions oppose the sanctions imposed by the Presiding Officer, *i.e.*, revocation and suspension of certain Respondents' licenses, as being either unlawful, unwarranted or unreasonable. This challenge has already been considered by the Commission in its April 22, 1976 Order Clarifying Scope of Proceeding, wherein we set aside, as being beyond the scope of the proceeding, the punitive actions taken by the Presiding Officer.[16] No action in the form of revocation or suspension of forwarder licenses will be taken for violations found. The Commission intends, however, to monitor the activities of Respondents to ensure compliance with this Report and Order.

Presiding Officer's "Recommendations"

In the closing section of his Initial Decision, the Presiding Officer recommended two actions regarding the regulation of freight forwarder activities. First, he suggested that legislation prohibiting the payment of brokerage to forwarders should be enacted. The Presiding Officer reasoned that the practice of brokerage under section 44(e) of the Act is inconsistent with the concept "that no man can serve two masters." Second, the Presiding Officer recommended that the Commission by rule require freight forwarders to publish a schedule of their fees and charges. The publication of such schedules, he found, would conform to the requirements of both section 16 First and section 17 of the Act in that it would (1) make it more difficult to give any undue or unreasonable preference to any particular person, and; (2) require the establishment and observance of just and reasonable regulations and practices.

Air-Sea, Cobal and NCBFAA except to the Presiding Officer's collateral proposals on the ground, *inter alia,* that they are "gratuitous" and beyond the scope of this investigation. We agree. Whatever the merit of the "recommendations" advanced in the Initial Decision, they are clearly beyond the issues set down for hearing in this proceeding and will be disregarded.

Prospective Relief

A number of proposals to resolve the GSA fee problem at issue here have been advanced. These proposals can be broken down into two

[15] Because section 510.24(b) makes it unlawful for a licensee to "render, or *offer* to render" any forwarding service free of charge or at a reduced fee, a licensee who *only* offered to render, but never actually rendered, such service at free or reduced charge would still run afoul of that section.

[16] Pending before the Commission is a Motion to Withdraw Petition to Reopen Hearing filed by Smith. The Commission had originally been petitioned to reopen the hearing and remand the proceeding to the Presiding Officer in order that Smith might offer a defense to the sanctions ordered against it. In view of the Commission's Order of April 22, 1976, Smith now asks that it be allowed to withdraw that petition. Motion granted.

categories: (1) those advocating free or reduced rates for GSA, and (2) those suggesting minimum fee charged GSA. A discussion of each follows:

(1) Free or reduced rates.

GSA suggests that section 510.24(b) be amended to allow GSA to obtain forwarding services free of charge or at reduced rates. The justification offered for this amendment is that GSA is unique as a shipper, is not competitive with commercial shippers, and that the nature of its cargo and programs make its shipments indistinguishable from those of charity or relief organizations which, under section 510.24(b), are allowed free or reduced forwarding fees. We cannot subscribe to this proposal.

The "feeling" of the Committee on Merchant Marine and Fisheries as expressed in its Report on the bill, which ultimately added section 44 to the Shipping Act, 1916, was that:

> . . . services which have been performed by forwarders for shippers should be compensated for by the shippers and that where brokerage fees have been earned by the forwarders or brokers, then the carriers in turn should pay for these services at the historical rate. Both the carrier and the shipper should be expected to pay *and the charge to each by the forwarders should be the reasonable value of the forwarder's service to each.* (Emphasis added) (House Report No. 1096, accompanying H.R. 2488, 87th Cong., 1st Sess. p. 3).

There is nothing in the Act or its legislative history to support the conclusion that Government agencies are to be given preferred treatment on forwarding services. If GSA must pay the same terminal and ocean transportation charges as do commercial shippers, we see no reason why GSA should acquire a preferred status in regards to forwarding services. Any amendment to section 510.24(b) which would place GSA shipments in the same category as relief and charitable agencies[17] would in effect permit forwarders of GSA shipments to rely on brokerage from ocean carriers to cover the costs of processing such shipments. This would be clearly inconsistent with the intent of Congress expressed above.

Nor are we prepared at least at this time to exempt under section 35 of the Act shipments of the civilian executive agencies of the U.S. Government from the application of the provisions of the Shipping Act, 1916. However, we will continue to review this matter to determine the future feasibility of the requested exemption.

(2) Minimum fee charged GSA.

There have also been suggested to us three approaches for making GSA bids compensatory.

Hearing Counsel's proposal would establish a unit cost for GSA forwarding services by looking to the ratio of the commercial forwarding fees charged by the licensee in the previous year to the total revenue as a

[17] We intend to review the exemption for relief and charitable agencies in section 510.24(b) to determine whether it continues to be proper or lawful with the repeal of section 6 of the Intercoastal Shipping Act, 1933.

measure of the value of service to the shipper. In essence, Hearing Counsel's proposed rule is based on the premise that the forwarder's cost per shipment for forwarding commercial shipments in the previous year provides a reasonable indication of the cost associated with processing GSA shipments. This approach is allegedly geared towards preventing the shifting of the burden of paying for GSA services to the commercial shipper.

NCBFAA simply proposes to set the fee charged GSA to the average fee charged commercial accounts in the preceding fiscal year.

The Presiding Officer would amend section 510.24(b) to require that the forwarding fee assessed any government agency not be less than the average forwarding fee *for similar services* rendered to other accounts in the preceding year.

We are not convinced by the facts before us that the implementation of either of the formulas of Hearing Counsel or NCBFAA would accomplish the desired result. Nor are we prepared to accept the Presiding Officer's proposal without a more thorough review of existing forwarding services, practices and fees. We are reluctant to establish binding rules of universal application governing the level of freight forwarder fees on the basis of the existing limited record. The important matter of what objective standards, if any, should be adopted to judge the acceptability of forwarding GSA bids under the Shipping Act, 1916, and the Commission's regulations, is one that requires considerably more study and analysis. We do not intend to take any precipitous action, no matter how well motivated, that might result in the establishment of requirements which could prove impossible of application or unduly or unnecessarily disruptive of the freight forwarder industry. Whatever standards are finally adopted must be well-reasoned, economocally sound and consistent with responsible regulatory policy. In deciding not to prescribe detailed fee requirements, we are certainly not blind to the seriousness of the problems underlying the practices found unlawful herein. Quite to the contrary, it is our acute awareness and concern with these problems that prompts us to exercise restraint in prescribing a solution, lest we compound their consequences. In this case, delay *is* manifestly preferable to error.

We will therefore hold under advisement, pending further study[18] and review, the issue, raised in our Order instituting this proceeding, of "whether the Commission's General Order 4 should be amended to include a rule governing the practices of forwarders bidding on GSA contracts and providing services thereunder." In the interim, each freight forwarder issuing bids to GSA should determine and establish, based on his costs and the circumstances of his operation, the fee that will be assessed GSA for the processing of its shipments. Consistent with our

[18] This study will, as discussed earlier, include a consideration of the feasibility of exempting GSA shipments from the provisions of the Shipping Act, 1916, under section 35 of that Act.

findings herein, we would expect that whatever GSA fee is established be compensatory, equitable and nondiscriminatory vis-a-vis commercial accounts.

Conflict Between Laws

One final point should be addressed. GSA has placed heavy reliance on *U.S. v. Georgia Public Service Commission,* 371 U.S. 285 (1963), in its discussion of an alleged conflict between the laws administered by GSA and this Commission.[19] That reliance, however, is clearly misplaced. The issue here it not one of conflict between a federal statute and state law under the Supremacy Clause but rather one of reconciling the fairness requirements of the Shipping Act, 1916, with the federal procurement requirements of negotiated rates under the Federal Property Act. GSA's authority to obtain transportation at the "lowest over-all cost" does not overrule the requirement that the rate agreed upon for such transportation be lawful under the Shipping Act. This is particularly so since the Shipping Act contains no exemption of the type appearing in section 22 of the Interstate Commerce Act (ICA) granting the Government preferred status. Rates and charges assessed the Government must therefore be reasonable and nondiscriminatory and otherwise comply fully with the substantive provisions of the Shipping Act, 1916. Viewed in this light, there is no conflict between the requirements imposed by the Federal Property Act and the Shipping Act, 1916 and GSA's contention to the contrary must be rejected.

WHEREFORE, IT IS ORDERED, That Respondents Air-Sea Forwarders, Inc., Cobal International, Inc., Meyer Shipping Company, and W. O. Smith and Company immediately cease and desist from submitting bids to GSA for forwarding services to be provided thereunder which are inconsistent with our decision herein.

(S) JOSEPH C. POLKING,
Acting Secretary.

[19] This decision concerned a conflict between a federal procurement statute and a law of the State of Georgia governing the rates established for the transportation of household goods within that State. The Court held that the Supremacy Clause of the U.S. Constitution gave preference to the provisions of the Federal Property Act, (40 U.S.C. 481, *et al.*) which authorizes the Administrator of GSA to seek preferential treatment for federal shipments over the requirements of the state statute.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 336(I)

ALFRED KUBIES WESTERN CORP.

v.

ROYAL NETHERLANDS STEAMSHIP CO.

NOTICE OF DETERMINATION NOT TO REVIEW

March 17, 1977

Notice is hereby given that the Commission on March 17, 1977, determined not to review the decision of the Settlement Officer in this proceeding served March 9, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secetary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 336(I)

ALFRED KUBIES WESTERN CORP.

v.

ROYAL NETHERLANDS STEAMSHIP CO.

March 9, 1977

Reparation awarded.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

Alfred Kubies Western Corp. (complainant) claims $402.00 as reparation from Royal Netherlands Steamship Co. (carrier) for an alleged freight overcharge on a shipment carried from New York, New York to Port Au Prince, Haiti via the SS METEOR on bill of lading Number 92 dated May 21, 1975. The consignee was Firestone Interamerica Company, Port Au Prince. While the complainant does not specifically allege a violation of the Shipping Act, 1916, it is presumed to be Section 18(b)(3).

The carrier denied the claim on August 27, 1975 solely on the basis of Item 45(b), United States Atlantic and Gulf-Haiti Conference Freight Tariff F.M.C. No. 1 which provides in part:

". . . Adjustment of freight based on alleged error in . . . description will be declined unless application is submitted in writing sufficiently in advance to permit . . . verification of description before the cargo leaves the carrier's possession, . . ."[2]

The shipment consisted of 12 crates identified on the bill of lading as El. Commercial Freezers weighing 2,940 pounds and measuring 480 cubic feet. The carrier assessed a 4th class rate of $84.50 per measurement ton based on the tariff description of Food Freezers, Mechanical N.O.S. Complainant alleges that the shipment consisted of Food Freezers,

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301-304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] With respect to a similar rule regarding the filing of a claim for reparation based on weights or measurements before the shipment involved leaves the custody of the carrier, in *Kraft Foods v. Moore McCormack Lines, Inc.*, in its report on remand served November 24, 1976 the Commission held "The Court of Appeals on review has determined that Rule 16 (a similar rule) is not a valid tariff provision, insofar as it conflicts with section 22 of the Shipping Act, 1916. . . . In effect the Rule sets up a period of limitation, the time during which the shipment remains in the custody of the carrier, which limitation was reviewed by the Court as infringing on the rights granted by section 22 of the Shipping Act. . . ."

Mechanical Household which take a class 18 rate of $51.00 per measurement ton. The surcharges would be identical using either description. Complainant alleges that instead of being charged $84.50 for 12 measurements tons, or $1,014.00 as it was, it should have been charged $51.00 for 12 measurement tons, or $612.00. The overcharge claim is for $402.00.

In support of its claim, the complainant has submitted the following:

1. A copy of the subject bill of lading describing the commodities as 12 Crates El. Commercial Freezers.

2. Complainant's commercial invoice number 10336 dated May 21, 1975, identifying the freezers as "Models H-16."

3. A Shipper's Export Declaration Correction Form dated July 10, 1975 filed by complainant with the Customs Director at the Port of New York changing the commodity description "Com. Food Freezers" to "El. Household Freezers." The comment thereon is "Inadvertent error in description."

4. A copy of complainant's original letter dated June 20, 1975 to the Consulate General of Haiti in New York, New York requesting a correction of the consular invoice amending the commodity description to read "Domestic Evercold Freezers for Operation on 115/60." A stamp and signature to the effect that the letter was seen and noted by the New York Consulate General of Haiti appears on the letter. Complainant advises that ordinarily no further action would be taken by the Consulate General.

5. Complainant's order (No. K-6504-R) of May 9, 1975, placed with the manufacturer, W. C. Wood Co. Ltd., Guelph, Canada for 12 Model H16 Evercold Freezers.

6. The manufacturer's price list effective on or after January 1, 1975 which indicates that Model H-16, as well as all other freezers on the list are household freezers.

7. A catalog of W. C. Wood Co., Ltd., the manufacturer, in which it is indicated "There are six basic sizes of Chest freezers built with the Wood's care to fit your family's needs." The photographs of the freezers and the descriptions thereof clearly indicate that they (including Model H-16) are household freezers. The measurements of Model H-16 are $46^1/_8$ inches long, $29^1/_4$ inches wide and 36 inches high. The capacity is 16 cubic feet.

Therefore, on the basis of the above information, it is found that an adequate substantiation of the complainant's claim that the shipment consisted of household freezers has been established. Complainant is awarded reparation of $402.00.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 507

UNITED FORWARDERS SERVICE, INC.

v.

SEA-LAND SERVICE, INC.

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

March 23, 1977

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 March 23, 1977.

It is Ordered, That applicant is authorized to waive collection of $362.50 of the charges previously assessed United Forwarders Service, Incorporated.

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

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 507 that effective September 16, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from September 16, 1976 through January 7, 1977, the rate on 'Rubber Goods: Soles' is $122.30 W/M, subject to all applicable rules, regulations, terms and conditions of said rate 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) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 507

UNITED FORWARDERS SERVICE, INC.

v.

SEA-LAND SERVICE, INC.

Adopted March 23, 1977

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90-298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant) has applied for permission to waive collection of a portion of the freight charges on a shipment of rubber soling that moved from Elizabeth, New Jersey to San Jose, Costa Rica, under a Sea-Land bill of landing dated December 18, 1976. The application was filed February 3, 1977.

The subject shipment moved under Sea-Land Tariff #261, FMC No. 140, original page 96, effective September 16, 1976, under the rate for the item "Rubber goods, viz: . . . Belting (through) Soles" (all under Item 3410). The aggregate weight of the shipment was 4,800 pounds, and it measured 145 cubic feet (3.625 measurement tons). The rate applicable at the time of shipment $222.30 W/M, i.e., $222.30 per ton of 2000 pounds or 40 cubic feet, whichever creates the greater revenue. The rate sought to be applied is $122.30 W/M, per Sea-Land Tariff #261, FMC No. 140, 1st revised page 96, item 3410, effective January 7, 1977 (correction No. 445).

Aggregate freight charges payable pursuant to the rate applicable at the time of shipment amounted to $805.84 ($22.30 × 3.625 measurement tons). Aggregate freight charges at the rate sought to be applied amount to $443.34. The difference sought to be waived is $362.50. The Applicant

[1] This decision became the decision of the Commission March 23, 1977.

[2] 46 U.S.C. 817, as amended.

is not aware of any other shipment of the same commodity which moved via Sea-Land during the same time period at the rates involved in this shipment.

Sea-Land offers the following as grounds for granting the application:

(4) In Sea-Land Service Tariff 217-A, FMC 102, Rubber Goods: Soles reflected a rate of $111.20 weight or measure whichever created the greater revenue. (exhibit 1)

Effective September 16, 1976 Section 1 of Tariff 217-A which named rates (including Rubber Goods: Soles) to Costa Rica was deleted from Tariff 217-A (exhibit 2) and were published (on statutory notice) in freight tariff 261, FMC No. 140. The rates named in Tariff 217-A were subject to a 10% General Rate Increase and were brought forward into Tariff 261 with the increase rolled in. In computing the 10% G.R.I. Rubber Goods: Soles which was at a level of $111.20 was to be increased to $122.30. Inadvertently the tariff clerk recorded the new rate as $222.30 (exhibit 3). The error in computation was not recognized and the incorrect rate was published on original page 96 Tariff 261 effective September 16, 1976 (exhibit 4). On December 24, 1976 United Forwarders, on behalf of American Biltrite forwarded a shipment of Rubber Soles to Costa Rica (exhibit 5). Upon receipt of the bill, United Forwarders noting the apparent rate error contacted Sea-Land salesman T. Petro, who in turn contacted M. Cox, Sea-Land Caribbean Pricing to notify him of the clerical error (exhibit 6).

On January 7, 1977 the rate was reduced to the proper level of $122.30 W/M (exhibits 7 and 8).

United Forwarder's paid Sea-Land (exhibit 9) based on $122.30 W/M.

A clerical error in computing an increased rate resulted an erroneous rate being published in Sea-Land Tariff 261. A corrected publication was made promptly following disclosure of the initial erroneous publication.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 816 (as amended by Public Law 90-298),and Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers; Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tarif of a clerical or administrative nature, resulting in the inadvertent filing of a much higher rate than merely the intended new rate with the 10% general rate increase.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

2.Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to Sea-Land to waive collection of a portion of the freight charges, specifically the amount of $362.50. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. RRILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
March 2, 1977.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 367(I)

CATERPILLAR OVERSEAS, S.A.

v.

SPRINGBOK LINE, LTD.

NOTICE OF DETERMINATION NOT TO REVIEW

March 21, 1977

Notice is hereby given that the Commission on March 21, 1977, determined not to review the decision of the Settlement Officer in this proceeding served March 10, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 367(I)

CATERPILLAR OVERSEAS, S.A.

v.

SPRINGBOK LINE, LTD.

Dismissal of Complaint.

DECISION OF RONALD J. NIEFORTH, SETTLEMENT OFFICER[1]

By complaint filed October 15, 1976, Caterpillar Overseas, S.A. (complainant) alleges that Springbok Line, Ltd., (carrier) applied an incorrect rate on three shipments of "Engines and Parts, Viz: Automobile, Gasoline or Diesel and Parts, N.O.S." resulting in an overcharge of $1,863.77. It seeks refund of this amount pursuant to the informal procedure contained in Subpart S (46 CFR 502) of Commission's informal procedure for adjudication of small claims subject to discretionary Commission review.

While a violation of the Shipping Act, 1916, is not specifically alleged in support of complainant's petition, it appears from the nature of the complaint that the claim for refund relates to the requirements of Section 18(b)(3) which prohibits the assessment of rates and charges other than those specified in the carrier's tariff on file with the Commission and duly published and in effect at the time. It further appears that informal settlement of the complaint is considered by the carrier to be time barred by tariff Rule 16, entitled OVERCHARGES, which Rule places a limitation period of six months for the filing of claims described in the Rule. The merits of the complaint are therefore considered based upon these premises.

As noted in the complaint, the shipments here involved were previously the subject of a formal complaint (Docket No. 76–39) which was dismissed on jurisidictional grounds by Administrative Law Judge Glanzer by Initial Decision served September 30, 1976, after the filing of a joint Stipulation of Facts and Motion for Authorization to Settle. Dismissal of

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof. (Note: Notice of determination not to review March 21, 1977).

the complaint did not restrict the complainant's right to resubmit its claim correcting the jurisdictional grounds defect found in Docket No. 76–39. The instant docket obviously is intended to accomplish this purpose.

The claim at issue involves a simple case of improper rate application wherein cargo described on the bill of lading as "Truck Engines, Diesel Engines Automotive for replacement" was assessed a different rate than that which is specified in the tariff as being applicable at the time. In lieu of a rate of $119.50 per cubic feet, which rate was assessed on the three shipments identified in the claim, the carrier's applicable United States/South and East Africa Conference Southbound Freight Tariff No. 2, FMC No. 3, provided in Item 255, Second Revised Page 152, Correction 106, a base rate of $70.25 per 40 cubic foot or 2,240 pounds, which rate should have applied on the shipments in question.

Ordinarily this observation would warrant the issuance of an order directing that the overcharge of $1,863.77 be refunded to the complainant. In this instance however, such action would be redundant for the reason that a check in full settlement of the overcharge has in the meantime been paid by the carrier as confirmed in letter of November 12, 1976, submitted by attorney for the complainant.

While in ordinary circumstances, the carrier could be admonished for taking unilateral action in a proceeding before the Commission and thereby prejudging the decision which might be rendered, I find that from a regulatory standpoint, the conference tariff did not prohibit an informal settlement of the rate issue and there was, therefore, no legal necessity to bring the matter before this agency for formal resolution. This position is based upon the fact that an informal settlement of the claim was not time barred by Rule 16 of the tariff as the carrier apparently believed. A careful review of the Rule reveals that it does not extend to errors involving the mere misapplication of a rate, which is the issue in this Docket. It is noted that the rule could be phrased in a clearer manner by appropriately inserting the words "except as otherwise provided" in the first paragraph in order to alert a tariff user of the pertinent exception which appears in part (3) of the rule.

Following is a statement of the rule as it appears on pages 110 and 111 of the tariff:

OVERCHARGES

Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier in writing before shipment involved leaves the custody of the carrier. Any expenses incurred by the carrier in connection with its investigation of the claim shall be borne by the party responsible for the error, or, if no error be found by the claimant. All other claims for adjustment of freight charges must be presented to the carrier in writing

within six (6) months after date of shipment. The limitation of six months does not apply to U.S. Government or its agencies.

(1) For purpose of uniformity in handling claims for excess measurements, refunds will only be made as follows:

(a) Where an error has been made by the dock in calculation of measurements.
(b) Against re-measurements at port of loading prior to ship's departure.
(c) Against re-measurement by steamer's agent at destination.
(d) By Joint re-measurement of steamer's agent and consignee.
(e) By re-measurement of a marine surveyor when requested by steamer's agent.
(f) Re-measurement fees and cable expenses in all cases to be paid by party at fault.

(2) In cases of claims by shipper of overcharges in weight, certified invoice or weigher's certificate to be considered evidence of proper weight.

(3) Except those claims for obvious error in calculation or misapplication of rate or rate basis, all claims of adjustment in freight charges must be presented to the carrier in waiting within six months after date of shipment.

The assessment of a rate which differs from that which the tariff provides clearly falls within the exception provided in paragraph (3) above as it relates to "misapplication" of a rate.

Conclusion and Order

I find that in view of the fact that the claim at issue has been properly settled between the carrier and the complainant subsequent to the filing of this Docket with this Commission, and in view of the fact that there is no tariff regulation or statutory provision which bars the parties from informally taking such action, a formal order with respect to this Docket is unwarranted. Complaint dismissed.

(S) Ronald J. Niefort,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 368(I)

CATERPILLAR OVERSEAS, S.A.

v.

SOUTH AFRICAN MARINE CORPORATION, LTD.

NOTICE OF DETERMINATION NOT TO REVIEW

March 21, 1977

Notice is hereby given that the Commission on March 21, 1977, determined not to review the decision of the Settlement Officer in this proceeding served March 10, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 368(I)

CATERPILLAR OVERSEAS, S.A.

v.

SOUTH AFRICAN MARINE CORPORATION, LTD.

Dismissal of Complaint.

DECISION OF RONALD J. NIEFORTH, SETTLEMENT OFFICER[1]

By complaint filed October 15, 1976, Caterpillar Overseas, S.A. (complainant) alleges that South Africa Marine Corporation, Ltd., (carrier) applied an incorrect rate on three shipments of "Engines and Parts, Viz: Automobile, Gasoline or Diesel and Parts, N.O.S." resulting in an overcharge of $1,633.66. It seeks refund of this amount pursuant to the informal procedure contained in Subpart S (46 CFR 502) of Commission's informal procedure for adjudication of small claims subject to discretionary Commission review.

While a violation of the Shipping Act, 1916, is not specifically alleged in support of complainant's petition, it appears from the nature of the complaint that the claim for refund relates to the requirements of Section 18(b)(3) which prohibits the assessment of rates and charges other than those specified in the carrier's tariff on file with the Commission and duly published and in effect at the time. It further appears that informal settlement of the complaint is considered by the carrier to be time barred by tariff Rule 16, entitled OVERCHARGES, which Rule places a limitation period of six months for the filing of claims described in the Rule. The merits of the complaint are therefore considered based upon these premises.

As noted in the complaint, the shipments here involved were previously the subject of a formal complaint (Docket No. 76–39) which was dismissed on jurisdictional grounds by Administrative Law Judge Glanzer by Initial Decision served September 30, 1976, after the filing of a joint Stipulation of Facts and Motion for Authorization to Settle. Dismissal of

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof. (Notice of determination not to review March 21, 1977).

the complaint did not restrict the complainant's right to resubmit its claim correcting the jurisdictional grounds defect found in Docket No. 76–39. The instant docket obviously is intended to accomplish this purpose.

The claim at issue involves a simple case of improper rate application wherein cargo described on the bill of lading as "Truck Engines, Diesel Engines Automotive for replacement" was assessed a different rate than that which is specified in the tariff as being applicable at the time. In lieu of a rate of $119.50 per cubic feet, which rate was assessed on the three shipments identified in the claim, the carrier's applicable United States/South and East Africa Conference Southbound Freight Tariff No. 2, FMC No. 3, provided in Item 255, Second Revised Page 152, Correction 106, a base rate of $70.25 per 40 cubic foot or 2,240 pounds, which rate should have applied on the shipments in question.

Ordinarily this observation would warrant the issuance of an order directing that the overcharge of $1,633.66 be refunded to the complainant. In this instance however, such action would be redundant for the reason that a check in full settlement of the overcharge has in the meantime been paid by the carrier as confirmed in letter of November 12, 1976, submitted by attorney for the complainant.

While in ordinary circumstances, the carrier could be admonished for taking unilateral action in a proceeding before the Commission and thereby prejudging the decision which might be rendered, I find that from a regulatory standpoint, the conference tariff did not prohibit an informal settlement of the rate issue and there was, therefore, no legal necessity to bring the matter before this agency for formal resolution. This position is based upon the fact that an informal settlement of the claim was not time barred by Rule 16 of the tariff as the carrier apparently believed. A careful review of the Rule reveals that it does not extend to errors involving the mere misapplication of a rate, which is the issue in this Docket. It is noted that the rule could be phrased in a clearer manner by appropriately inserting the words "except as otherwise provided" in the first paragraph in order to alert a tariff user of the pertinent exception which appears in part (3) of the rule.

Following is a statement of the rule as it appears on pages 110 and 111 of the tariff:

OVERCHARGES

Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier in writing before shipment involved leaves the custody of the carrier. Any expenses incurred by the carrier in connection with its investigation of the claim shall be borne by the party responsible for the error, or, if no error be found by the claimant. All other claims for adjustment of freight charges must be presented to the carrier in writing

within six (6) months after date of shipment. The limitation of six months does not apply to U.S. Government or its agencies.

(1) For purpose of uniformity in handling claims for excess measurements, refunds will only be made as follows:

(a) Where an error has been made by the dock in calculation of measurements.
(b) Against re-measurements at port of loading prior to ship's departure.
(c) Against re-measurement by steamer's agent at destination.
(d) By Joint re-measurement of steamer's agent and consignee.
(e) By re-measurement of a marine surveyor when requested by steamer's agent.
(f) Re-measurement fees and cable expenses in all cases to be paid by party at fault.

(2) In cases of claims by shipper of overcharges in weight, certified invoice or weigher's certificate to be considered evidence of proper weight.

(3) Except those claims for obvious error in calculation or misapplication of rate or rate basis, all claims of adjustment in freight charges must be presented to the carrier in waiting within six months after date of shipment.

The assessment of a rate which differs from that which the tariff provides clearly falls within the exception provided in paragraph (3) above as it relates to "misapplication" of a rate.

CONCLUSION AND ORDER

I find that in view of the fact that the claim at issue has been properly settled between the carrier and the complainant subsequent to the filing of this Docket with this Commission, and in view of the fact that there is no tariff regulation or statutory provision which bars the parties from informally taking such action, a formal order with respect to this Docket is unwarranted. Complaint dismissed.

(S) RONALD J. NIEFORTH,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 366(I)

CATERPILLAR OVERSEAS, S.A.

v.

SPRINGBOK SHIPPING COMPANY, LTD.

NOTICE OF DETERMINATION NOT TO REVIEW

March 21, 1977

Notice is hereby given that the Commission on March 21, 1977, determined not to review the decision of the Settlement Officer in this proceeding served March 10, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 366(I)

CATERPILLAR OVERSEAS, S.A.

v.

SPRINGBOK SHIPPING COMPANY, LTD.

Dismissal of Complaint.

DECISION OF RONALD J. NIEFORTH, SETTLEMENT OFFICER[1]

By complaint filed October 15, 1976, Caterpillar Overseas, S.A. (complainant) alleges that Springbok Shipping Company, Ltd., (carrier) applied an incorrect rate on three shipments of "Engines and Parts, Viz: Automobile, Gasoline or Diesel and Parts, N.O.S." resulting in an overcharge of $1,275.89. It seeks refund of this amount pursuant to the informal procedure contained in Subpart S (46 CFR 502) of Commission's informal procedure for adjudication of small claims subject to discretionary Commission review.

While a violation of the Shipping Act, 1916, is not specifically alleged in support of complainant's petition, it appears from the nature of the complaint that the claim for refund relates to the requirements of Section 18(b)(3) which prohibits the assessment of rates and charges other than those specified in the carrier's tariff on file with the Commission and duly published and in effect at the time. It further appears that informal settlement of the complaint is considered by the carrier to be time barred by tariff Rule 16, entitled OVERCHARGES, which Rule places a limitation period of six months for the filing of claims described in the Rule. The merits of the complaint are therefore considered based upon these premises.

As noted in the complaint, the shipments here involved were previously the subject of a formal complaint (Docket No. 76–39) which was dismissed on jurisdictional grounds by Administrative Law Judge Glanzer by Initial Decision served September 30, 1976, after the filing of a joint Stipulation of Facts and Motion for Authorization to Settle. Dismissal of

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof. (Note: Notice of determination not to review March 21, 1977.)

the complaint did not restrict the complainant's right to resubmit its claim correcting the jurisdictional grounds defect found in Docket No. 76–39. The instant docket obviously is intended to accomplish this purpose.

The claim at issue involves a simple case of improper rate application wherein cargo described on the bill of lading as "Truck Engines, Diesel Engines Automotive for replacement" was assessed a different rate than that which is specified in the tariff as being applicable at the time. In lieu of a rate of $119.50 per cubic feet, which rate was assessed on the three shipments identified in the claim, the carrier's applicable United States/South and East Africa Conference Southbound Freight Tariff No. 2, FMC No. 3, provided in Item 255, Second Revised Page 152, Correction 106, a base rate of $70.25 per 40 cubic foot or 2,240 pounds, which rate should have applied on the shipments in question.

Ordinarily this observation would warrant the issuance of an order directing that the overcharge of $1,275.89 be refunded to the complainant. In this instance however, such action would be redundant for the reason that a check in full settlement of the overcharge has in the meantime been paid by the carrier as confirmed in letter of November 12, 1976, submitted by attorney for the complainant.

While in ordinary circumstances, the carrier could be admonished for taking unilateral action in a proceeding before the Commission and thereby prejudging the decision which might be rendered, I find that from a regulatory standpoint, the conference tariff did not prohibit an informal settlement of the rate issue and there was, therefore, no legal necessity to bring the matter before this agency for formal resolution. This position is based upon the fact that an informal settlement of the claim was not time barred by Rule 16 of the tariff as the carrier apparently believed. A careful review of the Rule reveals that it does not extend to errors involving the mere misapplication of a rate, which is the issue in this Docket. It is noted that the rule could be phrased in a clearer manner by appropriately inserting the words "except as otherwise provided" in the first paragraph in order to alert a tariff user of the pertinent exception which appears in part (3) of the rule.

Following is a statement of the rule as it appears on pages 110 and 111 of the tariff:

OVERCHARGES

Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier in writing before shipment involved leaves the custody of the carrier. Any expenses incurred by the carrier in connection with its investigation of the claim shall be borne by the party responsible for the error, or, if no error be found by the claimant. All other claims for adjustment of freight charges must be presented to the carrier in writing

within six (6) months after date of shipment. The limitation of six months does not apply to U.S. Government or its agencies.

(1) For purpose of uniformity in handling claim for excess measurements, refunds will only be made as follows:

(a) Where an error has been made by the dock in calculation of measurements.
(b) Against re-measurements at port of loading prior to ship's departure.
(c) Against re-measurement by steamer's agent at destination.
(d) By Joint re-measurement of steamer's agent and consignee.
(e) By re-measurement of a marine surveyor when requested by steamer's agent.
(f) Re-measurement fees and cable expenses in all cases to be paid by party at fault.

(2) In cases of claims by shipper of overcharges in weight, certified invoice or weigher's certificate to be considered evidence of proper weight.

(3) Except those claims for obvious error in calculation or misapplication of rate or rate basis, all claims of adjustment in freight charges must be presented to the carrier in waiting within six months after date of shipment.

The assessment of a rate which differs from that which the tariff provides clearly falls within the exception provided in paragraph (3) above as it relates to "misapplication" of a rate.

CONCLUSION AND OORDER

I find that in view of the fact that the claim at issue has been properly settled between the carrier and the complainant subsequent to the filing of this Docket with this Commission, and in view of the fact that there is no tariff regulation or statutory provision which bars the parties from informally taking such action, a formal order with respect to this Docket is unwarranted. Complaint dismissed.

(S) RONALD J. NIEFORTH,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 508

INTERNATIONAL PAPER COMPANY

v.

GULF UNITED KINGDOM CONFERENCE

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

March 23, 1977

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 March 23, 1977.

It is Ordered, That applicant is authorized to waive collection of $2,440.73 of the charges previously assessed International Paper Company.

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

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 508 that effective May 28, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 28, 1976 through December 16, 1976, the rate basis for 'Paper Bags, Dunnage, Inflatable' was W only, subject to all applicable rules, regulations, terms and conditions of said rate 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) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 508

INTERNATIONAL PAPER COMPANY

v.

GULF UNITED KINGDOM CONFERENCE

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Gulf United Kingdom Conference (Gulf/U.K. or Applicant) has applied for permission to waive collection (on behalf of Sea-Land Service, Inc.) of a portion of the freight charges on a shipment of paper bags that moved from New Orleans, Louisiana via Rotterdam to Preston, U.K., under Sea-Land bill of lading dated December 1, 1976. The application was filed on January 31, 1977, with a re-submittal on February 14, 1977 which supplied verified signatures missing from the original filing.

The subject shipment moved under Gulf/United Kingdom Conference Tariff No. 38, FMC–17, page 94—9th revised, effective May 28, 1976, which governs shipments from U. S. Gulf of Mexico ports to ports in the United Kingdom. The aggregate weight of the shipment was 7,863 pounds. The rate applicable at time of shipment was $270 W/M, under the noncontract rate for paper bags, dunnage, inflatable. The rate sought to be applied is $270 per ton of 2,240 pounds (weight only), per Gulf/United Kingdom Conference Tariff No. 38, FMC–17, page 94—10th revised (correction No. 1089), effective December 16, 1976.

Aggregate freight charges payable pursuant to the rate applicable at time of shipment amounted to $3,388.50 plus handling and wharfage charges. Aggregate freight charges at the rate sought to be applied amount to $947.77 plus handling and wharfage charges. The difference sought to be waived is $2,440.73. The Applicant is not aware of any other shipment

[1] This decision became the decision of the Commission March 23, 1977.

[2] 46 U.S.C. 817, as amended.

of the same commodity which moved via Sea-Land or Gulf/U.K. during the same time period at the rates involved in this shipment.

Gulf/U.K. offers the following as grounds for granting the application:

(4) On May 18, 1976, the Gulf United Kingdom Conference made a temporary filing, by telex, to become effective May 28, 1976, as follows:

	Contract	*Non-Contract*
Paper Bags, Inflatable, Dunnage	$211.75 W	$249.10
Min. 18 WT per HH container	$105.00 W	$123.50

However, when the permanent tariff filing (7th Rev. Page 94) was issued, the rates were erroneously shown on a "WM" basis. This error was carried on the 8th and 9th Revised pages, and not corrected until 10th Revised Page 94, effective December 16, 1976.

Meanwhile, on September 20, 1976, a general rate increase became effective, and the above rates were increased by 8 1/2%, rounded down to the next lowest 25 cents. 9th Revised Page 94 was changed to reflect the increased rates, but still incorrectly showed the rates to be on a "WM" basis, i.e.,

Paper Bags, Inflatable, Dunnage	$229.50 WM	$270.00
Min. 18 WT per HH container	$113.75 WM	$133.80

On December 1, 1976, International Paper Company shipped 7,863 lbs. (502 cu. ft.) of Paper Bags, Inflatable, Dunnage on a vessel of Sea-Land Service, Inc., and were assessed the non-contract rate of $270.00 WM, for total of $3,388.50, plus handling and wharfage charges. At the correct rate of $270.00 W, the freight amounts to $947.77, plus handling and wharfage charges. Sea-Land Service, Inc. therefore requests permission to waive collection in the amount of $2,440.73. International Paper Company concurs in this request.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90-298), and Rule 6(b), *Special Docket Application,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

Therefore, upon consideration of the document presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent inclusion of the symbol "WM" for "weight or measure" in the tariff, when only the symbol "W" for "weight only" had been intended.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Gulf/U.K. filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to Gulf/U.K. and Sea-Land Service, Inc., to waive collection of a portion of the freight charges, specifically $2,440.73. An appropriate notice will be published in the tariff of the Gulf/United Kingdom Conference.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
March 3, 1977.

TITLE 46—SHIPPING

CHAPTER IV—FEDERAL MARITIME COMMISSION

SUBCHAPTER A—GENERAL PROVISIONS

PART 502—RULES OF PRACTICE AND PROCEDURE

[GENERAL ORDER 16, AMDT. 18, DOCKET NO.76–61]

March 28, 1977

Miscellaneous Amendments

AGENCY: Federal Maritime Commission

ACTION: Final Rules

SUMMARY: Rules of Practice and Procedure are amended to authorize presiding officers to enter such order or rule as they deem proper when no answer to a complaint is filed within the time provided therefor, and to extend the time for filing answers; to permit the filing on the following business day when the two-year statutory limit for filing complaints seeking reparation expires on a Saturday, Sunday, or legal holiday; and to authorize presiding officers to order a hearing as well as the submission of additional evidence in proceedings conducted under the shortened procedure.

Effective Date: Upon publication in the *Federal Register*.
For further information contact:

Joseph C. Polking, Acting Secretary
Federal Maritime Commission
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523-5725

Supplementary Information: The Commission instituted this proceeding by Notice of Proposed Rulemaking published in the *Federal Register* on November 23, 1976 (41 F.R. 227) to amend sections 502.64 (Rule 5(d)), 502.101 (Rule 7(a)), 502.181 (Rule 11(a)), and 502.184 (Rule 11(d)) of its

Rules of Practice and Procedure, 46 C.F.R. 502. The Maritime Administrative Bar Association (MABA) and Sea-Land Service, Inc. (Sea-Land)submitted comments which the Commission has carefully considered. A section-by-section discussion of the rules and comments follows.

1. Section 502.64 (Rule 5(d)). This section presently provides that only the Commission may enter an appropriate rule or order in the event that a respondent fails to file an answer to the complaint within the time provided. The rule further provides that only the Commission or the Chief Judge may permit the filing of an answer beyond the time permitted.

The amendment proposed would transfer this authority to presiding administrative law judges. MABA and Sea-Land support the changes. The need under the present rule to defer to the Commission or to the Chief Administrative Law Judge the issuance of necessary orders and rulings causes undue delays. The Commission recognizes the importance of expediting the hearing process so as to bring pending controversies to a prompt resolution. Any rule that acts to expedite such process while at the same time honoring the due process requirements is clearly in the public interest. The amendment to section 502.64 will accordingly be adopted.

2. Section 502.101 (Rule 7(a)). By deleting the reference to section 502.63 (Rule 5(c)), in section 502.101, as proposed, the method of computing time provided in section 502.101 would be made applicable to the computation of the two-year period for filing complaints seeking reparation under section 22 of the Shipping Act, 1916, 46 U.S.C. 821. This would permit the filing of a complaint on the next business day when the last day of the limitation period ends on a Saturday, Sunday, or legal holiday.

MABA and Sea-Land Service, Inc. oppose the amendment and maintain that the Commission lacks authority to adopt a rule which would result in an extension of time for filing granted by statute. Section 22 is silent on how the two-year period is to be computed. While MABA's and Sea-Land's argument may have some superficial appeal, it overlooks the fact that the present rule may in fact act to shorten the time within which reparation may be claimed, a result rejected by the court in *Kraft Foods v. F.M.C. and U.S.A.*, 538 F.2d 445 (D.C. Cir. 1976). Because the Commission maintains no facilities for the filing of documents on days when its offices are closed the rejection of a filing on the next business day when the limitation period ends on a Saturday, Sunday, or legal holiday, would result in shortening by one or more days the time provided in section 22 of the Shipping Act, 1916.

MABA suggests the addition to section 502.101 of a warning of possible subsequent adverse judicial construction of this statutory requirement should the amendment be adopted. While there is always the possibility that a court might overturn the rule adopted here, this is unlikely in view

of the fact that the method of time computation reflected in section 502.101 has been generally applied by the courts in their construction of periods of limitation found in other statutes. See *e.g.*, *Sherwood Bros. v. District of Columbia*, 113 F.2d 162 (D.C. Cir. 1940); *Union National Bank v. Lamb*, 337 U.S. 38 (1949); *District of Columbia v. General Federation of Women's Clubs*, 249 Fed. 503 (D.C. Cir. 1957); *Dayton Power and Light Co. v. Federal Power Commission*, 251 F.2d 875 (D.C.Cir. 1958); *Wilson v. Southern Ry Co.*, 147 F.2d 165 (5 Cir. 1949). In any event, we believe that the "caveat" suggested is inappropriate. The suggestion is therefore rejected and the amendment will be promulgated as proposed.

3. Sections 502.181 and 502.184. The amendment to section 502.181 authorizes presiding officers to order hearings in proceedings conducted under the shortened procedure. Under the current rule while the Commission may order a hearing, the presiding officer has no such authority. MABA opposes giving the presiding officer authority to order a hearing "when none of the parties want it."

The amendment to section 502.184 authorizes presiding officers to order the submission of additional evidence. MABA maintains that the amendment is unnecessary as the presiding officer may now advise the parties that he considers the record insufficient and give them an opportunity to submit additional evidence "if they so desire" and may also rule against the party who has the burden of proof.

We see little merit to MABA's comments. The two amendments are aimed at correcting certain inconsistencies in the rules by giving presiding officers in proceedings conducted under the shortened procedure the same authority they have under section 502.311 (Rule 20) in proceedings for the formal adjudication of small claims. There is no rational basis for the disparity in these rules both dealing with complaint proceedings. As stated in our Notice of Proposed Rulemaking, the present limitation on the authority of presiding officers may cause unnecessary delay should the proceeding be remanded by the Commission for lack of sufficient evidence. The presiding officer should have the authority to conduct the proceeding in such a manner as will ensure a record adequate to support a decision in accordance with statutory requirements. We are therefore adopting the amendments of sections 502.181 and 502.184 as proposed.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553) and section 43 of the Shipping Act, 1916 (46 U.S.C. 841a), Part 502 of Title 46, Code of Federal Regulations, is amended.*

Effective Date. Inasmuch as the expeditious adoption of these rules is desirable and inasmuch as they are procedural in nature, they shall be

*The text of the amendment is reprinted in 46 C.F.R. 502.

effective upon publication in the *Federal Register* and shall be applicable to all pending and future proceedings.

By the Commission.*

(S) JOSEPH C. POLKING,
Acting Secretary

*Vice Chairman Morse dissenting.

I dissent in respect to deleting the words "except Section 502.63 (Rule 5(c))" from the first sentence of Section 502.101. See my dissent in *CSC International, Inc.* v. *Waterman Steamship Corp.*, Docket No. 75-31, Order on Remand, served October 15, 1976 (16 SRR 1510, 1512). Otherwise, I concur.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–13

PETITION OF NORTH ATLANTIC FRENCH ATLANTIC FREIGHT CONFERENCE AND NORTH ATLANTIC BALTIC FREIGHT CONFERENCE FOR A DECLARATORY ORDER

Section 14b(2), Shipping Act, 1916, is a notice provision and requires carriers and conferences of carriers to provide ninety days notice before increasing rates that are under their control.

Howard A. Levy for Petitioner the North Atlantic French Atlantic Freight Conference, and Petitioner North Atlantic Baltic Freight Conference, and the North Atlantic United Kingdom Freight Conference, North Atlantic Continental Freight Conference, North Atlantic Westbound Freight Association, Continental North Atlantic Westbound Freight Conference, Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference, South Atlantic-North Europe Rate Agreement, Continental-U.S. Gulf Freight Association, U.K./U.S. Gulf Freight Association, and the Europe Pacific Coast Rate Agreement.

John Mason and *Paul S. McElligot* for Sea-Land Service.

Peter G. Sandlund for the Council of European and Japanese National Shipowners Associations.

Stanley O. Sher for Iberian/U.S. North Atlantic Westbound Freight Conference, Marseilles-U.S.A. North Atlantic Freight Conference, Med-Gulf Conference, Mediterranean/North Pacific Coast Freight Conference, North Atlantic Mediterranean Freight Conference, and the West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference.

Elkan Turk, Jr. for the Far East Conference.

Leonard James and *David Nolan* for the Pacific Coast European Conference.

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

REPORT AND ORDER

March 28, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett and James V. Day, *Commissioners*)*

*Commissioner Bob Casey not participating.

This proceeding was initiated as a result of a petition filed by the North Atlantic French Atlantic Freight Conference and the North Atlantic Baltic Freight Conference requesting the Commission to declare the correct interpretation of the ninety day proviso of section 14b(2) of the Shipping Act, 1916. One carrier and 21 carrier conferences and associations have replied to the petition.[1] We heard oral argument.

POSITION OF THE PARTIES

Section 14b of the Shipping Act, 1916 authorizes the Commission to permit the use of dual rate contracts, provided, *inter alia,* that such cotracts contain certain express provisions. The provision required by clause (2) of section 14b, is that:

> . . . whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days.

The North European Conferences (NEC)[2] take the position that there are three possible alternative interpretations of this requirement, *i.e.,* (1) that the carrier is only required to give the shipper ninety days notice of any increase in rates, covered by an exclusive patronage (dual rate) contract; (2) that a carrier need only maintain a contract rate in existence for ninety days, and thereafter may increase that rate without any notice to the dual rate contract merchant; and (3) that a carrier may increase a contract rate upon thirty days notice to the shipper, but only after that dual rate has been in effect for ninety days. Of these alternatives, only (1) and (3) are acceptable to NEC.

In the view of NEC, the second alternative, ninety days effectiveness, is untenable because Congress allegedly intended to provide dual rate shippers with a greater period of rate stability than shippers in nondual rate trades as a *quid pro quo* for their patronage agreements with carriers.

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[1] North European Conferences
- Associated North Atlantic Freight Conferences
  - North Atlantic United Kingdom
  - North Atlantic Baltic Freight Conference
  - North Atlantic/French Atlantic Freight Conference
  - North Atlantic Continental Freight Conference
  - North Atlantic Westbound Freight Association
  - Continental North Atlantic Westbound Freight Conference
  - Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference
- South Atlantic-North Europe Rate Agreement
- Continental-U.S. Gulf Freight Association
- U.K./U.S. Gulf Westbound Rate Agreement

Council of European and Japanese National Shipowners' Association (CENSA)
Pacific Coast European Conference
Far East Conference
Iberian/U.S. North Atlantic Westbound Freight Conference
Marseilles-U.S.A. North Atlantic Freight Conference
Med-Gulf Conference
Mediterranean/North Pacific Coast Freight Conference
North Atlantic Mediterranean Freight Conference
West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference
Sea-Land Service, Inc.

[2] The Far East Conference generally adheres to the arguments of NEC.

Therefore, it is argued that Congress could not have intended that dual rate shippers would have no notice at all of rate increases.

NEC urges the adoption of the third alternative, thirty days notice and ninety days effectiveness. NEC notes that Congress enacted sections 18(b)(2)[3] and 14b(2) of the Act at the same time, in Public Law 87–346, and points out that in the former section Congress expressly used the word "notice,"[4] while in the latter section Congress did not mention the word "notice." From that choice of words NEC concludes that Congress intended that a dual rate remain in effect for ninety days, but that, thereafter, the carrier could increase that rate upon thirty days notice.

Sea-Land Service, (Sea-Land) also advocates the third alternative on the theory that no other reading of the statute is permissible, for there is no ambiguity in the statute requiring an interpretation. Sea-Land asserts that section 14b(2) applies only to a rate that is in force and effect, and is not concerned with advance notice. Sea-Land is of the opinion that notice is provided for in section 18(b)(2) of the Act, and the two sections are to be read in conjunction with one another. Thus, it is argued that since section 18(b)(2) of the Act requires only thirty days notice of rate increases for noncontract shippers, if the Commission is to interpret section 14b(2) as a ninety days notice requirement, the Commission will find itself in a dilemma. The Commission will either be in a position of requiring that the carrier give non-contract shippers ninety days notice of rate increase rather than the statutorily permitted thirty days notice, or of permitting the spread between the contract rates and ordinary rates to exceed the 15% permitted by section 14b(7) of the statute. Sea-Land argues that to give non-contract shippers the same notice as is given contract shippers would eliminate the benefit flowing to contract shippers, which is the consideration for the promise of those contract shippers to give all of their business to the carrier.

Sea-Land believes the court erred in *F.M.C. v. Australia/U.S. Atlantic Gulf Conference,* 337 F. Supp. 1032 (1972),when it indicated that section 14b(2) required ninety days notice of rate increases.

The Iberian/U.S. North Atlantic Westbound Conference, and others,[5] (Iberian) jointly argue that section 14b(2) is a ninety day notice provision only and that a ninety day in effect rule is unduly harsh. Iberian argues that when section 14b(2) was added to the Shipping Act, 1916, rate increases were rare, so it did not matter whether section 14b(2) was an effectiveness provision or a notice provision. Because present day economic circumstances require frequent rate increases, a ninety day

[3] In pertinent part section 18(b)(2), Shipping Act, 1916, provides:

No change shall be made in rates, charges . . . which results in an increase in cost to the shipper . . . except by the publication and filing . . . of a new tariff . . . which shall become effective not earlier than thirty days after the publication and filing thereof with the Commission. . . .

[4] The word "notice" does not appear in section 18(b)(2) of the Shipping Act, 1916.

[5] Marseilles-U.S.A. North Atlantic Freight Conference, Med-Gulf Conference, Mediterranean/North Pacific Coast Freight Conference, North Atlantic Mediterranean Freight Conference, and West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference.

effectiveness rule would allegedly now have a detrimental impact upon carriers.

Iberian also points out that the Commission itself applying the intent of the Congress rather than the literal meaning of the words of the statute, held, in *The Dual Rate Cases,* 8 F.M.C. 16 (1964) that section 14b(2) was a notice requirement only.

Finally, Iberian notes that section 14b(2) requires that dual rate contracts approved by the Commission "expressly" contain the clause required by section 14b(2). Because none of the contracts approved by the Commission contain a clause requiring the contract rates to be in effect for thirty days before those rates may be increased, Iberian concludes that the Commission has clearly found section 14b(2) to be a notice provision only.

The Council of European and Japanese National Shipowners' Associations (CENSA) and the Pacific Coast European Conference (PCEC) substantially agree with Iberian. CENSA submits that the Commission correctly decided *The Dual Rate Cases* and should reaffirm that holding here. PCEC is of the same opinion. In this regard, PCEC would dismiss, as erroneous, the Commission's statement in *Surcharges at U.S. Atlantic and Gulf Ports,* 10 F.M.C. 13 (1965) that:

> Sec. 14b(2) itself does not require such notice. However, the Commission added the clause because of its recognition that many mercantile transactions require rate stability for at least ninety (90) days. 10 F.M.C. at 24, note 10.

PCEC submits that the Commission made it quite clear in *The Dual Rate Cases* that the Commission was not "adding" the ninety day notice clause, but was merely interpreting section 14b(2).

Hearing Counsel are of the opinion that section 14b requires that a dual rate remain in effect for ninety days before it may be increased, and then only upon ninety days notice of the increase. They argue that the Commission could not have ignored the words of section 14b(2) in *The Dual Rate Cases,* so the Commission could not have interpreted that section as being a notice requirement only, as it clearly is a *durational* requirement. In the view of Hearing Counsel, ninety days *notice* was an added requirement, imposed pursuant to section 14b(9).

Hearing Counsel point out that section 14b(6) of the Shipping Act permits the merchant to cancel a dual rate contract on ninety days notice to the carrier. They assert that, if the merchant receives only thirty days notice of a rate increase under the contract, even an immediate cancellation of the contract would bind the merchant to pay the increased rate for sixty days before the merchant could escape the obligations of the dual rate contract. Congress allegedly could not have intended that result. Therefore, according to Hearing Counsel, section 14b of the Shipping Act requires both ninety days notice and duration before a dual rate may be increased.

The National Industrial Traffic League (NIT League), urges the

Commission to reaffirm its holding in *The Dual Rate Cases* that ninety days notice of rate increases is required by dual rate contracts. NIT League argues that its members do not agree that dual rates may be increased within ninety days following the effectiveness of the original rate. The Commission also received identical telegrams from 11 shippers,[6] and a similar telegram from the Dupont Company.

Discussion

Section 14b of the Shipping Act, 1916, in pertinent part, provides that the Commission shall permit the use of a dual rate contract if the contract:

> . . . expressly . . . (2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days; . . . [and] (6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice. . . .

Section 14b of the Act was included in H.R. 4299, introduced in the House of Representatives in February 1961. As originally introduced in the House, clause (2) of section 14b read ". . . fixes tariff rates for the carriage of goods under such contract for a reasonable period, subject to approval by the Federal Maritime Board, but in no case less than ninety days. . . ."

Some of the witnesses testifying before the House Committee considering that bill interpreted the original language of section 14b(2) as requiring ninety days notice of rate changes. For example, James A. Dennean testifying on behalf of the Far East Conference stated:

> Regarding the requirements of H.R. 4299 that the contracts provide for a minimum of ninety days' notice of rate changes, our Far East Shipper's contract now provides for a minimum of 90 days' notice of rate increases, which is a minimum period of stability which we have found have been most satisfactory to the shipping public. *Hearings on H.R. 4299 Before the Special Subcommittee on Steamship Conferences of the House Committee on Merchant Marine and Fisheries*, 87th Congress, First Sess., at 270 (1961). (Hereafter *House Hearings*).

Donald F. Wierda of the American Steamship Committee on Conference Studies was unsure as to the import of that provision. He testified:

> The wording of this item suggests that the rates must be set without any change whatsoever for a period of at least 90 days, but very frequently in foreign commerce market conditions require exporters and importers to come to the conference for assistance in maintaining the market by reducing their rates during the contract period and very frequently such reductions are effected. . . . our position should not be made inflexible by a law of the United States. On the other hand, if this item 2 is intended to prevent any increases in rates unless adequate advance notice is given, then it is entirely reasonable. We feel that any shipper under a contract should be given adequate advance notice of any changes in the contract which might increase his landed cost and to permit him to revalue his position and to redetermine the advisability of maintaining his contract provision. *House Hearings* at page 70.

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[6] These shippers took the following positions:

We endorse the position of the FMC in Docket No. 75-13. It is essential that we continue to have the protection available under the FMC interpretation in this docket if we are to meet our commercial obligations as American Shippers.

Most of the witnesses, however, read that provision literally, that is, requiring that the rate remain in effect for ninety days before the rate could be increased. For example, Grant Arnold on behalf of NIT League, after quoting clause (2), advised:

We are opposed to the provisions. . . .

The league previously suggested that carriers be required to give 90 days' advance notice of increases in rates.

[t]he League suggests changing proviso (2) to read: (2) Provides that applicable tariff rates and charges shall not be increased upon less than 90 days' notice. *House Hearings* at 281.

Likewise, Theodore Gommi of the National Association of Alcoholic Beverage Importers, referring to the ten conditions which the contract must meet in order to receive approval, stated:

We recommend that the second of these conditions be changed to require that no increase in tariff rates of the carriers be permitted without 90 days' notice of such a change. *House Hearings* at 411.

Alvin J. Shields on behalf of American Metal Climax, Inc., after quoting clause (2), remarked:

As that reads, it would mean that a rate cannot be made effective for less than 90 days and that a carrier, in order to meet, say some spot competitions, would be precluded from establishing a rate for a shorter period. . . . The question also arises as to what happens on the 91st day after a rate has been established. The day it is established it is good for 90 days' but on the 91st day the carrier is obliged to give only 30 days' notice of any change (sic) as covered by the proposed section 18(b)(2). We do not think that there should be a specific limit as to the period of effectiveness of any rate but simply a proviso in the bill that would require the carriers to give contracting parties at least 90 days' notice of a rate increase. *House Hearings* at 501.

As can be seen, only one witness understood that provision to be a notice provision. One witness was unsure of the import of the provision. The remainder of the witnesses understood it to be an effectiveness provision, and were opposed to such a provision and requested a ninety day notice requirement.

Another indication of the witnesses' understanding of the import of section 14b(2), as it was initially introduced, and the Committee members' intention in regard to that provision is found in a colloquy between Leonard James and the Committee in March 1961.

Mr. James began by asking the Committee to state the meaning of 14b(2). Counsel for the Committee responded, "That rate must be in effect for 90 days. It says so quite definitely, sir." *House Hearings* at 184. There ensued a discussion of the relationship of the notice provision of section 18 to the 90-day provision in section 14b(2). Mr. James said:

Under the provision of section 18, we would be required to give 30 days' advance notice to all shippers, whether contract shippers or not, of both increases and decreases; but the provision on page 2 [section 14b(2)] would require fixing tariff rates in conferences for a period of 90 days without any exception there. We have two different standards. *House Hearings* at 185.

Chairman Bonner responded:

Let me go back to the hearings that we held. It was persistently stated that, so as to aid our American commerce, rates could be given, an assured rate for 90 days or more, so that negotiations could be gone into be manufacturers for delivery of goods. *Id.*

Mr. James then stated:

We have no objection to giving a reasonable period of advance notice to contract shippers or to all shippers. *Id.*

Mr. James and the members of the Committee argued and concluded that 14b(2) as then phrased provided the rate period, *i.e.*, ninety days, while section 18 provided for the notice of increases, *i.e.*, thirty days, and that the two sections were not connected. Representative Mailliard gave his understanding of the intent of the Committee, as follows:

Mr. Chairman, I think Mr. James is right. I am not an attorney, but I think that the general provisions later on in the bill would not go to this section because this section is the detail under which the Board can approve these contract rates and I think that is binding regardless of what is in the other section of the bill; and I think inadvertently, because I do not think that is what we intended, the provision stands that you cannot change your rate upward or downward in less than 90 days regardless of what the Board says. *Id.*

Representative Downing concurred in that interpretation.

Upon being asked to state what suggestions he would make for alterations in the bill, Mr. James responded.:

Could we not perhaps get over that conflict there by amending section (2) to provide that, with respect to contracts, they shall afford to shippers not less than, let us say, reasonable notice of rate increases? *House Hearings* at 186.

The Committee suggested that, perhaps, as an alternative, section 18(b) could be amended in such a way as to apply to all sections of the bill. Mr. James argued that such an alteration would be inadequate. He explained:

That would not change my objection to it because, as I understand the provision on page 2, [section 14b(2)] that is a provision which has, as a matter of law, been fixed in all contracts and would require, as it says, tariff rates to be in effect for 90 days; and I think, if you are going to make any change in section 14 on page 2, you have to do it in that section right there. You have to make any proviso that apply there apply right there because, simply by changing the word "section" to "sections" you would refer to— *House Hearings* at 188.

Mr. James was cut off by the chairman, who suggested that making the word "section" plural would cause section 18 to apply to all sections of the bill. Mr. James denied that, asserting:

But these provisions, Mr. Chairman, do not apply to the contract. The provisions in section 18 have nothing to do with the contract that is concerned on page 2. [section 14b(2)]. *Id.*

Whatever the intention of the members of the Committee in March of 1961, the subsequent history of section 14b(2) seems to indicate that the Congress intended that a dual rate contract would provide for ninety days' notice to the merchant of any increase in the rates for goods carried under the contract. When the House Subcommittee reported out the dual rate bill they did so by introducing a clean bill, No. H.R. 6775. In that bill section 14b(2) read as follows:

(2) provides that, whenever a tariff rate for the carriage of goods becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased for a reasonable period, but in no case less than ninety days. . . .

That version of section 14b(2) passed the House, and, except for technical changes, passed the Senate and the entire Congress after conference.

In the Senate Hearings on the House Bill all witnesses characterized the new version of section 14b(2) as a notice provision. For example, Leonard James, then appearing for the Committee of European Shipowners, testified in reference to H.R. 6775:

Line 18, page 2 [section 14b(2)] requires each conference to give at least ninety days' notice of rate increases. *Hearings on H.R. 6775 Before the Subcommittee on the Merchant Marine and Fisheries of the Senate Committee on Commerce,* 87th Congress, First Sess., at 239 (1961). (Hereafter *Senate Hearings*).

Mr. James saw a distinction between the notice provisions of section 14b(2) and the notice provisions of section 18(b)(2) of the Shipping Act. In reference to the latter, Mr. James stated:

It should also be noted that rate control provisions differ even with respect to different classes of conferences and individual carriers.

For example, those using the contract rate system must give at least 90 days notice of rate increases to all shippers, contract or non-contract—page 2, line 22 [section 14b(2)]—while conference carriers and individual carriers not using the contract rate system need give only 30 days advance notice (page 9, lines 23, 24 (section 18(b)(2)). *Senate Hearings* at 249.

Matthew S. Crinkley on behalf of Isbrandtsen Co., in commenting upon the safeguards contained in H.R. 6775, testified:

Item (2), page 2 [section 14b(2)], requires at least 90 days' notice of any increase in freight rates, and since this is a period usually provided in conference contracts, it would appear this provision should not present too much of a problem to the conference lines. *Senate Hearings* at 533.

An identical interpretation was placed on section 14b(2) in H.R. 6775 by Barber Steamship Lines (*Senate Hearings* at 675); by James A. Dennean on behalf of the Far East Conference (*Senate Hearings* at 712); and by Lewis C. Paine on behalf of Amerind Shipping Corp. (*Senate Hearings* at 719).

The above testimony regarding section 14b(2) does not conclusively establish that the Congress intended that provision to be a notice provision. However, section 14b(2) does interact with another provision of section 14b, that is, the provision dealing with the termination of the contract.

Section 14b(2) now reads:

(6) permits the contract shipper to terminate at any time without penalty upon ninety days' notice. . . .

Section 14b(6) as it now reads, replaced three provisions originally contained in H.R. 4299. As introduced on February 15, 1961 those provisions read:

(6) permits the shipper to terminate without penalty if the carrier or conference increases rates or charges applicable to the cargo within the contract period; (7) permits the shipper to terminate without penalty where the other signatory is a conference of carriers and when the carrier or carriers that have customarily carried the major share of the shipper's cargo withdraw from the conference; (8) terminates without penalty at the end of the contract period unless affirmatively renewed. . . .

In his testimony before the House, Matthew S. Crinkley tied clause (6) of section 14b to clause (2) of that section. He stated:

I think that the provision here is alright. I would say that it could be that, in equal protection to the carriers and shippers, contracts could be canceled by either party on the same notice as required for rate increases, 90 days. Either party could cancel on 90 days' notice. That is the case with this upper provision [6] where you provide that, if a shipper does not accept a rate increase, he can cancel his contract. It could be tied to the same period. If some of the lines insist that 90 days is too much and 60 days ought to be the time, then the contract could be canceled on 60 days' notice. It could be against the provision for the rate increase. *House Hearings* at 357.

As it passed the House, and sent to the Senate as H.R. 6775, clauses (6), (7) and (8) had been combined and revised into the present clause (6) of section 14b.

Mr. Crinkley testified again in the Senate where he discussed section 14b(2) and section 14b(6) as they now appear in the statute. In reference to section 14b(6) Mr. Crinkley stated:

This section would permit the contract shipper to terminate his contract on 90 days notice—presumably without having to give a reason. I think this is proper especially when the contract carriers are required to give 90 days notice of a rate increase. To keep the matter in balance, if a shorter period of time is permitted for notice of a rate increase by contract carriers, then the contract shipper should be permitted to cancel his contract within the same notice period. *Senate Hearings* at 533.

Section 14b(2) of the Shipping Act also interacts, to some extent, with section 18(b)(2) of the Act. As indicated above, some of the witnesses before the House interpreted section 14b(2), as it was originally introduced in the House, as being a provision which fixed the tariff rates for a ninety day period. One of those witnesses, Edward Branstent, testifying on behalf of the Pacific Coast Coffee Association, discussed the interaction of section 14b(2) and section 18(b)(2):

Likewise, after the initial fixed rate period specified for dual rate agreements in item (2) on page 2 of H.R. 4299 [section 14b(2)], there is no provision in the bill for advance notice of changes in rates under dual rate agreements except the 30-day notice provision of paragraph (2) of section 18(b) on page 8 of the bill. This 30-day notice provision is required to afford shippers protection in all of these situations. *House Hearings* at 394-95.

However, in the Senate, after section 14b(2) and section 14b(6) had been changed to read substantially as they now appear, Matthew S. Crinkley saw the interaction of section 14b(2) and section 18(b)(2) differently.

I see no particular wrong in the requirement that 30 days' notice should be given as to increases. The contract would set up either 60 or 90 days as the notice period, but the people who don't sign a contract are also entitled to consideration, and there should be some notice period provided, especially if you have a group of lines that are acting in concert. *Senate Hearings* at 524.

Thus, Mr. Crinkley saw section 18(b)(2) as providing notice to non-contract shippers, while section 14b(2) provided notice to contract shippers.

As originally introduced, the bill clearly provided that the contract rates would be fixed for ninety days (section 14b(2)); and that *no* change in any rate could become effective until thirty days after that change had been publicly filed with the Commission, unless the Commission permitted the change to become effective in less than thirty days. Carriers and shippers appeared before the House Committee and complained that, by fixing the rates for ninety days, carriers would be precluded from granting to shippers a rate reduction urgently needed to permit the shippers to meet their competition. The carriers and shippers argued that even if the Commission was given authority to allow rates to become effective on less than thirty days notice, the carriers would be prohibited from granting the speedy reduction in rates to shippers necessary to meet spot competition, as the carriers and shippers expected that the Commission would not act expeditiously on the request for a short notice reduction.

It could be said that the changes subsequently made to section 14b(2) and section 18(b)(2) by the Committee were intended to meet these complaints by requiring thirty days notice for rate *increases* to non-contract and contract shippers under section 18(b)(2) and providing in section 14b(2) that no dual rate could be *increased* unless it was in *effect* for ninety days. There is a flaw in this reasoning, however, and it can be found in the changes made in section 14b(6) of the Act.

As originally introduced in the House, section 14b(6) permitted the contract shipper to terminate the contract contemporaneous with the effectiveness of any increase in a contract rate. Thus, if the contract rate had been in effect for ninety days, and thereafter increased upon thirty days notice, the contract shipper would be released from his obligations under the contract as soon as the increase in the rate became effective. However, when the House changed sections 14b(2) and 18(b)(2) to read substantially as they now read, the House also changed section 14b(6) to provide that the merchant could terminate the contract without any reason, but only upon ninety days notice to the carrier. As a result, if section 14b(2) is read as an *effectiveness* provision with notice provided in section 18(b)(2), then the merchant would be bound to the contract at the increased rate for at least sixty days after that increased rate became effective because he would be required to give ninety days notice of termination. While the Congress could have intended that the Commission would add a clause permitting the merchant to terminate the contract contemporaneous with the effectiveness of any increase, as the Commission has in fact done, there is no indication of any such intention in the legislative history. Moreover, it is unlikely that a House Committee so scrupulously attentive to the interest of contract shippers would have left so vital a point to administrative rulemaking.

The sounder interpretation of the 1961 changes to the Shipping Act,

1916, and the one which is more fully supported by the legislative history, is that section 14b(2) is a notice provision governing the filing of rates covered by a dual rate contract, and 18(b)(2)is a notice provision limited to the filing of non-contract rates. Such an interpretation is also consistent with the changes made in section 14b(6) of the Act.

Faced with complaints from the carriers that fixing rates for a period of time was undesirable, and that all that was required was adequate notice to the contract shipper, as had been the longstanding practice of the carriers in the dual rate contracts then existing; and complaints from shippers that a ninety day fixed period of effectiveness for a rate was inadequate protection to the shipper because on the ninety-first day after a rate had been established the shipper would receive only thirty days notice of any increase, the House changed its scheme and provided ninety days notice to contract shippers and thirty days notice to non-contract shippers. This interpretation is bolstered by the testimony, before the House and Senate Committees considering the bill, reading section 14b(2) as it was originally introduced in the House as a provision which fixed the contract rate for ninety days, but reading that clause as it passed the House to be a provision requiring ninety days notice of rate increases; and linking it to the notice required for termination as provided in section 14b(6). Although the testimony of witnesses before legislative committees does not conclusively establish the intent of the legislature in enacting a statute, the testimony regarding this statute carries greater weight than usual because at no time did the Committee members or staff disagree with the witnesses' reading of section 14b(2) as a notice provision.

Thus, although the legislative history of the dual rate law is not conclusive and would permit section 14b(2) to be read either as a notice provision or as an effectiveness provision, we interpret section 14b(2) as a notice provision.

In *The Dual Rate Cases,* 8 F.M.C. 16 (1964), we brought together, considered, and resolved all of the conflicting interpretations and desires of the many carriers and merchants participating in the enactment of the dual rate law. In *The Dual Rate Cases,* we required that all dual rate contracts provide for ninety days *notice* of rate increases. Hearing Counsel argue that the notice provision was added pursuant to our authority under section 14b(9) of the Shipping Act, wherein the Commission is authorized to require and permit such other clauses in dual rate contracts as are not inconsistent with section 14b. Hearing Counsel errs.

In our discussion of section 14b(2) in *The Dual Rate Cases,* we stated:

> Under the second numbered provision of section 14b all contracts must contain a provision which expressly: [here we quoted section 14b(2) of the Act].
>
> Read most literally, this provision of the statute would simply require that rates would not be increased more often than once every 90 days. However, numerous witnesses, both shippers and carriers, who testified before the Senate and House Committee during the consideration of H.R. 4299 and H.R. 6775 viewed this provision as requiring 90 days' *notice* of rate increases rather than the bare assurance that rates would not be increased more often than once every 90 days. It was recognized by these witnesses that

merchants offering goods for sale in our foreign commerce must know the ocean freight rate well in advance of shipment. A contract which merely assures the merchant that a rate which was increased today will not be again increased sooner than 90 days from today does not meet this need. With the passage of each day under such a contract the merchant has one day less for the planning of future sales and after the running of the initial 90 days the merchant is assured of nothing. It appears therefore the overriding intent of the statute and the reasonable requirements of our foreign commerce demand that merchants be given a minimum of 90 days' advance notice of increases in rates. This would seem a reasonable *quid pro quo* on the part of the conference for the merchant's exclusive patronage.

. . . In keeping with the legislative intent that the Commission should, insofar as possible, standardize dual rate contracts, we are requiring that all contracts include a uniform clause relating to provision (2) of section 14b. This clause, which is set out below, requires 90 days' notice of rate increases and includes the additional cancellation provision just discussed. [The provision whereby the merchant may terminate the contract if the carrier does not rescind the rate increase.] Rate increases necessitated by emergency conditions outside the control of the carriers are permitted under a separate contract provision which will be discussed below. *The Dual Rate Cases* at 27–28.

We thereupon prescribed the rate increase provision found in article 4 (a) of the Uniform Merchants Rate Agreement (UMRA), 46 C.F.R. 538.10. That article provides only for ninety days advance notice of rate increases, and does not require that the rate have been in effect for ninety days before a rate increase can be made effective.

Nowhere in *The Dual Rate Cases* or in the UMRA do we expressly require dual rate contracts to provide that a contract rate must have been in effect for ninety days before that rate may be increased. Clearly, we were interpreting section 14b(2) to be a notice provision, for we advised that the witnesses before the Congressional Committees ". . . viewed *this provision* as requiring 90 days' *notice* of rate increases rather than the bare assurance that rates would not be increased more often than once every 90 days." (first italics added) *The Dual Rate Cases* at 27. Thus, we elected to and did interpret section 14b(2) of the Shipping Act to be a notice provision and did not add that requirement pursuant to our authority under section 14b(9).

In September, 1966 we completed our consideration of the dual rate law by promulgating General Order 19, the conclusion of a rulemaking proceeding commenced in March of 1961. In that General Order we provided for the procedures governing the filing and approval of dual rate contracts, and for a uniform merchants rate agreement. In that General Order we brought together all of the provisions required in *The Dual Rate Cases* and the several changes, not relevant here, to those provisions permitted after the report in *The Dual Rate Cases*.

However, shortly before the promulgation of General Order 19 we decided the case styled, *Surcharge at U.S. Atlantic-Gulf Ports*, 10 F.M.C. 13 (1966). In a footnote in that case we wrote:

Sec. 14b itself does not require such notice [90 days notice]. However, the Commission added the clause because of its recognition that many mercantile transactions require rate stability for at least 90 days. *Surcharge* at 24, note 10.

Hearing Counsel cite that footnote as support for their contention that the Commission added the ninety-day notice requirement pursuant to its authority under section 14b(9) of the Act. That footnote, unimportant to the *Surcharge* case, is in error, for, as indicated above, in *The Dual Rate Cases* the Commission expressly found that section 14b(2) as requiring ninety days notice of rate increases, and no dual rate contract approved in *The Dual Rate Cases* contained a provision requiring that a contract rate be in effect for 90 days before the rate could be increased.

We have not been persuaded that our interpretation of section 14b(2) in *The Dual Rate Cases* was in error. On the contrary, our reexamination of the legislative history of section 14b(2), as discussed herein, supports our earlier finding.[7]

Thus, we conclude that the proviso in 14b(2) of the Shipping Act, 1916 which provides that a "tariff rate . . . under the control of the carrier or conference of carriers, [it] shall not be increased before a reasonable period, but in no case less than ninety days" is a notice proviso and no tariff rate under the control of the carrier shall be increased on less than 90 days notice to the contract shipper.

THEREFORE, IT IS ORDERED, That this proceeding be discontinued.

(S) JOSEPH C. POLKING,
Acting Secretary.

[7] The discussion herein is limited to the express issues set forth in our notice instituting this proceeding and nothing herein shall be construed to address any other matter.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 324(I)

CATERPILLAR TRACTOR COMPANY

v.

UNITED STATES LINES, INC.

ORDER ON REVIEW OF SETTLEMENT OFFICER'S DECISION

March 29, 1977

This proceeding was instituted by informal complaint filed by Ocean Freight Consultants (OFC) as assignees of Caterpillar Tractor Company against United States Lines, Inc. Complainant alleges that respondent has subjected Caterpillar to an ocean freight rate in excess of the properly applicable tariff rate. Respondent consented to the informal adjudication procedure but did not file an answer to the complaint. The Settlement Officer served his decision denying reparation. We determined to review.

DISCUSSION

The bill of lading pertaining to the shipment in question was prepared by Harper Robonson & Co., acting as agents for the shipper. It indicates that the shipment moved in two house to house containers loaded by the shipper. Further, the shipper's agent described the cargo as "manufacturer's parts for assembly," and also specified the applicable rate of $45.00 W/M under Tariff Item No. 8576[1] which refers to "Tractors and parts N.O.S. packaged." Freight charges assessed at $45.00 per 40 cubic feet amounted to $2,513.25.

OFC contends that in view of the description in the bill of lading the shipment should have been rated per Tariff Item No. 8586[2] which refers to "Tractor parts for assembly purposes (not replacement) packaged" at $57.00 per 2,240 pounds. Computed on that basis freight charges would amount to $1,818.20 or $695.05 less than collected by respondent.

The basic question for consideration is whether complainant has

[1] North Atlantic UNITED KINGDOM Freight Conference Tariff No. (47) FMC-2, 6th Rev. Page 182, effective October 24, 1972.

[2] Same tariff of rates as fn. 1. Subject to a minimum of 35,000 lbs. per container.

demonstrated that the lower rate is more properly applicable to the shipment in question.

In support of its claim OFC has submitted the bill of lading, a "Special Note," and certain sheets from the shippers "Master Invoice." A review of the "Special Note" and of the shipper's invoice sheets reveals the following:

The "Special Note" offered in lieu of an unavailable packing list is a statement prepared almost two years after the date of shipment (November 21, 1972—November 14, 1974). Written on plain white paper and signed "A.F. Mosher, Export Rate Analyst" it asserts that the shipment consisted of "Tractor Parts for Assembly." No mention is made of whether Mr. Mosher was at the time of the shipment and is now in the shipper's employ, nor does it say what is the source of Mr. Mosher's knowledge on this matter. We agree with the Settlement Officer that this provides little in the form of proof.

The shipper's invoice sheets, on the other hand, list various items identified by technical names and numbers sold by Caterpillar Tractor Company of Peoria, Illinois, to Caterpillar Tractor Company, Ltd., of Glasgow, Scotland. The Settlement Officer found the nexus between the invoices and the bill of lading insufficient inasmuch as the nexus consisted only of a handwritten notation number. Even assuming that the handwritten annotations were made at the time and truly reflect the dates the listed items were forwarded to respondent, there is no indication, nor can it be ascertained on the face of these invoices that they represent a complete list of what the two containers actually held.

In light of the foregoing we agree with the Settlement Officer's conclusion that the "Special Note" and the shipper's invoice sheets have little probative value. Conspicuously missing from OFC's attempt to prove its claim are copies of documents exchanged between shipper and carrier upon delivery of the cargo to the carrier such as export declaration. packing list and dock receipt. Such absence is especially significant inasmuch as the Settlement Officer by letter dated March 25, 1975, specifically allowed complainant to supplement the record to provide further ". . . evidence of what in fact was actually shipped. . . ." Complainant in reply to this letter furnished only the above-mentioned manufacturer's invoices and a further explanation that the evidence already submitted was ample.

Complainant's further explanation suggests that because Caterpillar manufactures tractors and the bill of lading describes the commodity as "Manufacturer's Parts for Assembly," the conclusion must be reached that the shipment consisted of "Tractor Parts for Assembly." Complainant argues that the word "Manufacturer" is synonymous with "Tractor" in this case. Unfortunately for complainant, Caterpillar is not synonymous with tractor. The decription in the complaint itself of the scope of Caterpillar's business shows that it is engaged in the manufacture of

equipment not limited to tractors. The description reads, ". . . earth moving machinery and material handling machinery and tools."[3]

As indicated above the shipper's agent prepared the bill of lading and specified the rate to be assessed. As the containers were loaded by the shipper and the bill of lading prepared by the shipper's agent, it is reasonable to presume, in the absence of proof to the contrary, that the agent knew the contents of the two containers and properly classified and rated the cargo. While we have held that the description on the bill of lading is not the single controlling factor in claims alleging misclassification of cargo, the evidence offered by OFC failed to rebut the presumption that the agent knew the contents of the containers when preparing the bill of lading and rating to cargo.

Complainant has also suggested that its claim should be treated as being established inasmuch as respondent did not reply to the complaint. The Settlement Officer was not persuaded by this argument. He stated that although statements may be uncontroverted they are not thereby taken as proved. He also expressed certain doubts about a previous Commission decision in *Ocean Freight Consultants v. Royal Netherlands Steamship Company*, Docket 72-39 Report on Reconsideration served January 30, 1975, which he apparently feared could be read as unqualifiedly standing for the proposition that unrefuted allegations are to be accepted as fact.

We agree with the Settlement Officer that failure of respondent to answer does not preclude examination of the proof by the Commission. As indicated by the Settlement Officer Rule 5 of the Commission's Rules of Practice provides at 46 CFR 502.64:

> In the event that respondent should fail to file and serve the answer within the time provided, the Commission may enter such order as may be just, or may in any case require such proof as to the matters alleged in the complaint as it may deem proper.[4]

Our previous decision in *Ocean Freight Consultants* is not inconsistent with this because in the former case the complainant was found to have sustained the burden of proof not only because relevant facts were unrefuted but because additional evidence supported those facts to the Commission's satisfaction. The former case is also distinguishable because it did not involve failure to file an answer but involved failure of respondent to deny certain of complainant's allegations *in its answer*. They provision of the Rules of Practice applicable to failure to deny is more emphatic as to what is deemed to be established. The rule reads:

> "Recitals of material and relevant facts in a complaint . . . unless specifically denied in the answer thereto, shall be admitted as true, but if request is seasonably made, a competent witness shall be made available for crossexamination on such evidence."

Accordingly, the Settlement Officer's concern about reconciling the

[3] Moody's Industrial Manual lists among Catepillar's prime products, pipe layers, tool bars, hydraulic controls, cable controls, industrial and marine engines, hydraulic excavators, compactors, and inertia welders.

[4] See our report in Docket 75-15 served January 5, 1977, as a recent example where the Commission examined the proof but further supported its conclusions by reference to Rule 5.

Ocean Freight Consultants case with burden of proof requirements is unwarranted.

In conclusion, we agree with the Settlement Officer that complainant has not satisfactorily demonstrated that an overcharge occurred and the claim for reparation is denied.

Vice Chairman Clarence Morse, concurring. I concur only in the result, but in so doing have the following observations.

We have here a not-uncommon situation where a shipper gives a generalized description of a shipment to its expert—the ocean freight forwarder—and the latter blindly utilizes that description when preparing the ocean bill of lading. There is no tariff commodity description covering "manufacturer's parts for assembly" but instead the forwarder applied the tariff's "Tractors and parts N.O.S. packaged" rate in extending the freight computations. Since the shipper's commodity description did not match the tariff commodity description, the forwarder should have contacted the shipper, explained the situation to it, and obtained the shipper's authorization to properly describe the shipment in the bill of lading to match the applicable tariff commodity description. In my opinion, the freight forwarder has failed in adequately exercising the degree of expertise which a shipper is entitled to receive from any licensed ocean freight forwarder.[5] If I were a shipper I would hold the forwarder legally liable for any loss suffered, or fire it, or both. Furthermore, I would initiate a proceeding to have a forwarder's license canceled if the forwarder has a pattern of such acts.

In this case the Commission gave claimant a "second bite at the cherry" for the purpose of enabling it to establish the true nature of the goods shipped. Surely we need go no further in attempting to comply with the directives of *Isbrandtsen Co., Inc.* v. *U. S.*, 96 F. Suppl. 883 at 892 (1951), aff'd per curiam, 342 U. S. at 950. Not only did claimant fail to produce such evidence, but it (and the majority) ignored the mandates of the tariff rules. Rule 3(f) (Tariff 2nd Rev. page 9) provides in part:

(f) Description of commodities shall be uniform on all copies of the Bill of Lading and must be in essence in conformity with United States Export Declaration covering the shipment. Carrier shall verify the Bill of Lading description with the United States Export Declaration and request amendment of the Bill of Lading in the event of nonconformity with the United Staes Export Declaration. Amendments in the description on the Bill of Lading will only be accepted if in conformity with the United States Export Declaration or as supported by United States Custom House Form 7403. Trade names are not acceptable commodity descriptions and Shippers are required to declare their commodity by their generally accepted or generic common name.

(g) If shipments are not covered by a Shipper's Export Declaration as permitted by Export Control Regulations, shippers must insert the applicable commodity Schedule B number in the Line copy of the Bill of Lading. . . .

[5] Section 44 (b) and (e), Shipping Act, 1916, as amended: 46 CFR 510.9 and 510.23.

See my dissent in *Carborundum Company* v. *Royal Netherlands*, Docket No. 75–15, served January 5, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 329(I)

JOHNSON AND JOHNSON INTERNATIONAL

v.

ROYAL NETHERLANDS STEAMSHIP CO.

ORDER ON REVIEW OF SETTLEMENT OFFICER'S DECISION

March 28, 1977

Settlement Officer James S. Oneto served his decision in this proceeding October 3, 1975 wherein he determined that complainant's claim for reparation on an alleged overcharge of ocean freight should be granted. We determined to review.

Upon review of the Settlement Officer's decision we are of the opinion that his conclusions are proper and well founded. We wish, however, to clarify one aspect of his decision and to further support the ultimate conclusion of his decision by reference to subsequent decisions of the Commission.

The Settlement Officer referred to our decision in *Ocean Freight Consultants* v. *Royal Netherlands Steamship Company;* Docket 72–39 Report on Reconsideration served January 30, 1975, as having modified if not overruled the decision in Dockets 303(F) and 304(F) *Johnson & Johnson International* v. *Prudential Grace Lines, Inc*. The latter case had been cited by complainant to support its claim. We find the Settlement Officer's statement to be misleading inasmuch as the *final* decision of the Commission in *Johnson & Johnson* is in fact totally consistent with the decision in *Ocean Freight Consultants* and could not have been overruled thereby because it was issued later in time. The decision that was modified, however, by *Ocean Freight Consultants* (and also by the later Commission decision in Johnson & Johnson) is the *initial* decision in Johnson & Johnson. We wish to clarify that it is the initial decision in Johnson & Johnson that was quoted by complainant and it is the initial decision to which the Settlement Officer was referring as being overruled.

Finally, it should be pointed out that in addition to the grounds mentioned by the Settlement Officer for not adhering to the "trade name"

tariff rule we have recently adopted other grounds for reaching the same conclusion. See Commission Reports in Docket 75–15—*The Carborundum Company* v. *Royal Netherlands Steamship Company* and Docket 75–27—*Abbott Laboratories* v. *Venezuelan Line,* both served January 5, 1977.

Vice Chairman Clarence Morse, dissenting. I dissent.

See my dissent in *Abbott Laboratories, Docket 75–27, supra.*

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–35

AGREEMENT NO. T–2880, AS AMENDED, ET AL.

DOCKET NO. 74–42

POUCH TERMINAL, INC.

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

ORDER ADOPTING INITIAL DECISION

March 31, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Ashton C. Barrett, Bob Casey, and James V. Day, *Commissioners*)

This consolidated proceeding began with a Commission Order of Investigation and Hearing (Docket No. 74–35) into the approvability of six exclusive terminal lease agreements executed in the summer of 1973 between the Port Authority of New York and New Jersey (Port Authority) and five different common carriers by water or terminal operators subject to the Shipping Act, 1916 (Act). Shortly thereafter, Pouch Terminal, Inc. (Pouch), which had initially lodged section 15 protests against the lease agreements, filed a section 22 complaint (Docket No. 74–42) against the Port Authority alone. Pouch claimed that the leases were implemented without prior FMC approval, alleged violations of Shipping Act sections 15, 16 and 17, and sought $3,500,000 in reparations.

The Initial Decision of Administrative Law Judge Stanley M. Levy (Presiding Officer) held that the lease agreements were subject to section 15 of the Act and met the standards for approvability enunciated by that section.[1] Although the Presiding Officer found that the proposed terminal rents would not cover the Port Authority's fully distributed costs

[1] The Presiding Officer did not approve Agreement No. T–2882 on the grounds that the parties no longer intended for the lessee to occupy Pier 12 (the Agreement covering Pier 12 is actually designated No. T–2881, however). Agreement No. T–2884 was approved on the condition that it be amended to reflect the fact that only Pier 2 and not Piers 1 and 2 were to be used by the lessee. Such an amendment (No. 8) has been filed with the Commission.

(including interest expense), he nonetheless concluded that the agreed upon amounts were basically fair and reasonable in light of the dwindling, highly competitive market for breakbulk cargo in the Port of New York. Pouch's complaint was dismissed, and no unauthorized implementation of the lease agreements was found to have occurred.

The Commission now has before it the "Exceptions to the Initial Decision" filed by Pouch and the "Replies to Exceptions" filed by the Port Authority, the lessees of nine Brooklyn Marine Terminal Piers owned by the Port Authority (Lessees), and the Commission's Bureau of Hearing Counsel.

Pouch argues that the Initial Decision is erroneous because: (1) economic adversity cannot justify a noncompensatory terminal lease; (2) there is no evidentiary support for finding the subject leases "fair" or "reasonable"; (3) there is substantial evidence of prior implementation of the lease agreements; and (4) there is substantial evidence that Pouch was harmed by the implementation of the leases.

After a careful review of the entire record, we have determined that these arguments were fully presented to the Administrative Law Judge and that his findings and conclusions thereon were well founded and correct. Accordingly, we shall adopt his decision as modified by the following supplemental findings and conclusions of our own.

SUPPLEMENTAL FINDINGS

The Port Authority entered into the following "minimum/maximum" pier rental agreements (Lease Agreements) for Brooklyn Marine Terminal facilities (Brooklyn Piers) in mid-1973:

1) No. T–2880, as amended, with Barber Lines A/S (Barber), for the exclusive use of Piers 9A and 9B at an annual rent of not more than $1,027,965 nor less than $513,982.50. Term of occupancy: September 1, 1973 until June 30, 1974 (10 months) and month to month thereafter. Barber's prior lease with the Port Authority for these facilities was to have continued until December 31, 1973. Piers 9A and 9B were declared Public Piers by the Port Commissioners effective January 1, 1974.

2) No. T–2881, as amended by T–2881–1, with Pittston Stevedoring Corp. (Pittston), for the exclusive use of Pier 12 at an annual rent of not more than $600,000 nor less than $300;000. Term of occupancy: August 1, 1973 until October 31, 1975 (27 months) and month to month thereafter. *This agreement was cancelled effective November 1, 1975 and Pittston no longer occupies or intends to occupy Pier 12.* Pittston's prior lease with the Port Authority for this facility was to have continued until April 30, 1975. Pier 12 was declared as Public Pier by the Port Commissioners effective May 1, 1975.

3) No. T–2882, as amended, with Pittston for the exclusive use of Pier 10 at an annual rent of not more than $514,855 or less than $257,428. Term of occupancy: August 1, 1973 until March 31, 1975 (20 months) and month to month thereafter. Pittston's prior lease with the Port Authority for this facility was to have continued until September 30, 1974. Pier 10 was declared a Public Pier by the Port Commissioners effective September 1, 1974.

4) No. T–2883, as amended, with Nippon Yusen Kaisha (NYK) and International Operating Corp. (ITO), for the exclusive use of Pier 7 at an annual rent of not more than $720,000 or less than $360,000. Term of occupancy: September 1, 1973 until June 30, 1977 (46 months). A prior NYK/ITO lease with the Port Authority for this facility was to

have continued until June 7, 1976. *Pier 7 has not been declared a Public Pier by the Port Commissioners.*

5) No. T–2884, as amended, with Universal Maritime Service Corp. (UMS), for the exclusive use of Pier 2 at an annual rent of not more than $431,050 or less than $215,535. Term of occupancy: May 1, 1973 until January 31, 1974 (9 months) and month to month thereafter. Piers 1 and 2 were both used by UMS between May 1, 1973 and July 31, 1973 at a proposed maximum rental of $1,086,550 (Agreement No. T–2884–6) and between August 1, 1973 and February 29, 1974 at a proposed maximum rental of $625,487.50 (Agreement No. T–2884–7). UMS's prior lease with the Port Authority for Piers 1 and 2 expired April 30, 1973, *but these facilities were not declared Public Piers by the Port Commissioners until October 1, 1973.*

6)No. T–2885, as amended, with UMS for Piers 4 and 5 at an annual rent of not more than $641,992 or less than $320,996. Term of occupancy: from month to month upon the expiration of UMS's prior fixed term lease with the Port Authority on December 31, 1973. Piers 4 and 5 were declared Public Piers by the Port Authority effective January 1, 1974.

Pittston's abandonment of Pier 12 and performance of all Brooklyn operations at Pier 10 increases the likelihood Pittston will handle sufficient cargo to make Lease Agreement T–2882–1 fully compensatory.

UMS' abandonment of Pier 1 and performance of all Brooklyn operations at Pier 2 increases the likelihood UMS will attract sufficient cargo to make Lease Agreement No. T–2884–7/8 fully compensatory.

The Port Authority did not bill the Lessees in accordance with the variable per ton charges stated in its public tariff (FMC Schedule No. PA–9), but instead sent monthly "on account" statements to each "mini-max" tenant in the amount of 1/12th the maximum proposed rentals with the understanding that these payments would be subsequently adjusted to reflect either the public tariff rates or the mini-max rates, depending upon the Commission's final decision herein. The "on account" statements also equaled the monthly charges under the previous long term written rental agreements the Lessees had had for the same facilities.

Except for Agreement No. T–2883 (NYK and ITO), the stated terms of the prior leases had expired long before the record was closed in this proceeding (January 1976). None of these prior leases were approved by the Commission.

Pittston, ITO and UMS have not always paid the Port Authority's monthly "on account" statements when due.[2] Over $1,500,000 in arrearages have accumulated since mid-1974, about $1,100,000 of it on Pittston's account. The Port Authority has not taken legal action to collect back rents from Pittston, ITO or UMS, but has requested payment by letter and telephone and has not excused the debt. Pittston has experienced serious financial difficulties since 1974.

Neither the proposed agreements nor the Port Authority's public tariff contain provisions for the extension of credit.

Pouch ultimately attempted to rent its three pier Staten Island facility at a flexible rate of $1.50 per ton, $0.50 less than the Port Authority's $2.00

[2] In the case of Pittston, extensions of credit in excess of 90 days apparently began under its preexisting leases for Piers 10 and 12.

per ton charge under the mini-max Lease Agreements. Neither Pittston's rejection of this offer nor Pouch's failure to attract other tenants at this rate can be attributed to the fact that Pittston's mini-max payments at Brooklyn Piers 10 and 12 might have been less than the Port Authority's fully distributed costs of owning and operating these piers. In August 1973, Pittston was renting the two Brooklyn Piers and all three Pouch Piers. Business slow downs forced Pittston to consolidate its New York breakbulk operations. It chose to consolidate at Brooklyn rather than at Pouch for a variety of legitimate business reasons, including previous difficulties in obtaining full contract performance from Pouch on matters such as dredging. The minimum cost of renting the two Brooklyn Piers under the Lease Agreements ($557,428) was *higher* than Pouch's initial offer to Pittston for a new lease on all three Pouch piers ($540,000).

SUPPLEMENTAL CONCLUSIONS

The burden of proof in this proceeding is upon Pouch and Hearing Counsel and the evidence adduced fails to establish that the Port Authority engaged in or is proposing anticompetitive, unduly preferential, or unreasonable practices. The Port Authority knew the mini-max rentals were unlikely to be fully compensatory at cargo levels projected for 1973 and 1974, but this fact alone does not support a finding that the Port Authority was purposefully engaged in a predatory price cutting scheme aimed at other breakbulk terminal operations within the Port of New York. Modernization of the Brooklyn Piers was completed by 1962 when the breakbulk business was strong. When breakbulk tonnages dropped unexpectedly between 1969 and 1974, the Port Authority, as the owner of these modern, relatively expensive facilities, could offer them at terms the breakbulk market would accept or close them down completely. We cannot fault the Port Authority's choice of the former course of action under the circumstances.

The amount of revenue actually realized under the mini-max leases will depend upon cargo volume. If the *maximum* level is reached, the Port Authority would cover its fully distributed costs. If only *minimum* rents are paid, the Port Authority would still net more income than it would be closing the Brooklyn Piers. Consequently, the users of other Port Authority facilities would not be required to unfairly "subsidize" the Brooklyn operations. See generally, *Matson Navigation Company—Reduced Rates on Flour,* 10 F.M.C. 145, 153 (1966); *Matson Navigation Company—General Increase In Rates,* 16 F.M.C. 96, 101–103 (1973). There is also no indication that any other person ever sought, what is more was denied, use of the Brooklyn Piers following the expiration of the preexisting leases. In fact, no person other than Pouch has come forward to complain of discrimination or preference of any kind. We conclude that the Lessees are not receiving special benefits unavailable to other New York breakbulk carriers or stevedores.

We realize the Commission has previously disapproved terminal practices under Shipping Act section 17, second paragraph, which did not recover fully distributed costs. *E.g., City of Los Angeles Agreements,* 12 F.M.C. 110 (1968); *Practices etc. of San Francisco Bay Area Terminals,* 2 U.S.M.C. 588 (1941); *Investigation of Free Time Practices—Port of San Diego,* 9 F.M.C. 525 (1966). As a general rule, all terminal users are expected to pay their own way. Nonetheless, "noncompensatory" is not synonymous with "unreasonable." Justifications can be and have been accepted for terminal tariffs or leases with noncompensatory features. *E.g., City of Long Beach and Transocean Gateway Corporation,* 13 F.M.C. 70, 74 (1969). There is sufficient justification present for the Port Authority's failure to charge rents which would assure the recovery of fully distributed costs in this instance. The Lease Agreements would be at least incrementally profitable, and, if implemented as month-to-month tenancies, would not bind either party to a particular level of rents for more than 30 days.[3] The low rental charges disapproved in *City of Los Angeles, supra,* and investigated in *San Francisco Port Authority and States Steamship Co.,*[4] were not distressed short term prices reasonably compelled by an oversupply of terminal space and declining market conditions, but were purely "promotional inducements" designed to attract long term business to a particular port.

Although the record offers no reasons for disapproving the mini-max concept or the particular charges proposed in the Lease Agreements, we cannot ignore the fact that the only basis for the Lessees' use of the Brooklyn Piers to date which was not violative of section 15 was under the Port Authority's Public Tariff and the parties have obviously not adhered to that tariff. None of the Lessees were charged in the amounts and in the manner specified by Tariff No. PA–9. The tariff contains no provisions for monthly "on account" billing with subsequent adjustments nor does it permit extensions of credit in the unusual amounts and periods which have been extended to Pittston, UMS and ITO. Moreover, in the case of Piers 1 and 2, UMS was allowed to continue its exclusive occupancy for five months after the prior lease expired before the Port Authority even declared those facilities to be public piers. This course of conduct represents at least a cooperative working arrangement which was not reduced to writing, filed and approved by the Commission as required by section 15 and constitutes a violation of that statute. It also represents a violation of section 533.3 of the Commission's Rules by the Port Authority.[5]

The section 15 violation by Pittston and the Port Authority has not proximately injured Pouch, however, and Pouch is not entitled to

[3] The term of the Lease Agreements is further discussed below.

[4] 14 F.M.C. 233 (1971). The terminal lease in that proceeding was ultimately found to recover fully distributed costs.

[5] Section 533.3 requires terminal operators to maintain tariffs on file with the Commission which show *all* rates, charges, rules and regulations pertaining to its terminal facilities. No violation of section 533.3 arose from NYK's and ITO's use of Pier 7 because that facility was not declared a public pier.

reparations from either party for any loss of revenues or diminution in property values it may have experienced since the first of Pittston's preexisting leases expired on September 30, 1974 (Pier 10).

A final matter requiring attention is the ambiguity created by the clause providing that the Lease Agreements shall be "ineffective" unless approved by the Commission, and the lapse of the specific time periods for the fixed rental terms provided by five of the six agreements.[6] If the mini-max leases were approved immediately it is now unclear whether the parties intend to begin occupancy under month-to-month tenancies or fixed term tenancies equal to the number of months originally stated in the Lease Agreements.

The original lease terms varied from between 3 to 46 months in duration for no apparent reason except that they were generally related to each Lessee's obligation under its preexisting Port Authority lease. A month-to-month tenancy, even if approved for an indefinite period, minimizes the tenant's ability to hold the Port Authority to a rental formula which may produce revenues below fully distributed costs and also minimizes the Port Authority's ability to hold a tenant at the Brooklyn Terminal should it receive a more attractive offer from some other terminal operator with a lower cost structure. Accordingly, we shall condition our approval of the Lease Agreements upon the parties amending them to specify that they shall run for an initial term of 30 days and from month to month thereafter.

Having this day adopted the Initial Decision of the Administrative Law Judge in the above-styled matters, as supplemented by the foregoing findings and conclusions, which Initial Decision is set forth in full as an Appendix to this Order.

IT IS ORDERED, That the Complaint of Pouch Terminal, Inc., is dismissed; and

IT IS FURTHER ORDERED, That the request for approval of Agreement No. T-2881-1 between Pittston Stevedoring Corporation and the Port Authority for the use of Pier 12 is dismissed as moot; and

IT IS FURTHER ORDERED, That Agreement Nos. T-2880-14; T-2882-1; T-2883-5; T-2884-8; and T-2885-11; are approved upon condition that:

A) The Port Authority, Barber Lines A/S, Pittston Stevedoring Corporation, International Terminal Operating Company and Nippon Yusen Kaisha, and Universal Maritime Service Corporation, modify numbered paragraphs 1 and 2 of their respective agreements to read as follows:

> 1. The letting under this Lease shall be extended to cover the period of May 1, 1977 through May 31, 1977, and shall continue from month to month thereafter as a periodical tenancy.
>
> 2. For the period commencing May 1, 1977, the Lessee shall pay a basic rental as follows: . . .

B) The Commission actually receives, on or before April 28, 1977, a complete copy of

[6] The UMS lease for Piers 4 and 5 (T-2885-11) has no initial fixed term.

the agreement, modified as required in clause (1) of this paragraph and signed by all parties thereto; and

IT IS FURTHER ORDERED, That the approval contained herein shall become effective on the date both the conditions set forth in the above ordering paragraph are met; and

IT IS FURTHER ORDERED, That if the conditions set forth in the third ordering paragraph are not met for either Agreement No. T–2880–14; Agreement No. T–2882–1; Agreement No. T–2883–5; Agreement No. T–2884–8; or Agreement No. T–2885–11; then the agreement or agreements not meeting said conditions are disapproved effective April 28, 1977. Commissioner Clarence Morse, dissenting:

The majority find section 15 violations existed in the manner of the Port's billing of charges to the terminal operators.

I find the weight of the evidence to be that neither the Port nor the terminal operators knew how the Pouch protest and complaint would be resolved by the Commission; and, therefore, they tried to deal with financial matters in a way which would not keep them floundering in the uneconomic situation and cash flow problems which the mini-max agreements resolved and yet would permit reverting back to another formula if the agreements were not approved.

At most the Port is guilty of billing the terminal operators not in accordance with its tariff, and the terminal operators willingly accepted the billing procedure because it both helped relieve a bad financial situation and helped them await an unknown commission decision. It stretches the evidence to the extreme to conclude that there were unfiled section 15 agreements in that course of conduct.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 74–35

AGREEMENT No. T–2880, AS AMENDED, ET AL.

No. 74–42

POUCH TERMINAL, INC.

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

Agreements Nos. T–2880, as amended, T–2881–1, T–2883, as amended, T–2884, as amended, and T–2885, as amended, are such agreements as encompassed by section 15 of the Shipping Act and subject to the jurisdiction of the Commission.

Agreement No. T–2882, as amended, is no longer operative and no regulatory purpose would be served by any determination relating to such agreement.

Agreements Nos. T–2880, as amended, T–2881–1, T–2883, as amended, T–2884, as amended, and T–2885, as amended, are not unjustly discriminatory or unfair to Pouch nor do they operate to the detriment of the commerce of the United States, nor are they contrary to the public interest and are not otherwise in violation of the Shipping Act, 1916.

Agreement No. T–2884, as amended, should be modified to reflect that UMS shall only use Pier 2.

The agreements should be approved.

The agreements have not been implemented prior to Commission approval.

The agreements do not subject Pouch to undue or unreasonable prejudice or disadvantage or establish unjust and unreasonable regulation and practices in connection with the receiving, handling, storing or delivery of property in violation of sections 16 and 17 of the Shipping Act, 1916.

The complaint is dismissed with prejudice.

Patrick J. Falvey, F. A. Mulhern, Albert B. Dearden, Arthur L. Winn, Jr., Samuel H. Moerman, and *Paul M. Donovan* for The Port Authority of New York and New Jersey, respondent.

James M. Leonard and *Martin J. McHugh* for Barber Lines A/S, Pittston Stevedoring Corporation, Nippon Yusen Kaisha Limited, International Terminal Operating Co., Inc., and Universal Maritime Service Corporation, respondents.

Seymour H. Kligler and *David R. Kay* for Pouch Terminal, Inc., complainant.

John Robert Ewers and *Martin F. McAlwee,* Hearing Counsel.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE[1]

This consolidated proceeding[2] was instituted pursuant to the Commission's August 29, 1974, Order of Investigation under section 15 of the Shipping Act, 1916, and the complaint of Pouch Terminal, Inc. (Pouch), served September 17, 1974, alleging violations by the Port Authority of New York and New Jersey (Port Authority) under sections 16 and 17 of the Shipping Act, 1916, and involve certain lease agreements between the Port Authority and certain terminal operators and steamship lines for terminal facilities located at the Brooklyn Port Authority Marine Terminal.

The agreements involved herein are:

No. T-2880, as amended, with Barber Lines A/S (Barber);

No. T-2881-1 and T-2882, as amended by T-2882-1, with Pittston Stevedoring Corporation (Pittston);

No. T-2883, as amended, with Nippon Yusen Kaisha, Limited (NYK), and International Terminal Operating Company (ITO); and

No. T-2884, as amended, and No. T-2885, as amended, with Universal Maritime Service Corporation (UMS).

Agreement No. T-2880, as amended, between Barber and the Port Authority establishes terms and conditions for the exclusive use by Barber of Piers 9A and 9B at the Brooklyn Port Authority Marine Terminal. Under the terms of the Agreement, Barber is authorized to use the berthing areas adjacent to the pier facilities to berth seagoing vessels and other water-craft of designated companies; and, seagoing vessels of two other operators with the prior and continuing consent of the Port Authority. Further, Barber is subject to the general rules and regulations of the Port Authority's tariff (FMC Schedule No. PA-9) with the exception of the charges and fees set forth in the tariff. Under the payment provisions of the Agreement, Barber will pay the Port Authority on the basis of $2.00 times the revenue tons moving over piers 9A and 9B, but no less than $513,982.50 and no more than $1,027,965.

Agreement No. T-2881, as amended, between Pittston and the Port Authority establishes terms and conditions for the exclusive use by Pittston of Pier 10 at the Brooklyn Port Authority Marine Terminal. Under the terms of the Agreement, Pittston is authorized to use the berthing area adjacent to the pier facilities to berth seagoing vessels operated by persons for which Pittston acts as the stevedore or terminal operator and which has the prior and continuing approval of the Port Authority. Pittston is subject to the general rules and regulations of the Port Authority tariff (FMC Schedule No. 9A-9) with the exception of the charges and fees set forth in the tariff. Under the payment provisions of the Agreement, Pittston will pay the Port Authority on the basis of $2.00 times the revenue tons moving over Pier 10, but no less than $257,428 and no more than $514,855.

Agreement No. T-2882 as amended by Agreement No. T-2882-1 between Pittston and the Port Authority is no longer an operative agreement and Pittston has ceased to operate from Pier 12 under either a future lease agreement or under the Port Authority's public tariff.

Agreement No. T-2883, as amended, between NYK and ITO and the Port Authority establishes terms and conditions for the exclusive use by NYK and ITO of Pier 7 at the Brooklyn Port Authority Marine Terminal. Under the terms of the Agreement, NYK is authorized to use the berthing seagoing vessels owned or operated by NYK or by persons for which ITO acts as the stevedore or terminal operator. NYK and ITO are subject to the general rules and regulations of the Port Authority's tariff (FMC Schedule

[1] This decision became the decision of the Commission March 28, 1977.

[2] See order, served September 20, 1974.

No. PA-9) with the exception of the charges and fees set forth in the tariff. Under the payment provisions of the Agreement, NYK and ITO will pay the Port Authority on the basis of $2.00 times the revenue tons moving over Pier 7 but no less than $360,000 and no more than $720,000.

Agreement No. T-2884, as amended, and Agreement No. T-2885, as amended, between UMS and the Port Authority establish terms and conditions granting UMS the exclusive use of Piers 1 and 2 (T-2884) and Piers 4 and 5 (T-2885) at the Brooklyn Port Authority Marine Terminal. While Agreement No. T-2884, as amended, provides for the use of Piers 1 and 2 by UMS, the present understanding between UMS and the Port Authority is that Pier 1 will not be utilized by UMS pursuant to the Agreement.

Under the Agreements, as modified, between the Port Authority and UMS, UMS is authorized to only berth seagoing vessels and other watercraft in the berthing areas adjacent to Piers 2, 4 and 5 operated by persons for which UMS acts the stevedore or terminal operator and which has the prior and continuing approval of the Port Authority. UMS is subject to the general rules and regulations of the Port Authority's tariff (FMC Schedule No. PA-9) with the exception of the charges and fees set forth in the tariff.

Under the payment provisions of the Agreement, UMS will pay the Port on the basis of $2.00 times the revenue tons moving over Piers 2, 4 and 5, but no less than $312,743.75 and no more than $625,487.50 for Pier 2 and no less than $320,996 and no more than $641,992 for Piers 4 and 5.

It is the position of Pouch that:

1. The rental formula contained in the Agreements is not compensatory, i.e., it fails to provide the Port Authority with sufficient revenues to meet the Port Authority's expenses applicable to the demised premises;

2. the Port Authority knew the rental formula would not be compensatory when it offered such formula to its tenants;

3. nevertheless, the Port Authority put said rental formula into effect without Commission approval, in violation of section 15 of the Act;

4. the Port Authority's actions were a substantial factor inducing Pouch's tenant, Pittston, to remove operations from Pouch's piers to the Brooklyn Marine Terminal and a substantial factor in depriving Pouch of other tenants to replace Pittston;

5. the Port Authority's acts violate sections 15, 16 and 17 of the Act;

6. Pouch has lost rental income and the value of its property has been greatly reduced as a result of the Port Authority's illegal acts, and it is therefore entitled to damages pursuant to section 22 of the Act in the amount of $3,500,000.

To be determined, therefore, are:

Whether the leases listed "are agreements subject to Section 15 of the Shipping Act, 1916, and, if so, whether said Agreements should be approved, modified, or disapproved pursuant to Section No. 15 of the Shipping Act, 1916";

Whether the Port Authority, as Pouch alleges in its Complaint, violated sections 16 and 17 of the Shipping Act, 1916 by entering into the subject Agreements; and

Whether these Agreements subject Pouch Terminal, Inc. "to undue or unreasonable prejudice or disadvantage or establish unjust and unreasonable regulations and practices in connection with the receiving, handling, storing or delivery of property in violation of sections 16 and/or 17 of the Shipping Act, 1916."

After the consolidation of this proceeding the Port Authority moved to discontinue the investigation and dismiss the complaint for lack of jurisdiction. Additionally, the Port Authority filed a motion requesting an evidentiary hearing limited to the issue of the Commission's jurisdiction. The other respondents (leasees) joined the Port Authority in these motions. I determined that the Commission possessed jurisdiction and denied the two motions. The Port Authority appealed by rulings to the Commission and, on March 14, 1974, the Commission denied the Port

Authority's motion to dismiss and motion for evidentiary hearing on jurisdiction; but also vacated jurisdictional determination. The Commission ordered that the investigation be expedited to resolve the jurisdictional and substantive issues set forth in the Order of Investigation.

Upon the completion of discovery, the hearing commenced on November 17, 1975, and ended on December 21, 1975. Witnesses sponsored by the Port Authority, Pittston, UMS, Pouch and Hearing Counsel gave testimony and some 71 exhibits were admitted into evidence.

FINDINGS OF FACT

1.The Port Authority is a public agency created by the States of New York and New Jersey and is the owner of, or retains property rights under long term leases for, marine terminal facilities located within a geographical area designated as the New York-New Jersey Port District.

2. The Port Authority owns 100 vessel berths in the Port District of which 24 are designed to handle container vessels, 10 are open berths designed to handle special bulk cargoes, e.g., lumber, scrap metal, automobiles, and 66 are designed to handle general break-bulk cargo and vessels. The Port Authority container berths constitute 24 of the 35 available container berths in the Port. Its break-bulk berths constitute 66 of the 107 available break-bulk berths in the Port. In 1974 the Port Authority's container and break-bulk berths handled over 72% of the liner service cargo in the Port.

3. The Port Authority is an "other person subject to this act" as defined in section 1 of the Shipping Act, 1916.

4. Historically, the Port Authority has made its marine terminal facilities consisting of piers, wharves, docks, sheds and buildings available to the respective users through the means of the Port Authority's published tariff (Port Authority Marine Terminals—FMC Schedule No. PA–9) or through lease agreements with the terminal operator or steamship line using any particular facility.

5. Barber operates as a common carrier by water in the foreign commerce of the United States pursuant to tariffs on file with the Federal Maritime Commission and is subject to the provisions of the Shipping Act, 1916.

6. Pittston conducts operations at terminal facilities in the Port of New York and in this capacity carries on the business of furnishing wharfage, dock and other terminal facilities in connection with common carriers by water. It is an "other person subject to this Act" as defined in section 1 of the Shipping Act, 1916.

7. NYK operates as a common carrier by water in the foreign commerce of the United States pursuant to tariffs on file with the Federal Maritime Commission and is subject to the provisions of the Shipping Act, 1916.

8. ITO conducts operations at terminal facilities in the Port of New

York and in this capacity carries on the business of furnishing wharfage, dock and other terminal facilities in connection with common carriers by water. It is an ''other person subject to this act'' as defined in section 1 of the Shipping Act, 1916.

9. UMS conducts operations at terminal facilities in the Port of New York and in this capacity carries on the business of furnishing wharfage, dock and other terminal facilities in connection with common carriers by water. It is an ''other person subject to this act'' as defined in section 1 of the Shipping Act, 1916.

10. Pouch is engaged in the business of renting out to common carriers by water and terminal operators three break-bulk piers and operating adjacent warehouse facilities which are located at Staten Island, New York.

11. For the most part, the Port Authority's facilities have been furnished to terminal operators and steamship lines under separate lease agreements rather than under the public tariff.

12. All users of the Port Authority's marine terminal facilities are subject to the Port's General Rules and Regulations contained in its published tariff whether the respective user is a party to a lease agreement or not. The primary distinction between a public user and a user under a lease arrangement relates to the manner in which the user is charged for the facility. If the user has a lease arrangement with the Port Authority, the charges are based on the terms set forth in the lease. If the user does not have the benefit of a lease agreement, the charges are those set forth in the Port Authority's public tariff.

13. While the Port Authority furnishes marine terminal facilities to vessel and terminal operators in the Port of New York, the Port Authority does not staff these facilities in the sense that the Port Authority provides labor for the handling of cargoes. The Port Authority purposely limits its operations to dredging and to repair and maintenance functions which are necessary to keep the facilities in satisfactory condition for vessel tie up and the handling of cargo. The users of the facilities provide the labor needed to load and discharge cargo. This labor consists of cargo handlers, coopers and checkers.

14. At the time the Brooklyn Marine Terminal facilties were constructed by the Port Authority in the mid-nineteen fifties as modern and efficient break-bulk piers, the Port Authority had little difficulty in furnishing these facilities to vessel operators, steamship agents and terminal operators under long-term fixed rental leases.

15. In the years prior to 1969, cargo and cargo-handling systems in the Port of New York were largely break-bulk in contrast to containerized cargo or methods. A tonnage survey conducted by the Port Authority in 1969 showed that of the approximately 25 million pay tons of cargo handled by vessels maintaining regular calls at the Port of New York, 16-1/2 million tons were being discharged and loaded on break-bulk vessels

and the remaining 8-1/2 million tons of cargo were being handled in containers.

16. While the 1969 projections indicated a substantial growth in container cargo so that by 1974 break-bulk and container cargo would be approximately equal, the shift to containerized cargo and vessels was much greater than predicated. Thus, by 1974, of the approximately 29 million pay tons of cargo handled in the Port of New York, 20 million tons were handled by container vessels and break-bulk vessels handled less than 9 million tons.

17. The decline of break-bulk cargo activity during the period 1969 through 1974 had an adverse impact on older and less efficient break-bulk facilities in the Port of New York which were not capable of accommodating modern break-bulk vessels and cargo handling techniques such as multiple-pallet loads, side-port operations, containers and special cargo movements.

18. The Port Authority's modern break-bulk facilities located at the Brooklyn Port Authority Marine Terminal also experienced a dramatic decline in use as a result of the growth of containerization. Illustrative of the marked decline in cargo passing over the Brooklyn facilities are the Port Authority's statistics comparing weight tons handled at the Brooklyn 1–12 for the year 1966 with those handled in 1972. In 1966, 2,070,000 weight tons were handled at the Brooklyn facility in contrast to 1,450,000 for the year 1972. During the same period, the weight tons that were handled at the Port Authority's Newark/Elizabeth facilities rose from $5,479,000 weight tons handled in 1966 to 10,256,000 in 1972.

19. In a declining break-bulk market, the modern and efficient design of the Brooklyn piers was no longer attractive to a single user under a long-term fixed sum rental arrangement.

20. The effects of the decline in break-bulk operations in the Port of New York, particularly for the Port Authority, became critical during 1972 with the increased disuse of break-bulk facilities and decline in break-bulk tonnages.

21. A study of the break-bulk industry and the problems arising from the decline in break-bulk tonnages in the Port of New York and its effect on the Port Authority was undertaken by the Port Authority during 1972.

22. This study by the Port Authority revealed:

(1) The shift of the large break-bulk carriers to containerized operations meant they were no longer interested in leasing piers for break-bulk operations and that this shift could cause the modern, high volume break-bulk pier to become vacant;

(2) Long-term fixed rent lease agreements were less advantageous to terminal operators since the decrease in large break-bulk lines left the terminal oprator with a fewer number of regular user or stable accounts and no incentive to risk a long-term lease at a fixed rental.

(3) The large steamship agencies which had in the past unified marginal break-bulk vessel operators were disappearing and were no longer prospects for a fixed time pier rental program. This left the terminal operator as a potential unifying entity but not

under a long-term fixed rental because the remaining break-bulk vessels which could be handled by a terminal operator have less regular schedules and levels of activity;

(4) Long-term fixed-sum rental arrangements were not attractive to the marginal break-bulk carriers operating in the Port on other than Port Authority facilities.

23. As a consequence of the study the Port Authority concluded:

(1) The more efficient and modern break-bulk facilities such as the Brooklyn Port Authority Marine Terminal facilities were required to meet the operational requirements of break-bulk carriers calling at the Port of New York. Less-efficient or smaller piers were inadequate.

(2) Attracting and retaining break-bulk cargo in the Port of New York depended on making the most efficient break-bulk facilities available to the break-bulk shipping industry upon terms which did not require a fixed rental over a fixed term.

(3) Unless the Port Authority devised a rental program that included a flexible rental structure, a flexible short-term arrangement, and a flexible labor stuffing practice, most of the tenants at the Brooklyn Port Authority Marine Terminal would not and could not renew their existing leases, could not compete with other ports for competitive cargo and would leave the Port of New York or go out of business.

24. As a consequence of its study the Port Authority, in December of 1972, formulated a new rental program based on a "mini-max" rental formula which in the Port Authority's judgment was the most viable means of retaining the break-bulk industry in the Port of New York.

25. The rental program the Port Authority formulated is primarily based on charging for the use of marine terminal facilities by the unit, rather than on a fixed rental. This allows the facility charges to fluctuate on the volume of cargo handled, subject to a maximum and minimum rent.

26. Each of the Agreements provide for a charge in an amount equal to $2.00 per revenue ton handled on the pier subject to a maximum and a minimum rent.

27. Prior to the summer of 1973 the Port Authority rented its piers at Brooklyn Marine Terminal to tenants pursuant to long-term, fixed-rental leasing arrangements. UMS was renting Piers 1 and 2 for an annual rent of $1,086,550 pursuant to a lease due to expire April 30, 1973, but to continue as a month to month tenancy thereafter; UMS was renting Piers 4 and 5 for an annual rent of $720,000 pursuant to a lease due to expire June 7, 1976; Barber was renting Piers 9A and 9B for an annual rent of $1,027,965 pursuant to a lease due to expire December 31, 1973, and continue as a month to month tenancy thereafter; Pittston was renting Pier 10 for an annual rent of $514,855 pursuant to a lease due to expire September 30, 1974.

28. Implementation of a usage charge or rent for marine terminal facilities based on the number of cargo units handled would place the terminal operator in a position, financially, to operate from large facilities by allowing the terminal operator to consolidate the cargo of smaller carriers into the large block of cargo needed to maximize the efficiency of the larger piers, particularly the Brooklyn Port Authority Marine Terminal piers, and would also reduce the risks arising from fixed overhead costs such as labor, inefficient operations, or loss of cargo.

29. The need to encourage and support a terminal operator to consolidate blocks of tonnage to justify the use of the more modern break-bulk Port Authority piers was particularly important at the Brooklyn Port Authority Marine Terminal Facilities since the physical configuration of the piers was suited to the piers being occupied by a single occupant. In contrast to the Brooklyn piers, Port Newark break-bulk facilities were the wharf type of facilities and were more easily subdivided between different users.

30. The principal purpose for establishing a substantial minimum rent was to induce the respective user of a Port Authority pier to confine its operations to a smaller number of piers and not to begin operating on two or three piers at a time without the required amount of cargo to make such an operation successful. The minimum rent requirement was designed to encourage as many carriers to use the Port as possible. For this reason, the Port Authority did not want to establish facility use charges for the piers solely on a revenue ton basis or on a tariff basis.

31. The flexible rent program based on the "mini-max" formula was to be implemented at the Brooklyn Marine Terminal by executing amendments to the lease agreements in effect with the current users of the facilities. These amendments would change the terms and conditions under which charges were assessed for the facilities from a fixed-sum per year charge to charges computed by multiplying the number of revenue tons moving over the pier in any one year by $2.00 with a maximum charge not to exceed the prior year's fixed sum payment and a minimum charge of not less than one-half the prior year's fixed sum payment.

32. The mini-max rental formula, based on a $2.00 a ton rate, was comparable to the prevailing charges at other terminals in the Port of New York and at other Atlantic ports and was responsive to the obligations and needs of both the Port Authority and the break-bulk industry in the Port of New York.

33. The minimum charge established by the Agreements between the Port Authority and the respective parties to the Agreements guarantees to the Port Authority an amount of revenue which is below the fully-distributed costs of the Port Authority allocated to each of the piers subject to the Agreements. The maximum charge established by the Agreements would exceed the fully-distributed costs of the Port Authority.

34. The Port Authority recognized that the level of revenue by the Agreements would not meet its allocated costs in the first year of operation. By the third year of operation the Port Authority expects the revenues which the Port Authority would receive under the payment provisions of the Agreements will equal or exceed these costs.

35. The Port Authority's rate of $2.00 a revenue ton is higher than the previous effective per ton rate at the Pouch facility or proposed effective rate at the Pouch facility.

36. The Port Authority's Brooklyn Marine Terminal facilities are

located in an area where there is available a large pool of skilled longshore labor.

37. Pouch Terminal is located in an area that does not have a large pool of skilled labor.

38. The Port Authority Brooklyn Marine Terminal facility is superior to any of Pouch's three piers for the loading and discharging of cargo from modern break-bulk vessels.

39. Pittston's operations at the Pouch Terminal became increasingly expensive and inefficient.

40. The cessation of the business arrangement between Pittston and Pouch was substantially caused by the obsolescense of Pouch's facilities the inability to obtain skilled longshore labor at the Pouch location.

41. The operational problems faced by Pittston at the Pouch terminals combined with the decline of the break-bulk market were the primary causes for Pittston shifting its operations to the Brooklyn facility.

42. Other terminal facilities operated by competitors of the Port Authority which possess the characteristics of a modern break-bulk pier will remain competitive despite the institution of a mini-max rental charge for the Port Authority's Brooklyn facilities.

43. The Port Authority's mini-max rental program will be available to all break-bulk operators at the Port Authority's break-bulk facilities in the Port of New York.

Discussion

The Port Authority built various piers comprising the Brooklyn Marine Terminal during the six-year span between 1956 and 1962. At the time that the Brooklyn Marine Terminal was conceived the container revolution had not yet begun. Containerization, and the suitability or lack thereof of these piers to handle container traffic, was never considered by the Port Authority in building the piers.

Starting in 1965 and continuing through the present there has been, particularly in the Port of New York, a marked and radical change in the method by which ocean-borne cargo is transported and handled both on loading and discharge. Where, prior to 1965, general cargo was handled through traditional break-bulk methods, utilizing the services of skilled longshoremen and relatively simple mechanical aids, thereafter the radically new technological improvements represented by the container and its ancillary equipment became ever more pervasive.

Some indication of the dramatic change in the nature of the carriage of goods transported by water may be seen from the following tonnage figures:

> In the year 1969 in the Port of New York some 16 1/2 million tons of cargo were transported in the break-bulk mode. In that year some 8 1/2 million tons were transported by container.
>
> Five years later, in 1974, only 9 million tons were transported in the break-bulk mode while some 20 million tons of cargo passed through New York in containers.

This trend toward containerization appears irreversible.

The changes in the mode of maritime transport brought about by the container technological revolution have had serious repercussions in the stevedoring industry—particularly with regard to break-bulk stevedoring and terminaling. Prior to containerization there were some 54 stevedores engaged in break-bulk operation in the Port of New York. Today there are only 6.

Increasing containerization has whittled away, in another economic area, at the remaining break-bulk stevedoring and terminaling operations. It appears that practically all premium cargo today is transported by containers. What is left is lower valued cargo whose form does not particularly lend itself to transport by container. Thus, the business available to the break-bulk stevedore and terminal operator today represents the leavings of the container market. Another, and significant, result of this trend is that the break-bulk terminal operator can no longer rely on regular callings by scheduled liner operations. The break-bulk stevedore and terminal operator finds tramp ships as his customers more and more frequently and this has compounded the economic problems which afflict the industry. This problem has particularly affected those stevedores saddled with fixed term and fixed amount leases. If a stevedore and terminal operator cannot count on a regularized flow of traffic he experiences difficulty in being able to meet fixed rental obligations.

The plight of the stevedoring industry is illustrated by the fact that, as of 1972, UMS was suffering losses at the rate of 3 million dollars per year. One of the options faced by Pittston was the possibility of going out of business in the Port of New York. This danger was known to, and its gravity recognized by, many in the industry.

> It is clear that the outlook in 1972 and 1973 for increasing the total break-bulk tonnage in the Port District was most bleak and, in fact, most persons in the industry were predicting further reductions in break-bulk tonnage. It was the consensus that the effects of the container revolution and the consequent loss of break-bulk cargo was irreversible.[3]

With the decline of break-bulk volume another fact became obvious. There are far too many break-bulk piers in the Port of New York, many obsolete or obsolescent.

Faced with a depressed break-bulk economy the Port Authority concluded that the operational expenses attendant upon a proliferation of piers required drastic consolidation if break-bulk operation was to survive in the Port. Each separate pier maintained by a stevedore requires supervisory and operational personnel, irrespective of the labor force required on a day-to-day basis. The maintenance of large, fixed staffs, unrelated to the realities of the day-to-day flow of business was an economic burden which stevedores and terminal operators simply could not afford. Consolidation of facilities became imperative.

[3] Opening Brief of Pouch Terminal, Inc., p. 20.

It is useful to remember that the condition of which protestant, Pouch, herein complains—the empty condition of its piers—is not at all limited to Pouch. There are a number of piers comparable to Pouch's which are vacant and are faced with closing. In fact, the Port Authority, recognizing that its Erie Basin piers were not the equal of the Brooklyn Marine Terminal Piers, faced the obvious and realistic business necessity, and closed them down.

Similarly, UMS closed down its piers at Bush Terminal and paid rental elsewhere because its business was not sufficient to support a substandard break-bulk pier any longer.

In view of the depressed conditions of break-bulk traffic, the overabundance of piers in the Port of New York and the increasing threat posed by the advancing technology of containerized transport of goods, only those piers with the physical capacity to serve an increasingly sophisticated break-bulk and semi-container traffic might expect to continue to be utilized. There is no question that the physical characteristics of today's break-bulk pier are extremely critical. As noted above, the Port Authority closed down piers which it considered to be marginal in efficiency or incapable of meeting the demands of advanced break-bulk shipping.

There is a trend to unitized and palletized cargo and other technologically sophisticated methods of handling break-bulk cargo. Then, too, it is customary in by far the greater number of cases for break-bulk ships to carry some containers. Thus, even when operations are conducted at a break-bulk terminal, that terminal must also have the capability to handle a small number of containers. It is for these reasons that few break-bulk piers are capable of meeting the requirements of today's break-bulk cargo handling. The record establishes that the Port Authority Brooklyn Marine Terminal piers represent the most modern and efficient break-bulk piers available in the Port of New York.

It is in the context of this background that consideration will now be given to the issues raised by the leases entered into by the respondents.

JURISDICTION

The Port Authority, supported by the leasees, contends that the leases are not section 15 agreements within the jurisdiction of the Commission.

They had previously moved to discontinue the investigation in Docket No. 74–35 and to dismiss the complaint in Docket No. 74–42 for the reason that the subject matter of the investigation and complaint is not within the jurisdiction of the Commission under the Shipping Act, 1916.

By ruling, served December 13, 1974, I denied the motion to dismiss for lack of jurisdiction, finding that the leases were such agreements as set forth in section 15 of the Act and that they must necessarily be filed with the Commission for its determination whether they should be approved, disapproved, or modified.

The parties appealed my ruling to the Commission, which by order, served March 14, 1975, determined that the ruling on the motion to dismiss was improvident and premature. It ordered that along with other substantive issues the question of section 15 jurisdiction should be resolved at a full hearing as well as any uncertainties as to the effect of the lease provisions.

In compliance with the Commission's order of March 14, 1975, the question of section 15 jurisdiction as well as any uncertainties as to the effect of the lease provisions was heard during the course of the hearing November 17–21,1975, as well as other substantive issues.

The testimony and arguments advanced during the hearing and on brief do not alter in any material way the analysis of the leases set forth at great length in my ruling of December 13, 1974. For all of the factual and legal reasons set forth in the ruling of December 13, 1974, it is concluded that, after hearing on the issue, the leases in issue in this proceeding are section 15 agreements within the jurisdiction of the Commission and all the parties to such agreements are carriers or other persons subject to the Shipping Act, 1916.

The factual and legal reasons set forth in the ruling of December 13, 1974, that the leases are subject to the Commission's jurisdiction, are incorporated herein and made a part of this decision as if set forth in full herein.

In determining whether the leases are section 15 agreements and subject to the Commission's jurisdiction we must also give consideration to Pouch's contention that the Port Authority and the lessees under the involved leases have implemented the leases prior to Commission approval. In support thereof, Pouch points out that the lessees have not fully paid the monthly lease billings submitted to them by the Port Authority and that the Port Authority has not gone to court to collect the unpaid rents. This, Pouch suggests, supports a finding that the parties have schemed to put the lease provisions into effect and have done so prior to Commission approval.

The leases here involved were signed in the fall of 1973, two and a half years ago. Since then, with the present proceedings pending and the respondents contending that the leases are not subject to section 15, there has existed great uncertainty as to the rents due the Port Authority, whether pursuant to the tariff or under the leases. If, as the Port Authoirty and the lessees contend, the Commission is without jurisdiction under section 15, then the leases have been effective throughout the two and a half year period since they were signed and the amounts due are as per the leases. In the meantime, with the leases expiring and shifting to month-to-month basis in most cases and certain of the facilities being declared public and tariffs being made applicable, other sums are due if the lease provisions do not take effect until approved by the Commission. Under such circumstances any delay in action for collection by the Port

Authority at the old lease rates are not indicative of an implementation of the new lease rates.

The Port has billed pursuant to the old leases and, where appropriate, the Port tariff. The matter is carried as an account receivable. If the Commission believes it appropriate it could even permit the new rates to have a retroactive effect.[4] In any event, the allegation that the parties have implemented an agreement prior to required approval cannot be sustained and it is not so found.

THE MINI-MAX FORMULA

Late in 1972 the Port Authority's representatives discussed with the entire industry, including the major stevedoring and terminal operators and break-bulk carriers within the Port District (including those who were not, as well as those who were its tenants), the possibility of the Port Authority adopting a new rent scheme. In December of 1972 a recommendation was made within the Port Authority's Marine Terminals Department to establish a new rental program. This program was discussed with all Port Authority tenants in Brooklyn and lease term extensions to the existing leases were offered as an inducement to put the program into effect on each of the Brooklyn piers at the earliest possible time, i.e., upon approval of the Port Authority Commissioners and upon the approval of the Commission.

Flota Mercante Grancolombiana at Pier 3 and Maersk Line (Brigantine Terminal Corp.) at Pier 11 declined to accept the new program because they did not care to extend the terms of their leases.

In the fall of 1973 the Port Authority and certain of its tenants at Brooklyn Marine Terminal, that is, UMS, ITO–NYK, Barber and Pittston, each signed amendments to their existing leases for Brooklyn Marine Terminal piers each of which amendments extended the terms of the existing leases and provided for a rental to be determined on the basis of the so-called "mini-max formula." Thus, the amendments provided that the UMS lease for Piers 1 and 2, then a month to month tenancy be extended to a fixed tenancy through January 31, 1974, and a month to month tenancy thereafter, the UMS lease for Piers 4 and 5, due to expire December 31, 1973, be extended to a month to month tenancy thereafter; the ITO–NYK lease for Pier 7, due to expire June 7, 1976, be extended to June 30, 1977; the Barber lease due to expire December 31, 1973, and continue as a month to month tenancy thereafter be extended to June 30, 1974, and continue as a month to month tenancy thereafter; the Pittston lease for Pier 10 due to expire September 30, 1974, be extended through March 31, 1975, and continue as a month to month tenancy thereafter; the Pittston lease for Pier 12 due to expire April 30, 1974, be extended to October 31, 1975, and continue as a month to month tenancy thereafter.

[4] *Mediterranean Pools Investigation*, 9 F.M.C. 264, 304 (1966); *Agreement No. T-2336—New York Shipping Ass'n*, Docket No. 69-57, 11 SRR 571, 473 (1970).

Each tenant's rent pursuant to the amendment would be determined by multiplying the number of revenue tons of cargo handled on the leased pier as defined in the amendments, by $2.00; but the maximum rent could not exceed the annual fixed rental set by the existing lease nor be less than one-half of such maximum rental. The Minimum and Maximum rents were set as follows:

	Minimum	*Maximum*
Piers 1 and 2	$543,275	$1,086,550
Piers 4 and 5	320,996	641,992
Pier 7	360,000	720,000
Piers 9A and 9B	513,982.50	1,027,965
Pier 10	257,428	514,855
Pier 12	300,000	600.000

Each amendment provided that it would not be effective until approved by the Commission.

Pouch contends that the minimum rental does not return sufficient revenue to recover fully allocable costs, is not compensatory and therefore is unlawful.

The record in this proceeding does indeed demonstrate that the Port Authority will be furnishing terminal facilities below its fully distributed costs. As a general rule, the Commission has required that terminal facilities be furnished at a rate no lower than the terminal owner's or operator's fully distributed costs in order to prevent unlawful discrimination to other ports or terminals, and to avoid jeopardizing the financial soundness of terminal operations. *Agreement No. T-2108 and T-2108-A,* 12 F.M.C. 110 (1968); *Agreement No. T-2227—Between the San Francisco Port Authority and States Steamship Co.,* 14 F.M.C. 233 (1971).

This rule finds support from the principle that public piers and marine terminals are considered public utilities for regulatory purposes since they are necessary to the business of supplying the shipping public with a service needed in the furtherance of the commerce of the United States and ocean carriers and the shipping public are dependent upon the economy, efficiency and soundness of terminal operations. *Investigation of Free Time Practices—Port of San Diego,* 9 F.M.C. 525 (1966).

The Commission, however, in exercising its broad discretionary authority to determine whether the terminal practices or the actions generally of public port authorities are unlawful has accorded public port authorities discretion in making managerial decisions which affect port operations so long as the Port Authority has not acted unreasonably or contrary to the provision of the Shipping Act, 1916. *In the Matter of Agreement No. T-2598,* Docket No. 72-24, 14 SRR 573, March 21, 1975. Viewed in this light, the record herein establishes that the circumstances which prompted the Port Authority's decision to implement the mini-max rental agreements were compelling and should not be viewed as unreasonable or contrary to provisions of the Shipping Act, 1916.

As clearly revealed by the record, in today's conditions affecting break-

bulk stevedoring and terminaling in the Port of New York it would be unrealistic to believe that break-bulk piers could be rented at the rates and upon the terms and conditions suggested by Pouch. Mr. Costello of UMS in testifying to this effect said:

> If I am stuck with the fixed tonnage rental, let us say, and I only have 100,000 tons moving through a facility, I have to pay 700,000, I have to close the facility down. It just isn't there. The beneficial good from that ton is gone. It is gone to me, it is gone to the Port.[5]

The evidence herein reveals that the Port Authority's rental program as provided in the proposed leases was occasioned by the container revolution which caused a drastic reduction of break-bulk cargo traffic and services and resulted in a shrunken market for break-bulk terminal facilities.

With the industry facing an uncertain future and the consequent inability of tenants to pay rentals wholly unrelated to the volume of traffic handled, the Port Authority in an effort to prevent the demise of break-bulk service in the Port offered a lease program which offered the hope of survival for break-bulk stevedores and terminal operators. Mr. Termo of the Port Authority stated it thusly:

> Without flexibility so that the total rent can increase or decrease with volumes handled, the break bulk industry in the Port of New York could not survive and compete with other ports for competitive cargo.[6]

Although the minimum revenues would not be compensatory on a fully distributed basis, the evidence does support the conclusion that it is compensatory on an incremental basis. Applying the proposed rental to the actual tonnage moving over the piers in 1974 the revenues for the piers as a group, namely, Piers 2, 4 and 5, 7, 9A and 9B, 10 and 12, would aggregate $3,342,411. This exceeds all direct expenses, including allocations for overhead.[7]

The record shows that the $2.00 per ton charge proposed exceeds the charges of other pier landlords in the Port of New York and also at other ports on the Atlantic, Gulf and Pacific Coasts. To that extent it cannot be said that the Port Authority devised rentals to undercut and eliminate competitors. Rather, it is concluded that the proposed rentals are fair and reasonable when measured by general market conditions.

LAWFULNESS AND REASONABLENESS OF THE RENTAL CHARGES

The heart of Pouch's complaint, and at issue in this proceeding, is whether the mini-max formula for rentals results in an unjust or unreasonable practice or one otherwise discriminatory and unlawful.

The Port Authority, relying on *Union Pacific R. Co. v. United States,*

[5] Tr. 678.
[6] Ex. 9, p. 12.
[7] Exs. 25 and 35.

313 U.S. 450 (1941), contends that the evidence shows that the rentals proposed to be charged by the Port Authority under the involved leases constitute not less than the fair rental value of the properties involved, are in all respects reasonable, non-discriminatory and lawful and should not be disapproved by the Commission.

Union Pacific arose under the Elkins Act forbidding rebates, concessions or discrimination with respect to the transportation of property by railroad as covered by the Interstate Commerce Act (49 U.S.C. Section 41(1)). Dealing with subnormal rentals offered by the City of Kansas City, Kansas, to produce merchants for quarters in a municipal produce terminal, the District Court had ordered the City to assess rentals adequate to cover operating expenses and a "fair return" on the investment. The Supreme Court held this to be in error and decided that the highest rentals which the City might be required to assess should be determined by the standard of "fair rental value" rather than "a compensatory return." The Supreme Court said (pp. 473–474):

> Fair rental value rather than a compensatory return upon full value of the market facilities is the standard by which the City's schedule of rates is to be judged. To determine fair rental value, the going rates of rental for similar facilities in the community are significant, as are the rentals prospective tenants are willing to pay. Likewise, evidence of the over-all cost and the over-all value of the properties would be material. The cost of furnishing the facilities, including normal return on capital employed in like enterprises would have weight. Other pertinent factors would doubtless emerge in a controversy to have determined judicially whether certain rentals received are or are not fair. When enough evidence is offered to justify a conclusion based upon judgement and not guesswork, the requirements of the judicial process are met.

In line with the Supreme Court decision, the present record shows that the $2.00 per ton rental charge, proposed to be assessed under the involved leases, is as high or higher than—

> (1) Similar rental charges for other marine terminal properties throughout the Port of New York;[8]
>
> (2) Similar rental charges for marine terminal properties at other Atlantic ports ranging from Boston to Miami, at the Gulf ports of New Orleans, Mobile and Houston, and at the Pacific Coast ports of Los Angeles, Oakland and Seattle;[9] and
>
> (3) The Port Authority Public Tariff No. P.S-9 charge at the Port of New York of $2.00 per ton.[10]

Pouch contends that in *Union Pacific* the Supreme Court also observed that the ICC could require that rentals equal costs where the ICC sought "to root out competitive evils in discriminatory warehousing indulged in by carriers in an effort to acquire traffic," 313 U.S. 450 at p. 474; see also *Baltimore & Ohio Railway Co. v. United States,* 305 U.S. 507, 523–524 (1939).

Pouch does not believe that any decisions dealing with the Elkins Act are applicable to the Shipping Act, 1916. It argues that the concept of "fair rental value" would seem to have little or no applicability to ocean

[8] Exs. 20, 21.
[9] Exs. 22, 23.
[10] Ex. 9, pp. 14–15.

terminal rents since ocean terminals are for the most part municipally-owned or operated. This makes many of the factors which determine "fair rental value" inapplicable to meet the kinds of problems peculiar to the rental of ocean terminals.

Even assuming that "fair rental value" is the applicable standard, Pouch asserts that the Port Authority has not demonstrated that its mini-max formula constitutes the "fair rental value" of its piers.

Pouch attempts to discredit the evidence of other pier rentals as set forth in Exhibits 20–23 by contending that the $1.95 rate shown therein for Pouch was determined by dividing the annual rental of $537,000 by the number of tons which moved across Pouch piers in 1972. However, says Pouch, since the annual rental was fixed, the rental of $537,000 would be paid even if only one ton passed over the piers.[11]

Pouch's argument is counter productive. If conditions in the Port were to deteriorate to the point where charges on an annual basis at Pouch terminal resulted in costs of $3, $4, or $5 a ton, would a charge of less than $3, $4 or $5 at Brooklyn thereby become unfair competition? Would competitors be required to continue to raise their charges per ton as volume declined at Pouch to avoid being charged with unfair competition? The very fact that a cost of $1.95 per ton at Pouch piers in 1972 resulted from declining volumes showed that from a leasee's point of view a rental at Brooklyn of $2.00 for a more modern facility made good business sense.

Pouch claims that the Port Authority charged cut-rate prices for its Brooklyn Marine Terminal piers. It arrives at this "cut-rate" conclusion by arguing that in establishing its mini-max rate, the Port Authority set a rate for its facilities which, according to its own computations, is about the same as that charged by its competitor, Pouch, a facility which the Port Authority claims is very much inferior to the Brooklyn Marine Terminal. It says that $2.00 is an irresistibly low rental and one with which Pouch could not compete. The testimony of the witnesses for the stevedores, however, is to the effect that Pouch could not compete at any price because operating difficulties, both physical and labor, could not be surmounted.

Despite Pouch's contention that the Port Authority could have extracted higher rentals and that the offer of $2.00 per ton was predatory and anti-competitive, the record cannot support such a conclusion. Neither the Port Authority nor Pittston drove Pittston's customers from Staten Island. The Commission cannot ignore the reality that by 1972 one-third of the break-bulk tonnage handled in the Port of New York had disappeared; that major break-bulk carriers had discontinued break-bulk operations; and that more and more break-bulk piers in the Port were being vacated and rendered empty and unused. With the disappearance of major break-bulk liner operations, the only remaining tenants for the

[11] See Pouch reply brief, p. 3.

break-bulk piers are the terminal operators who can combine in one pier operation the reduced break-bulk tonnages of a number of lines. But even as to these terminal operators, with the volume of traffic shrinking and the volume in the future most uncertain, it is reasonable to find that they could no longer assume long-term rental obligations which provided no flexibility for fluctuations in traffic or substantial reductions of traffic.

The level of the proposed rental charges, as well as the flexible minimax character of the formula, is found to be a reasonably fair charge which the tenants were able or willing to pay. Furthermore, the approach of the Port Authority, it is concluded, would provide the Port of New York with the best means of continuing break-bulk liner service to and from the Port in the face of a continuing decline in volumes and competition with other ports for the volume that remained.

The record also compels the conclusion that the continued vacancy of the Pouch piers since the termination of the Pittston lease must be attributed to general market conditions and not to the rentals proposed by the Port Authority. When the Port Authority has on hand 29 empty and unrentable break-bulk marine terminal berths, many of which are modern, it is not surprising that Pouch has a similar experience with its three older piers.

Mr. Chiarello, President of Pittston Stevedoring Corporation, testified that Pittston did not renew its lease of the three Pouch piers because, among other reasons, Pittston and its steamship customers did not need all three Pouch piers although Pittston was willing to negotiate a continued rental of one of the piers, Pier 19, and then only on a flexible rental which varied with the amount of cargo handled over the pier. However, Mr. Pouch insisted that any lease with Pittston should embrace all three piers. In addition, the physically obsolete and inefficient character of the Pouch piers, coupled with the chronic and long-standing labor problem at the Pouch piers, made the shift to Brooklyn necessary.

Mr. Chiarello testified that the Port Authority Brooklyn piers were physically attractive for his operations because:

(1) They are modern and physically efficient piers in contrast to the antiquated and inefficient Pouch piers; and

(2) there was a "rich pool of skilled and experienced longshoremen" in Brooklyn whereas Pittston had experienced "serious interference in operations from the inadequacy of labor available at the Pouch piers."

After describing the comparative advantages and disadvantages of operations on the Pouch piers as compared with the Port Authority-Brooklyn piers, Mr. Chiarello testified:

Obviously the decision to lease any property for stevedoring purposes must involve the balancing of various economic factors. I may say that any differential in rate between that offered by Pouch and what would be charged to Pittston by the Port Authority on a public usage basis was of little relative significance. What were

significant, however, were the innate disadvantages inherent in the Staten Island operation, disadvantages which had proven themselves over the years.[12]

There is no doubt that the Pouch piers in Staten Island enjoy some physical advantages. For one, the existence of the warehouse facilities at the site does offer an advantage to a shipper who wishes to make use of both terminal and warehousing facilities; the physical proximity of the warehouses would, all other things being equal, offer an inducement to an interested carrier.

Then, too, the geographical location of Pouch on Staten Island offers ready access to vessels coming into New York Harbor. Once more assuming that all other things were equal, this location should offer a competitive advantage to Pouch in its effort to solicit customers.

The record reveals that the Pouch piers regrettably are obsolescent. Built in 1918 before the needs of today's break-bulk transport were developed, the Pouch piers in large measure cannot service the current carriers in an efficient and economic manner. The deficiencies of the Pouch piers were testified to by Mr. Chiarello, based upon Pittston's uninterrupted tenancy from 1955 to 1974.

The expert consultant hired by Pouch to inquire into the conditions, suitability and future use of the Pouch Terminal concluded that Piers 19 and 20 were wholly inadequate for modern break-bulk stevedoring and terminaling operations. Mr. Pouch conceded that Piers 19 and 20 were never equal to the piers at the Brooklyn Marine Terminal.

A difference of opinion did arise during the course of the testimony with respect to the physical efficiency of Pier 21. Mr. Pouch testified that he believed that Pier 21 (after it had been reconstructed subsequent to a fire) was the equal of the Brooklyn Marine Terminal Piers.

This contention was disputed by a former tenant of Pier 21, Mr. Chiarello of Pittston. He pointed out, that among other drawbacks, Pier 21 did not have sufficient unobstructed space to permit adequate maneuvering room. He said that there was little space in front for truck accommodation so that the operator was forced to bring trucks down the pier, an unwholesome and inefficient practice. All in all, Mr. Chiarello concluded, Pier 21, even after the modernization, was not the equal of the Brooklyn Marine Terminal Piers.

In this regard it is worth noting that despite the fact that Mr. Pouch believes Pier 21 to be the equal of the Brooklyn Marine Terminal, and despite the fact that he had devoted a year and a half to soliciting all marine interests in the Port as possible tenants of that pier, Mr. Pouch was unable to lease the pier at a rental at least 50 cents per ton lower than what was proposed to be charged by the Port Authority.

The testimony in this case establishes that the steamship lines calling at the Pouch Terminal and handled by Pittston all left Staten Island. Pittston still had a rental obligation for three piers. Pittston found it cheaper to

[12] Ex. 45, p. 12.

close down Pier 20 because the rental obligation owed by a terminal operator is only part of his costs; operational costs may be a far more significant factor. Mr. Chiarello testified that if Pouch Terminal were made available to Pittston—on a fully rent-free basis—Pittston would still have experienced a $700,000 operating loss. This was why Pittston decided to close down the pier even though obliged to continue to pay rent. Operating costs could more than offset any benefit derived from a cheap—even a free—rental.

The Pouch Terminal finds itself in a distressed economic condition. This is unfortunate and regrettable. That condition, however, fully corresponds to the equally distressed economic condition experienced by the break-bulk stevedoring and terminaling industry in the Port of New York. Pouch's customers and tenants are afflicted by the very same economic ills as is Pouch.

It cannot be found on this record that the economic detriment which has befallen Pouch can be attributed to any action by the Port Authority. Rather, we find that an obsolescent facility has been overtaken by the economic ills of the times.

MODIFICATION

Hearing Counsel interpose a single objection to approving the Agreements as drawn. Hearing Counsel contends that two of the agreements, Agreement No. T–2884, as amended, and Agreement No. T–2882, as amended, do not accurately reflect the understanding of the parties. The present understanding between the Port Authority and UMS is for UMS to use only Pier 2, not Piers 1 and 2 as reflected in the subject lease Agreement. The present understanding between the Port Authority and Pittston is that Pittston will not operate from Pier 12 under any circumstances. Thus, they say, Agreement No. T–2882, as amended, is no longer operative and its approval or disapproval is no longer an issue in these proceedings. Also, Agreement No. T–2884, as amended, should be approved conditioned on the Agreement being amended to reflect the present understanding of the parties.

The Port Authority is agreeable to this condition. It asserts that while Agreement No. T–2884 fully and accurately stated the understanding of the Port Authority and lessee UMS when made and submitted to the Commission, it is the desire of both parties now—over two years later—that the agreement be modified to terminate UMS' lease of Pier 1.

CONCLUSIONS

For all of the reasons hereinbefore set forth it is concluded that Agreements Nos. T–2880, as amended, T–2881–1, T–2883, as amended, T–2884, as amended, and T–2885, as amended, are such agreements as encompassed by section 15 of the Shipping Act, 1916, and subject to the jurisdiction of the Commission.

Agreement No. T-2882, as amended, no longer being operative, any conclusion as to jurisdiction and approvability thereof would serve no regulatory purpose.

For all the reasons hereinbefore set forth it is further concluded that the aforesaid agreements, excepting withdrawn T-2882, as amended, are not unjustly discriminatory or unfair to Pouch nor do they operate to the detriment of the commerce of the United States, nor are they contrary to the public interest and are not otherwise in violation of the Shipping Act, 1916.

It is concluded that Agreement No. T-2884, as amended, should be modified to reflect that UMS shall only use Pier 2.

For all the reasons hereinbefore set forth, the agreements, as modified, should be approved.

For all the reasons hereinbefore set forth it is concluded that the agreements have not been implemented by the parties prior to Commission approval.

For all the reasons hereinbefore set forth it is concluded that the agreements to not subject Pouch to undue or unreasonable prejudice or disadvantage nor establish unjust and unreasonable regulations and practices in connection with the receiving, handling, storing or delivery of property in violation of sections 16 and 17 of the Shipping Act, 1916.

For all of the reasons hereinbefore set forth the complaint is dismissed with prejudice.

(S) STANLEY M. LEVY,
Administrative Law Judge.

WASHINGTON, D.C.,
May 7, 1976.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 374(I)

SOKO HARDWARE

v.

Y. S. LINES

ORDER ON REVIEW OF DISMISSAL

March 30, 1977

This proceeding involves a request for reparation on alleged overcharges of ocean freight. The proceeding was discontinued by order of the settlement officer served February 28, 1977. The dismissal was based on a letter from complainant advising that the claim had been paid in full and requesting the complaint to be cancelled. By notice served March 15, 1977, we indicated our determination to review.

Our determination to review was prompted by the failure of the order of discontinuance to contain any discussion or findings on the question of whether settlement by payment in full results in payment of applicable tariff rates under section 18(b)(3) of the Shipping Act. While settlement of litigation is to be encouraged, it is our responsibility to assure that such settlements in matters involving section 18(b)(3) do not result in payment of charges for transportation which would not otherwise be permitted. To do otherwise could result in use of the Commission's offices to gain approval of inapplicable rates.

While the settlement officer in this proceeding no doubt was satisfied that the settlement was proper under section 18(b)(3), we think it preferable that, in the future, specific findings to this effect be incorporated in the order of dismissal. Upon our review of the record in this proceeding, we have determined that there is sufficient basis therein for permitting payment of the claim in full. Accordingly, it is ordered that proceedings in this matter be discontinued.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 488

COLLINS & AIKMAN EXPORT CORP.

v.

BARBER STEAMSHIP LINES, INC.

NOTICE OF ADOPTION OF INITIAL DECISION

March 28, 1977

No exceptions having been filed 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 28, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 488

COLLINS & AIKMAN EXPORT CORP.

v.

BARBER STEAMSHIP LINES, INC.

Application denied.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Barber Steamship Lines, Inc., seeks permission to waive collection of a portion of the freight charges on a shipment by Collins & Aikman Export Corporation of 13,983 feet of carpet, from Newport News, Virginia, to Jedda, Saudi Arabia, under bill of lading dated May 27, 1976. The rate applicable at the time of shipment is alleged to be $144.00 W/M Plus 70% Congestion Surcharge. The rate sought to be applied is $88.25 W/M Plus 70% Congestion Surcharge, subject to a minimum of 300 revenue tons. This rate would have resulted in total charges of $52,118.69. Permission to waive collection of $7,881.31 is sought.

The application states that: "After shipper applied for rate which Carrier established in Private Tariff FMC-31, there was a falldown in production schedule which prevented delivery of minimum quantity (300 revenue tons) for the vessel."

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and

[1] This decision became the decision of the Commission March 28, 1977.

eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

A falldown in production by the manufacturer is not an error in a tariff of a clerical or administrative nature, nor an error due to an inadvertence in failing to file a new tariff.

Accordingly permission sought by Barber Steamship Lines, Inc., to waive collection of a portion of the freight charges, represented by $7,881.31 is denied.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
February 1, 1977.

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 341(F)

THE FEDERAL MINISTER OF DEFENSE FEDERAL REPUBLIC OF GERMANY

v.

REPUBLIC INTERNATIONAL FORWARDING COMPANY
AND REPUBLIC VAN & STORAGE OF LOS ANGELES, INC.

ORDER DISMISSING PROCEEDING

March 22, 1977

On March 16, 1977 both the Complainant and the Respondent signed and filed a "Joint Motion of Complainant and Defendants for Dismissal of the Complaint." The Complainant has received full payment from the Respondents of the full amount demanded in the original complaint, and, as observed by the Commission in its recent March 1st Order, "we see no purpose to be served by their litigating the matters put at issue by the complaint."

Accordingly, and in view of the history of this proceeding, dismissal with prejudice (as requested by the parties) appears fully justified by the circumstances.

COMPLAINT DISMISSED, WITH PREJUDICE.

(S) THOMAS W. REILLY,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 341(F)

THE FEDERAL MINISTER OF DEFENSE
FEDERAL REPUBLIC OF GERMANY

v.

REPUBLIC INTERNATIONAL FORWARDING COMPANY AND REPUBLIC VAN AND STORAGE OF LOS ANGELES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

March 30, 1977

Notice is hereby given that the Commission on March 30, 1977, determined not to review the order of dismissal of the Administrative Law Judge in this proceeding served March 22, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–24

INTERCONEX, INC.

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U.S. LINES, INC.

ORDER OF DISMISSAL

April 1, 1977

On June 5, 1975, Colt Industries (Colt) on its own behalf and as an agent for the Government of the Republic of Korea filed a complaint in Docket No. 75–19 against Interconex, Inc. (ICX), and Sea-Land Service, Inc. (Sea-Land), American Export Lines, Inc. (AEL) and U.S. Lines, Inc. (USL). In its complaint, Colt alleged that ICX, acting as a non-vessel operating common carrier by water (NVOCC), prepared 379 ocean bills of lading during the period of July 28, 1972 to February 5, 1975 on cargoes to be transported on vessels owned by Sea-Land, USL and AEL in which the cubic measurements and/or weights of Colt cargo shipped from United States ports to Korea were overstated. It was also alleged that, by reason of such overstated measurements and/or weights, ICX and the underlying carriers received compensation in excess of that provided for in their applicable tariffs, contrary to section 18(b)(3) of the Shipping Act, 1916 (Act). Colt sought reparation for Respondents in the amount of $500,000. ICX subsequently (July 11, 1975) filed a counterclaim for some $1,100.00 against Colt in Docket No. 75–19.

In response to motions filed by various parties, the Presiding Administrative Law Judge by Order served September 5, 1975, dismissed Colt's claim and ICX's counterclaim. By virtue of a negotiated settlement reached by Colt, the Republic of Korea and ICX, the parties did not appeal the Administrative Law Judge's dismissal.[1]

On June 24, 1975, ICX filed the complaint in this proceeding, *i.e.*,

[1] The underlying carriers (USL, AEL, and Sea-Land) were invited to become party to an overall settlement in which they would settle ICX's claims against them in Docket No. 75–24, discussed *infra*, as well as ICX and Colt settling their claims against each other. ICX and the underlying carriers, however, were unable to reach agreement.

Docket No. 75–24. In its pleadings ICX advised that it instituted this proceeding primarily to toll the two-year statute of limitation with respect to any claims that it may have against Sea-Land, AEL, and USL as a result of Colt's claim against it in Docket No. 75–19. Further, ICX stated that it considered its complaint in this proceeding to be "in the nature of a cross-claim against co-parties as authorized by Rule 13(g) of the Federal Rules of Civil Procedure", and requested that its complaint be consolidated with the proceedings in Docket No. 75–19.

Because of the similarity of the causes of action, ICX adopted Colt's complaint in Docket No. 75–19 and incorporated it by reference in the complaint filed in this proceeding. ICX alleged that "on information and belief", Respondents "will or may" be required to "indemnify" ICX and that they "are or may be liable" to ICX for "all or part" of any reparations ICX may be required to pay as a consequence of the complaint in Docket No. 75–19. ICX submitted that if Colt, a shipper, prevails in its claim against ICX, as a carrier, the same set of facts and case law will entitle ICX, as a shipper, to recover from the respondent carriers.

Respondents each have moved for the dismissal of ICX's complaint on the ground that it is procedurally and substantively deficient. ICX responded to each of the motions.

On August 11, 1975, Administrative Law Judge William Beasley Harris granted Respondents' motions to dismiss the proceeding in Docket No. 75–24. In so doing, he observed that ICX had filed no replies to Respondents' dismissal motions. When ICX explained to the Presiding Officer the clerical error which resulted in him not receiving copies of ICX's replies to Respondents' motions, the Presiding Officer entered an "Order Upon *Sua Sponte* Reconsideration of Order served August 11, 1975," wherein he took into account ICX's replies and reaffirmed his Order of August 11, 1975.[2]

ICX has now filed an appeal from the order of dismissal to which Respondents have replied. USL has also filed a second motion to dismiss ICX's appeal arguing that it is moot because Docket No. 75–19 has since been terminated.

USL's dismissal request is premised on the theory that because the Administrative Law Judge's dismissal of Docket No. 72–19 was not appealed, and subsequently became the decision of the Commission, and because Docket No. 75–24 is premised upon Docket No. 75–19, no regulatory purpose would be served by allowing Docket No. 75–24 to continue. USL believes that in view of the fact that ICX has incorporated

[2] On the day the Presiding Officer issued his *sua sponte* Order, ICX moved for reconsideration and oral argument with respect to the Order of August 11, 1975. The Presiding Officer did not address ICX's motion. However, since ICX, in its reconsideration request, made the same arguments as were in its reply to Respondents' motions to dismiss, we consider the *sua sponte* reconsideration order to be an adequate response to the arguments advanced by ICX on reconsideration.

by reference Colt's allegations in Docket No. 75–19, which allegations will now never be proven, ICX's appeal has become moot.

ICX, in reply, argues that the dismissal of Colt's complaint should have no bearing on its right to appeal. It would violate due process, contends ICX, for the Commission to treat its appeal as though it has never been filed; particularly because its complaint constitutes an independent cause of action. The proper approach, concludes ICX, is not to dismiss its complaint but, rather, to allow ICX to amend its complaint making clearer its independence from Colt's complaint. We disagree. We view ICX's complaint as a contingent claim based upon a set of circumstances which now cannot come about.

The complaint of ICX in this proceeding being "in the nature of a cross-claim" did not constitute a wholly independent cause of action but rather relied for its vitality upon the catalytic effect of a finding that ICX was liable to Colt Industries for assessing improper charges under the complaint filed in Docket No. 75–19. In the event of such a finding, then the claim of ICX, in theory at least, would come to life and any liability suffered by ICX would then *ipso facto* form the basis of ICX's complaint against the ocean carriers.

ICX itself in its appeal recognized the contingency of its claim when it advised that:

> . . . ICX has no reason to make any *unconditional* claim against the underlying carriers unless it is held liable to Colt . . . [emphasis original];

and, that:

> Possibly the Colt case against ICX will be decided in a way which renders the ICX complaint moot—in which case the ICX complaint can be dismissed or withdrawn.

The contingency — *i.e.,* a finding of ICX's liability in Docket No. 75–19 — failed, however when the claim of Colt against ICX was dismissed by the Presiding Officer and became the decision of the Commission. This dismissal of the underlying Colt complaint destroys the possibility of a finding of ICX liability in that proceeding which would give rise to any claim by ICX in this proceeding. Therefore, ICX has no claim as to which, under any set of circumstances, as framed, it would prevail. (*Investigation of General Rate Increase in the Domestic Guam Trade,* 7 S.R.R. 167 (1969)). In short, our determination here is a denial of ICX's appeal from the Presiding Officer's Order of Dismissal. We do so having thoroughly reviewed the ICX appeal. We see in our denial no deprivation of due process.

Our disposition of the overriding issue remaining in this proceeding makes unnecessary any ruling by us on USL's motion to dismiss ICX's appeal.

THEREFORE, IT IS ORDERED, That appeal of Interconex, Inc. from the Presiding Officer's Order of Dismissal is denied;

FURTHER, IT IS ORDERED, That the complaint of Interconex, Inc. is, dismissed with prejudice.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 490

FOOTNER AND COMPANY, INC.

v.

SEA-LAND SERVICE, INC.

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

August 12, 1977

The Commission by notice served April 20, 1977, determined to review the Initial Decision of the Administrative Law Judge in this proceeding served April 5, 1977. Upon completion of review it has been decided that the Initial Decision of the Administrative Law Judge be adopted as the decision of the Commission.

THEREFORE, IT IS ORDERED, That applicant, Sea-Land Service, Inc., is authorized to waive collection of $525.00 of the charges previously assessed Footner and Company, Inc.

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 No. 490 that effective August 28, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from August 28, 1976, through September 18, 1976, the rate on 'ventilators, roof (non-mechanical)' minimum 22.5 m.t., for shipment, Elizabeth, New Jersey to Riyadh, Saudi Arabia was $210.00 w/m subject to all applicable rules, regulations, terms and conditions of said rate 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) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 490

FOOTNER AND COMPANY, INC.

v.

SEA-LAND, INC.

April 5, 1977

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298), and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant), has applied for permission to waive collection of a portion of the freight charges on a shipment of roof ventilators, which moved from Elizabeth, New Jersey, to Riyadh, Saudi Arabia, under a Sea-Land bill of lading dated August 28, 1976. The application was filed October 20, 1976.

The subject shipment moved under Sea-Land Service, Inc., Tariff 256–A, FMC–136, 4th revised page 81, item 755, effective August 31, 1976. The shipment measured 790 cubic feet (19.75 measurement tons of 40 cubic feet). The rate applicable at time of shipment was $210 W/M, with a minimum of 25 measurement tons per container. The rate sought to be applied is $210 W/M, with a minimum of 22.5 measurement tons per container. (Same tariff as cited above, except that the latter rate was published on 5th revised page 81, item 755, effective September 18, 1976.)

Aggregate freight charges payable pursuant to the rate applicable at time of shipment amounted to $5,250. Aggregate freight charges at the rate sought to be applied amount to $4,725. The difference sought to be waived is $525. The Applicant is not aware of any other shipment of the same commodity which moved via Sea-Land during the same time period at the rates involved in this shipment.

[1] This decision became the decision of the Commission August 12, 1977.

[2] 46 U.S.C. 817, as amended.

Sea-Land offers the following as grounds for granting the application:

(4) Sea-Land negotiated with Footner and Company for a rate to cover a movement of Ventilators, Roof, Non-motorized from Elizabeth, New Jersey. The negotiations were handled by Footner and Company, a freight forwarder, on behalf of Herschman and Poole. A rate of $210.00 W/M minimum weight 22.5 measurement tons was agreed upon (Attachment No. 1, page 6).

In passing the information to the rate analyst (attachment No. 2) the minimum weight was incorrectly transcribed as 25 measurement tons and the publication request (Attachment Nos. 3 and 4) reflects the incorrect minimum weight.

The forwarder realized the error and in his telex of September 15, 1976 (Attachment No. 5) informed our account representative Mr. Beilin that the charges billed were different from the charges as negotiated.

On September 17, 1976 the error in minimum weight was corrected by telex filing message 180 (Attachment Nos. 6 and 7).

Clerical error on Sea-Land's part in transmitting the wrong minimum weight to the tariff publications section was the cause of the erroneous publication effective August 31, 1976. A corrected publication was made promptly following disclosure of the initial erroneous publication.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in the tariff of a clerical or administrative nature, resulting from the inadvertent failure to file the negotiated rate with the proper minimum of 22.5 M.T. per container, as had been promised the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, specifically the amount of $525. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
April 5, 1977.

FEDERAL MARITIME COMMISSION

No. 73–27

CONSOLIDATED EXPRESS, INC.

v.

SEA-LAND SERVICE, INC., ET AL.

COMPLAINT DISMISSED

March 8, 1977

On February 14, 1977, I ordered complainant Consolidated Express, Inc. (Conex), to submit justification against dismissal of the complaint. See Order Requiring Complainant to Submit Justification Against Dismissal of Complaint. Briefly, I advised Conex that I could see no reason to retain this aged complaint case on the docket for a number of reasons relating to mootness, want of prosecution, other litigation, and lack of indication that the parties would either settle their differences or proceed to hearing.

In response to my ruling, Conex and respondent Seatrain Lines, Inc. (Seatrain), have submitted comments. Conex's comment takes the form of a request to withdraw the complaint without prejudice "in order to avoid litigation of matters which it appears may be resolved in other proceedings" but suggests that it may desire to use the record developed in this proceeding as part of any later Commission proceeding. See Complainant's Request to Withdraw Complaint Without Prejudice, March 1, 1977. By letter of the same date, respondent Seatrain requests that the complaint be dismissed *with* prejudice. Seatrain contends that the complaint was filed almost four years ago but Conex "has demonstrated a total inability to back up its complaint with evidence or to pursue its complaint to completion." Seatrain furthermore requests a finding that Conex has "totally failed in proof" on the merits of its complaint. Without detailed explanation, Seatrain requests this unusual action on the ground that it is a defendant in an unidentified antitrust case brought by Conex, cannot prevent the complaint from being dismissed, and somehow needs a finding on the merits.

As I explain below, I see no reason to continue this case on the docket. However, I find that Seatrain's requests for a dismissal with prejudice and for specific findings on the merits to be unwarranted.

As to the qustion of dismissing the complaint, I believe there can be little disagreement. As I explained in my ruling, cited above, this complaint case is now almost four years old and there are no signs whatsoever that Conex will proceed to hearing. Indeed, Conex indicates that it has chosen to seek whatever relief to which it believes it is entitled in another forum. As I noted in my ruling, furthermore, the practices of which Conex complained were ordered to be terminated long ago (September 18, 1973) and whatever viable issues which might have remained in the case were removed by Conex when it amended its complaint on September 9, 1976, to delete the claim for reparation.[1] The case therefore is essentially academic and at best would lead to a declaratory-order type decision establishing principles and guidelines governing the respective rights and duties of respondents under the Shipping and Intercoastal Acts. The need for even this type of decision is questionable, however, in view of the many decisions favorable to Conex already rendered in the courts, another agency, another proceeding before this Commission and in this proceeding as well.[2]

Failure to prosecute is, or course, recignized grounds for dismissal of a complaint. See Wright & Miller, *Federal Practice and Procedure:* Civil § 2370, p. 203; Federal Rule 41(b), 28 U.S.C.A.; *Link v. Wabash Railroad Co.,* 370 U.S. 626 (1962). This principle has been followed by the Commission. See, e.f., *The Tagit Co. v. Luckenbach Steamship Company, Inc., et al.,* 1 U.S.S.B.B. 519 (1935); *Isbrandtsen Co., Inc.,* 3 F.M.B. 543 (1941). Moreover, the Commission has expressed concern over the amount of time consumed in its proceedings, stating with respect to complaint cases particularly that "The Commission has a legitimate interest in seeing proceedings pursued to a conclusion and not languish on its docket for years while parties negotiate at leasure." Docket No. 74–11, *Rules of Practice and Procedure,* 14 SSR 923, 924 (1974). For similar sentiments expressed by the Commission, see Docket No. 75–36, *Miscellaneous Amendments,* 41 *Federal Register* 20585, May 19, 1976, and Docket No. 74–11, cited above, *Notice of Proposed Rulemaking,* 39 *Federal Register* 11117, March 25, 1974. Both for reasons of mootness and want of prosecution, then, this complaint should be and hereby is dismissed. This does not entirely dispose of the matter since Seatrain requests dismissal with prejudice and findings on the merits. As discussed below, however, I find Seatrain's requests unwarranted for several reasons.

As far as the issue of reparation is concerned, Conex has itself already succeeded in achieving a dismissal with prejudice. This occurred when Conex withdrew that portion of its complaint dealing with that issue. Since the practices of which Conex complained terminated as of September 1973, Conex is now precluded from filing a new complaint because of the two-year period of limitation prescribed by section 22 of

[1] This was apparently done because Conex has elected to seek damages in an antitrust action in the courts. See *Carnation Company v. Pacific Westbound Conference et al.,* 383 U.S. 213, 224 (1966).

[2] For a recitation of all of these cases and decisions, see my previous ruling, cited above, pp. 4, 5.

the Shipping Act, 1916, a non-waivable jurisdictional prerequisite. *U.S. Borax & Chem. Corp. v. Pac. Coast European Conf.*, 11 F.M.C. 451, 471–72 (1968), *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602, 612 (1959).

As to the remaining issues in the complaint, I do not believe that the action requested by Seatrain, to wit, dismissal with prejudice and findings on the merits is warranted. I recognize that complaints have been dismissed with prejudice in proceedings before the Commission.[3] Nevertheless, such action, as one court has stated, is "a drastic sanction to be applied only in extreme situations." *Syracuse Broadcasting Corp. v. Newhouse*, 271 F. 2d 910, 914 (2 Cir. 1959). Dismissals with prejudice are therefore scrutinized very carefully and, if allowed, are done so for such things as a clear record of delay, contumacious conduct by complainant, or serious showing of willful default. See Wright & Miller, cited above, § 2369, pp. 193–198. Although there has been considerable delay in this proceeding, as I have noted in my previous ruling, cited above (pp. 2, 3), and elsewhere (see Motions to Dismiss Denied, 16 SRR 817, note 1), it has not all been attributable to complainant and I certainly would not find that complainant has been guilty of contumacious conduct or has been in willful default. Despite all the delay, furthermore, Conex had submitted a prepared written case by September 1975, which, although untested at a hearing, withstood motions to dismiss. See ruling, cited above, pp. 2, 3. Furthermore, Seatrain's very abbreviated letter is not very enlightening, much less persuasive as to other reasons why I should grant the extraordinary sanction requested.[4]

Postscript

Seatrain has followed its initial letter of March 1 with a second letter dated the next day in reply to Conex's suggestions that "the record herein could be made a part of any later Federal Maritime Commission proceeding involving the same parties and the issues herein."[5] Seatrain expresses concern over a possible revival of these issues at some distant time in the future when memories fade and knowledgeable witnesses

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[3] See e.g., *Ace Machinery Co. v. Hapag-Lloyd A.G.*, Order, 16 SRR 1531, note 1 (1976); this docket, Dismissal of Complaint in Part, August 2, 1974; *Clipper Carloading Company v. Trans-Pacific Freight Conference of Japan, et al.*, Docket No. 72–20, Order of Dismissal, July 21, 1975. However, even when the Commission has specifically refused to vacate an order of a presiding judge dismissing a complaint with prejudice, it has subsequently entertained petitions to vacate and impliedly indicated that under proper circumstances such as "overriding public interest considerations" it could permit a reopening of the proceeding. See the Order in the *Ace Machinery* case, cited above, p. 1535.

[4] Seatrain also bases its request upon the fact that it is a defendant in an unidentified antitrust case brought by Conex and suggests that it somehow might need a determination on the merits by this Commission in connection with that litigation. I am not given much explanation as to why this might be so. If Seatrain means to say that Shipping-Act findings as to the long-terminated practices are necessary to its defense in the antitrust case, doubtless it can convince the Court of the need for referral to the Commission under the doctrine of primary jurisdiction. Cf. *Carnation Company v. Pacific Westbound Conference et al.*, cited above, 383 U.S. at pp. 222, 223.

[5] Although my ruling permitted respondents to file their comments simultaneously with those of Conex and did not provide for replies to Conex unless such would be appropriate (ruling, p. 6), Seatrain's immediate reply is understandable considering the suggestions contained in Conex's request for withdrawal. I have therefore accepted and considered Seatrain's second letter. However, since both sides have expressed their positions, further comments are unnecessary.

depart. Normally this would be a legitimate concern. However, as I explained above, the Congress anticipated Seatrain's concern by legislating a two-year period of limitations and Conex's right to seek money damages (reparation) under the Shipping Act, 1916, is now time-barred and, in effect, its complaint has been dismissed with prejudice in this respect. As to the issues of possible violations of law occurring between February and September 1973, it does not seem likely that Conex, which is seeking damages in an antitrust case, would desire to resume litigation before the Commission with no prospects of recovering damages and even if it did,[6] there are five-year statutes of limitations which will expire in 1978 (18 U.S.C. 3282; 28 U.S.C. 2462) so as to protect Seatrain against statutory penalties assuming violations are found and related court action is contemplated. There is, furthermore, as Seatrain notes, no evidentiary "record" in this case, merely proffered documents and other materials which have not been admitted into evidence. (This fact provides additional reason why I should not make findings on the merits which Seatrain is requesting). In short, I believe that Seatrain's apprehensions about possible revival of this complaint case to its "extreme prejudice" are not realistic. Furthermore, if there is a possibility that the Court in the antitrust case needs findings under the Shipping Act in connection with the antitrust case, as Seatrain earlier hinted, these findings should be made by means of the full hearing process rather than by summary edict via an order of dismissal with prejudice.

(S) NORMAN D. KLINE,
Administrative Law Judge.

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[6] Seatrain suggests the possibility that the Court in the pending antitrust case may refer certain matters to the Commission for determination. I do not know how possible such action by the Court may be but if it should occur, obviously it would not happen at a far distant time in the future and would doubtless occur because Seatrain itself or another defendant persuaded the Court to take such action.

FEDERAL MARITIME COMMISSION

No. 73–27

CONSOLIDATED EXPRESS, INC.

v.

SEA-LAND SERVICE, INC., ET AL.

NOTICE OF DETERMINATION NOT TO REVIEW

April 4, 1977

Notice is hereby given that the Commission on April 4, 1977, determined not to review the order of dismissal in this proceeding served March 8, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 505

KUHNE & NAGEL

v.

SEA-LAND SERVICE, INC.

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

April 4, 1977

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 4, 1977.

It is Ordered, That applicant is authorized to waive collection of $3,626.56 of the charges previously assessed Kuhne & Nagel.

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 505 that effective July 15, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from July 15, 1976 through August 19, 1976, the rate from Group 1 Ports on 'Boots, ski, N.O.S.', minimum 12 tons per container, is $142.00 W subject to all applicable rules, regulations, terms and conditions of said rate 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) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 505

KUHNE & NAGEL

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant) has applied for permission to waive collection of a portion of the freight charges on seven shipments of ski boots that moved from Genoa, Italy to (respectively Oakland (3), Los Angeles, and Long Beach, California, and Seattle, Washington (2), under bills of lading dated July 24, 1976 (four shipments), July 30, 1976 (two shipments), and August 5, 1976 (one).

The subject shipments moved under Sea-Land westbound Mediterranean-Pacific Coast joint container freight tariff No. 205, FMC–77, ICC–73, 15th revised page 138, effective June 25, 1976, under the rate for the item "Boots, Ski, N.O.S.: from Italy only" (Item 19–070). The aggregate weights of the seven shipments were, respectively, 10,120 kilos, 9947, 9844, 10,086, 9820 and 9408 kilos. The rate applicable at time of shipment was $224 per ton of 1000 kilos, minimum 7 tons per container. The rate sought to be applied is $142 per ton of 1000 kilos, minimum 12 tons per container. Sea-Land westbound Mediterranean-Pacific Coast joint container freight tariff No. 205, FMC–77, ICC–73, 16th revised page 138, item 19–070, effective August 19, 1976.

The shipments moved via Sea-Land's mini-landbridge service, by water from Genoa, Italy to Elizabeth, New Jersey, then by rail to their west coast destinations. Although moved under a through rail-water rate, the

[1] This decision became the decision of the Commission April 4, 1977.

[2] 46 U.S.C. 817, as amended.

waiver of a portion of the charges involved here would affect only the ocean carrier's portion.

Aggregate freight charges pursuant to the rate applicable at time of shipment amounted to $15,554.56 (combined total for seven shipments). Aggregat freight charges at the rate sought to be applied amount to $11,928. The difference sought to be waived is $3,626.56. The Applicant is not aware of any other shipments of the same commodity which moved via Sea-Land during the same period of time at the rates involved in this shipment.

Sea-Land offers the following as grounds for granting the application:

> (4) In early July Sea-Land agreed to publish a reduced through ocean-rail rate of $142.00W for a movement of ski boots to be made from Genoa to Pacific Coast destination terminals. Rate was to be published to be applicable in Sea-Land's mini-landbridge service in time for shipments that were to begin to move in the last half of the month. Publication of the agreed rate was made in Item No. 19-070 on 16th revised page of Tariff No. 205 with an issue date of July 13th, applicable only from ports in Italy. Through clerical error on Sea-Land's part the rate was erroneously symbolized as an increase effective on full statutory notice of 30 days (Attachment No. 1), whereas it should have carried a teardrop of (R) reduction symbol. With an issue date of July 13 the reduced rate should have been made effective on July 15 on not less than one day's notice, which would have been in amply time for the first shipment, dated July 24. The tariff page was not rejected by either Commission and actually became effective August 19. The mistake in tariff compilation and publication was not discovered until early August after some shipments had moved and charged at the rate of $224.00W, minimum 7 tons per container than in effect on 15th revised page 168 (Attachments No. 2 and 3).

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90-298), and Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to post the teardrop (R) reduction

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

symbol next to the new rate, which was in fact a reduction and intended to be so, and which had been promised to the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within 180 days from the date of the subject shipments.

Accordingly, permission is granted to Sea-Land Service, Inc. to waive collection of a portion of the freight charges, specifically, the amount of $3,626.56. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
March 15, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 481

THE PERMANENT MISSION OF SOCIALIST REPUBLIC OF ROMANIA

v.

PRUDENTIAL LINES

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

April 4, 1977

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 4, 1977.

It is Ordered, That applicant is authorized to waive collection of $712.00 of the charges previously assessed The Permanent Mission of Socialist Republic of Romania.

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 481 that effective December 17, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from December 17, 1975 through March 4, 1976, the special rate on 'Automobiles' is $175.00 lump sum, subject to all applicable rules, regulations, terms and conditions of said rate 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) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 481

THE PERMANENT MISSION OF SOCIALIST REPUBLIC OF ROMANIA

v.

PRUDENTIAL LINES

April 4, 1977

Application granted.

INITIAL DECISION[1] OF THOMAS E. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Prudential Lines (Prudential or Applicant) has applied for permission to waive collection of a portion of the freight charges on the shipment of an automobile from Costanza, Romania to New York, under Prudential bill of lading dated December 17, 1975. The application was filed May 17, 1976.

The subject shipment moved under Prudential Lines Inc. Mediterranean/U. S. Atlantic Freight Tariff FMC No. 43, Section 1, page 16, 6th revised, effective December 11, 1975, under the rate for "Cargo, N.O.S." The shipment measured 14′ × 4′ 10″ × 4′ 4″. The rate applicable at time of shipment was $107 W/M. The rate sought to be applied is a special lump sum rate of $175 for automobiles for the Permanent Mission of the Socialist Republic of Romania, which had been agreed upon in advance by the shipper and the carrier, but which rate was inadvertently forgotten to be filed until after the shipment was completed. See Prudential Lines Inc. Mediterranean/U.S. Atlantic Freight Tariff FMC No. 43, Section 1, page 16, 15th revised, effective March 4, 1976 (correction #184).

Aggregate freight charges payable, pursuant to the rate applicable at the time of shipment, amounted to $887. Aggregate freight charges at the rate sought to be applied amount to $175. The difference sought to be

[1]This decision became the decision of the Commission April 4, 1977.

[2]46 U.S.C. 817, as amended.

waived is $712. The Applicant is not aware of any other shipment of the same commodity which moved via Prudential during the same time period at the rates involved in this shipment.

The documents submitted with Prudential's application, together with others submitted later in response to requests from the assigned Administrative Law Judge, establish that an agreement was reached between Prudential's representative in Romania and the Ministry of Foreign Affairs of the Socialist Republic of Romania, whereby an automobile measuring 14′ × 14′ 10″ × 4′ 4″ would be shipped from Costanza, Romania, to the Permanent Mission of the Socialist Republic of Romania in New York, U.S.A. for a lump sum special rate of $175. However, due to poor communications and a lack of understanding of F.M.C. regulations by Prudential's Romanian agent, the lump sum rate was not transmitted to New York until after the shipment had been completed.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to timely file a new tariff, which had been agreed upon in advance by the parties.

2. Such waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Prudential filed a new tariff which set forth the rate on which such waiver should be based.

4. The application was filed within 180 days from the date of shipment.

Accordingly, permission is granted to Prudential Lines, Inc., to waive

[3] For other provisions and requirements see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

collection of a portion of the freight charges, specifically the amount of $712. An appropriate notice will be published in Prudential's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
MARCH 11, 1977.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–54

CONSOLIDATION ALLOWANCE RULES PUBLISHED IN THE FREIGHT TARIFFS OF CONFERENCES; INDEPENDENT CARRIERS AND THE RATE AGREEMENT OPERATING BETWEEN UNITED STATES ATLANTIC PORTS IN THE UNITED KINGDOM, IRELAND, THE SCANDINAVIAN PENINSULA AND CONTINENTAL EUROPE

ORDER DENYING APPEAL AND DISCONTINUING PROCEEDING

April 15, 1977

The Commission instituted this proceeding to determine the legality under sections 16, 17 and 18(b) of the Shipping Act, 1916, of "consolidation allowance" provisions contained in the tariffs of certain conferences, rate agreement member lines, and independent lines.[1] These consolidation allowances are fees paid by the Carriers to entities called Consolidators for the services rendered by the Consolidators in amalgamating less-than-container and less-than-trailer loads of cargo into containerloads for ocean transport.

In December 1975 this Commission was informed by the carriers that the consolidation allowance provisions which had been in effect for some seven years previously were proposed to be "suspended indefinitely" effective January 12, 1976. The result of this proposed suspension was immediate vociferous protest on the part of interests representing Consolidators and others alleged to be adversely affected by the loss of consolidation allowances.[2]

As a result of these protests, and Commission concern, the proposed suspension date of January 12, 1976 was repeatedly postponed—ultimately to September 20, 1976. During this interim, the carriers proposed amended consolidation allowance provisions which were scheduled to become effective on September 20, 1976 in the place of the pre-existing provisions. The amended consolidation provisions were a great deal more

[1] When referred to generally, all carrier interests, including conferences, the rate agreement, or individual carriers, will be called "Carriers."

[2] Although these parties include freight forwarders, NVOCC's and consolidators all such interests will be referred to as "Consolidators" hereafter. They are: Andrews International, Inc.; Boston Consolidation Service, Inc.; J. E. Bernard & Co., Inc.; C. S. Greene & Co., Inc.; and Yellow Forwarding Company.

complex than their predecessors. What had been (with certain minor exceptions) a fixed allowance of $525 per container unit consolidated became a quagmire of confusing, detailed rules.[3] The net result of these amended rules, however, was the loss of allowance payments by the major portion of Consolidators and reduced payments to those few who continued to qualify for such payments.

Although these proposed amended consolidation allowance rules did, in fact, go into effect, their duration was the limited period from September 20, 1976 to November 8, 1976. On November 8, 1976, by further tariff provision amendments, the pre-September 20, 1976 *status quo* was restored. This was accomplished as a result of an Order of the Federal District Court for the Southern District of New York[4] issued on November 4, 1976, granting a Motion for Preliminary Injunction. That court ordered the restoration of the *status quo ante* by requiring the cancellation of the amended consolidation allowance rules and reinstitution of the original provisions.

Presiding Administrative Law Judge Thomas W. Reilly scheduled a pre-hearing conference for November 5, 1976. At that time, he was informed of the sequence of events described above. At that time, also counsel for the conferences informed the Presiding Officer that, effective November 8, 1976, the court's order would be implemented, and that the conferences intended to file a motion to dismiss this proceeding as moot. All other parties—save Hearing Counsel—made it clear that they would actively support such a motion in the interest of avoiding the expenditure by all concerned of unnecessary time, expense, and effort in pursuing a proceeding notwithstanding satisfaction of all affected interests.

Thereafter, as promised, counsel for the Carriers, on November 15, 1976 filed the anticipated "Motion to Discontinue Proceeding." By that filing the carriers urged discontinuance of the proceeding on the ground of mootness, and, alternatively, requested that the proceeding be held in abeyance pending resolution of certain issues in a companion proceeding.[5] In response thereto, the Consolidators, Baltic Shipping Company (BSC), Polish Ocean Line (POL), and Hearing Counsel submitted Replies. The Consolidators, BSC and POL,[6] uniformly supported the motion of the Carriers. Hearing Counsel, however, opposed the Motion to Discontinue. It was Hearing Counsel's position that four of the eight original issues placed under investigation could be dismissed but that the remaining four issues should be pursued. The Consolidators and Carriers then filed Answers taking issue with the position of Hearing Counsel.

[3] A description of these rules may be found on pages 3–5 of the Commission's Order of Investigation and Hearing of September 24, 1976.

[4] *C. S. Greene & Co., Inc. v. North Atlantic Baltic Freight Conference*, No. 76 Cir. 4118 (S.D.N.Y., November 4, 1976).

[5] The companion proceeding is Commission Docket No. 76–35. That proceeding, which was instituted by Order to Show Cause, addressed only the issue of carrier authority under section 15 to institute, amend or discontinue consolidation allowance rules.

[6] Additionally, POL sought its dismissal as never having been involved in any proposed suspension of allowances, or amendments thereto.

On December 27, 1976, the Presiding Officer issued his "Order Granting Motion to Discontinue." Thereafter, pursuant to Commission procedures, Hearing Counsel filed an Appeal from that Order, and the Carriers and Consolidators filed Replies to the Appeal.

In his Order granting the motion to discontinue this proceeding, the Presiding Officer grounded his discontinuance on the Commission's own Order of Investigation and Hearing with respect to all issues raised. In so doing, he made the following points:

> Conference Respondents point out that the Commission's September 24 Order was directed to "the consolidation rules presently in effect in the trade" (referring to the September 20 amendments to the consolidation allowance rules). Indeed, the Commission's factual and historical preamble, leading up to its Order specifying the eight issues to be heard, is filled with repeated references to the September 20 amendments to the consolidation allowance rules, the "amended' rules, the "revised" rules (see p. 2–4 of Commission's Order), and the apparent evils, inequities and mischief the September 20 amendments would create. On page 5 of the Commission's Order, the statement is made: "Further, the subject rules bring into focus several relationships which are of interest to the Commission." On page 6 the Commission concludes: Upon consideration of the above matters, the Commission is of the opinion that the consolidation rules *presently in effect* in the trade and the industry practices which have arisen *in conjunction with such rules* should be made the subject of a public investigation and hearing to determine, among other things, whether *these rules* make or give any undue or unreasonable advantage. . . . (Emphasis original.)
>
> Taking the Commission's September 24 Order as a whole, and attempting to avoid giving undue importance to any small portion taken out of context, I find that the only reasonable interpretation yields the conclusion that the Commission was primarily, if not totally, concerned with the effects, ramifications and inequities posed by the September 20 amendments to the Conference Respondents' consolidation allowance rules, and *not* to a broad study of consolidation rules in general.[7] (Emphasis original.)

Hearing Counsel's position on appeal is, essentially, that: (1) The Presiding Officer correctly ruled as to issues (1), (4), (5) and (6) of the original Order of Investigation because these issues dealt with allegations of violations of sections 16 First, 18(b)(3), 18(b)(5) and 17 of the Shipping Act by virtue of implementation of the amended consolidation allowance rules; and (2) The Presiding Officer erred, however, in permitting the discontinuance of the proceeding with respect to issues (2), (3), (7) and (8) of the Order of Investigation because these issues allegedly address possible statutory violations resulting from implementation of consolidation allowance rules *generally,* and are issues which ". . . involved regulatory considerations which transcend any of the changes to the tariff provisions. . . ."

The Consolidators and the Carriers oppose Hearing Counsel's appeal, essentially on the grounds relied upon by the Presiding Officer in his discontinuance order.

We concur in the findings and conclusions of the Presiding Officer. The further prosecution of the issues involved *under the terms of the original Order* does not appear to be warranted. We take no position at this time

[7] *Order Granting Motion to Discontinue,* December 27, 1976. pp. 5–6.

as to the merits of the issues alleged by Hearing Counsel to have survived the cancellation of the amended consolidation rules. The Commission shall keep such issues under advisement. However, should we determine to pursue these issues, such an investigation will be instituted afresh and not be attempted to be molded out of whatever imprecise issues in the original Order may arguably survive in this proceeding.

THEREFORE, IT IS ORDERED, That the Appeal of Hearing Counsel from the Order Granting Motion to Discontinue is denied; and

IT IS FURTHER ORDERED, That this proceeding be, and hereby is, discontinued.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NOS. 71–2, 71–8, 71–26, AND 71–34

TRANSAMERICAN TRAILER TRANSPORT, INC.
SEATRAIN LINES, INC.
DANIELS & KENNEDY, INC.
CHANDRIS AMERICA LINES, INC.
GREEK LINE, INC.
HOME LINE AGENCY, INC.
INCRES LINE

v.

THE NEW YORK SHIPPING ASSOCIATION, INC.

DISMISSAL OF COMPLAINTS

April 13, 1977

The captioned complaints were consolidated with our investigation in Docket No. 69–57, *Agreement No. T–2336—New York Shipping Association Cooperative Working Arrangement,* which was designed to establish the formula to be used by the New York Shipping Association, Inc. (NYSA) in assessing carriers and other employers of maritime labor to raise monies to fund various fringe benefits for longshoremen for the 1969–1971 period and to insure that the necessary adjustments in assessments are made to implement the assessment formula approved by the Commission. The Commission has approved an assessment formula (*Agreement No. T–2336—New York Shipping Assoc.,* 15 F.M.C. 259 (1972)), and such approval has been affirmed upon court review. (*Transamerican Trailer Transport, Inc. v. F.M.C.,* 160 U.S. App. D.C. 351, 492 F.2d 617 (1974)). The Commission has also ordered that various assessment adjustments be made which it determined were necessitated by its action in 15 F.M.C. These adjustments are now the subject of review proceedings in the Court of Appeals for the District of Columbia Circuit. No. 76–2024—*NYSA v. F.M.C. & U.S.A.,* and No. 76–2026—*States Marine International, Inc. v. F.M.C. & U.S.A.*

The captioned complaints dealt with matters that are no longer subject to dispute, and will remain so regardless of the outcome of the pending review proceedings. Docket Nos. 71–2, 71–8, and 71–34 dealt solely with

questions relating to the authority of NYSA to raise the level of assessments on "excepted" cargoes and the propriety of such increased assessments. A challenge with respect to the increased assessment on excepted cargoes also formed a part of the gravamen of the complaint in 71–26. See 15 F.M.C. *supra,* at 302. These questions were resolved against Complainants in these proceedings in the Commission's action with respect to the establishment of the proper assessment formula. See 15 F.M.C. *supra,* at 264, 301–303; 160 U.S. App. D.C., *supra,* at 355, 360, 492 F.2d, *supra,* at 621, 626.

Moreover, Transamerican Trailer Transport, Inc., Seatrain Lines, Inc., and Daniels and Kennedy, Inc., the Complainants in 71–2, 71–8, and 74–26, respectively, have entered into Commission-approved settlement agreements which resolve all issues as between these Complainants and NYSA with respect to the 1969–1971 assessment period. (See Report in Docket No. 69–57, served September 17, 1976, pages 4–5, 12.)

THEREFORE, IT IS ORDERED, That, the subject complaint proceedings be, and they hereby are, dismissed.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 485

FORD MOTOR COMPANY

v.

SEA-LAND SERVICE, INC.

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

April 13, 1977

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 13, 1977.

It is Ordered, That applicant is authorized to waive collection of $30,170.88 of the charges previously assessed Ford Motor 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 485 that effective December 31, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from Decmeber 31, 1975 through February 23, 1976, the rate to Hiroshima, Japan on 'Shipping Containers, metal, Instruments of International Trade, Empty, K/D' is $135.00W, subject to a minimum of 11.68 weight tons per container, and the rate is subject to all applicable rules, regulations, terms and conditions of said rate 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) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 485

FORD MOTOR COMPANY

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended b P.L. 90–298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant) has applied for permission to waive collection of a portion of the freight charges on a shipment of empty metal shipping containers that moved from Houston, Texas to Hiroshima, Japan, under a Sea-Land bill of lading January 16, 1976. The application was filed July 14, 1976.

The subject shipment moved via mini-landbridge service by rail from Houston to Oakland, California, then over water to Hiroshima, via Kobe, Japan. The shipment moved under a through rail-water rate published in Sea-Land Freight Tariff No. 234, FMC–106 and ICC–92, item #692–9999–32, 1st revised page 477, effective December 31, 1975. Refund of the charges here involved would affect only the ocean carrier's portion. The aggregate weight of the shipment was 187,008 pounds, and it measured 14,160 cubic feet. The rate applicable at time of shipment was $135 per ton of 40 cubic feet or 2000 pounds, with a minimum of 11.68 revenue tons per container. The rate sought to be applied is $135 per weight ton of 2000 pounds, with a minimum of 23,360 pounds per container (11.68 weight tons), per Sea-Land Freight Tariff No. 234, FMC–106, ICC–92, item #692–9999–32, 2nd revised page 477, effective February 23, 1976.

Aggregate freight charges payable, at the rate applicable at time of shipment, amounted to $49,560. Aggregate freight charges at the rate sought to be applied amount to $19,389.12 (including container service charge). The difference sought to be waived is $30,170.88. The Applicant

[1] This decision became the decision of the Commission April 13, 1977.

[2] 46 U.S.C. 817, as amended.

is not aware of any other shipment of the same commodity which moved via Sea-Land during the same time period at the rates involved in this shipment.

Sea-Land offers the following as grounds for granting the application:

(4)Sea-Land negotiated with Ford Motor Company for a rate to cover movement of knocked-down shipping racks being returned from Houston, Texas, or New Orleans, La. to Hiroshima, Japan. A rate of $135.00 per weight ton of 2,000 lbs., to apply in Sea-Land's mini-landbridge service was agreed upon as a special rate to apply only to Hiroshima. Letter from Ford Motor Company dated October 29, 1975 to Sea-Land (attachment no. 1) confirms these negotiations. The agreed rate was to become effective by January 1, 1976 and remain in effect through March 31, 1976 to cover the anticipated period of movements. It also included attachment of a minimum weight of 11.68 weight tons per container to the rate, to insure adequate minimum revenue for Sea-Land, as set forth in teletype exchanges dated September 30 and October 29 (attachment no. 2) between Sea-Land's Oakland (Pacific Division) office and the home office in Edison (Menlo Park).

In sending the publication instructions, however, our Pacific Division in Oakland erroneously transmitted to the Pacific Division in Elizabeth a weight or measurement option for the rate, whereas the agreement was for the rate to apply on a weight basis only, subject to the minimum weight per container. This clerical error was carried forward to the actual tariff publication request (attachment no. 3) resulting in publication of the agreed rate on an optional weight of measurement basis in Item No. 629 9999 31 on 1st revised pate 477 effective December 31, 1975 together with the applicable conditions and notes on 2nd revised page 82, 4th revised page 83 and 3rd revised page 86 (attachment no. 4).

Within a few days after the effective date of December 31, the error in publication was picked up. By teletype dated January 7, 1976, the Pacific Division in Oakland instructed a correction be made, and it was passed to the tariff publications department January 12 (attachment no. 5). Actual publication of the correct rate was made on 2nd revised page 477 (attachment no. 6) which became effective February 23, 1976 on statutory 30 days' notice. Less than statutory notice was not authorized for this type of publication under the Interstate Commerce Commission's guidelines then governing reductions in rates in mini-landbridge tariffs. . . .

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298),and Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in Sea-Land's inadvertent failure to transmit the proper application of the negotiated, already agreed rate to their tariff publications department and, in turn, to the official tariff file in the Federal Maritime Commission.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to Sea-Land Service, Inc. to waive collection of a portion of the freight charges, specifically the amount of $30,170.88. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
March 23, 1977.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

Subchapter B—Regulations Affecting Maritime Carriers and Related Activities

Part 514—Reports of Rate Base and Income Account by Significant Vessel Operating Common Carriers in the Domestic Offshore Trades

[GENERAL ORDER 36, DOCKET NO. 67-57]

April 20, 1977

Repeal of Part 514

AGENCY:	Federal Maritime Commission
ACTION:	Repeal of Part 514
SUMMARY:	Rules requiring the maintenance of records and submission of data with respect to rate bases are revoked and repealed.

Effective Date: Upon publication in the *Federal Register.*

For further information contact:

Joseph C. Polking, Acting Secretary
Federal Maritime Commission
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523-5725

Supplementary Information: The Commission issued its Report and final rules in this proceeding on August 18, 1976 to become effective on December 6, 1976. Prior to the effective date, several persons filed petitions requesting reconsideration of these rules and/or reopening of the proceeding.[1] As a result of these filings, the Commission postponed the effective date of the rules pending its review of the various petitions.

[1] Petitions were filed by the following carriers:

(1) Matson Navigation Company (Matson);

(2) Sea-Land Service, Inc. (Sea-Land);

(3) Puerto Rico Maritime Shipping Authority (PRMSA);

(4) Farrell Lines, Inc. (Farrell); and

Of those filing petitions, only Matson, Sea-Land and PST&B have participated in this proceeding previously. All the other nine carriers were either not in the domestic offshore trade or not in existence at the time of the proceedings in this docket. For example, Farrell urges reconsideration of the final rules on the grounds that it did not enter the trade until January 1976 and, as a result, has not had an opportunity to express its views in this proceeding. Likewise, PRMSA argues that it has not had any opportunity to participate in the formulation of the final rules promulgated by the Commission because (1) the proceeding was initiated seven years before PRMSA was created; and (2) the bulk of the testimony was taken five years before PRMSA was created. PRMSA submits that sound regulatory principles and the public interest require that the proceeding be reopened to permit PRMSA to be heard before implementation of these rules.

The petitions now before the Commission also raise issues of economic and accounting theory and practice. Additionally, they reargue the burdensomeness of compliance with the rules.

After careful consideration of the petitions now before us and giving due regard to the fact that the carriers not previously participating in this proceeding represent a substantial portion of the entire capability in the very trades, *i.e.*, domestic offshore, the Commission's final rules were intended to address, we have decided to withdraw the rules promulgated on August 18, 1976 in this proceeding and discontinue the proceeding.

THEREFORE, IT IS ORDERED, That this proceeding be, and hereby is, discontinued.

AND, IT IS FURTHER ORDERED, That the rules promulgated on August 18, 1976 and published in the *Federal Register* on September 8, 1976 (41 F.R. 37785) be, and hereby are, revoked.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

(5) Crowley Maritime Corporation, on its own behalf and as parent corporation for:
(a) Trailer Marine Transport Corp.;
(b) Interisland Intermodal Lines, Inc.;
(c) Gulf Caribbean Marine Lines;
(d) CTMT, Inc.;
(e) Hawaiian Marine Lines, Inc.;
(f) Arctic Lighterage Co.; and
(g) Puget Sound Tug and Barge Company (PST&B).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 496

AMERICAN GILSONITE CO., INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

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

April 13, 1977

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 13, 1977.

It is Ordered, That applicant is authorized to waive collection of $5,951.93 of the charges previously assessed American Gilsonite Co., Inc.

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 496 that effective April 10, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from April 10, 1976 through July 1, 1976, the rate on 'Gilsonite, packed', in house to house containers, minimum 17.8 LT per container is $46.00W subject to all applicable rules, regulations, terms and conditions of said rate 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) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 496

AMERICAN GILSONITE CO., INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Lykes Bros. Steamship Co., Inc. (Lykes or Applicant) has applied for permission to waive collection of a portion of the freight charges on a shipment of gilsonite, which moved from Galveston, Texas to Rotterdam, Netherlands, under a Lykes bill of lading dated May 26, 1976. The application was filed November 12, 1976.

The subject shipment moved under Gulf European Freight Association Agreement (GEFA) 9360–3 Tariff No. 2, FMC–2, 4th revised page 73, effective March 10, 1976, under the rate for the item "Gilsonite, packed." The aggregate weight of the shipment was 240,222 pounds (in six containers). The rate applicable at time of shipment was $96 per ton of 2,240 pounds (weight only). The rate sought to be applied is $40.50 per ton of 2,240 pounds (weight only) when packed in house-to-house containers, with a minimum of 17.8 long tons per container. This latter rate had been agreed upon in advance by the shipper and the carrier, and had been filed in the GEFA tariff cited above on 3rd revised page 73; however, through inadvertent administrative and clerical error, the 4th revised page 73 was published bearing an unintended April 9, 1976 expiration date, thus leaving only the higher $96 rate effective as of the time of shipment on May 26, 1976. This was not corrected until the issuance of the 10th revised page 73 (same tariff citation as above), effective November 11, 1976. It should be noted that the application refers several times to the "7th revised" as being the correction; however,

[1] This decision became the decision of the Commission April 13, 1977.

[2] 46 U.S.C. 817, as amended.

it is clear from the reference to the effective date (November 11, 1976), the tariff pages submitted with the application, and a review of the official tariff documents on file at the Commission, that the reference to "7th" was a typographical error—that the 10th revised page 73 is the relevant error correction.

Aggregate freight charges payable pursuant to the rate applicable at time of shipment amounted to $10,295.23. Aggregate freight charges at the rate sought to be applied amount to $4,343.30. The difference sought to be waived is $5,951.93. The Applicant is not aware of any other shipments of the same commodity which moved via Lykes during the same time period at the rates involved in this shipment.

Lykes offers the following as grounds for granting the application:

> Prior to February 20, 1976, respondent had negotiated with American Gilsonite Co., a rate of $40.50/2240 lbs. covering the movement of Gilsonite, packed in House to House containers, minimum 17.8 long tons per container. This rate was then filed in the Gulf European Freight Association Tariff Number 2 (FMC–2) per page 73, 3rd revised (copy attached).
>
> During March 1976 Lykes reviewed this same tariff to delete rates against which cargo was not currently moving. Thru administrative error, the $40.50/2240 lbs. rate was inadvertently deleted effective April 10, 1976, as per GEFA page 73, 4th revised (copy attached), overlooking the fact that American Gilsonite was tendering the cargo for shipment against that rate.
>
> On March 30, 1976, Lykes issued booking contract #019–2057 (copy attached) with the expressed understanding the $40.50/2240lbs. rate was to be applied. Despite the fact that copies of this contract were furnished to Lykes Galveston, Houston and New Orleans offices, the administrative personnel failed to note the necessary rate extension required and thus the rate expired April 10.
>
> The vessel (Almeria Lykes voyage 36) sailed Galveston May 26th and the cargo moving under the referenced contract was assessed the only then current tariff rate of $96.00/2240 lbs. as per GEFA tariff pg 73, 4th revised (copy attached). . . .

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b),*Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of

[3] For other provisions and requirements see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, due to inadvertently deleting the negotiated rate from the filed tariff.

2. Such waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Lykes filed a new tariff which sets forth the rate on which such waiver would be based.

4. The application was filed within 180 days from the date of shipment.

Accordingly, permission is granted Lykes Bros. Steamship Co., Inc., to waive collection of a portion of the freight charges, specifically the amount of $5,951.93. An appropriate notice will be published in Lykes' tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
March 17, 1977.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–51

WEST COAST OF ITALY, SICILIAN AND ADRIATIC PORTS/NORTH ATLANTIC RANGE CONFERENCE AMENDED TARIFF RULE ESTABLISHING AN ALLOWANCE ON PREPAID FREIGHT

Allowance of a 3 percent discount for prepaid shipments found not violative of sections 16 and 17, Shipping Act, 1916.

Stanley O. Sher and *John R. Attansio* for Respondent West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference.

John Robert Ewers and *Deana Rose,* as Hearing Counsel.

REPORT AND ORDER

April 22, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

The Commission instituted this proceeding by Order served September 20, 1976, directing the West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference (WINAC) and its member lines to show cause why the Commission should not find that its Tariff Rule 15, which provides for a 3 percent allowance (discount) on prepaid freight, is violative of sections 16, First and 17 of the Shipping Act, 1916 and, accordingly, why such tariff rule should not be ordered stricken from the Conference tariff. Respondent filed memoranda of law and an affidavit of fact. Hearing Counsel, who opposed the 3 percent allowance filed a memorandum of law.[1]

POSITIONS OF THE PARTIES

In its memoranda of law and upon the affidavit of G. Ravera, the Conference Secretary, WINAC argues that the discount is necessitated by a 30-day time difference in collecting the freight due between prepaid and collect shipments. In this regard, it is pointed out that when freight is

[1] Because we believe that oral argument would serve no useful purpose in this proceeding, the parties' request for oral argument is denied.

prepaid, the carrier receives payment prior to the sailing of the vessel—generally when the cargo is tendered, but that on collect shipments the carrier receives payment only upon tender for delivery at the destination port. WINAC asserts that berthing time after tender and before sailing, sailing time, which may include intermediate ports of call, free time, and the time between tender for delivery and payment to the carrier or its agent, results in a 30-day difference between the receipt of payment for prepaid and collect shipments.

WINAC maintains that the foregoing delay in receipt of payment translates into an appreciable difference in the cost to the carrier, a major part of which is "attributable to the necessary increase in working capital caused by the delay." Respondent argues that the Commission has recognized that working capital is an appropriate part of the rate base[2] and has defined working capital for rate purposes as:

> The cash necessary to pay operating expenses incurred for common carrier service prior to the time when the revenues from that service are collected and available. *Alaskan Rates, supra* at 556.

WINAC contends that since the need for working capital is necessitated by the time lag between the payment of expenses and the receipt of payment in respect to which the expenses were incurred, "there is no question that a carrier's need for working capital increases as the incidence of collect shipments increases." WINAC views the present economic conditions in Italy as exacerbating the cost of these increased working capital requirements. In support of this contention Respondent cites the annual inflation rate in Italy of 18 percent, short-term interest rates of 23 percent, and the decline of the lira and exchange restrictions as factors which affect the cost of increased working capital requirements.

WINAC further argues that because the Commission has recognized a "comparative approach to assessing the reasonableness of rates, including comparisons with foreign to foreign rates,"[3] the 3 percent discount for prepaid shipments finds further support in a comparison with the rate structure of other Italian trades. G. Ravera notes in his affidavit that "in the trades between Italy on the one hand and West and South Africa, Australia, and the Far East, on the other, a surcharge ranging between 2.5 and 5 percent is imposed on freight collect."

Because of the fluctuations in the Italian economy and the cost involved in the mechanics of collect shipments, WINAC submits that its rate differential is not unreasonable, discriminatory, nor results in undue preference. The rate differential provided for in Tariff Rule 15 is an allegedly reasonable differential for different transportation services.

WINAC states that while the Commission's predecessor, the United States Shipping Board, in *American Tobacco Co. v. Campagnie Generale*

[2] *General Increase in Rates Pacific—Atlantic/Guam Trade*, 8 F.M.C. 498, 501 (1965), *remanded on other grounds*, *Guam v. Federal Maritime Commission*, 124 U.S. App. D.C. 324, 365 F.2d 515 (1966), *cert. denied*, *Pacific Far East Lines v. Guam*, 385 U.S. 1002, *Alaskan Rates*, 2 U.S.M.C. 558, 566 (1941), *modified*, 2 U.S.M.C. 639 (1942).

[3] *E.g.*, *Investigation of Ocean Rate Structures*, 12 F.M.C. 34 (1968).

Transatlantique, 1 U.S.S.B. 53 (1923) found the rate differential in that proceeding to be prejudicial and discriminatory, it was only that carrier's inability to justify the magnitude of the rate differential which resulted in such a finding.[4] WINAC submits that not only does the different service and cost justify the rate differential, but also that failure to provide such a differential imposes an unfair burden on shippers who do not ship freight collect. Because collect shipments increase the carrier's cost, Tariff Rule 15 allegedly relieves prepaying shippers of a cost burden which they have not created and at the same time establishes a modest incentive for other shippers to prepay their freight and thereby aid in holding down pressures for general rate increases. Thus, WINAC is of the opinion that the Tariff Rule 15 clearly benefits shippers and is neither violative of sections 16, First nor 17 of the Shipping Act, 1916.[5]

Lastly, WINAC submits that even assuming, *arguendo,* that it could be concluded that the differential permits the collection of different rates for similarly situated shippers, no violation of section 16 can be shown, since the presence of a competitive relationship is required to prove a case of undue preference or prejudice under section 16. WINAC notes that the discount is available to all shippers and consignees, and that there is no known competitive relationship between shippers who ship collect as opposed to prepaid. In addition, WINAC cites the lack of shipper complaints since the inception of the rate as probative of the lack of prejudice or preference resulting from the application of a three percent differential.

Hearing Counsel takes issue with every argument of law and factual allegation made by Respondent. At the outset Hearing Counsel submit that Respondent has failed to proffer sufficient facts to justify an allowance in freight charges through prepayment as previously found to be violative of the Shipping Act, in *American Tobacco, supra.*

Hearing Counsel next attack Respondent's premise that the lack of shipper complaints against Tariff Rule 15 is indicative of the rule's legality. In this connection, Hearing Counsel contends that while the Commission has not addressed this argument in a section 16 or 17 proceeding, the Commission in finding a violation of section 18(b)(5) in *Investigation of Ocean Rate Structure,* 12 F.M.C. 34 (1966) "summarily dismissed this argument by deciding that the lack of shipper grievance is immaterial."

Hearing Counsel dispute Respondent's analysis of the relationship between prepaid freight and the need for sufficient working capital. While Hearing Counsel agree that working capital is a proper item in determining

[4] In *American Tobacco, supra,* the carrier accepted payment in francs at the current rate of exchange when freight was prepaid in France but computed charges for freight collect on the basis of a *fixed* rate of 5 francs per dollar. In the time period concerned the exchange rate rose from 5.88 to 17.07½ francs per dollar. The Board found that the difference in rates—approaching 56%—exceeded the carrier's additional expenses for handling cargo freight collect and accordingly was unduly discriminatory and prejudicial.

[5] WINAC also challenges what it terms the Interstate Commerce Commission's (ICC) ancient and dogmatic approach to prepayment discounts. The ICC has generally rejected prepayment discounts based solely on the time of payment.

is not aware of any other shipment of the same commodity which moved via Sea-Land during the same time period at the rates involved in this shipment.

Sea-Land offers the following as grounds for granting the application:

(4)Sea-Land negotiated with Ford Motor Company for a rate to cover movement of knocked-down shipping racks being returned from Houston, Texas, or New Orleans, La. to Hiroshima, Japan. A rate of $135.00 per weight ton of 2,000 lbs., to apply in Sea-Land's mini-landbridge service was agreed upon as a special rate to apply only to Hiroshima. Letter from Ford Motor Company dated October 29, 1975 to Sea-Land (attachment no. 1) confirms these negotiations. The agreed rate was to become effective by January 1, 1976 and remain in effect through March 31, 1976 to cover the anticipated period of movements. It also included attachment of a minimum weight of 11.68 weight tons per container to the rate, to insure adequate minimum revenue for Sea-Land, as set forth in teletype exchanges dated September 30 and October 29 (attachment no. 2) between Sea-Land's Oakland (Pacific Division) office and the home office in Edison (Menlo Park).

In sending the publication instructions, however, our Pacific Division in Oakland erroneously transmitted to the Pacific Division in Elizabeth a weight or measurement option for the rate, whereas the agreement was for the rate to apply on a weight basis only, subject to the minimum weight per container. This clerical error was carried forward to the actual tariff publication request (attachment no. 3) resulting in publication of the agreed rate on an optional weight of measurement basis in Item No. 629 9999 31 on 1st revised pate 477 effective December 31, 1975 together with the applicable conditions and notes on 2nd revised page 82, 4th revised page 83 and 3rd revised page 86 (attachment no. 4).

Within a few days after the effective date of December 31, the error in publication was picked up. By teletype dated January 7, 1976, the Pacific Division in Oakland instructed a correction be made, and it was passed to the tariff publications department January 12 (attachment no. 5). Actual publication of the correct rate was made on 2nd revised page 477 (attachment no. 6) which became effective February 23, 1976 on statutory 30 days' notice. Less than statutory notice was not authorized for this type of publication under the Interstate Commerce Commission's guidelines then governing reductions in rates in mini-landbridge tariffs. . . .

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298),and Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

the rate base, they argue that the formula for calculating working capital does not vary if the freight is shipped prepaid or collect. Hearing Counsel view Tariff Rule 15 as an attempt to increase the Respondent's working capital without sufficient facts for a proper evaluation. In this regard, Hearing Counsel argue that if the Respondent carriers do not have to pay voyage expenses until 45 days after the voyage, then it is immaterial if there is a 30-day delay in the receipt of payment from a collect shipper.

Hearing Counsel maintain that Respondent has failed to prove that the 3 percent allowance results in an equivalent lessening of cost. Nor does Hearing Counsel accept Respondent's comparison of the 3 percent allowance with the surcharge for collect shipments in foreign to foreign trades. It is improper, Hearing Counsel argue, to compare the surcharge with the prepayment discount because the cases cited by Respondent in support of this position deal exclusively with comparisions of reciprocal or competitive trades and not foreign to foreign trades. Furthermore, Hearing Counsel argue that even if the trades were comparable, Respondent has not submitted any legal arguments to establish that the surcharge in the mentioned foreign to foreign trades is not unjustly discriminatory or preferential.

Hearing Counsel concludes that Respondent's factual and legal submissions are insufficient and that WINAC has failed to demonstrate that higher costs justify higher charges for collect shipments or that there is no competitive relationship between prepaid and collect shippers and hence, no violation of section 16, First. Hearing Counsel therefore urge "the Commission to strike Tariff Rule 15 or take other appropriate action as the circumstances warrant."

Discussion and Conclusions

The Commission and its predecessors have on only one occasion squarely addressed the issue of a freight differential for the prepayment of freight charges with respect to sections 16 First and 17, Shipping Act, 1916. In *American Tobacco Co. v. Compagnie General Transatlantique,* 1 U.S.S.B. 53 (1923), aff'd 31 F.2d 663; *cert. denied* 280 U.S. 555 (1929), the United States Shipping Board considered a carrier's practice of accepting payment in francs at the current rate of exchange when freight was prepaid in France, but computing charges for freight collect on a *fixed* basis of 5 francs to the dollar in New York. In that instance, the Board found that the freight differential was unduly preferential and unjustly discriminatory in violation of sections 16 and 17 because the difference in charges exceeded the total amount of the carrier's additional expenditures for transporting the cargo freight collect. The Board did not find that all freight differentials based upon prepayment were unlawful but rather found that such differentials are only unlawful to the extent they exceed the carrier's cost for transporting the cargo freight collect. Indeed, the Board expressly recognized that:

As the incidents of the transportation service in connection with the complainant's *collect shipments resulted in added expense to the carrier, . . . the cost thereof might* properly be reflected *in a higher charge than for prepaid shipment,* (emphasis added), 1 U.S.S.B. at 57.

The Board's rationale in the *American Tobacco* decision clearly indicates that the finding of a violation of sections 16 and 17 was not based on a theory that the rate differential was *per se* unlawful but rather on the inability of the respondent in that proceeding to justify the *level* of the differential. The determinative factor therefore is whether the conference or carrier can justify added expenses for handling collect shipments. Accordingly, the amount of the allowance for prepaid shipments, if any, must be determined on a case-by-case basis. Any allowance based upon the time of payment must withstand scrutiny under the applicable provisions of the Shipping Act, 1916, and must be justified by a showing that collect shipments result in added expense to the carrier. An examination of the record before us in this proceeding, indicates that the WINAC 3 percent allowance for prepaid shipments as provided in its tariff is warranted.

The representations of the Respondent in its brief and affidavit are unrefuted. In its memoranda of law and affidavit submitted by the Conference Secretary, Respondent states that the average difference in time between the receipt of freight prepaid and the receipt of freight collect is approximately 30 days and that this delay in the receipt of payment results in additional cost to the carrier, a major part of which is attributable to the necessary increase in working capital caused by the delay. The impact of the delay in payment is exacerbated by the condition of the Italian economy. Short term interest rates of 23 percent and the Italian inflation rate, which is approaching 18 percent, are cited as factors which increase the cost associated with collect shipment. In addition, the continued decline in the exchange rate of the lira has resulted in governmental restrictions which in turn affects the cost and risk of extending credit for collect shipments. For instance, the Italian Government had required that the purchase of dollars from within Italy be accompanied by a six-month deposit of 50 percent of the purchase price, interest free, in the Bank of Italy. More recently, the Government imposed a surcharge tax of seven percent on foreign exchange purchases. Although none of these restrictions are currently in effect,[6] the exchange restrictions imposed by the Italian Government are indicative of the instability in the Italian economy.

In view of the foregoing, we find that due to the present condition of the Italian economy, the deferral of payment by WINAC carriers on collect shipments results in added costs to those carriers which justify the imposition of a three percent allowance on prepaid shipments. However, because economic conditions are never static, the Commission intends to

[6] Source: International Monetary Fund.

closely monitor the status of the Italian economy, particularly changes in the inflation and interest rates, and periodically review the effect of Tariff Rule 15 on cargo movements in the trade to determine its continued validity.

THEREFORE, IT IS ORDERED, That this proceeding be discontinued.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 351(I)

STANISLAUS IMPORTS, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

April 22, 1977

Notice is hereby given that the Commission on April 22, 1977, determined not to review the decision of the Settlement Officer in this proceeding served April 14, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 351(I)

STANISLAUS IMPORTS, INC.

v.

SEA-LAND SERVICE, INC.

Reparation Awarded.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

Stanislaus Imports, Inc. (complainant) claims $289.75 as reparations from Sea-Land Service, Inc. (carrier) for alleged freight overcharges on two shipments of beads from Kobe, Japan to San Francisco, California, one via the SEA-LAND EXCHANGE on a bill of lading dated March 16, 1975, and the second via the SEA-LAND Trade on a bill of lading dated April 16, 1975. While the complainant does not specifically allege a violation of the Shipping Act, 1916, it is presumed to be a violation of Section 18(b)(3) thereof.

The conference chairman and the carrier, in separate letters advised complainant that the claims were not submitted before the cargo left the carrier's custody, and referred to the Trans-Pacific Freight Conference of Japan/Korea Tariff No. 35, FMC-6 which provides in Rule 59:

> "Claims for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier in writing before the shipment involved leaves the custody of the carrier. All other claims for adjustment of freight charges must be presented to the carrier in writing within six (6) months after the date of shipment."[2]

Basically the two movements covered shipments of Beads on which the carrier assessed the rate of $94.00 per measurement ton of 40 cubic feet based on a value exceeding $1,400 per revenue ton FOB. The bills of lading made no reference to value. Several of the carrier's letters to the

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof. (Note: Notice of determination not to Review April 22, 1977).

[2] With respect to such a rule the Commission, in its report on remand served November 24, 1976, in *Kraft Foods v. Moore McCormack Lines, Inc.*, negated its application with respect to claims before the Commission stating in part "In effect the Rule sets up as a period of limitation, the time during which the shipment remains in the custody of the carrier, which limitation was reviewed by the Court as infringing on the rights granted by section 22 of the Shipping Act. . . ."

complainant referred to tariff Rule 11 entitled "F.O.B. Value for Rates Based on F.A.S. Valuation."[3]

The claims filed with the Commission are accompanied by commercial invoices stating the invoice value of identifiable groups of cartons, as well as certificates and lists of measurement and weight for each group of cartons. The carrier, in a letter written after the claim was filed with the Commission stated that:

> "Upon investigation we find the commercial invoices included with the claims do separately state the invoice values for the separate commodities involved. The separate rates based on valuations, per Rule 11 of Tariff No. 35, FMC–6, issued by the Trans-Pacific Freight Conference of Japan/Korea, could have been applied."

Claim No. ST–1 covers the movement of 189 cartons of wooden beads and shell beads measuring 457 cubic feet and weighing 9,706 pounds which moved from Kobe, Japan to San Francisco, California on the SEA-LAND EXCHANGE on bill of lading No. 905–624568 dated March 26, 1975. No valuation was shown on the bill of lading, so the carrier assessed the conference tariff rate under Item No. 6260–15, on 3rd Revised Page 324 which covers Imitation Pearl Beads, Beaded Goods, Non-precious Beads and Personal Ornaments, Value exceeding $1,400 per revenue ton FOB of $94.00.

Claim No. ST–1 is submitted in the following format:

Total FOB value of Shipment $17,994.70.

Item 6260–10 Beads, Invoice value $9,212.56, cube 282–6 or $1,302.00 per revenue ton F.O.B.

Item 6260–15 Beads, Invoice value $8,782.14, cube 174–8 or $2,007.00 per revenue ton F.O.B.

Charged per bill of lading	$1,193.07
Should be Item 6260–10 (283 cu.) 7.075 x $80.00	$ 566.00
6260–15 (175 cu.) 4.375[4] x 94.00	411.25
Delivery $5.00 (11.45)[4]	
Bunker S.C. $3.00 (11.45)[4]	
C.A.F. 2.5% ($1,001.53)	
	57.25
	34.35
	25.86
	$1,094.71
Overcharge	$ 98.36

This claim, as submitted by complainant with the supporting documentation of the bill of lading, certificate and list of measurement and weight,

[3] "Where the tariff rate on any commodity is determined on the F.O.B. value, this value is to be based on the total value F.A.S. loading port on such commodity as indicated in each certified shipper's invoice, i.e., including all expenses up to delivery at ship's tackle, loading point. . . ."

[4] In its calculations complainant divided 175 cubic feet by 40 cubic feet arriving at a figure of 4.275 measurement tons. The correct figure is 4.375 measurement tons which complainant used in multiplying by the $94.00 rate to get the product of $411.25 shown above. However, in computing the delivery and bunker surcharge, complainant used the figure of 11.425 measurement tons. The sum should be 7.075 plus 4.375 or 11.45 measurement tons. Multiplying the $5.00 delivery charge and the $3.00 bunker surcharge by 11.425 measurement tons, complainant got products of $57.13 and $34.28. Using 11.45 measurement tons, the products are $57.25 and $34.35. The claim is 19 cents higher than it should be. $98.55 claimed minus 19 cents is $98.36, the amount of the claim as amended above.

and invoice of merchandise, has been computed properly, is adequately substantiated, and reparation thereon of $98.36 is awarded.

Claim No. ST–2 covers the movement of 178 cartons of wooden beads and shell beads measuring 549 cubic feet and weighing 9,424 pounds which moved from Kobe, Japan to San Francisco, California on the SEA-LAND TRADE on bill of lading No. 905–626799 dated April 16, 1975. No valuation was shown on the bill of lading so the carrier assessed the conference tariff rate under Item No. 6260–15, on 3rd Revised Page 324 which covers Imitation Pearl Beads, Beaded Goods, Non-precious Beads and Personal Ornaments, Value exceeding $1,400 per revenue ton FOB of $94.00.

Claim No. ST–2 is submitted in the following format:

Total FOB value of shipment $19,472.79

Item 6260–10 Beads, Invoice value $17,146.47, cube 532–7 or $1,286.00 per revenue ton F.O.B.

Item 6260–15 Beads, Invoice value $2,326.32, cube 16–3 or $5,185.80 per revenue ton F.O.B.

Charged per bill of lading	$1,433.24
Should be Item 6260–10 (533 cu.) 13.325 x $80.00	$1,066.00
Item 6260–15 (16 cu.) .400 x 94.00	37.60
Delivery $5.00 (13.725)	68.63
Bunker S.C. $3.00 (13.725)	41.19
C.A.F. 2.5% (1,144.79)	28.62
	$1,242.04
Overcharge	$ 191.20

This claim, as submitted by complainant with the supporting documentation of the bill of lading, certificate and list of measurement and weight, and invoice of merchandise, has been computed properly, is adequately substantiated, and reparation of $191.20 is awarded.

Total reparation of $289.56 is awarded complainant with interest at the rate of six percent per annum if not paid within 30 days of the date hereof.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 383(I)

BRISTOL-MYERS COMPANY

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

April 22, 1977

Notice is hereby given that the Commission on April 22, 1977, determined not to review the decision of the Settlement Officer in this proceeding served April 13, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 383(I)

BRISTOL-MYERS COMPANY

v.

SEA-LAND SERVICE, INC.

Application for permission to refund a portion of the freight charges granted.

DECISION OF RONALD J. NIEFORTH, SETTLEMENT OFFICER[1]

By complaint filed February 7, 1977, Bristol-Myers Company (complainant) seeks a refund of freight overcharges in the sum of $2,588.74 collected by Sea-Land Service, Inc., (carrier) for the transportation of merchandise shipped from Port Elizabeth, New Jersey to Port of Spain, Trinidad, aboard the SS JACKSONVILLE sailing March 27, 1975, under Bill of Lading Shipper Reference #403171.

In response to this docket the carrier has stated in its reply of February 18, 1977, that the overcharge claim is correct and that payment is due Bristol-Myers. The carrier further stated that it previously declined to refund the overcharge for the reason that such action was time barred by the freight tariff.

The shipment at issue moved under the rates, terms and conditions published in the Leeward & Windward Islands & Guianas Conference Freight Tariff F.M.C. No. 1, of which the carrier is listed as participating member line. As alleged by the carrier, Rule 105 of this tariff provides in part that claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within a period of six months following shipment. As noted above, the merchandise at issue was transported aboard the SS JACKSONVILLE, Voyage 194-S, over one year ago.

A review of the complainant's rate audit and the applicable tariff clearly supports the complainant's allegation that rates other than those provided for in the tariff were applied, thus resulting in an overcharge amount of $2,588.74.

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301-304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof. (Note: Notice of determination not to review April 22, 1977).

In instances where the misapplication of a rate(s) has occurred, as in this docket, the restrictive condition contained in the above rule runs afoul of section 18(b)(3), Shipping Act, 1916, which prohibits the assessment of other than that rate(s) specified in the applicable tariff on file with the Commission and duly published and in effect at the time. Section 22 of the Act, on the other hand, provides a period of 2 years in which a person may file a complaint setting forth any violation of the Act. The remedy to this dilemma lies in the complainant seeking redress before the Commission as reflected in the instant docket.

Based upon the foregoing commentary and a review of the applicable tariff which clearly supports the validity of the overcharge as alleged by the complainant, and consistent with the carrier's concurrence in letter, of February 18, 1977, Sea-Land Service, Inc., is directed to promptly refund the complainant the sum of $2,588.74 in full settlement of the complainant's claim under this docket.

(S) RONALD J. NIEFORTH,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 386(I)

GTE INTERNATIONAL, INC.

v.

ATLANTIC LINES, LTD.

NOTICE OF DETERMINATION NOT TO REVIEW

April 22, 1977

Notice is hereby given that the Commission on April 22, 1977, determined not to review the decision of the Settlement Officer in this proceeding served April 15, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 386(I)

GTE INTERNATIONAL, INC.

v.

ATLANTIC LINES, LTD.

DISMISSAL OF COMPLAINT
and
DISCONTINUANCE OF PROCEEDING

By complaint filed February 28, 1977, GTE International, Inc., (Complainant) states that Atlantic Lines, Ltd., (Carrier) refused to honor an otherwise legitimate overcharge claim of $139.26 solely on the basis of Item 105 of the Leeward and Windward Island & Guianas Conference Freight Tariff FMC No. 1 which prohibits the payment of overcharge claims not presented to the Carrier within six months after the date of the shipment.

The complaint was served upon the Carrier on March 7, 1977; no response has been received.

By letter dated March 29, 1977, the Complainant advised the undersigned that it had received a refund check from the Carrier in the amount of $139.26 as full settlement for "Informal Docket No. 386(I)." The Complainant also requested that this docket be withdrawn.

A review of the complaint, support documentation and the involved tariff confirms the Complainant's overcharge allegation and justifies the Carrier's refund action. Accordingly, the subject complaint is dismissed and this proceeding discontinued.

(S) WALDO R. PUTNAM,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 486

P.C. INTERNATIONAL, INC.

v.

SEA-LAND SERVICE, INC.

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

April 22, 1977

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 22, 1977.

It is Ordered, That applicant is authorized to waive collection of $2,500.00 of the charges previously assessed P.C. International, Inc.

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 486 that effective February 11, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 11, 1976 through February 26, 1976, the rate on 'Plywood' is $55.75 W, subject to all applicable rules, regulations, terms and conditions of said rate 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) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 486

P.C. INTERNATIONAL, INC.

v.

SEA-LAND SERVICE, INC.

Appliction granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90—) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant) has applied for permission to waive collection of a portion of the freight charges on three shipments of plywood that moved from New Orleans, Louisiana to Bremen, Germany, under Sea-Land bills of lading dated February 20, 1976. The application was filed August 16, 1976.

The subject shipment moved under Gulf European Freight Association (GEFA) Agreement No. 9360–3, Tariff No. 2, FMC–2, 3d revised page 83–A, effective February 20, 1976, under the rate for the item "Lumber and timber, viz.: . . . Plywood, in bundles, cases or crates." The aggregate weights of the three shipments were 42,112 pounds (18.8 tons of 2240 pounds), 39,818 pounds (17.776 tons) and 39,818 pounds, respectively. The rate applicable at time of shipment was $101.75 per ton of 2240 pounds. The rate sought to be applied is $55.75 per ton of 2240 pounds. GEFA Agreement No. 9360–3, Tariff No. 2, FMC–2, 4th revised page 83–A, correction 340, effective February 26, 1976, for the item: "Lumber and timber, viz.: . . . Plywood, a/c Combi Line and Sea-Land."

Aggregate freight charges payable at the rate applicable at time of shipment amounted to $5,566.65, including wharfage. Aggregate freight charges at the rate sought to be applied amount to $3,066.65, including wharfage. The difference sought to be waived is $2,500. The Applicant is not aware of any other shipment of the same commodity which moved

[1] This decision became the decision of the Commission April 22, 1977.
[2] 46 U.S.C. 817, as amended.

via Sea-Land during the same time period at the rates involved in this application.

Sea-Land offers the following as grounds for granting the application:

(4)At the time of shipment, plywood was an open-rated commodity in Tariff No. 2, FMC-2, issued by the Gulf European Freight Association (GEFA) and applying from U.S. Gulf ports including New Orleans, to Continental European ports, including Bremen and Bremerhaven, Germany. For a period of time extending several months prior to February, 1976, Combi Line had maintained a rate on this commodity of $55.75 per ton of 2,240 lbs., whereas Sea-Land's rate to Bremen was $101.75 as shown on 3rd Revised Page 83-A (Attachment No. 1) and prior revised pages to this tariff and its predecessor—Tariff No. 1, FMC-1.

Sea-Land's sales department, negotiating in early February with the shipper was able to obtain a booking of several containerloads predicated on meeting the Combi Line's rate of $55.75. Booking was made for a sailing from New Orleans on or about February 20. On February 11 Sea-Land's pricing department followed through by giving verbal instructions to the GEFA office to reduce the Sea-Land rate to $55.75, effective as quickly as possible. Unfortunately, through clerical error, GEFA failed to file the reduced rate as requested. This failure to publish was discovered by Sea-Land on February 26. Immediate verbal instructions were then given to GEFA to rectify the oversight and telegraphic filing of the rate was made, effective the same date per 4th Revised Page 83-A (Attachment No. 2).

The clerical error by GEFA to publish the rate as originally instructed by Sea-Land is confirmed by letter dated July 20, 1976 by the chairman/secretary addressed to Sea-Land (Attachment No. 3). . . .

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90-298), and Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to timely file the reduced rate tariff, as had been promised the shipper.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff, which set forth the rate on which such waiver would be based.

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to Sea-Land Service, Inc. to waive collection of a portion of the freight charges, specifically the amount of $2,500.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
March 24, 1977.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 371(I)

WHITE-WESTINGHOUSE INT'L. CO. FOR N. V. TECHNISCHE HANDELMAATSCHAPPIZ

v.

SEA-LAND SERVICE, INC.

DISMISSAL OF PROCEEDING[1]

May 2, 1977

White-Westinghouse Int'l Co. (complainant) filed this informal complaint against Sea-Land Service, Inc. (respondent) which covers the movement of 84 cartons of household refrigerators weighing 20,639 pounds and measuring 3,523 cubic feet via respondent on the JACKSONVILLE, bill of lading number 901629225, on September 17, 1975 from New York, New York to N. V. Technische Handelmaatschappiz in Curacao, Netherland Antilles. On January 20, 1977 respondent consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304).

Complainant seeks reparations of $1,233.05 from respondent with respect to the subject movement, the rates for same being in the United States Atlantic and Gulf-Venezuela and Netherlands Antilles Conference, S.B. VEN 11, Freight Tariff F.M.C. No. 2. The claim was filed with the respondent on August 20, 1976, within two years from the date the cause of action arose, i.e., September 17, 1975 and must be considered on its merits as ruled by the Commission in *Colgate Palmolive Company v. United Fruit Company,* Informal Docket No. 115(I) served September 30, 1970.

The claim has already been settled between the parties by the submittal by respondent to complainant of a check dated January 31, 1977, in the amount of $1,233.05, the full amount of the claim. Complainant advised of the receipt of said check in its letter of March 21, 1977. For the sake of good order, the settlement involved the matters discussed below.

On September 2, 1976, respondent denied the subject claim, filed on

[1] Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301–304 (as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

August 20, 1976, referring to Item 11, 2nd Revised Page 12–B of the conference tariff which states:

> "claims by shippers for adjustment of freight charges will be considered only when submitted to writing to the carrier within six months of the date of shipment."

This claim is not governed by the six-month rule, but by the two-year principle referred to in *Colgate Palmolive Company* v. *United Fruit Company, supra.*

The subject shipment was described on the bill of lading as 84 ctns. of electric h. h. refrigerators weighing 20,639 pounds, measuring 3,253 cubic feet. The tariff rate applies per ton of 40 cubic feet or 2,000 pounds, whichever produces the greater revenue. The rate assessed was on a measurement basis for 88.075 measurement tons. Item 490 of the conference tariff contains a contract rate to Curacao (Group A) of $58.50 per W/M ton for Household Refrigerators, K.D. which the respondent assessed, i.e., $58.50 (88.075)—$5,152.39. To this were added Landing, Storage and Delivery Charges to Curacao (Item 9 of tariff) on Cargo, N.O.S. of $11.00 per freight ton, i.e., $11.00 (88.075)—$968.83. The total freight and charges assessed complainant was $6,121.22.

Complainant based its complaint on lower rates and charges. Item 490 of the conference tariff also contains a contract rate to Curacao (Group A) of $50.00 per W/M ton for Household Refrigerators, S.U., which complainant states should have been assessed, i.e. $50.00 (88.075)—$4,403.75. To this complainant adds Landing, Storage and Delivery Charges to Curacao (Item 9 of tariff) on Cargo, in carrier's containers stripped by consignee at an off terminal location of $5.50[2] per freight ton, i.e. $5.50 (88.075)—$484.41. The total freight and charges complainant alleges that should have been assessed was $4,888.16.

Rates and charges assessed	$6,121.22
Rates and charges applicable per complainant	4,888.16
Amount of claim	$1,233.06

On December 13, respondent received the notice of our intent to process this claim. In its January 20, 1977 response, authorizing processing by a Settlement Officer, respondent advised:

> "Upon investigation we find the claim to be in order for refund of $1,233.05 and are placing it in channels for payment."

In view of the prompt settlement of the claim by check dated January 31, 1977, after its filing with the Commission on November 12, 1976, it appears that the parties had no difficulty as to the facts involved. However, verification that the refrigerators were "set up" subjecting them to the lower rate appeared to be the only matter concerning which available information was incomplete.

[2] Attention is called to the fact that Landing, Storage and Delivery Charges assessed on Cargo, N.O.S. were $11.00 per freight ton. The same charges covering Cargo, in carriers' containers stripped by consignee at an off terminal location are only $5.50 per freight ton. (Item 9 of tariff)

In response to our inquiring, complainant advised by letter of March 31, 1977 that "household refrigerators we shipped are ready for use and, therfore, would be considered to be 'set up' per your statement of the 24th instance." Complainant further advised that it manufactured the household appliances it sold, and submitted a copy of the dock receipt and its invoice dated September 4, 1975 covering the subject shipment.

The invoice clarifies that the consignee was billed for 84 refrigerators, each packed in a separate carton. Fifty-one cartons measured 32" x 34" x 67", 19 cartons measured 34" x 32" x 63 ", and 14 cartons measured 34" x 34" x 66". These are definitely uniform measurements of refrigerators "set up".

Respondent has advised that a check for the full amount of the claim ($1,233.05) has been given to complainant, and complainant has acknowledged receipt of same. Accordingly, the proceeding is dismissed.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 371(I)

WHITE-WESTINGHOUSE INT'L. CO. FOR N. V. TECHNISCHE HANDELMAATSCHAPPIZ

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

May 23, 1977

Notice is hereby given that the Commission on May 12, 1977 determined not to review the decision of the Settlement Officer in this proceeding served May 2, 1977.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–62

PUBLICATION OF INACTIVE TARIFFS BY INDEPENDENT CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

ORDER

May 2, 1977

This proceeding began with the issuance of an Order to Show Cause directed to 38 nonconference, nonvessel operating common carriers by water in the foreign commerce of the United States (Respondents). These carriers were directed to demonstrate that the tariffs they had filed with the Commission in fact described an active, *bona fide* offering of transportation services to the public, or suffer the cancellation of these tariffs.

Thirty (30) of the Respondents did not reply to the Show Cause Order and the Commission's invitation to submit supporting affidavits of fact and memoranda of law, contained therein.

Eight Respondents did file information of some type, but none of these even alleged that they were actively soliciting or providing common carrier services.

Imperial Van Lines, Wilson Container Co., Inc. and IASL Corporation have canceled the tariffs alleged to describe an essentially fictitious or suspended service, thereby mooting any controversy pertaining to said tariffs.

Transocean Container Service Co., Ltd., has stated that it wishes its tariffs to be canceled. This request shall be accommodated by the instant Order.

Requests for noncancellation were received from Trans-Globe Shipping Co. (Trans-Globe); Specialized Transportation Sales, Inc. (STS); Posey International, Inc. (Posey); and W.R. Zanes and Co. of Louisiana, Inc. (Zanes). A reply to these requests was filed by the Commission's Bureau of Hearing Counsel which favored cancellation of all but Zanes' tariff.

The Commission is of the view that neither Trans-Globe, STS, Posey

nor Zanes are performing as common carriers by water in the trades listed in the tariffs now under examination. It is misleading to the public, potentially unfair to competing carriers, and an administrative burden upon our staff, for "paper" tariffs to be kept on file, available for possible use if it should suit the narrow purposes of the persons issuing them to quickly enter the trade, but otherwise describing a nonexistent service. We construe such a situation as contravening the implicit requirements of Shipping Act section 18(b), subsections (1) through (3), which necessitate the prompt submission of accurate information concerning the services offered by a common carrier, including the suspension of all or any part of the operations described by its published tariffs. See *Embargo on Cargo, North Atlantic and Gulf Ports,* 2 U.S.M.C. 464, 465 (1940); *Intercoastal Schedules of Hammond Shipping Co., Ltd.;* 1 U.S.S.B. 606, 607 (1939); *Carriers Transporting Sugar from Virgin Islands to the United States;* 1 U.S.M.C. 695, 699–700 (1938); *Intercoastal Investigation, 1935,* 1 U.S.S.B. 400, 449 (1935).

Trans-Globe has, without explanation, amended its tariff to include Japan and South Korea in the range of ports served and substitute NOS rates for several specific commodity rates. Mere physical changes in a tariff cannot substitute for the performance of common carrier service. Until Trans-Globe intends to actively engage in such service, it should not maintain a tariff on file with the Commision. *Ghezzi Trucking, Inc.—Cancellation of Inactive Tariffs,* 13 F.M.C. 253, 255 (1970).

Posey states that it has been inactive as a common carrier because local ocean carriers do not publish Freight All Kinds (FAK) rates, but that one such carrier might begin accepting FAK cargo shortly. Until such time as Posey is actually able to perform as a common carrier, it too should not be permitted to maintain an inaccurate and incomplete tariff on file with the Commission. When and if the local ocean carriers publish a FAK rate, Posey can readily submit a current tariff.

STS states that it has been "quoting" from its tariff and is "in the process" of increasing some of its published rates. In the absence of evidence describing the exact nature and extent of this "quoting," we have no basis for concluding that STS is actively soliciting, what is more, offering common carrier services, and shall cancel its tariffs.

Zanes admits it is not an active common carrier, but states that it has been prevented from obtaining business by the International Longshoremen's Association's 50-mile container stuffing rule. Now that this rule has been overturned by the National Labor Relations Board, Zanes is "seriously considering" the activation of a common carrier service. As in the case of Posey, once Zanes is prepared to actually commence common carrier service, it may readily file a tariff describing the service and rates it will be offering at that time.

WHEREFORE, IT IS ORDERED, That the tariffs of the thirty-five carriers listed in the attached Appendix are hereby canceled, provided that this cancellation shall be without prejudice to said carriers filing new

tariffs when they are prepared to begin *bona fide* operations as common carriers in the foreign commerce of the United States.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–2

BORDEN INTERAMERICA INC.

v.

VENEZUELAN LINE

ORDER

May 13, 1977

In our January 10, 1977 Report and Order in this proceeding, we allowed the parties additional time in which to submit further evidence concerning (1) the standing of the Complainant to receive reparations and (2) the value of the goods shipped.

Complainant filed an "Amended Complaint" stating that its proper name was Borden Interamerica Inc., and that Borden Interamerica Inc. actually paid the freight charges for the disputed shipment.

Venezuelan Line filed a "Reply to the Amended Complaint" wherein it argued only that the terms of Borden's sales invoice bearing the incomplete date of –28–73 were not sufficiently clear to establish the precise value per ton of the chemicals shipped. Venezuelan Line also stated that the value designation applied at the time of shipment ($300 to $500 per ton) was based upon an Export Declaration provided to its Charleston, South Carolina, agent by an employee of the Complainant. The agent's copy of this document has been misplaced, however, and was not furnished to the Commission.

Complainant did not reply to these allegations or produce its copy of the Export Declaration. It has also failed to introduce evidence which corroborates or verifies the accuracy of the $217.14 per ton value indicated by the 1973 invoice.

In circumstances such as these, where critical information concerning a disputed shipment is entirely in the possession of the shipper, the Commission has consistently required clear proof that the original shipping documents were in fact erroneous before holding that the carrier has violated Shipping Act section 18(b)(3). In the absence of evidence corroborating the 1973 sales invoice or rebutting Venezuelan Line's statements that a higher value was stated by the shipper on Export

Declaration, the instant record does not permit us to conclude that the goods shipped had an actual value less than the $300 per ton specified on Venezuelan Line's bill of lading at the time of shipment.

Accordingly, IT IS ORDERED, That the Amended Complaint of Borden Interamerica Inc. seeking reparations based upon the value classification applied to its January 7, 1974 shipment of 105.62 short tons of Urea Formaldehyde (UF-85) is denied.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 495

UNIVERSAL NOLIN UMC INDUSTRIES, INC.

v.

SEA-LAND SERVICE, INC.

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

May 11, 1977

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 May 11, 1977.

It is Ordered, That applicant is authorized to waive collection of $870.19 of the charges previously assessed Universal Nolin UMC Industries, Inc.

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 495 that effective May 1, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 1, 1976, through June 25, 1976, the rate on 'Milk Coolers, with Refrigeration Equipment, including Fans' to Group 1 port is $66.50 WM, subject to all applicable rules, regulations, terms and conditions of said rate 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) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 495

UNIVERSAL NOLIN UMC INDUSTRIES, INC.

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298), and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Aplicant), has applied for permission to waive collection of a portion of the freight charges on two shipments of milk coolers, which moved via Sea-Land's mini-landbridge service from New Orleans, Louisiana, to Tokyo, Japan, by way of Oakland, California (rail New Orleans to Oakland). The two shipments moved under Sea-Land bills of lading dated May 13, 1976. The application was filed November 8, 1976. Waiver of the charges involved herein would affect only the ocean carrier's portion.

The subject shipments moved under Sea-Land's westbound USA-Far East Joint Container Freight Tariff No. 234, FMC–106, ICC–92, item #719 1536 30, 3rd revised page 507, effective May 1, 1976. The aggregate weight of the two shipments was 22,270 pounds and their aggregate measurement was 3315 cubic feet. The rate applicable at time of shipment was $77 per ton of 40 cubic feet or 2000 pounds, whichever yields the greater revenue. The rate sought to be applied is $66.50 per ton of 40 cubic feet or 2000 pounds, whichever is greater; per the same tariff page as cited above, except see 7th revised page 507, effective June 25, 1976.

Aggregate freight charges for the two shipments payable pursuant to the rate applicable at the time of shipment amounted to $6,562.76, including handling charges. Aggregate freight charges at the rate sought to be applied amount to $5,692.57, including handling charges. The difference sought to be waived is $870.19.

[1] This decision became the decision of the Commission May 11, 1977.

[2] 46 U.S.C. 817, as amended.

Except for the four shipments involved in Special Docket 492 (*Toei Kogyo Co. v. Sea-Land*), the Applicant is not aware of any other shipments of the same commodity which moved via Sea-Land during the same time period at the rates involved in this application.

Sea-Land offers the following as grounds for granting the application:

(4) Sea-Land Tariff No. 234, FMC No. 106 and ICC No. 92, naming mini-landbridge rates from U. S. Atlantic and Gulf seaport cities to Far East ports, was a reissue of Tariff No. 201, FMC No. 74 and ICC No. 72, which became effective September 15, 1975. On original page 507 (Attachment No. 1) it brought forward without change a special rate of $66.50 W/M in Item No. 719 1536 30 applying to Japan Group 1 ports, including Tokyo as provided in Rule No. 5. This rate had initially been established to meet the same total rate published by a competing carrier in its mini-landbridge tariff. The rate was subject to an expiration date of January 31, 1976 as explained in Rule No. 10 on original page 86 (Attachment No. 2). The expiration date was subsequently extended to June 30 and July 31, 1976 on 1st revised page 507, 3rd, 4th and 5th revised pages 86 (Attachment No. 3).

In February, 1976 a shipper of milk coolers requested Sea-Land's sales representative to extend the $66.50 rate to December 31, 1976 so that he could continue to sell his products competitively with local Japanese manufacturers. The sales representative proposed this request by letter dated February 13, 1976 (Attachment No. 4). It was approved by Sea-Land's Pacific Division pricing headquarters in Oakland and the shipper so informed verbally on February 20. Instructions to publish the extension of the expiration date were teletyped March 30 to the Elizabeth, N. J. office for processing through the tariff publishing officer (Attachment No. 5).

Concurrently, Sea-Land was processing a general increase in rates to become effective May 1, 1976 in Tariff No. 234 corresponding to a similar general increase in all-water rates taken by the Far East Conference. Special rates which Sea-Land had agreed to maintain in effect to a date beyond May 1 were, of course, not to be subjected to a general increase. Unfortunately, due to administrative error, Sea-Land failed to except Item No. 719 1536 30 from the general increase and the rate of $66.50 was increased to $77.00 on 3rd revised page 507 (Attachment No. 6). On June 23 this error was discovered by pricing personnel and it was corrected by immediate filing of 7th revised page 507 (Attachment No. 7) with an effective date of June 25. The shipments here involved, (Attachment No. 8) moved during the period of time the erroneous rate of $77.00W/M was in effect.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to except the subject commodity item from the general rate increase, as had been promised the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate upon which such waiver would be based.

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, specifically the amount of $870.19. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
April 14, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 492

TOEI KOGYO CO. LTD.

v.

SEA-LAND SERVICE, INC.

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

May 11, 1977

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 May 11, 1977.

It is Ordered, That applicant is authorized to refund and waive collection of $953.67 of the charges previously assessed Toei Kogyo Co. Ltd.

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 492 that effective May 1, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 1, 1976 through June 25, 1976, the rate on 'Milk Coolers, with Refrigeration Equipment, including Fans' to Group 1 port is $66.50 WM, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That refund and 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 refund and waiver.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 492

TOEI KOGYO CO. LTD.

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298), and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant), has applied for permission to refund a portion of the freight charges on one shipment of milk coolers, and to waive collection of a portion of the freight charges on three other shipments of milk coolers, all of which moved via Sea-Land's mini-landbridge service from New Orleans, Louisiana, to Tokyo, Japan, via Oakland, California (by rail New Orleans to Oakland), between May 4 and June 28, 1976. The four shipments moved under Sea-Land bills of lading dated May 4, May 18, May 28 and June 11, 1976, respectively. The application was filed October 29, 1976. Refund or waiver of the charges involved herein would affect only the ocean carrier's portion.

The subject shipments moved under Sea-Land's westbound USA-Far East Joint Container Freight Tariff No. 234, FMC–106, ICC–92, Item #719 1536 30, 3rd revised page 507, effective May 1, 1976. The aggregate weights of the four shipments were, respectively: 3329 pounds, 8850, 6350 and 8922 pounds. In the same chronological order, they measured 155 cubic feet, 1315, 1040 and 1123 cubic feet. The rate applicable at time of shipment was $77 per ton of 40 cubic feet or 2000 pounds, whichever yields the greater revenue. The rate sought to be applied is $66.50 per ton of 40 cubic feet or 2000 pounds, whichever is greater, per the same tariff page as cited above, except see 7th revised page 507, effective June 25, 1976.

[1] This decision became the decision of the Commission May 11, 1977.

[2] 46 U.S.C. 817, as amended.

Aggregate freight charges payable pursuant to the rate applicable at the times of shipment amounted to, respectively: $317.76 (inclu. handling charge), $2,531.38, $2,002.00, and $2,302.16 (inclu. handling charge). Aggregate freight charges at the rate sought to be applied amount to $277.07 (inclu. handling), $2,186.19, $1,729.00, and $2,007.37 (inclu. handling). The differences sought to be waived or refunded total $953.67.

There were only two other shipments of the same commodity which moved via Sea-Land during the same time period at the rates involved in this application. Those other two shipments are the subject of another Special Docket application (SD-495, *Universal Nolin UMC Industries v. Sea-Land*) because there the shipper, rather than the consignee, bore the freight charges and would be the proper beneficiary of any waiver of collection or refund. (That other application involves the same commodity, origin and destination, shipper and consignee.)

Sea-Land offers the following as grounds for granting the application:

(4) Sea-Land Tariff No. 234, FMC No. 106 and ICC No. 92, naming mini-landbridge rates from U. S. Atlantic and Gulf seaport cities to Far East ports, was a reissue of Tariff No. 201, FMC No. 74 and ICC No. 72, which became effective September 15, 1975. On original page 507 (Attachment No. 1) it brought forward without change a special rate of $66.50 W/M in Item No. 719 1536 30 applying to Japan Group 1 ports, including Tokyo as provided in Rule No. 5. This rate had initially been established to meet the same total rate published by a competing carrier in its mini-landbridge tariff. The rate was subject to an expiration date of January 31, 1976 as explained in Rule No. 10 on original page 86 (Attachment No. 2). The expiration date was subsequently extended to June 30 and July 31, 1976 on 1st revised page 507, 3rd, 4th and 5th revised pages 86 (Attachment No. 3).

In February, 1976 a shipper of milk coolers requested Sea-Land's sales representative to extend the $66.50 rate to December 31, 1976 so that he could continue to sell his products competitively with local Japanese manufacturers. The sales representative proposed this request by letter dated February 13, 1976 (Attachment No. 4). It was approved by Sea-Land's Pacific Division pricing headquarters in Oakland and the shipper so informed verbally on February 20. Instructions to publish the extension of the expiration date were teletyped March 30 to the Elizabeth, N. J. office for processing through the tariff publishing officer (Attachment No. 5).

Concurrently, Sea-Land was processing a general increase in rates to become effective May 1, 1976 in Tariff No. 234 corresponding to a similar general increase in all-water rates taken by the Far East Conferences. Special rates which Sea-Land had agreed to maintain in effect to a date beyond May 1 were, of course, not to be subjected to the general increase. Unfortunately, due to administrative error, Sea-Land failed to except Item No. 719 1536 30 from the general increase and the rate of $66.50 was increased to $77.00 on 3rd revised page 507 (Attachment No. 6). On June 23 this error was discovered by pricing personnel and it was corrected by immediate filing of 7th revised page 507 (Attachment No. 7) with an effective date of June 25.

The erroneous rate of $77.00W/M was in effect from May 1 through June 24. In addition to the shipment described in paragraph (1) (Attachment No. 8) on which permission to refund $40.69 is sought, there were three additional shipments as shown in Attachment No. 9 on which permission is sought to waive collection of a portion of the charges. The rate of $77.00W/M was assessed but the consignee paid charges based on the rate of $66.50W/M on each.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90-298), and Rule 6(b), *Special Docket Applications*, Rules of

Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to except the subject commodity item from the general rate increase, as had been promised the shipper.

2. Such a refund or waiver of collection (respectively, where applicable for the subject four shipments) will not result in discrimination among shippers.

3. Prior to applying for authority to refund or waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate upon which the respective refund and waivers would be based.

4. The application was filed within 180 days from the date of the subject shipment.

Accordingly, permission is granted to Sea-Land Service, Inc., to refund and waive collection, as applicable, of a portion of the freight charges, specifically in the total amount of $953.67 for the subject four shipments. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
April 14, 1977.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–79

HOUSEHOLD GOODS FORWARDERS ASSOCIATION OF AMERICA, INC., ET AL.

v.

AMERICAN E XPORT LINES, INC., SEA-LAND SERVICE, INC.
U. S. LINES

Where different commodity descriptions are involved, economic injury is not demonstrated, and the choice of routing is entirely within the control of the underlying shipper, the mere fact that military household goods are transported at one rate when shipped directly by the Military Sealift Command and at another rate when a nonvessel operating common carrier intermediary is employed does not establish a violation of Shipping Act section 17, first paragraph.

Alan F. Wohlstetter, for Household Goods Forwarders Association of America, Inc.

James N. Jacobi, for American Export Lines, Inc.

Edward M. Shea, for Sea-Land Service, Inc.

Russel T. Weil, for United States Lines, Inc.

Dudley J. Clapp, Jr., Milton J. Stickles, Jr., and *E. Duncan Hammer, Jr.,* for Military Sealift Command.

Donald J. Brunner and *C. Jonathan Benner,* Hearing Counsel.

REPORT AND ORDER

May 18, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

In response to a petition by the Household Goods Forwarders Association of America, Inc. (HGFA), the Commission issued a Show Cause Order directing American Export Lines, Inc. (AEL), Sea-Land Service, Inc. (Sea-Land), and United States Lines, Inc. (USL), to demonstrate why the disparity between the rates at which containerized "military household goods" are shipped by the Military Sealift Command (MSC) and by privately owned nonvessel operating common carrier

(NVO) members of HGFA, between U.S. Atlantic and Continental European ports (MSC Trade Route 5), should not be declared unjustly discriminatory within the meaning of section 17 of the Shipping Act, 1916 (Act).

At the time this proceeding was commenced the rates Respondents charged MSC for household goods (MSC rates) were lower than the rates available to HGFA members (NVO rates) by some $100 to $300 per container without consideration of bunker fuel surcharges, and lower by about $90 to $400 per container if bunker surcharges were included in the calculations. The NVO rates were in turn considerably lower than the commercial rates.[1]

HGFA promptly entered a joint stipulation of facts with the respondent carriers. Among the stipulations were the following: Respondents had each unsuccessfully attempted to persuade MSC to remove household goods from the "Cargo, N.O.S." commodity classification and establish a separate MSC household goods rate; during RFP 800, 1st cycle, household goods constituted 9.1 percent of the items moving under MSC's, "Cargo, N.O.S." rate; Respondents' NVO rates are reasonable; transportation conditions do not warrant a substantial discrepancy between rates for military household goods shipped by MSC and those shipped by NVO's;[2] the NVO rate is available only for shipments covered by Government Bills of Lading; the Defense Department pays the total transportation cost for both NVO and MSC shipments; and, the Defense Department itself determines whether a given shipment moves via MSC or via a NVO.

In separately filed memoranda of law, Respondents focused on MSC's insistence that they carry household goods under a broad "Cargo, N.O.S." classification when they would prefer to establish a separate "Household Goods" rate.[3] It was argued that Respondents could not have violated section 17 because there is only one underlying "shipper,"[4] and they have merely acquiesced in a commodity classification scheme

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[1] The rate data in the Commission's Show Cause Order was based upon MSC's RFP 800, 2nd cycle, bids (effective January 1, 1974) and all applicable bunker surcharges. MSC rates are established for six-month periods ("cycles") through a competitive bidding procedure (RFP System) which classifies *all cargo* other than refrigerated and vehicular items as "Cargo, N.O.S." These rates are expressed in dollars per measurement ton. The NVO rate is established by Respondents acting individually, but all three carriers express their rates as a flat charge per container (or in dollars per cubic foot for partial loads) and have quoted identical rates (except for bunker surcharges) since at least May 1, 1972. The NVO rate is available for all United States Government shipments; *it is not limited to household goods owned by Defense Department personnel.* The commercial rate is established by the North Atlantic/Continental and North Atlantic/French Freight Conferences. It is expressed in dollars per weight ton over a 6,720 lb. minimum. These different rating systems make rate comparison difficult. MSC and NVO rates can be accurately compared because a measurement ton is fixed at 40 cubic feet and the MSC tariff lists averages of the internal capacity of the containers used by each carrier. Comparison of the MSC or the NVO rate with the commercial (by weight) charge is more art than science. Educated estimates are possible if one knows the storage characteristics of household goods, but exact figures are impossible unless both weights and measurement figures are available on a specific shipment.

[2] The parties stipulated to MSC/NVO rate discrepancies based upon RFP 800, 2nd cycle, data *without bunker surcharges* and stated that these discrepancies were "substantial."

[3] MSC typically accepts bids on only three military commodities: "Refrigerated," "Vehicles" and "Cargo, N.O.S."

[4] Only AEL and USL make the "single shipper" argument. Sea-Land believes two shippers are involved, but suggests (without providing any particulars) that there are cost justifications for different MSC and NVO rates on household goods.

dictated by the Defense Department. *American Export Isbrandtsen Lines, Inc. v. Federal Maritime Commission*, 409 F.2d 1258 (2d Cir. 1969); *Violations of Section 14, Fourth, 16 First and 17 (Bunker Fuel Surcharges)*, 15 F.M.C. 92 (1972), as essentially reversed by order published at 13 S.R.R. 526 (1973).

Respondents also claimed that their lower MSC rates are justified in light of the mix of low and high valued items carried thereunder, the legality or reduced rates to the sovereign, and their compliance with the Commission's General Order 29.[5] Nonetheless, Respondents urge the Commission to take *prospective action* against MSC's use of the "Cargo, N.O.S." classification and re-establish the separate rate for military household goods which existed prior to 1966 when MSC switched to the RFP system.

Hearing Counsel and HGFA supported the Respondents in arguing that the stipulated facts present a *prima facie,* but "prospective only," violation of section 17.[6] Neither Respondents, HGFA nor Hearing Counsel exercised their right to request an evidentiary hearing.

The only discordant note was voiced by MSC, which had been granted leave to intervene. MSC objected strongly to what they viewed as the collusive nature of the proceeding, the inadequacy of the joint stipulation, and the other parties' apparent efforts to deprive MSC of an opportunity to rebut their allegations. MSC further stated that the real controversy is not a Shipping Act matter, but concerns a dispute between itself and HGFA as to the cost efficiency of NVO door-to-door service. In 1971 MSC began using direct procurement methods (the RFP system) to obtain inland drayage of household goods in conjunction with the line haul services of ocean carriers; it has subsequently increased its reliance upon this method of transport at the expense of the Through Government Bill of Lading or NVO method. MSC considered the claim that NVO rates are reasonable to be a sham in light of past HGFA contentions that these rates are too high. *E.g.,* HGFA Opening Brief in FMC Docket No. 73–22, *Matson Navigation Company—Proposed Changes in Rates.* MSC also stressed the absence of facts in the Joint Stipulation which show that Respondents have identifiable costs peculiarly attributed to the shipment of household goods which necessitate a special MSC household goods rate or that HGFA members have been injured by the rate disparities in question. MSC also subscribes to the "one shipper" theory on the grounds that the bifurcated military cargo rate system being investigated is entirely a product of Defense Department procurement regulations; the government pays the ocean freight in both instances.

Sea-Land thereafter filed a "Motion to Supplement the Record" stating

[5] 46 C.F.R. Part 549 prescribed a "fully distributed costs" floor for military cargo rates beginning with RFP 700 (January 1 through June 30, 1972). These regulations were affirmed *per curiam* by the United States Court of Appeals on December 19, 1974. General Order 29 has generally been effective in curbing unrealistically low military cargo rates in foreign commerce.

[6] Like Sea-Land, Hearing Counsel and HGFA believe there are two different shippers involved because the NVO's stand in the position of shippers in their relationship with the Respondents.

that the RFP 900, 1st cycle, rates were considerably higher than those relied upon in the Commission's Show Cause Order (RFP 800, 2nd Cycle), and, if bunker surcharges were omitted, the disparity between Sea-Land's own MSC and NVO rates would be under $60 for both 40 and 35 foot containers.

In February 1976, the Commission took official notice of the fact that RFP 1000, 2nd Cycle, MSC rates were then higher than Respondents' NVO rates (if bunker surcharges were excluded), and ordered HGFA to show cause why the proceeding should not be discontinued as moot.

HGFA responded by first arguing the facts. MSC rates change with each RFP cycle, and, according to HCFA, the critical problem is the continuation of *different* rates for different shippers of identical commodities, not the exact amount of the rate disparity or which of the shippers is favored.[7] HGFA then presented a lengthy supplemental argument against the invalidity of any discount to government shippers in light of the repeal of section 6 of the Intercoastal Shipping Act on October 26, 1974 (P.L. 93–487).

Hearing Counsel and Respondents also stated that the controversy was not moot so long as military household goods rates could be shipped under two different rates. However, Respondents felt it necessary to part company with HGFA on the section 6 issue. All three carriers filed replies emphasizing that the Defense Department is solely responsible for any disparities between MSC and NVO rates and that the repeal of section 6 affected only *domestic commerce rates*.

MSC also replied to HGFA's supplemental arguments. MSC stated that whatever the effect of section 6's repeal, it did not eliminate the Defense Department's obligations to procure ocean transportation under competitive conditions pursuant to the Armed Services Procurement Act, 10 U.S.C. 2304, *et seq.*, or require that government rates be identical to commercial rates in all respects. Finally, MSC claimed that if U.S. Government shippers must be treated as commercial shippers in all respects, it follows that foreign governments are also precluded from receiving special rates, even when they own the vessels carrying their goods.

Discussion and Conclusions

Inasmuch as rate disparities similar to those initially complained of continue to exist, this somewhat questionable "controversy" is not moot and must be resolved upon its merits. Because the Commission has not been presented with a clear case of two shippers of like traffic moving under the same circumstances and conditions being charged different

[7] HGFA also pointed out that by May 6, 1976, all three Respondents would have increased their NVO rates to a level higher than their MSC rates.

rates—to the detriment of one of them—we hold that the stipulated facts do not establish a violation of section 17 as a matter of law.[8]

All parties admit that the instant dispute is caused by the Defense Department's decision to ship some of its household goods via MSC and some via NVO's and to pay the entire transportation cost in either case. The tariffs Respondents publish to accommodate this practice are claimed to be unjustly discriminatory on their face, yet the relief demanded by HGFA and Respondents alike is not the interdiction of a separate "Government Household Goods" tariff which duplicatively includes military cargo, but the abolition of the "Cargo, N.O.S." classification by MSC—at least insofar as it includes household goods. Either approach would eliminate discrimination. The former would also lower the rate the NVO's must pay. The Commission has been furnished no basis for choosing one solution over the other or for making any finding of unjust discrimination.

Nothing in the record indicates that "MSC Cargo, N.O.S." and "Household Goods of Government Personnel Shipped by NVO's Under Government Bills of Lading" are not different commodities for rate making purposes. Although both include military household goods, each commodity description legitimately includes other items as well. The Commission has heretofore accepted MSC's use of a "Cargo, N.O.S." classification for a myriad of commercially shipped commodities, provided that the rates charged recovered the carriers' fully distributed costs. This approach at least partially reflects the national policies expressed in the Armed Services Procurement Act and the various cargo preference laws. Absent evidence that MSC "Cargo, N.O.S." is not a distinct "commodity," no discrimination can occur if it moves at different rates than some of the individual items (*e.g.* household goods) ordinarily included in MSC's total cargo mix.

HGFA would distinguish the instant case from the disparate Defense Department/State Department household goods rates approved by the Second Circuit in *American Export Isbrandtsen Lines, Inc., supra,* because here the United States Government operates through an NVO intermediary as to part of its shipments, thereby technically involving two shippers. It is true that NVO's are ordinarily treated as shippers in their dealings with ocean carriers. The special circumstances of this case indicate, however, that the HGFA members are not operating independently, but as the *alter ego* of the Defense Department. They are contractually limited to the use of a "military" rate available only on American Flag carriers when a Government Bill of Lading has been issued pursuant to a conscious choice of routing by the Defense

[8] P.L. 93–487 does not directly affect this conclusion. The repeal of Intercoastal Shipping Act section 6 means that rates and practices applicable to government and charitable cargoes must now be judged by the same standards as commercial cargoes; it does not forbid all differences in the treatment of government and commercial shipments. See, *Department of Defense v. Matson Navigation Company,* 20 F.M.C. ——, 17 SRR 1, 5–6 (1977). A carrier may *reasonably and fairly* accommodate the special needs of any shipper—including MSC.

Department. Two different shippers may well be present in this instance (MSC and the NVO's), but the real party in interest here is not injured by the different rates these "shippers" pay within the meaning of section 17.

Moreover, HGFA has not even attempted to demonstrate the amount of injury, if any, it is suffering as a result of MSC's use of a "Cargo, N.O.S." rate. HGFA concedes that Respondents' NVO rates are reasonable, and that its members are fully reimbursed for the cost of ocean freight by the Defense Department.[9] Based upon the Joint Stipulation, HGFA's objective in establishing a single government household goods rate does not appear to be the elimination of injury to its members, but to increase the amount of freight MSC must pay to Respondents. Such a result is unwarranted in light of General Order 29 and the record before us.

WHEREFORE, IT IS ORDERED, That the initial Order to Show Cause directed to American Export Lines, Inc., Sea-Land Service, Inc., and United States Lines, Inc., and the subsequent Order to Show Cause directed to the Household Goods Forwarders Association of America, Inc., are hereby dismissed; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) JOSEPH C. POLKING,
Acting Secretary.

[9] The fact that HGFA members are fully reimbursed only to the extent that they comply with MSC regulations may explain the uniformity in Respondents' individually established NVO rates over the past few years.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–64

STATES STEAMSHIP COMPANY FAR EAST/USA HOUSEHOLD GOODS TARIFF NO. 2 FMC–9

A foreign commerce tariff may be canceled immediately if the effect of the cancellation is to eliminate a service and not to raise the cost of that service.

A telex tariff cancellation notice received after the close of Commission business was effective upon receipt when no steps were taken to reject said notice within the next few business days.

Once accepted by the Commission, a tariff filing is valid and binding between shipper and carrier even if subsequently found to violate provisions of the Shipping Act or the Commission's Rules; it is not void *ab initio.*

Dillon E. Coker and *Peter Q. Nyce, Jr.,* for Military Traffic Management Command.

R. Frederic Fisher and *Barbara H. Buggert,* for States Steamship Co.

Alan F. Wohstetter and *Edward A. Ryan,* for Household Goods Forwarders Association of America, Inc.

John Robert Ewers and *C. Douglass Miller* as Hearing Counsel.

REPORT AND ORDER

May 18, 1977

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and Clarence Morse, *Commissioners*)

The Military Traffic Management Command of the Department of Defense (MTMC) has petitioned the Commission to review the status of States Steamship Company's (States Line), Far East/USA Household Goods Tariff No. 2, FMC–9, and issue a declaratory order indicating whether this tariff has been canceled. MTMC alleges that such an order would resolve a pending dispute between itself and a number of nonvessel operating common carriers (NVO's) of used household goods employing an International Through Government Bill of Lading pursuant to contrac-

tual arrangements with the Department of Defense.[1] This dispute concerns the level of household goods rates offered by vessel operating carriers from the Far East to U.S. West Coast ports and Hawaii between May 1 and October 30, 1976. MTMC takes the position that the "lowest available" ocean rate was that quoted in Section I of States Line's FMC No. 9 tariff, and would have the Commission declare that this rate remained in effect until at least August 28, 1976.

Replies to MTMC's petition were submitted by the Bureau of Hearing Counsel (Hearing Counsel), States Line, and the Household Goods Forwarders Association of America, Inc. (Intervenor).[2] These parties claim Tariff FMC-9 was canceled on or before May 21, 1976 and that the "lowest available rate" for military household goods from that date forward was contained in the Trans-Pacific American Flag Berth Operators Freight Tariff No. 3, FMC-2, effective May 1, 1976.[3]

MTMC was permitted to reply to States Line, which had styled its reply as a "Motion to Dismiss." The controversy presented is entirely one of law; no relevant questions of fact are disputed.

BACKGROUND INFORMATION

States Line entered into a mutual transshipment agreement (FMC No. 9373) with Lykes Bros. Steamship Company, Inc. (Lykes), in 1965 and filed a tariff implementing this agreement to take effect May 28, 1965.[4] The *agreement* provided for the through carriage of miltary household goods which originated at various Far Eastern ports and were: (1) initially booked by Lykes, transshipped to States Line's vessels in Japan, and delivered to U.S. West Coast ports by States Line;[5] and (2) initially booked by States Line, transshipped to Lykes' vessels in Japan, and delivered to U.S. Gulf ports by Lykes.[6] The *tariff* designated these two transshipment services as Section I and Section II service, respectively, and specifically referred to Agreement No. 9373 in both instances. The tariff did not, however, contain rules clearly describing the details of the transshipment operation, nor was it expressly required to contain such rules by the Commission's tariff filing regulations.[7]

[1] The NVO's provide service to MTMC under contracts which require adherence to a single factor through rate for a six month period, unless the NVO cancels its service upon thirty days notice. MTMC will not permit an upward adjustment of the NVO's rate unless the NVO establishes an *unavoidable increase* in its underlying costs. When the claimed increase is in the cost of the underlying ocean transportation, an upward adjustment is apparently allowed only when the *lowest available ocean rate* has increased.

[2] Intervenor is a non-profit corporation consisting of 68 NVO's who specialize in shipping used household goods. Some of these NVO's are under contract with MTMC in the Far East/U.S. West Coast trade.

[3] States Line is a member of the Trans-Pacific American Flag Berth Operators Conference (T-PAFBO). *T-PAFBO calls only at U.S. West Coast ports and Hawaii.* It does not serve U.S. Gulf Coast ports.

[4] Agreement No. 9373 called for States Line to file a *single tariff* stating the rates, charges and practices applicable to the transshipment service offered by *both* States Line and Lykes. Lykes had no tariff on file *in its own name* which included military household goods to West Coast ports, but was listed as a participating carrier in the States Line tariff as provided by section 536.4(10) of the Rules.

[5] States Line did not make direct vessel calls at U.S. Gulf ports between 1964 and 1977 as a condition of its subsidy arrangements with MARAD.

[6] Lykes did not make direct vessel calls at U.S. Gulf ports between 1964 and 1977 as a condition of its subsidy arrangements with MARAD. Lykes is not a member of T-PAFBO.

[7] 46 C.F.R. Part 536 (General Order 13).

In late 1975, States Line's original Household Goods Tariff was canceled and superseded by States Line's Tariff FMC–9. The title page of the latter document erroneously indicated that Agreement No. 9373 applied only to Section II service, and the tariff rules did not specifically clarify this discrepancy. Nonetheless, it was discernible from the tariff as a whole that both Section I and Section II service required some type of transshipment arrangement between originating and delivering carriers. States Line and Lykes were the only participating carriers listed in Tariff FMC–9; since Section I service involved delivery on the West Coast by a States Line vessel, it follows that this transshipment service could be offered only under a Lykes bill of lading.

On January 10, 1976, States Line and Lykes notified the Commission that they had canceled Agreement No. 9373. Without a properly filed agreement in effect, any further transshipments of military household goods by States Line and Lykes would have violated section 15 of the Shipping Act, 1916. Through oversight, however, States Line neglected to cancel Tariff FMC–9. Neither States Line nor Lykes moved any cargo under that tariff subsequent to January 10, 1976.

On May 17, 1976, States Line sent the Commission's Bureau of Compliance a telex commuication requesting special permission to cancel Tariff FMC–9 in its entirety effective May 18, 1976. No action had been taken on this request when another telex was received withdrawing the first message and stating that Tariff FMC–9 was canceled immediately. This second telex was received about 9:00 P.M., Friday, May 21, 1976, and was not seen by the Commission's staff until Monday morning, May 24, 1976. Such "temporary tariff amendments" are permitted by section 536.6(c) of the Rules. A permanent cancellation supplement to Tariff FMC–9 was filed July 29, 1976.

The Bureau of Compliance took no action to cancel or suspend Tariff FMC–9 on January 10, 1976, nor did it reject or disallow States Line's subsequent tariff filings purporting to cancel that tariff.

POSITION OF THE PARTIES

MTMC believes Tariff FMC–9 to still be in full force and effect, or, alternatively, that said tariff was not legally canceled until August 29, 1976. MTMC reaches this conclusion by contending that: (1) Agreement No. 9373 applied only to Section II service (States Line bookings delivered to the Gulf Coast by Lykes) so that cancellation of the Agreement did not affect the availability of Section I service (Lykes bookings delivered to the Pacific Coast by States Line); (2) the May 21, 1976 telex cancellation was a legal "nullity" because it caused military household goods rates to increase upon less than 30 days notice,[8] was

[8] Shipping Act section 18(b)(2) requires 30 days notice of rate increases. MTMC believes the cancellation of Tariff FMC–9 *increased* States Line's rates because States Line participated in T-PAFBO Tariff FMC–2 and the latter tariff contained a higher rate for the same service subsequent to May 1, 1976.

not followed by a permanent tariff amendment within 15 days[9] and was not simultaneously furnished to all States Line tariff subscribers;[10] (3) the July 29, 1976 permanent cancellation supplement was invalid because it improperly attempted to cancel the tariff retroactively; and (4) if the July 29, 1976 filing were validly accepted for filing by the Commission, it still resulted in a rate increase for household goods which could not take effect for 30 days.

States Line, Hearing Counsel and Intervenors believe Tariff FMC-9 was canceled by operation of law on January 10, 1976, when the underlying transshipment agreement was canceled, or, in the alternative, that the May 21, 1976 telex effectively canceled the tariff immediately. In support of this position, it is argued that: (1) Section I service was clearly dependent upon the continued existence of Agreement No. 9373, despite the absence of a specific statement to that effect on the title page of Tariff FMC-9; (2) the cancellation of Section I service did not result in a rate increase for Far East/U.S. West Coast household goods carried by States Line; (3) States Line's failure to file a permanent cancellation supplement by June 5, 1976 did not nullify its May 21, 1976 telex filing—as long as the cancellation notice remained on file it was controlling for all tariff filing purposes; and (4) there were no subscribers to Tariff FMC-9 upon which the May 21, 1976 telex filing could be served.

States Line and Intervenors also devote significant space to arguing that the Tariff FMC-9 rates were not actually "available" for use by the NVO's subsequent to January 10, 1976, regardless of the legal status of the tariff itself because States Line would have refused to provide the service.

DISCUSSION AND CONCLUSIONS

It is not the Commission's function to determine the "lowest available" ocean rate for MTMC purposes. Whether the rates specified in Tariff FMC-9 *would have been* made available to NVO's subsequent to the cancellation of Agreement No. 9373 is a matter for MTMC to resolve in accordance with its own statutes and regulations. The Commission will, however, render its opinion on the narrower question of whether Tariff FMC-9 has been canceled.

We believe Tariff FMC-9 was effectively canceled on May 21, 1976, and not before or after that date. The Commission's Rules do not provide for the automatic cancellation of transshipment *tariffs* upon receipt of notice that an underlying transshipment *agreement* has been canceled. The responsibility for maintaining accurate tariffs falls fully and solely upon the ocean carriers which publish them. As long as Tariff FMC-9 did not include an amendment or supplement which purported to cancel it,

[9] Section 536.6(c)(5) of the Rules requires a temporary tariff amendment to be followed by a permanent amendment within 15 days. States Line did not comply with this regulation.

[10] Section 636.6(c)(4) of the Rules requires carriers making temporary tariff filings to simultaneously serve the temporary filing on all subscribers to the tariff in question.

then Tariff FMC–9 contained the only legal rates States Line could have charged for the transshipment service covered by that tariff, even though the actual provision of such service would have violated section 15 of the Shipping Act. See generally, *Davis v. Portland Seed Company*, 264 U.S. 403, 425 (1924), and cases cited therein; *Chicago, Milwaukee, St. Paul and Pacific RR Co. v. Alouette Peat Products, Ltd.*, 253 F.2d 449 (9th Cir 1957).

The critical question is the effect of the May 21, 1976 telex cancellation. If a tariff cancellation would have increased States Line's rate for military household goods delivered to the *U.S. Gulf Coast* or *Lykes' rate* for military household goods delivered to the U.S. Pacific Coast, it could not have taken effect until June 20, 1976. The May 21, 1976 telex did not increase the rates for these services; it eliminated the services altogether.[11]

MTMC cites judicial decisions[12] for the proposition that the May 21, 1976 cancellation notice was invalid, even though accepted by the Commission, because a permanent tariff amendment was not filed within the 15 day period required by the Commission's Rules. These decisions find various agency actions taken in contravention of an agency's own regulations to be invalid, but are readily distinguishable from the tariff filing situation now facing the Commission. The cited cases deal with adjudicatory proceedings affecting significant operating or employment rights where due process is constitutionally required and scrupulously observed. The filing of common carrier tariffs involves a considerably different legal premise.

A tariff has one major purpose—to prevent rebates and other types of unjust discrimination by publicly stating the rates to be charged all eligible shippers. Tariff filings are neither adjudicatory matters nor finally determinative of individual rights or privileges. Once accepted by the Commission, a tariff must be adhered to by publishing carrier and shipper alike. *E.g. Gilbert Imported Hardwoods v. 245 Packages of Guatamabu Squares*, 508 F.2d 1116 (5th Cir. 1975); *United States v. Pan American Mail Line, Inc.*, 359 F. Supp. 728 (S.D.N.Y. 1972). Damage actions for illegal tariff provisions arise after the fact and are resolved by means of section 22 proceedings.[13] To *retroactively* declare a duly accepted tariff *void* for noncompliance with section 536.6(c)(5) would contravene the regulatory scheme established by most Federal common carrier statutes, including the Shipping Act. Once accepted, a tariff may be canceled only after the Commission has, after appropriate proceedings, found it to be

[11] The T-PAFBO rate (which applied to States Line and not Lykes) was admittedly higher than the FMC–9 Section I rate for service from the Far East to the U.S. West Coast, but Section I service required an initial booking on a *Lykes Bros. vessel*. Section I service was therefore an offering of Lykes Bros. and not States Line. It should also be noted that Section 536.2(c) of the Rules prohibits a carrier from filing a tariff which duplicates or conflicts with any other tariff to which the carrier is a party. If Section I service were a service of States Line and not of Lykes, Tariff FMC–9 would have improperly duplicated the West Coast service offered by States Line under the T-PAFBO tariff.

[12] *Ralph Nader v. Nuclear Regulatory Corp.*, 513 F.2d 1045, 1051 (D.C. Cir. 1975); *Pacific Molasses Co. v. Federal Trade Commission*, 356 F.2d 386 (5th Cir. 1966); *Mississippi Valley Barge Line Co. v. United States*, 252 F. Supp. 162 (E.D. Mo. 1966).

[13] Section 22 of the Shipping Act, 1916; 46 U.S.C. 821.

inconsistent with some provision of the Shipping Act or the Commission's Rules. Moreover, the Rules provide another, less drastic remedy for noncompliance with section 536.6(c)(5) which is plainly inconsistent with MTMC's "nullity" theory. Section 536.6(c)(7) states that temporary filing privileges shall be denied to carriers which persistently fail to file proper permanent amendments to replace their temporary tariff submissions.[14]

States Line has furnished an affidavit from its Rates and Conferences Manager stating that there were no subscribers to Tariff FMC-9 and that no violation of section 536.6(c)(4) could have occurred with regard to the May 21, 1976 telex cancellation notice. MTMC has not disputed this fact, but even if section 536.6(c)(4) had been violated, such a violation would not make the May 21, 1976 telex filing a "nullity." Once the temporary filing was accepted by the Commission,[15] it became legally binding upon States Line, Lykes, and any shippers of military household goods employing the service described therein.

Accordingly, IT IS ORDERED, That the "Petition for Declaratory Order" of the Military Traffic Management Command is granted to the extent indicated herein and denied in all other respects.

(S) JOSEPH C. POLKING,
Acting Secretary.

[14] See also section 32(c) of the Shipping Act [46 U.S.C. 831(c)] which provides for a civil penalty of up to $1,000 per day for violations of the Commission's Rules.

[15] The Commission's Rules do not indicate how or when a tariff submission is "accepted for filing," but provide for the rejection of tariff matter in certain instances. No notice or confirmation of acceptance is routinely furnished to carriers by the Bureau of Compliance. It is generally assumed that a tariff which is not rejected by the close of business on its stated effective date has been accepted for filing. Difficulties arise in the case of after hours telex filings such as States Line's May 21, 1976 cancellation notice. In such situations, the Commission must have a reasonable opportunity to review the filing, and a "rule of reason" has been applied. If the tariff submission is in proper form it is *accepted retroactively*. If significant errors exist, then the tariff is *rejected* as expeditiously as possible on the theory that it was never accepted and not on the theory that it was "void *ab initio.*"

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 375(I)

NATIONAL STARCH & CHEMICAL CORPORATION

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

May 18, 1977

Notice is hereby given that the Commission on May 18, 1977 determined not to review the decision of the Settlement Officer in this proceeding served May 10, 1977.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 375(I)

NATIONAL STARCH & CHEMICAL CORPORATION

v.

SEA-LAND SERVICE, INC.

Dismissal of Complaint and Discontinuance of Proceeding.

DECISION OF RONALD J. NIEFORTH, SETTLEMENT OFFICER[1]

By complaint filed November 26, 1976, National Starch & Chemical Corporation (complainant) states that Sea-Land Service, Inc. (carrier) declined to honor a claim for freight overcharge of $124.44, on the grounds that such action would violate item 105 of the Leeward & Windward Islands & Guianas Conference Tariff F.M.C. No. 1 which prohibits the payment of overcharge claims not presented to the carrier within six months after date of shipment.

The complaint, which was served on the carrier November 30, 1976, prompted the carrier to respond on January 20, 1977, advising that its investigation disclosed that the claim for refund was in order. Subsequently, in letter of March 2, 1977, the carrier confirmed that a check in the amount of $124.44 dated February 2, 1977, had been sent to the complainant in settlement of the claim.

An analysis of the complaint and supporting documentation together with a review of the applicable conference tariff confirms the complainant's allegation relative to the assessment of an improper rate. The freight refund which has been made by the carrier in connection with this Docket is, therefore, found to be proper and indeed mandatory to satisfy statutory requirements as provided in Section 18(b)(3), Shipping Act, 1916.

The subject complaint is dismissed and this proceeding discontinued.

(S) RONALD J. NIEFORTH,
Settlement Officer.

[1] Both parties having consented to the formal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from date of service thereof. (Note: Notice of determination not to review May 18, 1977.)

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 494

BRUNSWICK CORPORATION

v.

SEA-LAND SERVICE, INC.

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

May 18, 1977

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 May 18, 1977.

It is Ordered, That applicant is authorized to waive collection of $1,007.50 of the charges previously assessed Brunswick Corporation.

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

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 494 that effective May 1, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 1, 1976, through June 1, 1976, the rate on 'Golf Clubs' to Group 1 Ports is $100,00 W/M, subject to all applicable rules, regulations, terms and conditions of said rate 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) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 494

BRUNSWICK CORPORATION

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298) and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant), has applied for permission to waive collection of a portion of the freight charges on three shipments of golf clubs, which moved via mini-landbridge service from Jacksonville, Florida, to Tokyo and Kobe, Japan, under Sea-Land bills of lading dated May 10, 1976. The application was filed November 4, 1976. Waiver of the charges involved herein will affect only the ocean carrier's portion.

The subject shipments moved via rail from Jacksonville to Oakland, California, then via Sea-Land to Japan. The shipments were moved pursuant to Sea-Land's filed tariffs covering shipments from U.S.A. to Japan, Sea-Land westbound U.S.A.—Far East Joint Container Freight Tariff No. 234, FMC–106, ICC–92, item #894 4210 00, 1st revised page 577, effective May 1, 1976. The three shipments had an aggregate weight of 27,502 pounds and measured 3,100 cubic feet. The rate applicable at time of the shipments was $113 (W/M) per ton of 40 cubic feet or 2000 pounds. The rate sought to be applied is $100 (W/M) per ton of 40 cubic feet or 2000 pounds; same tariff cited above, except see 2nd revised page 577, effective June 1, 1976.

Aggregate freight charges payable pursuant to the rate applicable at time of shipment amounted to $8,757.50. Aggregate freight charges at the rate sought to be applied amount to $7,750. The difference sought to be waived is $1,007.50. The Applicant is not aware of any other shipments

[1] This decision became the decision of the Commission May 18, 1977.
[2] 46 U.S.C. 817, as amended.

of the same commodity which moved via Sea-Land during the same time period at the rates involved in this application.

Sea-Land offers the following as grounds for granting the application:

(4) Sea-Land Tariff No. 234, FMC No. 106 and ICC No. 92, naming mini-bridge rates from U.S. Atlantic and Gulf seaport cities to Far East ports, carried a special rate of $100.00 w/M on original page 577, effective September 15, 1975 (Attachment No. 1) subject to an expiration date of July 31, 1976 as shown in Rule 10 on 6th Revised Page 86 (Attachment No. 2) and applying to Japan Group 1 ports including Tokyo as provided in Rule No. 5.

Commitment was made to the shipper to maintain the rate of $100.00 W/M without increase through December 31, 1976 per teletype of February 24, 1976 from our Chicago sales office to our Pacific Division pricing headquarters in Oakland (Attachment No. 3).

Concurrently, Sea-Land was processing a general increase in rates in Tariff No. 234 corresponding to a similar general increase in all-water rates taken by the Far East Conference. The increase was originally intended to become effective April 1, 1976 but actually became effective May 1. Special rates which Sea-Land had agreed to maintain in effect beyond that date were, of course, not to be subjected to the general increase. Unfortunately, due to administrative error, Sea-Land failed to except the special rate in Item No. 894 4210 00 from the general increase and the rate of $100.00 W/M was increased to $113 W/M on 1st Revised Page 577 (Attachment No. 4).

On May 13 this error was discovered by pricing personnel who sent a teletype message to the Elizabeth office requesting them to reinstate the $100.00 rate (Attachment No. 5). That rate was then reinstated on 2nd Revised page 577 effective June 1, 1976 (Attachment No. 6). Meantime, the three shipments involved herein had moved on May 10 and were assessed the then applicable rate of $113.00 W/M. Copies of each of the bills of lading and freight bill are enclosed as Attachment No. 7. Having been assured of the continuance of the $100.00 rate through December 31, the shipper's freight forwarder reduced the charges to the basis of that rate when paying the Sea-Land freight bills.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to except the special rate from the general rate increase, as had been promised the shipper.

2. Such a waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within 180 days from the date of the subject shipments.

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, specifically the amount of $1,007.50. An appropriate notice will be published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
April 22, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 497

SMITH & JOHNSON (SHIPPING) INC.

v.

SEA-LAND SERVICE, INC.

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

May 18, 1977

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 May 18, 1977.

It is Ordered, That applicant is authorized to waive collection of $4,681.35 of the charges previously assessed Smith & Johnson (Shipping) Inc.

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

> "Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 497 that effective May 21, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 21, 1976, through November 15, 1976, the rate on 'Pipe Fittings other than Brass or Copper (not including valves)' minimum 45 MT per container to ports in Spain is $34.00 W/M, subject to all applicable rules, regulations, terms and conditions of said rate 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) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 497

SMITH & JOHNSON (SHIPPING) INC.

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION[1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

Sea-Land Service, Inc., seeks permission to waive collection of a portion of the freight charges on a shipment by Smith & Johnson (Shipping) Inc., of 46.35 metric tons of pipe fittings from New Orleans to Bilbao, Spain, on May 21, 1976. The rate applicable at the time of shipment was $135.00 per 2,240 pounds.[2] This rate resulted in aggregate freight charges of $6,319.53. The rate sought to be applied is $34.00 per 2,240 pounds.[3] This rate would have resulted in total freight charges of $1,638.18. Therefore, permission to waive collection of $4,681.35 is requested.

On or about May 14, 1976, Sea-Land's New Orleans office negotiated with the complainant a rate of $34.00 per ton of 40 cubic feet or 2,240 lbs. to meet competition of other carriers, for a containerload of Iron or Steel Pipe Fittings to be shipped May 21 from New Orleans to Bilbao, Spain. The existing effective rate was then $128.50 W/M named in Item 13360, plus 5% increase per 10th Revised Title Page, of Sea-Land's Freight Tariff No. 233, FMC No. 105. The negotiated rate of $34.00 W/M was confirmed with a booking of the shipment by a teletype message dated May 14 from the complainant to Sea-Land.

Sea-Land made telegraphic filing effective May 21 of the negotiated rate, but through clerical and administrative error the rate was named to

[1] This decision became the decision of the Commission May 18, 1977.

[2] Item No. 13360, Pipe Fittings (NOT including Valves) WM $128.50, Sea-Land Service, Inc., Tariff No. 233, FMC—105, FROM: United States Gulf Ports as Named in Item 40 TO: Ports in Spain as named in Item 40, Original Page 174, Effective Date April 5, 1975.

[3] Telegraphic filing, Pipe Fittings Other Than Brass or Copper (NOT including valves) Minimum 45 MT Per Container, WM $34.00. Same tariff of rates as above. Effective Date of Reduction when filed, i.e., November 15, 1976.

apply to Lisbon, Portugal, instead of Bilbao, and published in Item No. 30110 of Sea-Land's Tariff No. 162, FMC No. 40. When the erroneous publication was discovered, Sea-Land made another clerical error by telegraphic filing of a rate of $80.00 per ton of 2,240 lbs., instead of the agreed rate of $34.00 W/M, applicable to ports in Spain in Item No. 13360 on 3rd Revised Page 174 of Sea-Land's Tariff No. 233, FMC No. 105, effective July 21, 1976.

Freight charges on the shipment were calculated and billed to the shipper at the then effective tariff rate of $135.00 W/M for a total of $6,319.53, on Sea-Land's freight bill 031–705729. In paying the freight charges, shipper remitted $1,622.93 based on the agreed rate of $34.00 W/M. The amount paid is $15.25 less than the correct total charges that obtain from the agreed rate; Sea-Land is billing the shipper for this amount.

Telegraphic filing, effective November 15, 1976, has now been made of the agreed rate of $34.00 W/M, minimum 45 measurement tons, in Item 15735 on page 192 of Sea-Land's Tariff No. 233, FMC No. 105, applying from New Orleans to ports in Spain, including Bilbao.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from the shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[4] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

[4] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

The Senate Report[5] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

It is therefore found that:

1. There was an error due to inadvertence in failing to file a new rate.
2. Such waiver of collection of a portion of the freight charges will not result in discrimination among shippers.
3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which sets forth the rate on which such waiver would be based.
4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, represented by $4,681.35.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
April 25, 1977.

[5] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 498

UNION CARBIDE CORPORATION

v.

SEA-LAND SERVICE, INC.

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

May 18, 1977

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 May 18, 1977.

It is Ordered, That applicant is authorized to waive collection of $5,241.55 of the charges previously assessed Union Carbide Corporation.

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

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 498 that effective May 27, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 27, 1976, through July 23, 1976, the rate on 'Methyl, Methylthio Propionaldehyde' from Jacksonville to Marseilles, Minimum 17 WT per container is $65.00 W, subject to all applicable rules, regulations, terms and conditions of said rate 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) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 498

UNION CARBIDE CORPORATION

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land Service, Inc., seeks permission to waive collection of a portion of the freight charges on five shipments of Methyl, Methylthio Propionaldehyde by Union Carbide Corporation aggregating 3,574,740 pounds from Jacksonville, Florida, to Marseilles, France, under bills of lading dated June 1, 16, and 21 and July 6 and 13, 1976. The rates applicable at the time of shipment are alleged to be $76.75 W, Min. 15 WT per container and $65.00 W, Min. 18 WT per container. These rates resulted in total charges of $131,211.55. The rate sought to be applied is ocean rate $65.00 per ton of 2,240 pounds, minimum 17 tons per container. This rate would have resulted in total charges of $125,970.00. Permission to waive collection of $5,241.55 is sought.

On May 21, 1976, the Sea-Land sales representative obtained approval from Sea-Land's pricing personnel for a rate of $65.00 per long ton to apply from Jacksonville, Florida, to Marseilles, France, on Methyl Methylthio Proprionaldehyde, an insecticide bearing the trade name "Temik 5-G" shipped by the complainant. A minimum of 17 long tons per Sea-Land 35-foot container was attached to the agreed rate to be competitive with the quotation of $65.00 per long ton, minimum 18 tons, by a foreign flag carrier utilizing 40-foot containers. A confirming teletype, requesting publication and effective date of May 27 was sent by the sales representative to the pricing department the same day. However, the publication request to the tariff publication department, dated May 26 and specifying a telex filing to be effective May 27, went astray in transmittal

[1] This decision became the decision of the Commission May 18, 1977.

and was not received; therefore, the required tariff publication was not made.

Shipments of Methyl Methylthio Propionaldehyde began June 1 and five shipments moved before the failure to publish the agreed rate was corrected. These shipments were assessed the tariff rate then applicable as named in Item 3790 on 3rd revised page 77–B of Sea-Land Tariff No. 168–B, FMC No. 73. When the failure to publish the required rate was discovered, it was rectified by telegraphic filing of new Item 5047 containing the proper commodity description and rate, effective July 23, 1976, and published on 7th revised page 91 of Tariff 168–B.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

[Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

It is therefore found that:

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

1. There was an error due to an inadvertence in failing to file a new tariff.

2. Such waiver of collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to waive collection of a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such waiver would be based.

4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly, permission is granted to Sea-Land Service, Inc., to waive collection of a portion of the freight charges, represented by $5,241.55.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
April 25, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 499

LETRASET CONSUMER PRODUCTS INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

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

May 18, 1977

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 May 18, 1977.

It is Ordered, That applicant is authorized to refund $2,690.97 of the charges previously assessed Letraset Consumer Products Inc.

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

"Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket 499 that effective December 1, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from December 1, 1975, through June 30, 1976, the non-contract rate on 'Powder, Molding, Papier Machze not exceed 100' per LT is $150.25 W, 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 days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 499

LETRASET CONSUMER PRODUCTS INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

By application filed December 1, 1976, Lykes Brothers Steamship Company, Inc., seeks permission to refund a portion of the freight charges on two shipments consigned to Letraset Consumer Products, Inc., aggregating 23,682 pounds or 821 cubic feet from Houston, Texas, to London, United Kingdom, on June 4 and 20, 1976. The rate applicable at the time of shipment was $208.50 per 2,240 pounds.[2] This rate resulted in aggregate freight charges of $4,279.46. The rate sought to be applied is $150.25 per 2,240 pounds. This rate would have resulted in total freight charges of $1,588.49. Therefore permission to refund $2,690.97 is requested.

When the general rate increase of December 1, 1975, was incorporated in the Gulf/U.K. Tariff No. 38 (FMC–17), the rate covering powder, moulding, papier mache was inadvertently dropped by the Gulf/U.K. Conference tariff filing clerk from 5th revised page 101 by clerical mistake in tariff compilation. This rate should have been simply carried forward with the general rate increases.

The clerical error by the Gulf/U.K. Conference tariff filing clerk of dropping the rate was discovered subsequent to the above mentioned shipments, Lykes then requested on June 29, 1976, the U.K. Conference members to file a rate of $150.25 per 2,240 lbs. thus reinstating the previously existing rate. This was approved effective June 30, 1976, and filed in Gulf/U.K. Tariff No. 38 (FMC–17) 6th revised page 101. The rate remained in effect at $150.25 per 2,240 lbs. through 9/30/76 at which time

[1] This decision became the decision of the Commission March 18, 1977.

[2] General Cargo, NOS, Gulf United Kingdom Tariff No. 38 (FMC–17).

it took a 8½% general rate increase and effective October 1, 1976, became the following:

	Contract	Non-Contract
Thru 9/30/76	$127.75/2240#	$150.25/2240#
Eff. 10/1/76	$138.50/2240#	$162.90/2240#

Lykes reproposed the $150.25 per 2,240 lbs. rate to the Gulf/U.K. Conference on 11/16/76 and it was approved by the Conference 11/16/76 and was filed and became effective November 18, 1976, therefore, from 12/1/75 until rates were re-filed on June 30, 1976, there was no tariff entry to cover this commodity other than General Cargo rate of $208.50 per 2,240 lbs. or 40 cuft, whichever results in greater revenue, which rate was assessed on shipments listed herein. Payment was received in the amount of $4,279.46, basis the General Cargo rate. Respondent believes no discrimination among shippers will result from the refund of $2,690.97 being granted, this refund representing the freight differential between the $150.25/2240# and application of the $208.50/2240# or 40 cubic ft. tariff rate. Respondent also agrees to publication of a notice or of such action that the Commission may direct, if permission to refund is granted.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[3] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

[3] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Porion of the Freight Charges.*

The Senate Report[4] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

The inadvertent failure of Lykes to extend the rate when it clearly intended to do so presents the kind of situation section 18(b)(3) was intended to remedy and requested waiver should be granted.

It is therefore found:

1. There was an inadvertent failure to include the intended rate in the published general rate increase;

2. The waiver requested will not result in discrimination among shippers;

3. Prior to requesting permission for the refund of a portion of the freight charges Lykes filed a new tariff setting forth the rate upon which the waiver would be based; and

4. The application was filed within 180 days of the date of shipment.

Accordingly, Lykes will be permitted to refund $2,690.70 to the Complainant.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
April 25, 1977.

[4] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

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ACCOUNTING REPORTS

The Commission's accounting regulations do not require carriers to maintain particular types of accounts or any uniform accounting system. General Order 5 (46 CFR Part 511) and General Order 11 (46 CFR Part 512) provide only that carriers using the uniform system of accounts prescribed by the Maritime Administration must file annual financial reports based upon that system. A carrier employing a different accounting system must thoroughly describe that system to the Commission. Petition for Declaratory Order of Matson Navigation Co., 462 (463).

Whether the capitalization of interest expended for vessel construction represents a "generally accepted accounting procedure" within the meaning of the rules applicable to the uniform system of accounts prescribed for subsidized carriers by MARAD (46 CFR Part 282.1 (359)) is a matter for the Maritime Administration, and not for the Commission, to determine. Id. (463–464).

Accounts or accounting methods acceptable to the Maritime Administration may be filed with the Commission in connection with annual accounting reports. Such annual financial reports do not themselves establish the validity of any revenue account, vessel investment account or total rate base calculation, but merely guide the Commission's staff in its regulatory responsibilities. The Commission's major concern with regard to such filings is that the methodology employed in preparing the reports be plainly identified. Id. (464).

The Commission's General Order 5 and General Order 11 regulations (46 CFR Parts 511 and 512) do not state whether interest expenditures incurred during vessel construction should be capitalized or whether "Interest During Construction Accounts" should be maintained. The Commission has accepted annual financial reports which included entries for capitalized interest on borrowed capital, and reports which did not. Id. (464).

AGREEMENTS UNDER SECTION 15: See also Section 19 Regulations; Terminal Leases

—In general

Terminal lease agreement between the City of Anchorage and Sea-Land Service, Inc., providing for a shift of Sea-Land's preferential berth from Terminal 1 to Terminal 2 on February 1, 1976 will not be temporarily approved. Severe icing occurs at Anchorage, and there is the real possibility that Totem's vessel could be damaged because of the mooring and weather conditions. Totem will not berth at Terminals 2 and 3 during the

severe icing conditions because of the risk to the vessel and her crew. If Totem cannot use POL-Terminal 1, even on a first-come-first-served basis, it may be forced to leave the trade, at least temporarily. Totem's refusal to use Terminals 2 and 3 is reasonable. Continuation of Totem's service to Anchorage is in the public interest and should be maintained if possible. Continued use of Terminal 1 by Sea-Land in a preferential basis is contrary to the public interest in violation of section 15 of the 1916 Act, in that there is a real possibility that it will serve to effectively preclude Totem from offering a competitive service during severe icing conditions. Therefore, the presently approved agreement between the City and Sea-Land which gives Sea-Land preferential berthing rights at Terminal 1 will be disapproved effective February 5, 1976, unless the parties, prior to that date, amend the agreement to provide that effective February 5, 1976, such preferential berthing rights shall not apply during the months of February through April 1976. Agreement Nos. T-1685, as Amended and T-1685-6: Between the City of Anchorage and Sea-Land Service, Inc., 69 (79-80).

Respondents, six Japanese flag-carriers seeking continuation of agreements, pursuant to which they cooperate among themselves so as to provide a coordinated fully containerized service between Japan and California, entered into those agreements to facilitate the transition from a breakbulk to a fully containerized service; respondents have recaptured the share of conference cargoes which they enjoyed prior to commencing the transition; and the conduct of respondents pursuant to the agreements has not been shown to have been unjustly discriminatory or unfair as between carriers. Agreements No. 9718-3 and 9731-5,351 (364).

The transpacific trades, through 1974, had a significant excess of capacity over cargo offered for carriage. Agreements among six Japanese flag-carriers for cooperation among themselves to provide a coordinated fully containerized service between Japan and California permit these carriers to offer the level of service which they considered competitively necessary with substantially less capacity than would be required for each carrier to individually offer that level of service. The agreements, therefore, tend to ameliorate the overtonnaging problem in the trades and tend to keep a high number of common carriers in those trades. Both of these results are beneficial to the public and outweigh the anticompetitive effects of the agreements sufficiently to justify continued implementation of the agreements until August 27, 1977, when they will terminate in accordance with amendments now before the Commission for approval. Consequently, the agreements are not contrary to the public interest or detrimental to the commerce of the United States. Id. (365).

The record does not show that agreements among six Japanese flag-carriers, pursuant to which the carriers cooperate among themselves so as to provide a coordinated fully containerized service between Japan and California, have resulted in unfairly depriving members of the Marine Cooks and Stewards Union of employment by U.S. flag-carriers in the trades. The decline in employment is the result of several factors, including modernization of the equipment used by the steamship companies employing the union members, the transfer of vessels previously employing union members to other trades, and the decline in the share of conference cargo carried by the steamship lines employing the union's members. The decline in the share of conference cargo was attributable in large part to the increase in the share carried by a steamship company which does not employ the union's members. Even though the success enjoyed by the Japanese flag-carriers has contributed to the decline in union employment, it was not proved that the agreements have been unjustly discriminatory or unfair as between carriers. Thus, the union did not prove that the agreements have unfairly deprived the union members of employment. Id. (366).

In a proceeding brought by one carrier against other carriers alleging the other carriers had entered into and implemented agreements which had not been submitted to the Commission for approval pursuant to section 15 of the 1916 Shipping Act, the questions of possible past section 15 violations could be considered apart from the complaint and would not bar dismissal of the complaint after the parties had entered into approved section 15 agreements resolving the private controversy. Refrigerated Express Lines (A/Asia) Pty. Ltd. v. Columbus Lines, 581.

Complaint by one carrier against other carriers alleging that they had entered into and implemented agreements relating to the carriage of meat from Australia which would give them exclusive rights in such trade in return for observing maximum rates set by the Australian Meat Board, and that those agreements had not been submitted to the Commission for approval pursuant to section 15 of the 1916 Shipping Act would be dismissed with prejudice. The parties had entered into agreements relating to such carriage, those agreements had been approved by the Commission, and it appeared that the private controversy between complainant and respondents had been terminated. Id. (582, 584).

The Presiding Officer properly dismissed as a matter of law the complaint of Lykes, a member of the Far East Conference, that the conference was violating sections 15, 14b, 14 Third, 16 First and 17 of the 1916 Shipping Act by implementing a modified and unapproved version of the conference agreements by failing to impose sanctions against its members who were minibridge carriers. Lykes is unable to make vessel calls at West Coast ports and the ability to call at such ports is necessary to engage in westbound minibridge service (U.S. Atlantic or Gulf Coast ports by rail to West Coast ports and thence by vessel to the Far East). The FEC may not itself engage in or prevent its members from engaging in any type of intermodal service without first receiving Commission approval of an express amendment to the conference agreement. Had the FEC acted to curb, encourage or regulate minibridge competition by its member lines, the lines joining in such action would have violated section 15 and possibly sections 14 Third and 14b of the Shipping Act. Lykes Bros. Steamship Co., Inc. v. Far East Conference, 589 (593).

Proceedings designed, inter alia, to codify in one rule the various general provisions regarding section 15 agreements is discontinued. Time and events have overtaken the original proposals. The more efficient procedure would be to fashion new rules for further comment. Section 15 Agreements Under the Shipping Act, 1916, 547.

—Antitrust Law

Respondent carriers, pursuant to agreements under which they cooperate among themselves so as to provide a coordinated fully containerized service between Japan and California, have reduced the level of competition among themselves. As such the agreements run counter to the policies of the U.S. antitrust laws. It is necessary, therefore, to examine what benefits, if any, the agreements confer upon the public, for the Commission will not approve an agreement if it invades the antitrust law policies more than is necessary to serve the regulatory purposes of the Shipping Act. Agreements Nos. 9718-3 and 9731-5, 351 (364).

—Assessment formula

The Administrative Law Judge erred in finding that the Commission has not already determined that the State Marine Group, consisting of 12 breakbulk lines, had been

overassessed by the New York Shipping Association for the period 1969–1971. The improper basis of assessment for the Puerto Rican carriers resulted in the underassessment of that group. It necessarily follows, since the total assessment obligation is fixed, that the States Marine Group was overassessed. The fact that the Commission did not, in earlier phases of the proceeding, require an adjustment of the tonnage/manhour basis upon which the Group's cargo was assessed, as was done with respect to automobiles, newsprint and Puerto Rican trade cargoes, does not mean that in implementing the Commission's order requiring adjustments of assessments the breakbulk carriers cannot be compensated for overassessments caused by the underassessments on the Puerto Rican carriers. Agreement No. T-2336—New York Shipping Association Cooperative Working Arrangement, 248 (253).

In computing any liability to the States Marine Group by the New York Shipping Association for overassessments for the benefits for longshoremen for the 1969–1971 period, account must be taken of any valid claims that reduce the size of the liability against which the Group's claims are to be offset. The present amount of such total liability, i.e., the underassessment of the Puerto Rican carriers for the 1969–1971 period has, by virtue of Commission approved settlement, been reduced by credits by NYSA to the automobile interests. As thus, reduced, the amount of overassessments is $689,599. Id. (253–254).

The States Marine Group's claim for overassessment by the New York Shipping Association for the benefit for longshoremen for the period 1969–1971 has not been satisfied by virtue of the Group's assessment treatment during the 1971–1974 and 1974–1977 assessment periods. Once liability has been established, it cannot be removed by contentions that, since assessments are raised continuously over successive periods, all periods must be considered in determining assessment liabilities. Id. (254).

Since payments are made for longshoremen benefit funds on a continuing basis over many assessment periods, it is arguable that liability to certain carriers for overpayment for earlier periods could be discharged by assessment reductions for later periods. Such is not the case with respect to overpayments made by the States Marine Group for the period 1969–1971 vs. alleged compensation because of increased payments by the Puerto Rican carriers for the 1971–1974 assessment period. The argument that such is the case rests on many assumptions none of which has been or can be proved in the context of the present proceeding. The weakest link in the argument is the assumption as to what would have happened with respect to the assessment for cargo in the Puerto Rican trade if the assessment formula for the period 1971–1974 had been litigated. The assessment formulas for Puerto Rican cargo for the 1971–1974 and 1974–1977 periods were approved in the context of settlements. Considerations underlying settlements do not necessarily coincide with the process of making findings on a record in a litigated proceeding. Since it cannot be shown that the Puerto Rican carriers were overassessed for the 1971–1974 periods, it follows, ipso facto, that the States Marine Group cannot be shown to have been underassessed by virtue of such overassessment. Id. (255–258).

The States Marine Group did not agree not to pursue and did not waive its claim against the New York Shipping Association for overassessments for the benefit of longshoremen for the 1969–1971 period. NYSA remains liable for the satisfaction of the claim. NYSA is itself an entity subject to the Shipping Act, 1916 and bears the responsibility to make such adjustments as are necessary to implement Commission approval of the assessment agreement. Id. (260).

Claim of the States Marine Group for interest as part of the outstanding liability of the New York Shipping Association for assessment overpayments by the Group for the period 1969–1971 is denied. Whether to grant interest is a matter for Commission discretion and neither equity nor promotion of effective regulation requires such grant

here. NYSA has not engaged in any conduct which it should have known was improper at the time, has not been shown to have improperly delayed the proceeding, and did not hold but promptly paid over the assessments it collected for the use and benefit of ILA which was their intended and proper purpose. Id. (261).

Complaints by carriers relating to the authority of the New York Shipping Association to raise the level of assessments on excepted cargoes are dismissed as moot following a Commission decision in a related proceeding. Transamerican Trailer Transport, Inc. v. New York Shipping Association, Inc, 739 (740).

—*Monopoly*

The relevant market for purposes of determining whether respondents, six Japanese flag-carriers seeking continuation of agreements, pursuant to which they cooperate among themselves so as to provide a coordinated fully containerized service between Japan and California, have a monopoly cannot be geographically less than the U.S. Pacific Coast. Respondents are liner operators. In addition to the liner operators which are members of the Trans-Pacific Freight Conference of Japan and/or the Pacific Westbound Conference, at least ten other carriers provide liner services between Japan and the U.S. Pacific Coast. To determine respondent's share of the relevant market it is necessary to consider the carryings of all liner operations in that market, both conference and nonconference. The record is insufficient to support a finding that respondents have a monopoly of the relevant market because it is not possible to determine the share which respondents have of any market greater than the inbound conference trades. Agreements Nos. 9718-3 and 9731-5, 351 (356-358).

—*Pooling agreements*

Petitioner, the Marine Cooks and Stewards Union, failed to prove that an agreement among six Japanese flag-carriers to pool revenues in the trade between the Pacific Coast of the United States and Japan is unjustly discriminatory or unfair as between carriers. The Commission had previously held that petitioner failed in its proof and no further evidence bearing on monopoly or unfairness was adduced. Agreement No. 10116-1—Extension of Pooling Agreement, 595 (597).

Petitioner, the Marine Cooks and Stewards Union, failed to prove that an agreement among six Japanese flag-carriers to pool revenues in the trade between the Pacific Coast of the United States and Japan resulted in the strongest member sustaining the weakest which would have otherwise failed, or resulted in the members increasing their share of the conference trades. Id. (597-598).

—*Rates*

Agreement granting the Pacific Westbound Conference authority to fix intermodal rates is approved for 18 months on condition that the agreement be modified to permit member lines to individually offer intermodal service not only as to minibridge but as to interior intermodal as well until such time as the conference implements the authority granted to it by the filing of appropriate tariffs. Agreement No. 57-96, Pacific Westbound Conference—Extension of Authority for intermodal Service, 289 (295, 307).

Aside from the fact that the Far East Conference's proposal to control minibridge is inconsistent with its existing authority and would at the very least require a major amendment to the FEC agreement, FEC failed to present any convincing arguments why it, rather than the Pacific Westbound Conference, should be adjudged to be the

"appropriate" conference to exercise westbound minibridge jurisdiction to the Far East. Id. (296–297).

Agreement granting the Pacific Westbound Conference authority to fix intermodal rates as to minibridge and interior intermodal is justified by the need to eliminate multiple tariffs and desirability of uniformity of tariffs, and by the potential for rate instability and malpractice which exists in the trade by reason of the fact that the trade is overtonnaged. Id. (298–299).

By restricting and precluding individual member lines from publishing tariffs for through intermodal transportation and fixing the rates and charges at which such transportation will be offered, agreement of the Pacific Westbound Conference constitutes a clear illegal restraint of trade. As such, the agreement is contrary to the public interest unless it can be shown to be justified or warranted in terms of legitimate commercial objectives. The Conference must demonstrate that the agreement serves a serious transportation need, is necessary to secure important public benefits or is in furtherance of a valid regulatory purpose of the Shipping Act. Id. (299).

Argument that conference ratemaking agreements are somehow immune from the approval standards of section 15 of the Shipping Act, including the public interest considerations of *Svenska,* is wholly inconsistent with the clear language of section 15 itself. Section 15 explicitly requires that the Commission subject to its approval requirements "any agreement" which provides for one or more of the activities specifically set forth in the seven categories enumerated therein, one of these being the "fixing or regulating of transportation rates." All conference ratemaking arrangements are subject to the approval standards of section 15. Id. (299–300).

While all conference ratemaking agreements are required to meet the standards for approval set forth in section 15, the extent of the justification that need be shown for such approval will vary from case to case with the intensity of the otherwise "illegal restraint" involved. Thus, the "legitimate commercial objectives" which the Commission will accept as evidencing the necessity for the restraint will generally be determined by the type and scope of the agreement under consideration. The Commission does not agree that, because of the intermodal aspects of the instant agreement, "the most stringent proof of a serious transportation need" is required. Id. (300–301).

The Commission has generally found agreements giving conferences intermodal ratemaking authority to be in the public interest. These types of agreements are generally acceptable. However, such agreements will not be summarily approved merely because similar agreements have been found warranted and have been approved under section 15 in the past. The Commission will not abdicate its responsibility to assure that the conduct legalized by such agreements does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purpose of the statute. Id. (301).

Applying the standards of section 15 as interpreted in *Svenska,* approval of agreement giving the Pacific Westbound Conference authority to fix intermodal rates is required by a serious transportation need and will serve to secure important public benefits. There are some definite legitimate objectives to be derived from approval, one of which is elimination of the multiplicity of minibridge tariffs which exists under the present system of allowing each PWC member to file its own individual tariff. The single most important public benefit derives from the advantage that conference authority over intermodal rates will offer. The intermodal movement of cargoes, allowing for continuous movement under a single bill of lading with less handling, provides an essential transportation service to shippers and consignees. The conference system provides the manner by

which the development of intermodalism can be most effectively accomplished in the individual trades. Uniformity of tariff rules is one of the desirable benefits that can be expected to result from approval. Clearly, conference authority over intermodal rates and traffic is an important public benefit that militates in favor of the approval of intermodal activity. Id. (301–303).

In addition to the clear and present benefits that can be derived from an agreement authorizing the Pacific Westbound Conference to fix intermodal rates by virtue of the elimination of multiple intermodal tariffs, approval of the agreement is also warranted by transportation circumstances and therefore will serve to fulfill a transportation need. Although the conference did not demonstrate any present rate instability or malpractice, there is a definite potential for both. The trade is overtonnaged and overtonnaging invariably gives rise to rate stability and malpractices. The threat to stability which can be expected to continue as minibridge grows, coupled with the disadvantages inherent in a multi-tariff system, fully support conference jurisdiction over intermodal tariff and traffic, both interior and minibridge. Id. (303).

Interior intermodal presents an equal if not greater threat to rate stability than does minibridge if only because the volume of cargo potentially available in intermodal operations from the industrial heartland of the United States exceeds the volume involved in minibridge. Likewise, the multiplicity of tariffs can be expected to present even greater difficulties than with minibridge because of the number of tariffs involved. Under the circumstances, there is no reason or regulatory purpose to be served by limiting the Pacific Westbound Conference's intermodal authority to minibridge. Id. (304).

Failure of the Pacific Westbound Conference to expeditiously publish an interior intermodal tariff could deprive the shipping public of benefits which it might otherwise receive if a member line published an intermodal tariff. Accordingly, the conference will be required to modify its agreement giving it authority to fix intermodal rates to permit member lines to individually offer intermodal service not only as to minibridge but as to interior intermodal as well until such time as the conference implements the authority granted to it by the filing of appropriate tariffs. Id. (304).

The Commission cannot itself modify the agreement of the Pacific Westbound Conference giving it authority to fix intermodal rates without the unanimous approval of the member lines, including those lines which had no part in the original submission of the agreement. The Commission's standing to amend or modify an agreement under section 15 is always subject to the subsequent acceptance of the amendment or modification by the parties thereto. However, the Commission is not powerless to rectify a situation created when a single conference member line consistently frustrates the wishes of the vast majority by continually casting a dissenting vote. Id. (305).

— ***Voting rules***

Where conferences submitted to the Commission for approval proposed amendments to their agreements, which had been unanimously adopted by the conferences' members as required; a prospective member of the conferences objected to the amendments; and later, on becoming a member of the conferences, the carrier pursued its objections and filed protests with the Commission which ordered an investigation and hearing, the Presiding Officer erred in discontinuing the proceeding on the ground that the new carrier member had destroyed the required unanimity and thus there were no agreements before the Commission to approve. The entry of a new conference member does not invalidate a prior unanimous conference action, even though that action has not yet received Commission approval. However, failure of any party to the proceeding to file

exceptions to the Presiding Officer's ruling was tantamount to acquiescence and is construed as an effective withdrawal of the amendments from Commission consideration, and, therefore, the proceeding is discontinued. Agreement No. 8080-11, Amendment to the Atlantic and Gulf/Indonesia Agreement, 500 (502-503).

COMMON CARRIER: See also Jurisdiction

Although neither section 1 of the Shipping Act, 1916 nor section 5 of the 1933 Act defines the term "common carrier," it has long been held that this term means the common carrier at common law. The determination of common carrier status can be made by reference to a number of indicia, e.g., variety of cargo carried, number of shippers, type of solicitation, regularity of service, port coverage, responsibility toward the cargo, issuance of bills of lading, etc. It is not necessary that a carrier's operations encompass every one of these factors. Possible Violations of Section 18(a) of the Shipping Act, 1916, and Section 2 of the Intercoastal Shipping Act Arising from Charging Higher Rates than Specified by Current Tariff, 43 (50).

The fact that a carrier does not itself own or operate transportation equipment does not destroy its common carrier status. The Commission has recognized the so-called nonvessel operating common carrier, a common carrier publishing a tariff and offering a transportation service to the shipping public who neither owns nor operates vessels or motor vehicles. Id. (51).

A nonvessel owning carrier which offered to the general public a coordinated transportation service, including consolidation at its terminals, transportation by water and distribution to consignees in Hawaii, with the shippers having no authority to alter the service, was not merely a shipper's agent. Such operation is that of a common carrier subject to the provisions of section 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act. Contention that disclaimer of liability in its tariff or bill of lading signified that its service was not that of common carriage was without substance. The carrier honored some claims and shippers were not aware of the disclaimer. Even if the carrier had fully implemented the disclaimer provision, this fact alone had no legal significance in determining carrier status. Liability is imposed by law. Id. (53, 56).

The reason why assumption of liability need not be included in any definition of common carriage is that once a person holds himself out generally to carry for hire for whomever wishes to employ him, he has undertaken the occupation of a common carrier and liability will be imposed on him as a matter of law. So strict is this doctrine that a common carrier's liability has been likened to that of an insurer. Id. (55).

At the common law, a tender of cargo consisted of an unconditional offer to perform, coupled with a manifested ability to carry out the offer, and production of the subject matter of the tender. Dow Chemical International, Inc. v. American President Lines, Ltd. 531 (537).

A sequence of events whereby a shipper presented its containers at the entrance to a carrier's terminal yard, was given a pass, and was directed to the carrier's container yard, did not constitute an offer to deliver the container, and thus was not a tender. However, tender of the container did occur when the shipper arrived at the gate to the carrier's container yard and offered the carrier the bill of lading for the container. Arrival at the gate and offer of the bill of lading constituted an offer to deliver the container, the shipper had the container at the gate, and had there the ability to deliver the container to the carrier. Id. (537).

COMPLAINTS: See also Jurisdiction

It is one thing to permit an amendment to a complaint which merely affixes a notary's seal, adds a supporting sworn statement, or alters the type of relief requested without changing the essential nature of the cause of action or the respondents involved. It is something else to name a totally different respondent. The latter "amendment" constitutes a new proceeding and goes beyond the type of amendments permitted by Rule 502.70. Trane Co. v. South African Marine Corp. (N.Y.), 374 (384).

Amendments to complaints are liberally permitted under the Commission's rules so as to protect rights which might expire under the two-year period of limitations contained in section 22 of the Shipping Act. However, amendments which do not merely add parties having a community of interest with an original complainant to a suit properly brought, but substitute parties, especially when such parties are jurisdictionally indispensable, are not merely clarifying amendment but new complaints which should be so treated despite the possible effects of the period of limitations. Id. (385).

The GSA and other government agencies are "persons" under section 16 First of the 1916 Shipping Act. Such treatment is not only appropriate and consistent with public policy but is also in keeping with the Commissions longstanding practice of treating such agencies as "persons" for the purpose of filing a complaint under section 22 of the Act. Freight Forwarder Bids on Government Shipments at United States Port—Possible Violations of the Shipping Act, 1916, and General Order 4, 619 (622).

DEVICES TO DEFEAT APPLICABLE RATES

A freight forwarder did not violate section 16 of the 1916 Act when it allegedly breached its duty to its principal by preparing shipping documents describing the goods in a manner contrary to the principal's express instructions, with the result that a higher rate was charged for the shipments. The principal, a shipper, was unable to show any competitive relationship with any other shipper. The forwarder was not under an "absolute obligation" to follow the instructions of its principal. What the shipper is alleging under the color of section 16 is a violation of an agent to its principal under common law principles. The Commission has no jurisdiction over such a claim. Further, were the Commission to espouse the sort of duty allegedly owed by the agent to its principal, compliance by a forwarder with such a duty could well result, in itself, in a violation of the Shipping Act. European Trade Specialists v. Prudential-Grace Lines, 148 (152–154).

DISCRIMINATION: See also Freight Forwarding; Section 19 Regulations

Carrier did not violate section 16 of the 1916 Shipping Act by discriminating in favor of Norfolk forwarders and against forwarders in ports and at airports. In this case the forwarder was selected by the shipper. As to alleged discrimination in favor of another shipper, there was no evidence that the carrier had ever carried cargo for that shipper. European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc., 148 (158).

Not all preferences or advantages offered by carriers are condemned by law, but only those that are unjust or unreasonable violate the Shipping Act, 1916. Moreover, the existence of unjust discrimination or prejudice must be demonstrated by substantial proof. Port of Houston Authority v. Lykes Bros. Steamship Co., Inc., 192 (199).

Proceeding instituted by order to show cause for the purpose of eliminating inbound/outbound rate disparities in the U.S. North Atlantic/Continental European trade is discontinued. Many of the items of alleged disparity had been eliminated, or it was

shown that no meaningful disparity existed. Some items of disparity remained considering the length of time since institution of the proceeding and the real possibility that subsequent rate actions have either eroded previous remedial rate actions, created new disparities on other items or eliminated disparities, continuation would serve little useful purpose. The Commission will use other approaches whereby meaningful disparities can be identified and eliminated. Publication of Discriminatory Rates in the U.S. North Atlantic/Continental European Trade, 477.

The intent of Congress in repealing section 6 and amending section 5 of the Intercoastal Shipping Act of 1933 was to require that the rates on government cargoes be established on the same basis as commercial rates. The government is no longer statutorily entitled to reduced rates, but must justify such rates on valid transportation factors. While the repeal of section 6 does not preclude as a matter of law a separate simplified rate system for military cargoes, such a rate structure must be based on valid transportation factors. Department of Defense and Military Sealift Command v. Matson Navigation Co., 503 (507).

DUAL RATE CONTRACTS

The sounder interpretation of the 1961 changes to the Shipping Act, 1916, and the one which is more fully supported by the legislative history is that section 14b(2) ("whenever a tariff rate for the carriage of goods under contract becomes effective . . . it shall not be increased before a reasonable period, but in no case less than ninety days") is a notice provision governing the filing of rates covered by a dual rate contract, and section 18(b)(2) is a notice provision limited to the filing of noncontract rates. The contract rate need not be in effect for 90 days before a rate increase can be made effective. Petition of North Atlantic French Freight Conference, 660 (669–672).

ENVIRONMENTAL IMPACT STATEMENT

Environmental issues relating to the matter of approvability of preferential berthing agreements at Anchorage do not constitute a major federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, and preparation of a detailed environmental impact statement is not required. Agreement No. T–1685, as Amended, and T–1685–6: Between the City of Anchorage and Sea-Land Service, Inc., 440 (459).

FREETIME AND DEMURRAGE: See Truck Detention

FREIGHT FORWARDING

A licensed ocean freight forwarder must be independent. He cannot be one who is directly or indirectly controlled by a shipper. The Commission has consistently and unequivocally held that one who is employed by a shipper is not independent within the meaning of the 1916 Shipping Act and therefore cannot be licensed or continue to hold a license as a freight forwarder. Cleto Hernandez R. dba Pan Inter, 104 (108).

No weight can be given to the proposition that the holder of a freight forwarding license having no shipper connection at the time of licensing has a right to the continuation of that license when a subsequent connection arises. It is immaterial that such control arises after a license is issued rather than prior to an application therefor. Shipper control negates the Commission's authority not only to issue a license in the first instance, but to allow it to continue, regardless of any conditions that the licensee may propose. Id. (109).

Whenever a shipper connection is found to exist, that relationship alone is sufficient to revoke a freight forwarder license, notwithstanding any other merits or demerits of the particular forwarder involved. Id. (109).

A freight forwarder who failed to remit money to a shipper and entrusted to him by a consignor until more than five months after that money was due and owing, and who apparently did not have sufficient funds to remit that money during the five month period, was not qualified to remain a freight forwarder. There was overwhelming evidence that the licensee had used the funds for his personal requirements during that time. Id. (110, 111).

The phrase "fit, willing and able to carry on the business of forwarding," as set forth in section 44(b) of the 1916 Shipping Act, means that a forwarder is unfit and unable to perform his duties when he uses funds entrusted to him for uses not intended or fails to pay bills incurred in connection with the freight forwarding activities. These standards pertain not only to complete independence from shipper control, the ability to pay bills and properly use funds entrusted to him by others, but also means that a forwarder must act with the highest degree of business responsibility and integrity. Id. (111).

It is well established that the burden of proof in a freight forwarder licensing proceeding is on the applicant. The plain language of section 44(b) of the 1916 Shipping Act indicates as much by providing that a forwarding license shall only issue if the Commission finds that the applicant meets the statutory criteria and that "otherwise such application shall be denied." By applying for its initial federal license as an independent ocean freight forwarder an applicant seeks to change the status quo, and it has been held that the burden of proof in administrative proceedings falls upon the party seeking to change the status quo. Lesco Packing Co., Inc., 132 (136).

An applicant for an independent ocean freight forwarder license was under no obligation to secure counsel to represent itself in the application proceedings, and that portion of the initial decision denying the application which relied on the applicant's clumsiness in representing itself pro se was erroneous. Id. (137).

An applicant for an independent ocean freight forwarder license whose principal had engaged in a course of misconduct over the years lacked the character qualifications to be a licensee. The principal had been found guilty of violating the Bills of Lading Act; had made knowing and false statements to the Commission on a freight forwarder license application; had falsely obtained grandfather rights in violation of section 44(a) of the 1916 Shipping Act; his firm has been denied export rights by the Department of Commerce because of the improper export of strategic commodities; and the principal had previously been found by the Commission to have engaged in a scheme to permit himself to engage in ocean freight forwarding without a license. Id. (137).

A freight forwarder did not violate section 16 of the 1916 Act when it allegedly breached its duty to its principal by preparing shipping documents describing the goods in a manner contrary to the principal's express instructions, with the result that a higher rate was charged for the shipments. The principal, a shipper, was unable to show any competitive relationship with any other shipper. The forwarder was not under an "absolute obligation" to follow the instructions of its principal. What the shipper is alleging under the color of section 16 is a violation of an agent to its principal under common law principles. The Commission has no jurisdiction over such a claim. Further, were the Commission to espouse the sort of duty allegedly owed by the agent to its principal, complaince by a forwarder with such a duty could well result, in itself, in a violation of the Shipping Act. European Trade Specialists v. Prudential-Grace Lines, 148 (152–154).

A freight forwarder did not violate section 17 of the 1916 Act by its inability to secure

classification of its principal's cargo under a particular tariff item, thus "betraying the shipper" by misdescribing the cargo. The description furnished by the forwarder accurately described the commodity shipped and, accordingly, no unjust or unreasonable practice was engaged in by the forwarder. Id. (154).

A shipper did not sustain its burden of proof that a freight forwarder violated section 17 of the 1916 Act by failing to apprise its principal, the shipper, of any dispute or discrepancy as to the rate to be applied to the principal's goods. The record would not allow any conclusion on whether the forwarder had properly informed its shipper prior to shipment of a discrepancy in the applied rate. Id. (155).

Section 17 of the 1916 Shipping Act does not require that forwarders publish their regulations and procedures. Nor has the Commission, either in General Order 4 or elsewhere by rule or decision, mandated that a licensed freight forwarder must establish and publish a special body of regulations. Id. (156).

A freight forwarder did not violate section 17 of the 1916 Shipping Act when it failed to abide by its shipper's instructions in describing the commodity shipped. There was no evidence of collusion between the forwarder and the carrier. The forwarder properly described the cargo as it was required by the Act to do. The alleged "scienter" of the forwarder was irrelevant to a proceeding in which the issue was simply a determination of the nature of the commodity shipped. Id. (156–157).

The matter of whether a freight forwarder violated section 17 of the 1916 Shipping Act by allegedly not following the usual routine of a forwarder in informing its shipper that the carrier was objecting to a proposed tariff classification and in obtaining additional product classification from the shipper is remanded for further hearing with respect to the forwarder's obligations. Id. (157).

Carrier did not violate section 16 of the 1916 Shipping Act by discriminating in favor of Norfolk forwarders and against forwarders in ports and at airports. In this case the forwarder was selected by the shipper. As to alleged discrimination in favor of another shipper, there was no evidence that the carrier had ever carried cargo for that shipper. Id. (158).

Carrier did not engage in an unjust and unreasonable practice in violation of section 17 of the 1916 Shipping Act in that its agent did not inform the shipper of the agent's inability to bind the carrier to a rate initially quoted by the agent. The agent's representation was not conclusive as to the rate applicable and the shiper's president was thoroughly aware through experience of the inability of an agent to quote an authoritative rating since the conference and carriers were the final arbiters of the proper rate to be charged. Id. (160).

An application for an ocean freight forwarder license, which was commonly owned with a produce broker for a client engaged in the movement of produce in the export commerce of the United States, was independent from shippers within the meaning of section 1 of the 1916 Shipping Act, and its application would be granted. Sequoia Forwarders Co., 182 (186,190).

The *Zanelli* case does not stand for the proposition that every agency or other relationship between a forwarder and an export shipper is proscribed by the independence requirement of section 1 of the 1916 Shipping Act. The statutory requirement of "absolute independence" is "absolute" only to the extent that it "absolutely" bars the licensing of any applicant whose activities cause it to be included in one of the prohibited categories of section 1 of the Act. It is not a standard requiring an applicant to be "absolutely independent" of shipper interests. The section 1 independence requirement does not preclude all relationships between forwarders on the one hand, and shippers and consignees on the other. Id. (187–188).

A produce broker for a client engaged in the movement of produce in the export commerce of the United States was neither a "shipper," "consignee," "seller" or "purchaser of export shipments within the meaning of section 1 of the 1916 Shipping Act. Id. (188).

There was no reason to believe that an arrangement between a produce broker commonly owned with an applicant for freight forwarder license and a client providing 25% of the broker's business was such that the client "directly or indirectly controlled" the broker within the meaning of section 1 of the 1916 Shipping Act. Neither firm had any employees in common, nor did they own stock, have a proprietary interest in or a corporate connection with one another. Such a relationship is not the type of relationship which the Commission has in the past found to allow for the granting of illegal rebates, and therefore prohibited by section 1 of the Act. Id. (188–189).

That an applicant for an independent ocean freight forwarder license might possibly use confidential information obtained as a forwarder for the benefit of a commonly owned commodity broker and its principal client was not grounds for denying its application. What an applicant might do, if licensed, is insufficient to justify the denial of a license if the applicant is otherwise qualified in fact and law. Once licensed, however, the forwarder is subject to all Commission rules and regulations, and any unlawful conduct or activity can be dealt with in an appropriate proceeding. Id. (189).

The purpose of section 510.24(c) of the Commission's rules is to prevent illegal rebates by prohibiting a licensed forwarder from sharing any part of its revenue with a shipper or agent thereof, since were it to do so the shipper would be in fact receiving a rebate. Thus, while a commodities broker which was commonly owned with an applicant for an independent ocean freight forwarder license, was the special agent for a client involved in the movement of produce in the export commerce of the United States, and was registered as such under the Agricultural Commodities Act, it did not necessarily follow that this type of special agency was of the nature so as to invoke the prohibition of section 510.24(c). That section is directed at agency arrangements which give rise to direct or indirect rebates to the shipper, i.e., where the agent is controlled by the shipper or consignee principal. Id. (190).

Assuming, arguendo, that an applicant for a freight forwarder license had an officer qualified to conduct ocean freight forwarding, there remains the matter of another officer submitting false information to the Commission and its representative with the presumed knowledge of yet another officer (who together hold most of the applicant's stock). This activity alone calls into question the applicant's "fitness" to conduct a freight forwarder business. International Freight Services, Ltd., 224 (225).

A freight forwarder license is somewhat more than a mere license to do business. The holder of a license occupies a position of enormous competitive and economic power and enjoys a fiduciary relationship with shippers. A licensee's integrity must be above repraoch. The giving of false information to the Commission or its representative is to be considered in determining the fitness of an applicant. Id. (232).

Questions of "legal fraud" have no place in determining whether an applicant for a freight forwarder license has been truthful in his representations to the Commission about his qualifications for a license. Ability to serve the public in an endeavor as sensitive as forwarding should not turn on nice legal distinctions. Id. (236–237).

Applicant for a freight forwarder license who made numerous misrepresentations to the Commission or its representative must be denied a license. To do otherwise would be to condone a cavalier approach to misrepresentation made by the applicant himself; to overlook the fact that he induced others to falsely represent themselves; to finally accept those proven facts as "peccadillos" which should be overlooked for the sake of

permitting the applicant to "provide expanded service to the shipping public"; and to accept applicant's concept of "normal competition" practices which were found to be unlawful in open court. The applicant is unfit to carry on the business of forwarding. Id. (240–241).

Applicant for a freight forwarder license, one of whose two principals had no actual experience in forwarding while the other's experience was limited to one shipment which he personally handled, was not able to conduct the business of an ocean freight forwarder. The principal who handled one shipment claimed that he was qualified on the basis of being in charge of the London office of a company when it handled some ocean shipments and on the basis of his experience in handling air shipments. There was no evidence as to the alleged similarity of air and ocean shipments. Having observed the demeanor of the principal on the witness stand and having considered the whole of his testimony and the entire record in the case, it cannot be concluded that the experience of the principal renders him sufficiently "able" to conduct the freight forwarding business so as to be the qualifying officer for the corporate applicant. Id. (24–243).

GENERAL ORDER 4: See Freight Forwarding

GENERAL ORDER 5: See Accounting Reports

GENERAL ORDER 11: See Accounting Reports

GENERAL ORDER 13: See Rates

GENERAL ORDER 20: See Security for the Protection of the Public

GENERAL ORDER 29

Two proceedings (investigating the lawfulness of certain rates bid by a carrier for the carriage of military cargo) which had been continued beyond the life of the rates challenged therein for the purpose of establishing prospective guidelines regarding the application of General Order 29 of the Commission were discontinued without prejudice due to the amount of time that had elapsed since the institution of the proceedings and in view of the imminent introduction of a new standardized cost information system, which would necessitate further revision of the General Order when implemented. American Export Lines, Inc., Sea-Land Service, Inc. and United States Lines, Inc.—Possible Violations of Section 18(b)(5) of the Shipping Act, 1916, in connection with Rates on Military Cargo, 391 (392).

JURISDICTION

The jurisdictional problem of the failure of a complaint to establish that complainant has paid the freight, or has otherwise validly succeeded to the claim, goes to the issue of standing to recover reparation, although not to standing to file a complaint not seeking reparation. Trane Co. v. South African Marine Corp. (N.Y.), 374 (378).

A complaint, seeking reparation for overcharges, which failed to allege that a common carrier by water subject to the jurisdiction of the Shipping Act violated section 18(b)(3) of the Act is jurisdictionally defective and must be dismissed. Id. (381).

A complaint alleging a violation of section 18(b)(3) of the Shipping Act by a common carrier, but naming only the carrier's agent as respondent, is jurisdictionally defective.

Section 18(b)(3) is limited by its terms to common carriers or conferences of such carriers. A carrier's agent does not transport property, is not a party to a conference agreement consisting of carriers, and has no tariff of its own, there is no doctrine that a carrier may stand aloof while the agent assumes full responsibility for violation of the carrier's duties under the Act. Id. (382–383).

Section 33 of the Shipping Act does not preclude the Federal Maritime exercise of jurisdiction over a company engaged in the transportation of passengers for hire between various points on the Atlantic Coast of the United States pursuant to P. L. 89–777. Not only was P.L. 89–777 not enacted as part of the Shipping Act, but section 33 only precludes concurrent (with the ICC) subject matter jurisdiction. While the carrier here is subject to Part III of the Interstate Commerce Act, none of its provisions are even similar to provisions of section 3 of P.L. 89–777. American Cruise Lines, Inc., 420 (422).

Part III of the Interstate Commerce Act does not contain a provision requiring parties subject to that Part to establish financial responsibility for passenger indemnification as required by P.L. 89–777. Accordingly, the FMC in exercising jurisdiction over an interstate common carrier, subject to ICC jurisdiction, under P.L. 89–777 is not exercising concurrent jurisdiction with the ICC. Not only does the ICA not prohibit carriers subject to it from complying with the rules and regulations of other agencies, but it specifically provides in Part III thereof that "nothing in this chapter shall be construed to affect . . . liabilities of vessels and their owners for loss or damage. . . ." Id. (422–423).

The 1916 Shipping Act limited the Commission's *in personam* jurisdiction in only three respects: (1) there must be a common carrier by water which is not a tramp or ferryboat; (2) the carrier must transport cargo between the United States and a foreign country; and (3) the Commission may not exercise concurrent jurisdiction over any matter within the jurisdiction of the ICC. The FMC's foreign commerce jurisdiction is not restricted to ocean carriers operating vessels which physically call at United States ports. A common carrier engaged in through transportation of goods between the United States and a foreign country by water is subject to section 1 of the 1916 Act. Austasia Container Express, 512 (518).

The 1916 Shipping Act does not permit the Commission to directly reach the port-to-port rate of an ocean carrier operating only between two foreign countries. Nor does the Commission envision section 1 of the Act as encompassing joint rate/through route international transportation offered by ICC regulated carriers via foreign ports in conjunction with ocean carriers which are themselves subject to the Shipping Act. Id. (518).

American goods exported to Canada on one bill of lading may be shipped elsewhere under a second bill of lading without directly involving the Commission's jurisdiction. However, extraterritorial aspects of section 15 agreements or other anticompetitive actions by section 1 carriers violative of sections 16 or 17 may be within the scope of the Shipping Act. Id. (518).

Nonvessel operating carriers are section I carriers. They undertake to provide ocean transportation to the public and are subject to the same tariff filing requirements as vessel operating carriers. Id. (518–519).

Carrier which holds itself out as offering a through common carrier service from Detroit to various Australian ports (truck to Windsor, Ontario, rail to Vancouver, Canada, vessels to Australia) and which issues a single bill of lading for the entire movement when the cargo reaches Canada, is a nonvessel operating common carrier in the foreign commerce of the United States within the meaning of section I of the 1916 Shipping Act. To accord jurisdictional significance to the fact that the bill of lading is

not issued until the goods reach Canada, and that the underlying water carrier does not call at a United States port, would exalt form over substance. It would leave a significant loophole in the Shipping Act's protective mantle. Id. (513, 518–519).

So long as a nonvessel operating carrier solicits and musters cargo in the United States and uses exempt ICC motor carriage to transport the cargo from the United States on a through route containing a significant transoceanic segment (Detroit to Windsor, Ont., to Vancouver, B.C. to Australia), the carrier can and should be effectively regulated by the Maritime Commission. The ICC's limited regulation of carriage to Windsor is not an obstacle to exercise of FMC jurisdiction. The joint exercise of ICC and FMC authority over a particular person does not constitute the type of concurrent power forbidden by section 33 of the 1916 Shipping Act; that prohibition only prevents the two agencies from regulating the same commercial activities at the same time. Id. (520).

The true purpose of the Commission's previous descriptions of its jurisdiction as "port-to-port" was to disclaim any encroachment into the legitimate regulatory realm of the ICC at a time before the FMC and ICC had developed mutual procedures for the filing of joint through intermodal tariffs. Id. (520).

Nonvessel operating carrier which offers through transportation of goods from Detroit to Australia, via truck to Windsor, Ont., rail to Vancouver and vessels to Australia, is required by section 18(b) of the 1916 Shipping Act to file a tariff covering the through route transportation. Moreover, the Commission's rules requiring filing tariffs is not jurisdictionally limited by section 18(b). Since 1961, the Commission's rule making authority has resided in Shipping Act section 43. This authority has been broadly interpreted by the courts and permits the adoption of substantive rules in furtherance of general Shipping Act objectives without a prior finding that a specific Shipping Act violation has occurred. The Commission's obligations to define and eliminate unreasonable preference and discrimination by ocean carriers pursuant to sections 16 First and 17 of the Act are sufficient to support adoption of the tariff filing rules and their application to all foreign commerce carriers as defined in section 1 of the Act. Id. (521–522).

OVERCHARGES: See Reparation

PRACTICE AND PROCEDURE

—In general

A finding made by a Settlement Officer which was not reviewed by the Commission was of a procedural value and was dispositive of a similar issue in a subsequent case. Vandor Imports v. Orient Overseas Container Lines, 396 (398–399).

Where the complaint in a proceeding for reparation was served by mail upon respondent on October 29, 1975, accompanied by a Commission cover letter stating that complainant had requested the shortened procedure provided in Rule 11 of the Commission's Rules of Practice and Procedure but referring by error to the "informal procedure" under which an answer should be filed; respondent filed an affidavit, received by the Commission on November 20, 1975, consenting to the informal procedure under Subpart S of the Rules (applicable only to proceedings involving claims of less than $5,000), whereupon respondent received a letter from the presiding officer stating that the informal procedure was not applicable and that complainant had requested the shortened procedure, and urging respondent to enter an appearance in the proceeding, the presiding officer's letter constituted a grant of an extension of time for

respondent to state whether it consented to the shortened procedure and to answer the complaint. The granting of such an extension was authorized by Rule 10(g) of the Commission's Rules. E.S.B. Inc. v. Moore-McCormack Lines, Inc., 480 (481).

Where the presiding officer in a proceeding for reparation granted (pursuant to Rule 10(g) of the Commission's Rules of Practice and Procedure) an extension of time for respondent to state whether it consented to the use of the shortened procedure and did file an answer, permission from the Commission or the Chief Administrative Law Judge to grant the extension pursuant to Rule 5(d) was unnecessary. Rule 11(i) provides that Subpart E (Rule 5) applies only where the respondent does not consent to conducting the proceeding under the shortened procedure, Rule 5 was inapplicable. Id. (481).

The presiding officer in a proceeding for reparation properly denied complainant's motion for judgment on the pleadings, which was based on the respondent's failure to answer the complaint within the twenty-day period provided by Rule 5(d) of the Commission's Rules of Practice and Procedure. Even where agencies act in a quasi-judicial capacity, the strict rules which prevail in suits between private parties and the hard and fast rules as to pleadings which govern courts of law do not apply to administrative proceedings, where inquiries should not be too narrowly constrained by technicalities. Respondent was unaware of the Commission's procedural requirements, but, when instructed how to proceed, made what appeared to be a good faith effort to comply with the Commission's Rules. Moreover, the complaint, alleging a violation by the respondent of section 18(b)(3) of the Shipping Act, 1916, raised issues of fact which could not be resolved by default, but were required to be properly established on the basis of all the available evidence. Under the circumstances, the presiding officer had the authority to grant respondent an extension of time in which to answer, and did not act arbitrarily in accepting the filing of respondent's answer. Id. (481).

The Commission amends its Rules of Practice and Procedure to authorize presiding officers to enter such order or rule as they deem proper when no answer to a complaint is timely filed and to extend the time for filing answers; to permit the filing on the following business day when the two-year statutory limit for filing complaints seeking reparation expires on a Saturday, Sunday, or legal holiday; and to authorize presiding officers to order a hearing as well as the submission of additional evidence in proceedings conducted under the shortened procedure. Rules of Practice and Procedure, 656.

Where an administrative law judge dismissed the proceeding, observing that complainant had filed no replies to respondents' motions to dismiss, and, upon being informed by complainant that he had not received copies of the reply due to clerical error, entered an "Order upon Sua Sponte Reconsideration" wherein he took account of complainant's replies and again dismissed the proceeding, the sua sponte reconsideration order constituted an adequate response to complainant's subsequently filed motion for reconsideration, in which complainant raised the same arguments. The administrative law judge was accordingly not required to address the latter motion separately. Interconex, Inc. v. Sea-Land Service, Inc., American Export Lines, Inc., and U.S. Lines, Inc., 714 (715).

Complainant in docket proceeding is dismissed without prejudice. The case was almost four years old and there were no signs whatsoever that complainant would proceed to hearing. The practices complained of had long since been terminated, and whatever issues which have remained were removed by complainant when it amended the complaint to delete its claim for reparation. The case was therefore essentially academic and at best would lead to a declaratory order-type decision establishing the rights of the parties. However, the dismissal would not be with prejudice and the ALJ

would not make findings on the merits. Complainant had succeeded in dismissing the claim for reparation with prejudice by its amendment since that claim was now barred by the statute of limitations. Dismissal of the remainder of the complaint with prejudice was not warranted since complainant had not been guilty of contumacious conduct and had not been in willful default. As to the request that the record be made a part of any future proceeding between the parties relating to the same controversy, claims for reparation were now time-barred, and, in view of the fact that complainant was now seeking damages in an antitrust suit, it appeared unlikely that complainant would resume litigation before the Commission with no prospect of recovering damages. Moreover, no evidentiary record existed in the case, merely proffered documents and other materials which had not been admitted into evidence. Consolidated Express, Inc. v. Sea-Land Service, Inc., 722 (723–725).

—Attorneys

The Commission expects attorneys and other persons practicing before it to observe the same code of conduct and standard of diligence as would be required of them in a court of law. The Commission quasi-judicial character must be recognized and respected not solely for its own sake but more importantly to assure that the basic procedural and substantive rights of party-litigants be properly protected and represented. Windjammer Cruises, Inc. and Windjammer Cruises, Ltd., 112 (113).

The Commission's Rules of Practice limit practice before the Commission to attorneys, persons admitted to practice, or officers or regular employees of a party to a proceeding; practice before the Commission by firms or corporations on behalf of others is specifically prohibited. Accordingly, where a claim was submitted by one firm on behalf of another, and there was nothing in the Commission's files to indicate that the person filing the claim was an attorney or a person admitted to practice before the agency, the complaint was not properly submitted under the Rules of Practice and could not be considered on its merits. The complaint was dismissed without prejudice to resubmission within the two year statutory time period for the filing of such claims. Wilmot Engineering Co. v. United States Lines, Inc., 403.

—Declaratory orders

A petition for declaratory order seeking authority to capitalize the cost of monies used to acquire a containership under construction (which cost would include the net interest paid on borrowed funds, or "actual interest," and income foregone as a result of using existent company funds, or "foregone interest"), and further requesting the Commission to state that such capitalized interest would be recognized as part of the petitioner's vessel investment account in all rate making proceedings involving the new vessel and future vessels constructed by the petitioners, presented involved questions of policy and fact not effectively treatable by issuance of a declaratory order, and was therefore denied. Petitioner did not request the resolution of a particular controversy or uncertainty arising from prior actions of the Commission, or even allege that any controversy existed, but desired a personal exemption from the Commission's ordinary approach to rate base valuation; before a conclusion could be reached on such a "petition for special relief," close examination of the petitioner's financial position and rate structure would be required, an action for which there did not appear to be any current public interest basis. Petition for Declaratory Order of Matson Navigation Co., 462 (463).

— Designation of parties to agreements

Rules of Practice and Procedure are amended by designating parties to agreements as "proponents" and parties opposing approval as "protestants." General Order 16, Amdt. 16, 509.

— Dismissal orders

Rules of Practice and Procedure are amended to provide specifically for review of orders of dismissal by presiding officers. General Order 16, Amdt. 16, 509 (511).

— Government in the Sunshine Act

The Commission adopts regulations to implement the Government in the Sunshine Act. Commission meetings will be announced by appropriate methods in addition to publication in the Federal Register. Notices will be provided in the public reference room. Public Information, 559.

The Commission amends its Rules of Practice and Procedure relating to ex parte communications in order to conform them to the requirements of section 14 of the Government in the Sunshine Act. The rules do not authorize Hearing Counsel to engage in forbidden ex parte practices. Ex Parte Communications, 601 (602).

— Production of witnesses and materials

Rules of Practice and Procedure are amended to provide that presiding officers will rule on the production of witnesses and materials located in a foreign country. Only the Commission shall enforce orders and enforcement is discretionary. General Order 16, Amdt. 16, 509 (510).

PRACTICES: See also Terminal Operators

A freight forwarder did not violate section 17 of the 1916 Act by its inability to secure classification of its principal's cargo under a particular tariff item, thus "betraying the shipper" by misdescribing the cargo. The description furnished by the forwarder accurately described the commodity shipped and, accordingly, no unjust or unreasonable practice was engaged in by the forwarder. European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc., 148 (154).

A shipper did not sustain its burden of proof that a freight forwarder violated section 17 of the 1916 Act by failing to apprise its principal, the shipper, of any dispute or discrepancy as to the rate to be applied to the principal's goods. The record would not allow any conclusion on whether the forwarder had properly informed its shipper prior to shipment of a discrepancy in the applied rate. Id. (155).

Section 17 of the 1916 Shipping Act does not require that forwarders publish their regulations and procedures. Nor has the Commission, either in General Order 4 or elsewhere by rule or decision, mandated that a licensed freight forwarder must establish and publish a special body of regulations. Id. (156).

A freight forwarder did not violate section 17 of the 1916 Shipping Act when it failed to abide by its shipper's instructions in describing the commodity shipped. There was no evidence of collusion between the forwarder and the carrier. The forwarder properly described the cargo as it was required by the Act to do. The alleged "scienter" of the forwarder was irrelevant to a proceeding in which the issue was simply a determination of the nature of the commodity shipped. Id. (157).

The matter of whether a freight forwarder violated section 17 of the 1916 Shipping Act by allegedly not following the usual routine of a forwarder in informing its shipper that the carrier was objecting to a proposed tariff classification and in obtaining additional product classification from the shipper is remanded for further hearing with respect to the forwarder's obligations. Id. (157).

Carrier did not engage in an unjust and unreasonable practice in violation of section 17 of the 1916 Shipping Act in that its agent did not inform the shipper of the agent's inability to bind the carrier to a rate initially quoted by the agent. The agent's representation was not conclusive as to the rate applicable and the shipper's president was thoroughly aware through experience of the inability of an agent to quote an authoritative rating since the conference and carriers were the final arbiters of the proper rate to be charged. Id. (160).

Allowance by the West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference and its member lines of a three percent discount on prepaid freight does not violate sections 16 and 17 of the 1916 Shipping Act. The determinative factor is whether the conference can justify added expenses for handling collect shipments. Here, the average difference in time between the receipt of freight prepaid and the receipt of freight collect is about 30 days and this delay results in additional cost to the carrier, a major part of which is attributable to the necessary increase in working capital caused by the delay. The impact of the delay is exacerbated by the condition of the Italian economy—high interest rates and inflation. West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference Amended Tariff Rule Establishing an Allowance on Prepaid Freight, 751 (755).

PREFERENCE AND PREJUDICE: See also Freight Forwarding

Terminal lease agreement between the City of Anchorage and Sea-Land Service, Inc., providing for a shift of Sea-Land's preferential berth from Terminal 1 to Terminal 2 on February 1, 1976, will not be temporarily approved. Severe icing occurs at Anchorage, and there is the real possibility that Totem's vessel could be damaged because of the mooring and weather conditions. Totem will not berth at Terminals 2 and 3 during the severe icing conditions because of the risk to the vessel and her crew. If Totem cannot use POL-Terminal 1, even on a first-come-first-served basis, it may be forced to leave the trade, at least temporarily. Totem's refusal to use Terminals 2 and 3 is reasonable. Continuation of Totem's service to Anchorage is in the public interest and should be maintained if possible. Continued use of Terminal 1 by Sea-Land in a preferential basis is contrary to the public interest in violation of section 15 of the 1916 Act, in that there is a real possibility that it will serve to effectively preclude Totem from offering a competitive service during severe icing conditions. Therefore, the presently approved agreement between the City and Sea-Land which gives Sea-Land preferential berthing rights at Terminal 1 will be disapproved effective February 5, 1976, unless the parties, prior to that date, amend the agreement to provide that effective February 5, 1976, such preferential berthing rights shall not apply during the months of February through April 1976. Agreement Nos. T–1685, as Amended and T–1685–6: Between the City of Anchorage and Sea-Land Service, Inc., 69 (79–80).

Not all preferences or advantages offered by carriers are condemned by law, but only those that are unjust or unreasonable violate the Shipping Act, 1916. Moreover, the existence of unjust discrimination or prejudice must be demonstrated by substantial proof. Port of Houston Authority v. Lykes Bros. Steamship Co., Inc., 192 (199).

Complaint of the Military Sealift Command that a carrier had violated section 18(a) of the 1916 Shipping Act because it had failed to file "appropriate military class rates" is

dismissed. Complainant failed to establish that the carrier's rate structure was unreasonable vis-a-vis other shippers. Similarly, complainant's request that container rates for military cargo be established at a level that would provide the carrier "a return equivalent to the fully allocated costs of transporting those classes of cargo plus an appropriate return on its investment in the trade" would, to the extent that such a standard is not applied to commercial shipments, place complainant in a preferred class. This would establish a special class of rates applicable only to military cargoes and, without additional jurisdiction, would clearly be contrary to the intent of Congress in repealing section 6 of the Intercoastal Shipping Act of 1933. Department of Defense and Military Sealift Command v. Matson Navigation Co., 503 (507).

Practices of the Port of Houston Authority, in connection with the rental of heavy crane equipment, under which Houston's cranes have first priority on jobs, even to the extent of displacing private crane owners equipment already working, violate sections 16 First and 17 of the 1916 Shipping Act, not only as applied against private crane operators, but also with regard to stevedores hiring private cranes. Houston has unjustly preferred itself to private crane owners and subjected stevedores hiring private crane owners to "bumping" and other unreasonable practices while exempting stevedores who own their own cranes from such practices. Perry's Crane Service, Inc. v. Port of Houston Authority of Harris County, Texas 548 (549).

The Port of Houston's practice of giving itself first priority on cranes must be limited. Prior to the start of any job a stevedore should determine the availability of Houston's cranes and if there is one equally suitable for the job at hand then Houston should be given a preference as to furnishing a crane for that job. The limited preference is justified because of Houston's heavy investment in cranes and extensive labor-related expenses and guarantees; declining share of available crane work; the flexibility of private cranes in moving from one location to another—an option not open to Houston; the fact that private crane owners are using facilities constructed and paid for by Houston to conduct their private business; and the absence of any evidence that Houston is attempting to monopolize the crane rental business on its facilities. Limiting of the preference results in a practice which, while still preferential, is no longer undue or unreasonable—the key determination. The first call privilege, as modified, will require stevedores to select a Houston crane only if that crane is suitable for the job in the judgment of the stevedore in terms of size and expense as any available crane. Id. (551–552).

Practice of the Port of Houston, in connection with the rental of heavy crane equipment, of preferring its own cranes to the extent of "bumping" other crane equipment is unlawful and cannot be justified even if modified to allow Houston "bumping" privileges if it can furnish a more suitable crane for the job than that provided by the private crane owner. Assuming the unavailability of a Houston crane and the election by a stevedore to use a private crane for a particular job, that private crane owner should be permitted to perform the job to completion without "bumping" by a Houston crane. Id. (552).

Contention that the failure of the Far East Conference and its member lines to take action against the member lines engaging in minibridge activities, even if consistent with the conference agreement, still results in unjust prejudice to complainant, a member line which cannot engage in the particular minibridge activities involved, is rejected. The argument ignores the fact that overland competition from the Pacific Westbound Conference lines, the majority of which are also FEC members, has existed for over 50 years. Lykes Bros. Steamship Co., Inc. v. Far East Conference, 589 (593–594).

The contention that the costs of freight forwarders in processing GSA accounts can be

absorbed without additional personnel and without incurring significant costs, and, that therefore costs charged to the GSA for processing shipments should not be compared to costs charged to commercial shippers, is rejected. The fatal flaw in such an approach is that it is not applied to commercial accounts. Respondents' failure to even consider the application of the "absorption" theory to their commercial accounts or to provide any explanation as to why incremental pricing is appropriate for GSA accounts but not for commercial accounts renders that approach unjustly and unlawfully discriminatory as between shipper customers. Freight Forwarder Bids on Government Shipments at United States Ports—Possible Violations of the Shipping Act, 1916, and General Order 4, 619 (624–625).

The prohibition against uneven treatment embodied under section 16 First of the 1916 Shipping Act extends not only to "persons" but also to a "description of traffic." Thus, in a proceeding to determine whether practices of freight forwarders as they related to contracts with the GSA violated section 16 of the 1916 Shipping Act, the Commission could consider those issues even if the GSA were not a person within the meaning of section 16 since GSA shipments describe a particular kind of traffic. Id. (622).

In order to find that freight forwarders had violated section 16 First of the 1916 Shipping Act by offering reduced rates to the GSA, it was not necessary to find that the GSA actually competes with commercial shippers. While a forwarder may not have to perform all services listed in a GSA contract, the fact remains that a forwarder is contractually obligated to perform any and all of those services upon request, and those services generally correspond to those offered a commercial shipper. The work involved in processing a GSA shipment is clearly no less complex or time consuming than with a commercial account, and it follows that the costs involved in processing GSA and commercial shipments should be comparable. Id. (623–624).

The contention that that the provision of freight forwarding service to the GSA at lower rates than to commercial shippers is in the public interest because the government receives quality service at low cost without injuring anyone is without merit. By enacting section 16 of the 1916 Shipping Act, among other provisions, Congress has established the "public policy" to be the fair and even handed treatment of similarly situated shippers and localities. To the extent that low forwarding fees do not reflect the cost of providing such services, they have arguably made commercial customers pay costs attributable to GSA shipments. If a commercial shipper is called upon to subsidize any costs of processing GSA shipments it follows that that shipper has been financially injured to some degree. Even if it could somehow be shown that the low bids assessed GSA did not result in measurable financial losses, freight forwarders could not be absolved from wrongdoing. The potential for injury is clear and exists with or without finding of specific economic damage. The extent of injury is only critical in a reparation context. Id. (625–626).

Requiring freight forwarders to establish reasonable and equitable charges for the handling of GSA shipments would not run contrary to the public interest by substantially restraining competition in the forwarder industry. Such a requirement would merely ensure that forwarders honor an obligation imposed on them by law, that once a particular forwarding fee is established by a forwarder for a particular service based on the circumstances of his operation, that fee be made available to all shippers equally. Even if such a requirement might lessen competition, such action is dictated by the requirements of the 1916 Shipping Act. Id. (626).

Freight forwarders who charged the GSA less for freight forwarding service than commercial shippers violated section 16 First of the 1916 Shipping Act. Id. (627)

Freight forwarders who charged the GSA less for friehgt forwarding services than

commercial shippers in violation of section 16 First of the 1916 Shipping Act also violated section 510.24(b) of Commission General Order 4. The variation in the magnitude of the fees charged the GSA and commercial shippers was sufficient to give rise the reasonable probability that the low bids offered by the forwarders were in consideration of those forwarders receiving compensation from carriers in violation of section 510.24(b). Id. (628–629).

Because section 510.24(b) of Commission General Order 4 makes it unlawful for a licensee to "render or offer to render" any forwarding service free of charge or at a reduced fee, a licensee who only offered to render, but never actually rendered, such service free or at a reduced charge would still run afoul of that section. Id. (629).

There is nothing in the 1916 Shipping Act or its legislative history to support the conclusion that government agencies are to be given preferred treatment on forwarding services. If a government shipper, here the GSA, must pay the same terminal and ocean transportation charges as do commercial shippers, there is no reason why the GSA should acquire a preferred position with regard to forwarding services. Any amendment to section 510.24(b) of Commission General Order 4 which would place GSA shipments in the same category as charitable and relief agencies would in effect permit forwarders of GSA shipments to rely on brokerage from ocean carriers to cover the cost of processing such shipments. Such an amendment would clearly be inconsistent with the intent of Congress. Id. (630).

Freight forwarders issuing bids to the GSA will be required to determine and establish, based on the costs and the circumstances of their operations, the fee that will be assessed the GSA for processing its shipments. Whatever GSA fee is established shall be compensatory, equitable and nondiscriminatory vis-a-vis commercial accounts. Id. (631–632).

Allowance by the West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference and its member lines of a three percent discount on prepaid freight does not violate sections 16 and 17 of the 1916 Shipping Act. The determinative factor is whether the conference can justify added expenses for handling collect shipments. Here, the average difference in time between the receipt of freight prepaid and the receipt of freight collect is about 30 days and this delay results in additional cost to the carrier, a major part of which is attributable to the necessary increase in working capital caused by the delay. The impact of the delay is exacerbated by the condition of the Italian economy—high interest rates and inflation. West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference Amended Tariff Rule Establishing an Allowance on Prepaid Freight, 751 (755).

The mere fact that military household goods are transported at one rate when shipped directly by the Military Sealift Command and at another rate when a nonvessel operating common carrier intermediary is employed does not establish a violation of section 17, first paragraph of the 1916 Shipping Act. The Commission has not been presented with a clear case of two shippers of like traffic moving under the same circumstances and conditions being charged different rates—to the detriment of one of them. Nothing on the record indicates that "MSC Cargo, N.O.S." and "Household Goods of Government Personnel Shipped by NVO's Under Government Bills of Lading" are not different commodities for rate making purposes. Although both include military household goods, each description legitimately includes other items as well. While two shippers are technically involved, the special circumstances of the case indicate that the NOV's are not operating independently, but as the *alter ego* of the Defense Department. The real party in interest is not injured by the different rates these "shippers" pay within the meaning of section 17. Household Goods Forwarders Association of America v. American Export Lines, 787 (790–792).

RATES: See also Agreements Under Section 15; Discrimination

Nonvessel operating common carrier which charged higher rates than specified in its tariff violated section 18(a) of the 1916 Act and section 2 of the Intercoastal Shipping Act, and its tariff is canceled. Possible Violations of Section 18(a) of the Shipping Act, 1916, and Section 2 of the Intercoastal Shipping Act Arising from Charging Higher Rates than Specified by Tariff, 43 (49, 56–57).

There is no requirement under the Shipping Act that obligates a carrier to acquiesce to a particular description of cargo desired by the shipper, particularly when the description desired appears to be inaccurate. The carrier's obligation in general is to rate the goods accurately according to the descriptions available to it. European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc., 148 (161).

The standard for whether or not a cargo is properly rated is only a determination of what the goods transported actually were. There is no "unreasonable man" standard as applied to torts at common law. The administrative law judge was completely justified in relying on the shipper's own sales literature and samples of the commodity itself in attempting to determine the true nature of the goods. The next question should involve the propriety of the rates applied to these goods. In this case, the record is inadequate and the proceeding is remanded to resolve the exact nature of the goods shipped and the properly applicable rate. Id. (163–164).

Section 18(b) of the Shipping Act, 1916, requires that carrier/conferences in foreign commerce file with the Commission rates and charges "for transportation between all points on its route and on any through route which has been established." Thus, the requirement clearly applies not only to point-to-point traffic, but to through routes as well. Therefore, and until exempted pursuant to section 35 of the Act, the law requires the filing of through rates with the Commission notwithstanding that such rates are also on file with another agency. Filing of Freight and Passenger Rates, Etc., 203 (205).

Nonvessel operating common carriers by water engaged in providing transportation for military household goods and personal effects where there is also a domestic movement within the United States are granted continuing special permission to file supplements and/or revised tariff pages for such transportation on less than the 30 days' notice requirements of sections 18(a) and (b) of the Shipping Act, 1916, but not less than one days' notice, and a waiver of the tariff format requirements of Tariff Circular No. 3 and General Order 13 is granted. Id. (205–206).

Reasonable rates are determined by establishing a fair value of the carrier's property devoted to public service. This return on rate base should be sufficient to cover operating expenses and the cost of attracting capital. Petition for Declaratory Order of Matson Navigation Co., 462 (464).

Carrier's general rate increase in the Virgin Islands trade is found to be just and reasonable. Respondent has experienced increased costs of operation and respondent operates efficiently. Some indication of the need for the increases was shown, and no computation made with respect to the increases showed them to be improper. The rates withstand the test of operating ratio and rate of return on rate base. Transconex, Inc.—Proposed General Rate Increase in the Virgin Islands Domestic Offshore Trade, 492 (495).

While a bill of lading description of a commodity is ordinarily neither conclusive nor binding in a determination of legal freight charges, where the consignor or shipper is the manufacturer of the commodity shipped, the description in the bill of lading may not be ignored. CSC International, Inc. v. Waterman Steamship Corp., 523 (527).

There is no better entrenched rule in the making of rates and ratings than the one that

a commodity cannot be lawfully classified according to the uses to which it is put. Id. (528).

One use of a commodity does not necessarily determine the transportation nature for tariff purposes of the commodity. Different rates on the same commodity dependent upon the use made of the commodity would lead to unjust discrimination. Id. (528).

The nature and character of each shipment at the time tendered determines its status for rate purposes, and the use which may subsequently be made of the material shipped is not controlling. Id. (528).

Complaint alleging carrier misrated a commodity as a chemical instead of as a detergent, and therefore applied an improper rate, is dismissed. Complainant was a manufacturer and distributor of chemicals; the bill of lading described the commodity as a chemical; the consignee was a chemical company; the commodity is defined in a chemical dictionary; and, one of the uses of the commodity is in chemical synthesis. Moreover, the classification of the commodity as a chemical was clearly in conformity with the classification of the commodity contained in the Statistical Classification of Domestic and Foreign Commodities Exported from the United States published by the Department of Commerce. Id. (528).

There is no conflict between the requirements imposed by the Federal Property Act and the 1916 Shipping Act. The GSA's authority to obtain transportation at the "lowest overall cost" does not overrule the requirement that the rate agreed upon for such transportation be lawful under the 1916 Shipping Act. This is particularly so since the 1916 Shipping Act contains no exemption of the type appearing in section 22 of the Interstate Commerce Act granting the government preferred status. Rates and charges assessed the government must therefore be reasonable and nondiscriminatory and otherwise comply fully with the substantive provisions of the 1916 Shipping Act. Freights Forwarder Bids on Government Shipments at United States Port—Possible Violations of the Shipping Act, 1916, and General Order 4, 619 (632).

On reconsideration and giving due regard to the fact that carriers not previously participating in the proceeding represent a substantial portion of the entire capability in the very trades, i.e., domestic offshore, the Commission's final rules were intended to address, the promulgated rules (revoking rules requiring the maintenance of records and submission of data with regard to rate base) are withdrawn. Reports of Rate Base and Income Account, 745 (746).

REPARATION

—In general

The proviso portions of section 18(b)(3) of the 1916 Shipping Act, which empower the Commission to permit a refund or waive collection of a portion of freight charges, are not of a discretionary procedural nature. In order for the Commission to be vested with the authority to grant refunds or waivers it must first ascertain that all requirements set forth in section 18(b)(3) of the Act have been complied with. Commodity Credit Corporation v. Surinam Navigation Co., Ltd., 65.

Application to waive collection of a portion of freight charges is denied where complainant merely submitted the conclusory statement that there had been a "misfiling due to clerical error," and supporting documents submitted by complainant did not reveal the nature of the alleged clerical error. A determination as to the propriety of a waiver could not be made on such a record. The Commission may not permit deviations from the rates on file. Union Engineering, Kuwait v. Iran Express Lines, 93 (96–97).

Reparation is awarded to a shipper whose shipment was incorrectly rated by the carrier. The shipment consisted of fiber drums of polyethylene synthetic resin, there was a specific tariff in force for such material, and the carrier had applied the higher synthetic resin N.O.S. rate for the material. The carrier had specific knowledge from the bill of lading that the material was shipped in drums. Union Carbide InterAmerica, Inc. v. Venezuelan Line (Compania Anonima Venezolana de Navegacion), 97 (99).

Reparation is awarded where the carrier had failed to charge complainant's subsidiary the contract rate although the shipper had not been listed as the fully-owned subsidiary of complainant and the bills of lading failed to contain the appropriate proprietary clauses. The contract shipper later notified the carrier of the subsidiary status of the shipper and that the cargo was proprietary cargo. Cities Service International, Inc. v. Lykes Bros. Steamship Co., Inc., 128 (129).

With respect to domestic intercoastal commerce governed by section 18(a) of the 1916 Shipping Act and section 4 of the Intercoastal Shipping Act of 1933, an error in a tariff is not, standing alone, and in the absence of a finding of unreasonableness, ground for permitting a carrier to charge rates other than those on file and in effect at the time of the shipment. Accordingly, a carrier was denied permission to refund a portion and to waive collection of a portion of the freight charges on three shipments of sterilized milk in hermetically sealed containers from Oakland, California, to Guam, where the carrier was not able to prove that the rate charged was unreasonable but only that the rate for milk, "sterilized, in hermetically sealed containers with or without added flavoring" had mistakenly been changed to "W/M" from "W/T" with the result that the charges in question had incorrectly been on a measurement rather than a weight basis. Real Fresh, Inc. v. Matson Navigation Co., 215 (216–217).

In denying a claim for a refund under a tariff rule providing that the carrier bears the cost of transporting the cargo from the actual port of discharge to the port of discharge named in the bill of lading on the grounds that the shipper had failed to provide adequate proof of the port of discharge named in the bill of lading, the settlement officer erred by failing to request the shipper or the carrier to supply additional documentation pursuant to 46 CFR 502.304(a) and (e). F. Powers Co., Inc. v. Orient Overseas Container Lines, 219 (221).

Since the carrier's tariff rule provided for the forwarding of cargo, at carrier's expense, from the port of discharge to the bill of lading port without distinguishing between less than trailer load (LTL) lots and trailer load shipments, the shipper was awarded a refund of the cost of transporting by truck LTD cargo from the port of discharge to the bill of lading port. The carrier could not by a statement of policy, no matter how widely published, establish a rule binding on shippers unless such rule was first filed with the Commission under section 18(b) of the Shipping Act of 1916. Accordingly, the carrier's unfiled rule distinguishing between LTL and trailer load shipments could not be relied upon to deny reparation, but itself violated section 18(b)(3) of the Act by denying transportation privileges to LTL shippers in a manner not stated in the carrier's tariff. Id. (221–222).

While a carrier's argument in a misclassification case that an award for the claimant would force it and other carriers to inquire of every shipper as to whether the description of cargo in the bill of lading is correct constituted a compelling equitable consideration, it was not a cognizable legal defense to an award of a refund of overcharges pursuant to section 18(b)(3) of the 1916 Shipping Act. The Commission is not empowered to consider arguments addressed to equitable considerations in matters arising under section 18(b)(3) of the Shipping Act of 1916. Andes Products Export-Emport v. Prudential Lines, Inc., 244 (246–247).

Since the Commission is not empowered to consider arguments addressed to equitable considerations in matters arising under section 18(b)(3) of the Shipping Act of 1916, there was no merit in a misclassification dispute to respondent's contention that the claimant was not entitled to a refund of overcharges because the claimant had been delinquent in researching the applicable tariff and in describing the cargo in the bill of lading. Id. (247).

An action seeking reparation for alleged overcharges was dismissed as a nullity where the complaint named only the carrier's agent as a respondent and did not name the carrier itself. While the named respondent had agreed to a stipulation which stated that it in fact acted as the agent of the carrier, and while it may have been the intent of the stipulation to indicate that the agent or its attorney had informed the carrier of the complaint, section 22 of the Shipping Act of 1916 places exclusive responsibility for furnishing a copy of the complaint on the Commission. Even if section 22 could be interpreted so as to permit the function of furnishing a copy of the complaint to the carrier to be performed by an agent, it would not follow that knowledge of a proceeding commenced against an agent makes the principal a named party to that proceeding. Caterpillar Overseas, S.A. v. South African Marine Corporation (N.Y.), 315 (318).

A tariff item which stated that the charge for a shipment of lesser weight or measurement quantity shall not exceed the charge for shipment of a greater weight or measurement quantity of the same commodity provided justification for the carrier to waive collection of a portion of certain freight charges by applying a rate which covered only shipment of a minimum of 30,000 lbs. to a shipment which actually weighed 29,723 lbs., where the waiver application otherwise satisfied the criteria of section 18(b)(3) of the 1916 Shipping Act. Riviana Foods v. Sea-Land Service, Inc., 320 (322–323).

A tariff item which stated that the charge for a shipment of a lesser weight or measurement quantity shall not exceed the charge for shipment of a greater weight or measurement quantity of the same commodity provided justification for the carrier to waive collection of a portion of certain freight charges by applying a rate which covered only shipment of a minimum of 30,000 lbs. to a shipment which actually weighed 24,642 lbs., where the waiver application otherwise satisfied the criteria of section 18(b)(3) of the 1916 Shipping Act. Douglas Material Company v. Sea-Land Service, Inc., 328 (330).

Ruling of the Settlement Officer dismissing complaint for reparation of freight overcharges is vacated. The Settlement Officer in his dismissal had noted that, as a tariff applicable to the shipment could not be located, a determination on whether the carrier had collected the proper charges could not be made. Dismissal of the complaint under such circumstances would deprive complainant of obtaining relief, not because it had been established that it was not entitled to reparation, but because of lack of information needed to decide the merits. Questions as to whether the charges collected were based on a tariff with the Commission, the identity of the underlying ocean carrier and whether it had an applicable tariff on file, the identity of the shipper on the bill of lading, and whether the bill of lading identified any of the carriers as independent ocean freight forwarders remained unanswered. Since resolution of those questions, among others, might require an evidentiary hearing not available under Subpart S of the Rules, the proceeding would be referred to the Office of the Administrative Law Judges for adjudication under the formal procedure provided in Subpart T of the Rules. The Federal Minister of Defense, Federal Republic of Germany v. Republic International Forwarding Co. and Republic Van and Storage Co. of Los Angeles, Inc., 337, 338.

"Any person" may file a complaint under section 22 of the 1916 Shipping Act whether or not such person has suffered injury. However, to seek reparation a person must show injury and proof of pecuniary loss. Also the complainant must show that it has suffered

real damage. In a claim for refund of freight charges, the complainant must show that it has paid freight or has succeeded to the claim in a valid fashion such as by assignment. No authorities are cited holding that a parent corporation, without more, has standing to seek recovery of damages suffered by its wholly owned subsidiary corporation. Trane Co. v. South African Marine Corp. (N.Y.), 374 (378).

Reparation was denied to a shipper which had been told by an agent of the carrier that the rate applicable to a shipment of motor oil was $96/cubic foot (a temporary rate applicable only to shipments between certain listed ports); which was subsequently advised that the quoted rate was in error and that the shipment rate would be $129.25/cubic foot (the general commodity rate applicable to motor oil under the carrier's tariff); and which paid the higher rate under protest. The port of destination stated on the bill of lading was not among the ports eligible for the reduced temporary rate; accordingly, the shipment was required to be billed at the general commodity rate. Celestial Mercantile Corp. v. M. Golodetz & Co., Inc., 404 (405–406).

In considering claims for reparation, the determination of the applicable rate shall be based on what can be shown is the true nature of the commodity shipped. Such a determination will be based on all the evidence of record with no single document or piece of evidence necessarily being controlling. Kraft Foods v. Moore-McCormack Lines, Inc., 407 (409–410).

In preparing a bill of lading, it is usually the case that the carrier, in classifying and rating a shipment, must look to the information supplied to him by the shipper or freight forwarder. Elementary fairness dictates that the carrier should be entitled to rely on such information, and to charge and collect freight in accordance with the description supplied by the shipper. To require a carrier to inquire of a shipper whether the latter's description of the goods shipped is correct would place an undue burden on the carrier. Pan American Health Organization v. Prudential Lines, Inc., 412 (414).

The importance of declaring in bills of lading the correct description of the cargo shipped cannot be overemphasized. The carrier has the right to expect that a shipper will properly identify his shipment, just as the shipper has the right to expect the carrier to charge the proper rate for the type of goods actually carried. An equitable rule would seem to limit reparations based on misidentification and misrating to those cases where the actual language used on the face of the bill of lading indicates an improper misclassification or obvious disregard by the carrier of the descriptive language used by the shipper. Further, a shipper who insists upon using a trade name, rather than an appropriate and readily available commodity index description in the filed tariff, should be held to do so at his peril. Id. (414–415).

A shipper was entitled to reparation where, due to misdescriptions of cargo by the shipper, the bill of lading covering the shipment placed the goods shipped in an incorrect class of commodities having a higher shipping rate than that actually authorized for the goods shipped. That the carrier was without fault with regard to the error was immaterial. Id. (415).

A carrier which did not deny the merits of a shipper's claim of overcharge but nonetheless denied the claim on the ground that it was not timely filed under a tariff rule was not only within the rights under its governing tariff, but was required to take the action which it had taken. The unauthorized payment of an otherwise legitimate claim in response to the application of stimuli (e.g., the filing of a reparation complaint with the Commission) while denying all other similar claims in the absence of such stimuli represents precisely the type of discriminatory practice proscribed by section 16 First of the Shipping Act, 1916. SCM Corporation v. Seatrain International, S.A. and Seatrain U.K. Ltd., 417 (419).

A shipper which conclusively proved that goods shipped under the bill of lading description "raw drugs" consisted entirely of Cerelose powder, a form of dextrose, was entitled to reparation in the amount of the difference between the shipping rate for dextrose and the higher rate charged by the carrier, applicable to "harmless drugs." That the rate charged by the carrier had been based on the shipper's own "raw drugs" designation did not detract from the conclusion that a misrating had occurred. Section 18(b)(3) of the Shipping Act, 1916, prohibits a carrier from assessing a charge greater, less or different than the rate specified in its tariff for a particular commodity or service, and does not distinguish between knowing and inadvertent misratings. Abbott Laboratories v. Venezuelan Line, 426 (429).

Whether or not an unlawful charge has been assessed knowingly may be a matter for consideration in determining whether to seek penalties for a violation of the Shipping Act, 1916; it is immaterial, however, to the question whether a violation of the Act has occurred. Id. (429).

A tariff rule barring a claim by a shipper for adjustment of freight charges based on an error in description, unless made in writing sufficiently in advance to permit verification of description before the cargo leaves the carrier's possession, cannot act as a bar to Commission consideration of the claim on its merits. Carborundum Co. v. Royal Netherlands Steamship Co. (Antilles) N.V., 431 (434).

Complainant shipper's product, properly described as Trimet (its registered trade name) or Trimet, Technical Trimethylolethane, or Technical Trimethylolethane, was an alcohol and an ingredient of synthetic resin, as contended by respondent carrier, and not a raw material within the contemplation of respondent's tariff, as contended by complainant. The shipper's claim for reparation (in the amount of the difference between the charged rate for "alcohols, not hazardous" and the lower rate for general organic chemicals or that for synthetic resin) was accordingly denied. CSC International, Inc. v. Orient Overseas Container Line, Inc., 465 (474, 475–476).

A shipper of mine safety hats described by the shipper as "safety hats," "Topgard hats" and "V-Gard Caps" was entitled to reparation in the amount of the difference between the rate for "Hats, N.O.S.," at which the goods were shipped, and the lower rate for "Helmets, N.O.S." In view of the goods' function as protective headgear designed to resist impact from overhead objects, the goods were more akin to helmets or safety hats, which share the characteristic of being protective head coverings made of materials capable of resisting impact to avoid injury to the wearer, then they were to mere hats. MSA International v. Chilean Line, 478 (479).

It is not Commission policy to award costs or attorney's fees as reparation except in the most unusual circumstances. Refrigerated Express Lines (A/ASIA) Pty., Ltd. v. Columbus Lines, 581 (585).

On review of the Settlement Officer's decision granting reparation on an overcharge claim, involving the carrier's trade name tariff rule, the decision is affirmed. The Settlement Officer referred to the Commission decision in *Ocean Freight Consultants v. Royal Netherlands Steamship Co.* (Dkt. 72–39, Report on Reconsideration served Jan. 30, 1975, as having modified if not overruled the decision in Dockets 303(F) and 304(F)), *Johnson & Johnson International v. Prudential-Grace Lines, Inc.* The Officer's statement is misleading inasmuch as the final decision of the Commission in *Johnson & Johnson* is in fact totally consistent with *Ocean Freight Consultants* and could not have been overruled thereby because it was issued later in time. The decision that was modified by *Ocean Freight Consultants* (and by the later decision in *Johnson & Johnson*) was the initial decision in *Johnson & Johnson*. Johnson & Johnson International v. Royal Netherlands Steamship Co., 678.

Although the record offers no reason to disapprove the minimax concept or the particular charges proposed in lease agreements between the Port Authority and carriers or terminal operators, the Commission cannot ignore the fact that the only basis for the lessees' use of the involved piers to date which was not violative of section 15 was under the Port Authority's public tariff and the parties have not adhered to that tariff. The tariff contains no provisions for monthly "on account" billing (pending approval of the agreements) with subsequent adjustments nor does it permit extensions of credit in the unusual amounts and periods which have been extended to several proposed lessees. Moreover, in the case of two piers, one lessee was allowed to continue its exclusive occupancy for five months after the prior lease expired before the Port even declared those facilities to be public piers. This course of conduct represents at least a cooperative working arrangement which was not reduced to writing, filed and approved by the Commission as required by section 15 and constitutes a violation of that statute. It also represents a violation of the Commission's Rules by the Port Authority. The section 15 violation has not proximately injured an objecting terminal operator and it is not entitled to reparations. Agreement No. T-2880, as Amended, 680 (684–685).

The appeal of a nonvessel operating common carrier from the dismissal of its complaint in a proceeding "in the nature of a crossclaim" (seeking "indemnification" from other carriers named as correspondents of complainant in a previously instituted reparation proceeding) was denied on the ground of mootness where the previously instituted reparation proceeding had been dismissed by its presiding officer and that dismissal had not been appealed to the Commission. The "crossclaim" proceeding did not state an independent claim of the complainant, but was entirely contingent upon a finding against the complainant in the previous proceeding; that contingency failed, however, when the prior claim was dismissed by the presiding officer and that dismissal, going unappealed, became the decision of the Commission. Thus, complainant had no claim as to which it could prevail under any circumstances, and the administrative law judge properly dismissed the "cross-claim" action. Interconex, Inc. v. Sea-Land Service, Inc., American Export Lines, Inc. and U.S. Lines, Inc., 714 (716).

The denial of complainant's appeal from the dismissal of its proceeding "in the nature of a cross-claim" which proceeding was contingent for its vitality upon a contingency which had been destroyed by prior action of the Commission, did not deprive the complainant-appellant of its right to due process of law. Id. (716).

—*Administrative or clerical error* (see also negotiated rates)

Application for permission to refund a portion of freight charges is granted where through oversight the contract rate was not extended for the tariff quoting period. The inadvertent failure to extend the rate fell within the intended grounds for such refunds. Andrew Corporation International v. Atlantic Gulf Service, 139 (141).

Application to refund a portion of freight charges is granted where the applicable rate had inadvertently been omitted from a revision of the conference tariff. The conference had changed the format of its tariff to conform to the U.S. Customs Shipper's Export Declaration, and the rate for the commodity had been omitted in the revision. The conference stated that it was not its intent to increase the shipper's rate on the commodity at the time the tariff format was changed. Phillips Petroleum Co. v. Pacific Westbound Conference 143 (147).

Application to refund a portion of freight charges is granted where the tariff for the cargo was inadvertently omitted from a revised tariff. The item had been carried in previous tariffs for over 20 years. The administrative error by which the item was omitted from the revised tariff was clearly of the type for which relief was contemplated

under section 18(b)(3) of the 1916 Shipping Act. The Goodyear Tire & Rubber Co. v. Delta Steamship Lines, Inc., 174 (176).

Pursuant to section 18(b)(3) of the 1916 Shipping Act, as amended by Public Law 90–298 and as further implemented by 46 CFR 502.92, the carrier was permitted to waive collection of a portion of certain freight overcharges where due to an "administrative oversight" the carrier had inadvertently failed to extend a lower rate beyond its applicable expiration date. The waiver would not result in discrimination among shippers; prior to requesting the waiver the carrier had filed a new tariff setting forth the rate upon which the waiver would be based; and the waiver application had been filed within 180 days of the date of shipment. Riviana Foods v. Sea-Land Service, Inc., 320 (322–323).

The carrier was permitted to waive collection of a portion of certain freight charges where, due to a clerical error, the carrier's tariff publishing personnel had published the applicable rate with an incorrect reference which rendered the rate not subject to a certain discount and thus not competitively equal to the rate applicable via other carriers. The waiver would not result in discrimination among shippers; prior to requesting the waiver the carrier had filed a new tariff setting forth the rate upon which the waiver would be based; and the waiver application had been filed within 180 days of the date of the shipment. Kurtin Wool Stock Corp. v. Sea-Land Service, Inc., 324 (326–327).

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A common carrier's application for permission to waive collection of a portion of certain freight charges was granted where there had been a tariff filing error due to inadvertence; the granting of the requested waiver would not result in discrimination among shippers; the shipper had filed a new tariff setting forth the rate upon which the waiver was to be based prior to applying for permission to waive collection; and the application had been filed within 180 days of the shipment involved. Raytheon Co., Inc. v. Sea-Land Service, Inc., 343 (346).

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Application to waive collection of a portion of freight charges is granted where the carrier, through clerical and administrative oversight, had failed to extend the expiration date of the special rate for the commodity shipped. The oversight had occurred during a general rate increase by the carrier, and the carrier had stated that it did not intend to raise the special rate. This type of clerical and administrative error is of the type within the intended coverage of section 18(b)(3) of the 1916 Shipping Act. Shuman Plastics International, Ltd. v. Sea-Land Service, Inc., 496 (498).

Where, due to a clerical error in connection with the reissuing of certain tariff pages, special rates for articles of plumbing fixtures were overlooked, the carrier was permitted to refund a portion of the freight charges which it had collected pursuant to a general rate for the commodities. The error in the tariff was of a clerical or administrative nature and resulted in the failure to withhold a general rate increase from the special rates, as had been promised to the shipper; a refund of a portion of the freight charges would not result in discrimination among shippers; prior to applying for authority to refund, the carrier had filed a new tariff which set forth the rate on which such refund would be based; and the refund application had been filed within 180 days from the date of shipment. Kohler International, Ltd. v. Sea-Land Service, Inc., 565 (568–569).

Where through inadvertence the carrier's tariff agent had not been informed that a certain rate was not to include a congestion surcharge, the carrier was permitted to waive collection of that portion of freight charges on a shipment subject to the rate which was equal to the amount of the surcharge. A waiver of collection of a portion of the freight charges would not result in discrimination among shippers; prior to applying for the waiver, the carrier had filed a new tariff which set forth the rate on which the waiver would be based; and the waiver application had been filed within 180 days from the date of shipment. U.S. Department of Agriculture v. Waterman Steamship Corp., 577 (578–580).

Application for permission to waive collection of a portion of freight charges is granted where the carrier had filed the wrong rate for the commodity. The carrier had stated that the incorrect rate had been filed in error and that the proper rate had been substituted. This is the type of clerical and administrative error within the coverage of section 18(b)(3) of the 1916 Shipping Act. United States Mahogany Corp. v. Solar International Shipping Agency, Inc., 608 (611).

Permission to waive collection of a portion of freight charges is granted where the carrier's tariff clerk had inadvertently published $222.30 instead of the proper rate of $122.30 during a tariff revision. This type of clerical and administrative error is within the intended scope of coverage of section 18(b)(3) of the 1916 Shipping Act. United Forwarders Service, Inc. v. Sea-Land Service, Inc., 636 (638).

Application to waive collection of a portion of freight charges is granted where the rate was erroneously shown in a revised tariff as $270 WM instead of $279 W. This is the type of clerical and administrative error within the intended scope of coverage of section 18(b)(3) of the 1916 Shipping Act. International Paper Co. v. Gulf United Kingdom Conference, 652 (654).

Permission to waive collection of a portion of freight charges is denied. The agreed upon rate had been subject to a minimum of 300 revenue tons, and a falldown in production schedule prevented delivery of that minimum quantity for the vessel. A falldown in production by the manufacturer is not an error in tariff of a clerical or administrative nature, nor it it an error due to inadvertence in failing to file a new tariff. Collins & Aikman Export Corp. v. Barbar Steamship Lines, Inc., 709 (711).

Application to waive collection of a portion of freight charges is granted where the rate for the commodity shipped was inadvertently dropped by the conference tariff filing clerk during the incorporation of a general rate increase. The carrier stated that the omission was the result of clerical mistake and that the rate should have simply been carried forward with the general rate increases. The inadvertent failure of the carrier to extend the rate when it clearly intended to do so presents the kind of situation section 18(b)(3) of the Shipping Act was intended to remedy. Letraset Consumer Products, Inc. v. Lykes Bros. Steamship Co., Inc., 813 (816).

—Burden of proof

In an action for freight overcharges, complainant has a heavy burden of proof once the shipment has left the custody of the carrier. In this case the complainant met its burden of proof and, accordingly, reparation was awarded. Rohm and Haas Comapny v. Venezuela Line, 9 (11).

The test the Commission applies on claims for reparation involving an alleged error of a commodity classification is what the complainant can prove, based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description. However, the complainant has a heavy burden of proof once the shipment has left the custody of the carrier. In this case, the shipper was able to prove that the carrier had incorrectly applied the higher rate for "automobile, bus and truck parts, *viz:* other parts" to shipments of connecting rod assemblies and engine components which should properly have been classified under the lower rate for "automoblie, bus and truck parts, *viz:* cyclinder block assemblies, with or without crankshafts." Accordingly, reparation was awarded. Cummins Engine Co., Inc. v. United States Lines, Inc., 100 (101).

In an action for reparation to recover overcharges, the complainant has a heavy burden of proof once the shipment has left the custody of the carrier. In this case, the carrier met his burden of proof and was awarded a refund. Union Carbide Inter-America, Inc. v. Venezuela Line, 126 (127).

The general rule in a misclassification dispute is that what is actually shipped determines the applicable rates. However, where the shipment has left the custody of the carrier and the carrier is thereby prevented from verifying the claimant's contentions, the claimant has a heavy ultimate burden of proof to establish its claim. In this case, claimant was able to substantiate its claim, on the basis of invoices and statements from the supplier and from the merchandiser, that pencils carried by respondent were not mechanical and therefore should have had applied to them the rate for "Pencils, Not Mechanical" rather than the rate for "Pencils, N.O.S." Andes Products Export-Import v. Prudential Lines, Inc., 244 (246–247).

Reparation is denied where the shipment left the custody of the carrier and the carrier was prevented from verifying the claimant's contention as to the total measurement of the shipment. Claimant failed to sustain the heavy burden of proof required in such cases. Claimant's packing list indicated a total measurement of 798 cubic feet, whereas the Mate's receipt showed that the cartons were measured on receipt of the cargo at the dock prior to shipment, and measured 898 cubic feet. Claimant had had ample opportunity to request remeasurement by the carrier in accordance with provisions of the bill of lading. United Decorative Flower Co., Inc. v. Maersk Line, 340 (341–342).

In considering claims involving disputes as to the nature of cargo (either weight, measurement or description) if the cargo has left the custody of the carrier before the claim is brought and the cargo cannot be reexamined, the complainant bears a heavy burden of proof. In the instant case, complainant met that burden of proof. Kraft Foods v. Moore-McCormack Lines, Inc., 407 (410–411).

In a reparation proceeding based upon incorrect description on the bill of lading of the goods shipped, where the shipment has left the custody of the carrier and the carrier is therefore prevented from personally verifying the shipper's claimed description of the goods shipped, the shipper has a heavy burden of proof and must establish with reasonable certainty and definiteness the validity of its claim. Pan American Health Organization v. Prudential Lines, Inc., 412 (414).

While the carrier has a right to expect that the shipper will properly identify the goods contained in a shipment, the shipper similarly has the right to expect the carrier to

charge the proper rate for the actual goods carried. Where a mistake occurs, the party who commits it has the heavy burden of proof to support a claim for rectification. Abbott Laboratories v. Venezuelan Line, 426 (428).

In determining whether complainant has met its burden of proving the true nature of a commodity shipped, considerations of size and experience of shipper and frequency of shipments made have nothing to do with proof of the nature of the commodity, and in any event the Commission has previously disavowed equity theories regarding overcharge claims. Carborundum Co. v. Royal Netherlands Steamship Co. (Antilles) N.V., 431 (435–436).

Complainant carried its burden of proof on an overcharge claim to show the true nature of the commodity shipped by affirmative evidence, especially inasmuch as respondent failed to answer, plead or otherwise appear throughout the course of the proceeding. Id. (436).

In rating a shipment of chemical goods, respondent shipper properly applied Rule 4 of its North Atlantic/Far East Tariff FMC–6, which provides that a correct description of the goods may be arrived at by comparison of the shipper's bill of lading description and the description contained in the shipper's Export Declaration. Such use of the Export Declaration does not constitute an extension of the bill of lading, but operates as a "check and balance" similar to those exercised by the various branches of government under the U.S. Constitution. Such a check and balance is desirable, particularly in an age of containerization; a carrier should not be bound by a shipper's misdescription of the goods in the bill of lading. CSC International, Inc. v. Orient Overseas Container Line, Inc., 465 (471–472).

Complainant's contention that the presiding officer in a reparation proceeding held the bills of lading to be the sole proof of the transaction between the parties, to the exclusion of all other evidence, was rejected. The presiding officer recognized, in making his decision, that even though the bill of lading sets forth the terms and conditions in the contract of affreightment, it is not conclusive as to the description of the goods shipped, and that a shipper who challenges that description may introduce whatever evidence he has to prove his allegations as to what actually moved, even where the bills of lading and other shipping documents were prepared by the shipper or his agent. E.S.B. Inc. v. Moore-McCormack Lines, Inc., 480 (481).

The presiding officer in a reparation proceeding correctly found that complainant shipper had presented insufficient evidence to prove that certain cartons were not only skidded but also externally crated on all sides so as to qualify for a lower freight charge. The bills of lading covering the goods described the packages as "skidded cartons," and made no reference to crates; letters from the goods' packers stating that the cartons were packed in wooden crates made no reference to any records prepared at the time that goods were packed, nor any mention of the date the packaging was done; complainant did not answer the respondent's argument that had the cartons been crated, the measurements on the packing lists and those shown on the packer's letters and the bill of lading could not have been identical, as they were; complainant's packing lists referred to the shipments only as "box," "wood box," and "pallet box"; and no explanation of the reason for the use of any special packaging for the shipment was offered. Accordingly, the shipper failed to meet its heavy burden of proving that respondent carrier had violated section 18(b)(3) of the Shipping Act, 1916, and its claim for reparation was properly denied. Id. (482,489–490).

In a misclassification dispute, where the articles shipped are no longer in the possession of the carrier, the claimant had a heavy burden of proof to establish his claim. In this case claimant was able to prove that a commodity described in the bill of

lading as "Dental Investment Multi-Vest" and rated on the basis of a "Cargo, N.O.S." was a refractory material and should have been rated on the basis of the commodity description, "refractory mixes, plastic and castable." Hoblemann International, Inc. v. Moore-McCormack Lines, Inc., 572 (573, 575–576).

The Export Declaration Schedule B Commodity Numbers established by the United States Customs Service are not the commodity descriptions controlling in a misclassification dispute. What counts is the commodity description and rate on file with the Federal Maritime Commission at the time of shipment. Accordingly, where the claimant had been able to prove that a commodity described in the bill of lading as "Dental Investment Multi-Vest" was a refractory material which had improperly been rated on the basis of a "Cargo, N.O.S.," the claimant was entitled to reparation based on the only commodity description in the applicable tariff closely resembling the shipment ("refractory mixes, plastic or castable") and not on the basis of the Schedule B rate for "fire ground clay." Id. (573–574, 576).

Reparation is awarded on a shipment of food freezers. The carrier had rated the shipment as Food Freezers, Mechanical, N.O.S. The shipper introduced evidence showing that the freezers should have been rated as Food Freezers, Mechanical Household. While the bill of lading had identified the commodity as Electric Commercial Freezers, complainant had corrected the export declaration form to state Electric Household Freezers and had requested correction of the consular invoice to reflect that change. Complainant submitted information from the manufacturer showing the freezers to be household freezers, as well as its order to the manufacturer, which specified freezers identified by the manufacturer as household freezers. Alfred Kubies Western Corp. v. Royal Netherlands Steamship Co., 633 (635).

In a proceeding to recover alleged freight overcharges resulting from the misrating of a shipment as "Tractors and parts N.O.S. packaged," rather than "Tractor parts for assembly purposes (not replacement) packaged," a "special note" offered in lieu of an unavailable packing list provided little in the form of proof as to the nature of the goods shipped. The note was a statement prepared almost two years after the date of shipment, was written on plain white paper, and was signed by an individual purporting to be an "export rate analyst." The note asserted that the shipment consisted of "tractor parts for assembly." No mention was made in the note of whether the individual was at the time of the shipment or was now in the shipper's employ, nor did it state what was the source of the individual's knowledge on the matter. Caterpillar Tractor Co. v. United States Lines, Inc., 673 (674).

In a proceeding to recover alleged freight overcharges resulting from the misrating of a shipment as "Tractors and parts N.O.S. packaged" rather than "Tractor parts for assembly purposes (not replacement) packaged," shipper's invoice sheets submitted to show the nature of the shipment were of little probative value. The only nexus between the invoices and the bill of lading consisted of a handwritten notation number, and, even assuming that the handwritten annotations were made at the time, and reflected the dates the listed items were forwarded to the carrier, there was no indication, nor could it be ascertained on the face of the invoices, that they represented a complete list of what the two containers in the shipment actually held. Id. (674).

In a proceeding to recover freight overcharges resulting from the alleged misrating of a shipment as "Tractors and parts N.O.S. packaged," rather than "Tractor parts for assembly purposes (not replacement) packaged," the fact that the Caterpillar Tractor Co. was the shipper and the bill of lading described the shipment as "Manufacturer's parts for assembly" did not compel the conclusion that the shipment consisted of tractor parts for assembly. The Caterpillar Tractor Co. is not synonymous with tractor, and the

complaint described that company as being engaged in the manufacture of moving equipment not limited to tractors. Id. (674–675).

Where containers were loaded by the shipper and the bill of lading was prepared by the shipper's agent, it was reasonable to presume, in the absence of proof to the contrary, that the agent knew the contents of the containers and properly classified and rated the cargo. Id. (675).

The failure of a respondent in a reparation proceeding to answer does not preclude examination of the proof offered by complainant by the Commission. Thus, complainant's contention that its claim should be treated as being established because respondent did not reply to the complaint was without merit. Id. (675).

The settlement officer, in a reparation proceeding alleging overcharges as the result of the misrating of certain cargo, properly denied reparation. The rating of the cargo had been consistent with the bill of lading and the shipper's agent's description of the cargo. Complainant failed to offer sufficient evidence of misrating. Id. (676).

A shipper was entitled to reparation for overcharges paid in connection with shipments of beads where the shipments had been charged at the rate for beads having value in excess of $1,400 per revenue ton but had actually included some cartons of beads having values below $1,400 per revenue ton, which were subject to lower rate. While the bill of lading covering the shipments did not state the value of the beads shipped, the shipper's claim, based on commercial invoices stating the invoice value of identifiable cartons and certificates and lists of measurement and weight for each group of cartons, was properly computed and adequately substantiated and established the existence of the overcharges alleged. Stanislaus Imports, Inc. v. Sea-Land Service, Inc., 757 (759–760).

A carrier's application for permission to refund a portion of certain freight charges was granted where the shipper's claim of overcharge was clearly valid and where the carrier had stated in its reply that the claim was correct and that it had previously declined to refund the overcharge solely because such action was time barred by its applicable tariff. Bristol-Myers Co. v. Sea-Land Service, Inc., 761 (762–763).

In a reparation proceeding alleging improper designation of cargo value by the carrier, where critical information concerning the disputed shipment is entirely in the possession of the shipper, the Commission has consistently required that the shipper present clear proof that the original shipping documents were in fact erroneous before the carrier will be found to have violated section 18(b)(3) of the Shipping Act, 1916. Accordingly, a shipper's claim for reparation alleging improper valuation of the cargo by the carrier was denied where the carrier's copy of the Export Declaration provided by an agent of the shipper (upon which the valuation of the cargo had allegedly been based) had been misplaced and where the shipper, which based its claim entirely on the value stated in a sales invoice bearing an incomplete date, failed to introduce its copy of the Export Declaration or any other evidence to corroborate or verify the accuracy of the sales invoice or to refute the carrier's assertions. Borden Interamerica, Inc. v. Venezuelan Lines, 777 (778).

— Carrier's six-month tariff rule

The filing of a timely complaint with the Commission effectively overrides any tariff technicality under which an overcharge claim legally may be denied by a water carrier subject to the Commission's jurisdiction during the two-year period for recoving reparation set forth in section 22 of the Shipping Act of 1916. Accordingly, complainant was entitled to a refund of ocean freight charges on a shipment of industrial tires which were in excess of those lawfully applicable at the time of the transportation in violation

of section 18(b)(3) of the Act where the carrier denied the claim solely on the basis of a tariff provision which time bars claims for adjustments of freight charges not received by the carrier within six months after date of shipment. Uniroyal, Inc. v. Hapag-Lloyd Aktiengesellschaft, 1 (2–3).

Complaint for freight overcharges was timely filed with the Commission where it was filed approximately 13 months after the bill of lading date, even though complainant had failed to comply with a provision of the applicable tariff that claims for adjustment be presented to the carrier within six months after the date of shipment. The Commission, in *Colgate Palmolive Company* v. *United Fruit Company* (Informal Docket No. 115(I)), ruled that a claim filed with the Commission within two years from the date the cause of action arose must be considered on its merits. Rohm and Haas Company v. Venezuela Line, 9 (10–11).

Complainant was entitled to a refund of freight overcharges where the merits of its claim were not at issue and carrier had denied the claim solely on the basis of a tariff provision which time bars claims for adjustments of freight charges not received by the carrier within six months after date of shipment. The complaint was filed within two years of the alleged injury and thus was timely filed in accordance with section 22 of the 1916 Shipping Act. Union Carbide Inter-America, Inc. v. Venezuela Line (Cia. Anonima Venezolana de Navegacion), 85 (87).

A claim for reparation which is brought under the 1916 Shipping Act cannot be barred on the merits by a conference rule if the claim is filed with the Commission within two years of its accrual. Union Carbide Inter-America, Inc. v. Venezuelan Line (Cia. Anonima Venezolana de Navegacion), 97 (99).

The Commission has ruled that a claim filed within two years from the date the cause of action arose must be considered on its merits. Accordingly, shipper's claim for reparation was timely filed where the shipment moved on February 28, 1974 and the claim was filed with the Commission on November 11, 1975. The fact that the shipper had failed to comply with a tariff provision requiring that claims be filed with the carrier within six months after the date of shipment was not material. Union Carbide Inter-America, Inc. v. Venezuela Line, 126.

A shipper was entitled to reparation for an overcharge resulting from the application of an admittedly incorrect rate where the shipper filed its complaint for reparation within two years of the carrier's denial of its claim for return of the overcharge and where the shipper's evidence was sufficient to establish the fact and amount of overcharge. The carrier's denial of the shipper's claim had been based, not upon any dispute with the shipper's assertions, but on the ground that its lawfully filed tariff did not permit refunds on claims filed more than six months after the date of shipment; the filing by the shipper of a timely complaint to the Commission effectively eliminated this tariff technicality. National Starch & Chemical Corp. v. Atlantic Container Line. Ltd. 393 (395).

Where a tariff rule provided that "Except for those claims for obvious error in calculation or misapplication of rate or rate basis, all claims of adjustment of freight charges must be presented to the carrier in writing within six months after the date of shipment," the assessment of a rate which differed from that provided by the tariff clearly fell within the exception provided in the tariff rule as it related to "misapplication" of a rate. Caterpillar Overseas, S.A. v. Springbok Line, Ltd., 640 (642-643); Caterpillar Overseas, S.A. v. South African Marine Corp., Ltd., 644 (646-647); Caterpillar Overseas, S.A. v. Springbok Shipping Co., Ltd., 648 (650-651).

In instances where the misapplication of a rate has occurred, and a direct claim to the carrier is time barred by rule contained in the applicable tariff, the shipper's remedy is to file a complaint seeking redress before the Commission within the two-year period

specified by section 22 of the Shipping Act, 1916. Bristol-Myers Co. v. Sea-Land Service, Inc., 761 (763).

—Intended use of cargo

In a misclassification dispute as to whether the carrier had properly refused to classify a cargo under the tariff item for rubber commodities titled "Synthetic (Not Articles or Materials manufactured therefrom)," the claimant's request that the presiding officer's initial decision denying a refund be clarified was granted where the presiding officer apparently based his decision, inter alia, on the intended use of the rubber goods by the ultimate user and on the officer's assessment of the hazards involved in transporting the cargo "into a troubled zone of the world." A more disciplined and logical approach, relying on the settled principle that the final application of a product with several possible end uses is immaterial to the proper classification of the commodities for tariff purposes, was required; following such an approach, an order denying the complaint was issued. Crestline Supply Corporation v. The Concordia Line and Boise-Griffin Steamship Co., Inc., 207 (209, 211, 213).

In a misclassification dispute where the primary factual question was whether a cargo of rubber sheets and tapes had been "manufactured from" synthetic rubber at the time it was shipped, there was no relevance to claimant's evidence aimed at proving that the goods were not "completely finished" in that further processing was required before they could be finally installed in the water conservation equipment for which they were ultimately intended. The final application of a product with several possible end uses is immaterial to the proper classification of commodities for tariff purposes. The applicable freight rate should depend upon the intrinsic nature and market value of the goods themselves, rather than a shipper's representation as to the intended use of goods, as it would be virtually impossible for ocean carriers to ascertain whether each item transported is subsequently put to the use for which it was rated for ocean transportation. Id. (211).

—Interest

A shipper of mine safety hats (described by the shipper as "safety hats," "Topgard hats" and "V-Gard Caps") who was overcharged when the safety hats were rated as "hats" and not as "helmets" by the carrier was not entitled to an award of interest on the amount of the overcharge since the carrier's misclassification was due to a great extent to the shipper's failure to describe its product properly. MSA International v. Chilean Line., 478 (479).

—Misinterpretation of tariff

Application for permission to waive collection of a portion of freight charges is denied where both the consignor and his forwarder shipped the cargo without first checking the rate. Misinterpretation of a tariff is not subject to rectification under P. L. 90–298, and the failure of a consignor or forwarder to check a rate prior to shipment is not the kind of circumstance for which section 18(b)(3) of the 1916 Shipping Act affords relief. Homasote Co. v. United States Lines, Inc. 89 (91).

—Negotiated rates

Waiver of collection of a portion of freight charges will be permitted where the carrier

failed to file the negotiated rate in its tariffs. There was an error due to inadvertence in the failure to file the rate. *Commodity Credit Corporation v. Surinam Navigation Co.*, Ltd. 65 (68).

Permission to waive collection of a portion of freight charges arising from the shipment of goods to Spain is granted where, through inadvertence, the tariff publishing officer instructed publication of the agreed upon rate to other ports instead of Spanish ports. This is the type of error that can be remedied pursuant to section 18(b)(3) of the 1916 Shipping Act. The Buckeye Cellulose Corp. v. Sea-Land Service, Inc., 170 (173).

Application to waive a portion of freight charges is granted where, through oversight, the agreed upon rate was not published before the sailing on which the cargo was carried. The carrier's tariff publishing officer was unaware that the rate was to be published on the day it was received, but had followed the usual practice of posting the rate for the following sailing. This type of error was quite clearly an administrative oversight of the kind contemplated by section 18(b)(3) of the 1916 Shipping Act. Wyandot Exporting Co. v. Sea-Land Service, Inc., 178 (181).

The inadvertent clerical omission of agreed freight rates from a carrier's tariff, which was compounded by a second error, the insertion of an inaccurate freight rate in place of the agreed rate upon discovery of the original omission, constituted an error permitting waiver of collection of freight charges within the contemplation of section 18(b)(3) of the Act. Raytheon Co., Inc. v. Sea-Land Service, Inc., 343 (344-346).

The inadvertent clerical omission of agreed freight rates from a carrier's tariff, which was compounded when, upon discovering the omission, the clerk inserted an inaccurate freight rate in place of the agreed rate, constituted an error permitting waiver of collection of freight charges within the contemplation of section 18(b)(3) of the Act. Raytheon Co., Inc. v. Sea-Land Service, Inc., 347 (348-350).

Where due to a clerical error the carrier had failed to file a special rate for shipments of caustic soda weighing a minimum of 599 tons per vessel as had been promised to the shipper, the carrier was permitted to waive collection from the shipper of a portion of freight charges on a shipment of the subject commodity. A waiver of collection of a portion of the freight charges would not result in discrimination among shippers; prior to applying for the waiver, the carrier had filed a new tariff which set forth the rate on which the waiver would be based; and the waiver application had been filed within 180 days from the date of shipment. Dow Chemical International, Inc. v. Far Eastern Shipping Co., 604 (605–607).

Application to waive collection of a portion of freight charges is granted where the agreed upon rate of $210.00 W/M minimum weight 22.5 measurement tons was incorrectly transcribed as $210 W/M minimum weight 25 measurement tons. The carrier had stated that the transmittal of the incorrect minimum weight was due to clerical error. This is the type of administrative or clerical error within the intended scope of coverage of section 18(b)(3) of the 1916 Shipping Act. Footner and Co., Inc. v. Sea-Land Service, Inc., 718 (719).

Application to waive collection of a portion of freight charges is granted where, through clerical error, the agreed upon rate was erroneously symbolized as an increase effective on full statutory notice of 30 days, whereas it should have carried a teardrop of (R) reduction symbol, which would have permitted it to be in effect at the time of the shipments in question some two weeks later. This type of clerical error is within the intended scope of section 18(b)(3) of the 1916 Shipping Act. Kuhne & Nagel v. Sea-Land Service, Inc., 725 (729).

Permission was granted to waive collection of a portion of the freight charges assessed by a carrier in connection with the shipment of an automobile where, due to poor

communications and a lack of understanding of the Commission's regulations by a foreign agent of the carrier, an agreed lump sum rate for the shipment was not transmitted to the carrier's office in New York until after the shipment had been completed, which resulted in an overcharge. The carrier's error was an "error due to inadvertence in failing to file a new tariff" within the meaning of section 18(b)(3) of the Shipping Act, 1916; waiver would not result in discrimination among shippers; the carrier had filed a new tariff setting forth the agreed rate prior to applying for authority to waive collection; and the carrier's application had been filed within 180 days from the date of shipment. The Permanent Mission of the Socialist Republic of Romania v. Prudential Lines, 731 (733).

A carrier was granted permission to waive collection of a portion of freight charges assessed in connection with a shipment of empty metal shipping containers where, after agreeing with the shipper on a rate per weight ton to cover the shipment, the carrier's Oakland office mistakenly transmitted to a second office a weight or measurement option for the rate, which error was carried forward to the actual publication of the rate tariff, resulting in an overcharge. The carrier's transmission error was "an error in a tariff of a clerical or administrative nature" within the meaning of section 18(b)(3) of the Shipping Act, 1916; waiver of collection would not result in discrimination among shippers; the carrier had filed a corrected tariff prior to applying for permission to waive collection; and the application for permission to waive was filed within 180 days from the date of the subject shipment. Ford Motor Co. v. Sea-Land Service, Inc., 741 (743–744).

A carrier was permitted to waive collection of freight charges assessed in connection with a shipment of Gilsonite where the carrier had erroneously caused the rate agreed upon with the shipper to expire prematurely, and had then failed, due to oversight, to extend the rate and apply it to the shipment involved, causing an overcharge. The carrier's clerical and administrative errors were of the type within the intended coverage of section 18(b)(3) of the Shipping Act, 1916 and section 502.92 of the Commission's Rules of Practice and Procedure; waiver of collection would not result in discrimination among shippers; the carrier had filed a new tariff setting forth the rate on which its application for permission to waive collection was based prior to filing the application; and the application was filed within 180 days from the date of the shipment involved. American Gilsonite Co., Inc. v. Lykes Bros. Steamship Co., Inc., 747 (748–749).

Where due to clerical error the carrier's tariff agent had failed to file a reduced rate as had been promised the shipper, the carrier would be permitted to waive collection from the shipper of a portion of the freight charges on cargo it had transported under a higher tariff rate. A waiver of collection of a portion of the freight charges would not result in discrimination among shippers; prior to applying for authority to waive collection of the freight charges, the carrier had filed a new tariff which set forth the rate on which the waiver would be based; and the waiver application had been filed within 180 days from the date of the subject shipment. P.C. International, Inc. v. Sea-Land Service, Inc., 766 (767–769).

The Commission's settlement officer was required to consider on its merits a timely filed reparation claim, despite the fact that the claim had already been settled between the parties by payment in full of the reparation sought. White-Westinghouse Int'l. Co. for N. V. Technische Handelmaatschappiz v. Sea-Land Service, Inc., 770.

A reparation proceeding involving an overcharge of freight charges assessed in connection with a shipment of refrigerators was dismissed upon findings by the settlement officer that respondent carrier had concurred in and had paid in full the

amount of the reparation sought, and that the validity of the shipper's claim was adequately established by the pertinent documentation. *Id.* (771–772).

Where due to clerical error the carrier had failed to file a special reduced rate as had been promised the shipper, the carrier would be permitted to waive collection from the shipper of a portion of the freight charges assessable on cargo it had transported under a higher general tariff rate. A waiver of collection of a portion of the freight charges would not result in discrimination among shippers; prior to applying for authority to waive collection of the freight charges, the carrier had filed a new tariff which set forth the rate on which the waiver would be based; and the waiver application had been filed within 180 days from the date of the subject shipment. Universal Nolin UMC Industries, Inc. v. Sea-Land Service, Inc., 779 (781-782).

Where due to an administrative error the carrier had failed to except a certain rate, which it had promised the shipper, from a general rate increase, the carrier would be permitted to refund to the consignee, who bore the cost of transportation, a portion of the freight charges on one shipment of the subject commodity and to waive collection from the consignee of a portion of the freight charges on three other shipments of the commodity. A refund or waiver of collection would not result in discrimination among shippers; prior to applying for authority to refund or waive collection of a portion of the freight charges, the carrier had filed a new tariff which set forth the rate upon which the refund and waivers would be based; and the refund and waiver applications had been filed within 180 days from the date of the subject shipment. Toei Kogyo Co. Ltd. v. Sea-Land Service, Inc., 783 (784–786).

Carrier's application for permission to waive collection of freight charges was granted where the carrier, after agreeing with shipper to maintain a special rate beyond its scheduled expiration date to the end of the year, failed due to administrative error to except the special rate from a general increase in the applicable tariff which had been in process at the time of the carrier's agreement with the shipper and which went into effect prior to the agreed expiration date of the special rate, causing an overcharge. The carrier's error was "an error in a tariff of a clerical or administrative nature" within the meaning of section 18(b)(3) of the Shipping Act, 1916, and section 502.92 of the Commission's Rules of Practice and Procedure, and the carrier's application complied in all respects with the requirements specified in the Act. Brunswick Corp. v. Sea-Land Service, Inc., 801 (803–804).

Application to waive collection of a portion of freight charges is granted where the negotiated rate was incorrectly named to Lisbon, Portugal, instead of Bilbao, Spain. The naming of the rate to the wrong port was due to clerical and administrative error. Carriers are authorized to make voluntary refunds and waive collection of a portion of freight charges for good cause such as bona fide mistake. Smith & Johnson (Shipping), Inc. v. Sea-Land Service, Inc., 805 (808).

Application to waive collection of a portion of freight charges is granted where a confirming teletype requesting publication and the effective date of the agreed-upon rate went astray in transmittal between the carrier's sales agent and its tariff publication department. As a result, the required tariff publication was not made. Thus, there was an error due to inadvertence in the failure to file the tariff. Union Carbide Corp. v. Sea-Land Service, Inc., 809 (812).

—Port equalization

A carrier was not permitted to charge the consignee the entire cost of ground transportation of the cargo from Oakland (the port of its actual discharge) to a

destination point designated by the consignee but was permitted to collect an amount equal to the cost of drayage from San Francisco (the port of discharge named in the bill of lading) to the designated destination point, where a rule in the applicable tariff provided that when cargo is discharged at a port other than that named in the bill of lading and is then transported by the carrier to a destination point designated by the consignee, the consignee remains responsible for the cost which it normally would have incurred to move the cargo to its point of destination had the cargo been discharged at the port named in the bill of lading. There was no merit to the carrier's contention that the tariff rule was not applicable since Oakland and San Francisco are "Bay area ports." Konwal Co., Inc. v. Orient Overseas Container Line, 58 (59–60).

A shipper was able to establish with sufficient clarity that the port of discharge named in certain bills of lading was San Francisco and not Oakland (where the cargo had actually been discharged), notwithstanding that the shipper was not able to produce the bills of lading but only invoices which indicated Oakland as the port of discharge. It is a common steamship practice to identify bills of lading by port of loading and port of discharge, and the invoices in question, in referring to the bills of lading, contained the annotation "B/L HK-SF." In addition, the carrier failed either to deny that San Francisco was the bill of lading port or to provide copies of the bills of lading, but merely asserted that the shipper's proof was insufficient. This characterization of the shipper's proof did not constitute a sufficient denial of material facts alleged in the complaint for purposes of complying with Rule 5(d) of the Commission's Rules of Practice and Procedure which provides that material facts in a complaint will be taken as admitted unless specifically denied. Accordingly, the shipper was entitled to a refund of the cost of transporting the cargo by truck from Oakland to San Francisco under a tariff rule which provided that, if a cargo is not delivered to the port of discharge named in the bill of lading, the carrier is obligated to pay the cost of transporting the cargo from the actual port of discharge to the port of discharge named in the bill of lading. F. Powers Co., Inc. v. Orient Overseas Container Lines, 219 (219–221).

Where a carrier discharged goods destined for the port of San Francisco at its port of delivery at Oakland and moved the goods overland truck collect to the port of discharge shown on the bill of lading, the shipper was entitled to reparation in the amount of its "port equalization" claims (based on the excess of the trucking rates from Oakland to San Francisco over the drayage rates within San Francisco, which the shipper would have had to pay in any case). Rule 28 of the carrier's Hong Kong Eastbound Pacific Coast Tariff No. 1 (FMC–1) provided that a carrier discharging cargo at a point other than that specified in the bill of lading could arrange for movement of the goods, at its own expense, to that designated by the consignee of the goods; since such movement had been undertaken at the expense of the shipper, the carrier was liable for the overcharge under section 18(b)(3) of the Shipping Act, 1916. Vandor Imports v. Orient Overseas Container Lines, 396 (397–398).

— *Settlements*

Where a shipper's claim for refund of overcharges was denied by the carrier on the ground that it was not timely filed under the applicable tariff, and the shipper thereupon brought a complaint for reparation before the Commission, whereupon the carrier offered to pay the shipper's claim and requested that the settlement officer discontinue the docket, the request for discontinuance could not be granted prior to determining the merits without placing the carrier in violation of its governing tariff and the Commission's statutes. Accordingly, in order to prevent the carrier from being charged with a

violation of section 18(b)(3) of the Shipping Act, 1916, as amended, the requested reparation was granted on a finding that the shipper proved its case. SCM Corp. v. Seatrain International, S.A. and Seatrain U.K., Ltd., 417 (418–419).

The Commission could not ratify the presiding officer's approval of a settlement agreement entered in a proceeding on a claim for reparation on an alleged freight overcharge where a violation of section 18(b)(3) of the Shipping Act of 1916 had not been established by the presiding officer and where respondents had specifically advised the Commission that the settlement was not to be construed as an admission of any violation on their part. An agreement to settle a claim for reparation based on an allegation of a violation of section 18(b)(3) can be approved only on an affirmative finding that such violation occurred. The Federal Minister of Defense, Federal Republic of Germany v. Republic International Forwarding Company and Republic Van and Storage of Los Angeles, Inc., 569 (570).

A presiding officer's ruling dismissing a proceeding on a claim for reparation for an alleged freight overcharge was vacated and remanded for whatever action the officer and the parties deemed warranted where the dismissal had been premised on the Commission's approval of a settlement agreement between the parties which did not contain a finding of a violation of section 18(b)(3) and which the Commission was thus without authority to approve. Id. (570).

The fact that the law and Commission rules encourage settlements and engage in every presumption that such settlements are valid and lawful does not mean that the Commission must act as a rubber stamp in evaluating settlements, especially when the settlements themselves require approval under section 15 of the 1916 Shipping Act. Refrigerated Express Lines (A/ASIA) Pty. Ltd. v. Columbus Lines, 581 (582, 584).

Complaint alleging improper eviction of vessel to permit berthing of respondent's vessel, and that respondent's vessel caused a break in the bus bar conductor system which had the effect of precluding the movement of container cranes at another terminal, with the result that complainant could not utilize dockside space at that terminal, is dismissed with prejudice. The parties had entered into a statement of satisfaction and settlement whereby respondent had agreed to pay complainant $10,000 in satisfaction of the alleged claims upon dismissal of the complaint with prejudice. Sea-Land Service, Inc. v. The City of Anchorage, Alaska and Totem Ocean Trailer Express, Inc., 617.

Complaint seeking refund of overcharge is dismissed where the claim at issue had been properly settled subsequent to the filing of the docket with the Commission. There was no tariff or regulatory provision which barred the parties from informally taking such action. Caterpillar Overseas, S.A. v. Springbok Line, Ltd., 640 (643); Caterpillar Overseas, S.A. v. South African Marine Corp., Ltd., 644 (647); Caterpillar Overseas, S.A. v. Springbok Shipping Co., Ltd., 648 (651).

While in ordinary circumstances a carrier could be admonished for taking unilateral action in settling a claim for overcharges while a proceeding was before the Commission relating to the claim, and thereby prejudging the decision that might be rendered, the settlement officer finds, from a regulatory standpoint, that the conference tariff did not prohibit an informal settlement of the rate issue and there was, therefore, no legal necessity to bring the matter before the Commission for decision. This position is based upon the fact that an informal settlement of the claims was not time barred by Rule 16 of the tariff as the carrier apparently believed. A careful review of the applicable rule revealed that it did not extend to errors involving the mere misapplication of a rate, which was the issue in the docket. Id. (642); (647); (650).

It is preferable that a settlement officer who dismisses a claim for reparation for alleged overcharges, on the grounds that the claim has been paid in full, make specific

findings in the order of dismissal on the question of whether settlement by payment results in payment of applicable tariff rates under section 18(b)(3) of the 1916 Shipping Act. While settlement of litigation is to be encouraged, it is the Commission's responsibility to assure that such settlements in matters involving section 18(b)(3) do not result in payment of charges for transportation which would not otherwise be permitted. To do otherwise could result in use of the Commission's offices to gain approval of inapplicable rate. Soko Hardware v. Y. S. Lines, 708.

A complaint alleging that the carrier had refused to honor an otherwise legitimate overcharge claim was dismissed, and the proceeding initiated thereby, discontinued where complainant advised the settlement officer that it had received a refund check from the carrier as full settlement of the overcharge claim and where a review of the complaint, support documentation and the involved tariff confirmed the complainant's overcharge allegation and justified the carrier's refund action. GTE International, Inc. v. Atlantic Lines, Ltd., 764 (765).

Shipper's complaint seeking reparation for freight overcharges was dismissed and the reparation proceeding discontinued where respondent carrier, which had concurred in the shipper's claim but had been unable to refund the charges on the ground that the shipper's direct claim to the carrier was time barred by the applicable tariff, had sent the shipper a check in full payment of the claim, and where an analysis of the complaint and supporting documentation and of validity of the shipper's claim and, consequently, the propriety of the carrier's refund. National Starch & Chemical Corp. v. Sea-Land Service, Inc., 799 (800).

— ***Statute of limitations***

Authority to refund a portion of freight charges is denied where the carrier failed to file with the Commission a tariff setting forth the rate upon which the refund would be based within 180 days from the shipment. Airflex Industries Reliable Cargo Shipping A/C v. Lykes Bros. S/S Co., Inc., 16 (17).

Complainant shipper whose application for a refund of a portion of freight charges was denied because of the carrier's failure to file with the Commission a tariff setting forth the rate upon which the refund would be based within 180 days from the date of the shipment was not precluded from filing a complaint under section 22 of the Act, alleging violation of any section of the Act, such as sections 16 or 17, and asking reparation for any injury caused by such alleged violation. Id. (17).

Authority to refund a portion of freight charges is denied where the carrier failed to file with the Commission a tariff setting forth the rate upon which the refund would be based within 180 days from the shipment. Perkins-Goodwin Co., Inc. v. Lykes Bros. Steamship Co., Inc., 21 (22).

Complainant shipper whose application for a refund of a portion of freight charges was denied because of the carrier's failure to file with the Commission a tariff setting forth the rate upon which the refund would be based within 180 days from the date of the shipment was not precluded from filing a complaint under section 22 of the Act, alleging violation of any section of the Act, such as sections 16 or 17, and asking reparation for any injury caused by such alleged violation. Id. (22).

Pursuant to the Commission's formal complaint procedures (46 CFR § 505.62) and informal docket procedures (46 CFR § 502-301 et seq.), a claim for reparation on overcharges of ocean freight may be filed within two years from the date of the accrual of a cause of action. Homasote Co. v. United States Lines, Inc., 89.

Complaint seeking reparation of freight overcharges was timely filed when filed on the

Monday after Sunday, the last day of the two-year limitation period. The Commission's offices were also closed on the preceding Saturday. Dismissal of the complaint for late filing would have caused undue hardship. Therefore, the Commission, in its discretion, waived pursuant to Rule 1(j) the exception of Rule 5(c) contained in Rule 7(a), so that by making Rule 7(a) applicable to the computation of the two-year limitations period, the filing of the complaint was timely. CSC International, Inc. v. Waterman Steamship Corp., 332 (333).

The only reference in the Commission's rules to the computation of the two-year statutory period is found in Rule 7(a) which by express terms makes that method of computing time inapplicable to filings under Rule 5(c), such as, complaints seeking reparation under section 22 of the 1916 Shipping Act. The Commission, however, has reserved the right in Rule 1(j) to waive all but one of its rules provided such waiver is not inconsistent with any statute and is warranted to prevent manifest injustice or undue hardship. Id. (333).

A tariff provision such as one requiring that a claim for adjustment of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carrier in writing before the shipment involved leaves the custody of the carrier, cannot be used to defeat a claim for reparation which was otherwise properly filed within the two-year statute of limitation period. Properly filed claims must be considered on the merits. Kraft Foods v. Moore-McCormack Lines, Inc., 407 (409).

An overcharge complaint relating to shipments delivered on November 12, 1973, which complaint was filed on November 12, 1975, was not filed within the two-year statutory period provided in section 22 of the Shipping Act, 1916, and was accordingly dismissed as untimely. The last day on which the action could have been brought was November 11, 1975; and as the Commission's offices were open for business on that day, no undue hardship permitting waiver of the timeliness requirement was found to exist. Commercial Solvents Corporation International, Inc. v. Moore-McCormack Lines, Inc., 424 (425).

An overcharge complaint relating to a shipment delivered on November 9, 1973, which complaint was filed on November 12, 1975, was not filed within the two-year statutory period provided by section 22 of the Shipping Act, 1916, and was accordingly dismissed as untimely. The last day on which the complaint could have been timely filed was November 8, 1975; however, as that day was a Saturday, and the Commission's offices were closed, the complainant would have been permitted to file its complaint through Monday, November 10. Rejection of the complaint at any time thereafter did not constitute an unfair hardship warranting the issuance of a waiver of the timeliness requirement. Id. (425).

Claims for reparation filed on December 29, 1975, which related to shipments shipped (according to their bills of lading) on December 21, 1973 and January 28, 1974 and on which freight charges were collected, respectively, on July 2, 1974 and April 2, 1974, were filed within the two-year statutory period provided in section 22 of the Shipping Act, 1916. A cause of action based upon a claim for reparation accrues at the time of shipment or at the time of payment of freight charges, whichever is later; in the instant case the payment of freight charges occurred later than the time of shipment, and the cause of action accrued at the time of collection. CSC International, Inc. v. Orient Overseas Container Line, Inc., 465 (470).

A cause of action on a claim for reparation for freight overcharges accrues at the time of shipment or payment of the freight whichever is later. Hobelmann International, Inc. v. Moore-McCormack Lines, Inc., 572 (574).

In accordance with the requirement of section 22 of the Shipping Act of 1916 that complaints must be filed within two years from the time the cause of action accrues in order for an award of reparation to be entered, a misclassification claim was timely filed where it was filed within two years of the payment of the freight, notwithstanding that a request for an adjustment based on the alleged error in description had not been presented to the carrier in writing before the shipment left the carrier's custody. Id. (574).

— Tariff designations; ambiguity

Where the bill of lading described the commodity as being in "bags" and this description was found in the carrier's tariff, carrier was not permitted to submit additional billing based on a higher tariff for the commodity "in other packaging." In *United States* v. *Gulf Refining Company*, 268 US 542 (1925), it was held that, when a commodity shipped is included in more than one tariff designation, that which is more specific will be held applicable; and, where two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rate. Union Carbide Inter-America, Inc. v. Venezuelan Line, 166 (169).

In a misclassification dispute where the shipper claimed that a cargo of rubber sheets and tapes should have been classified under the tariff item for rubber commodities titled "Synthetic (Not Articles or Materials manufactured therefrom)," there was no merit to the shipper's contention that the carrier's tariff was ambiguous inasmuch as all synthetic rubber is manufactured from petroleum products and other chemicals. Other than "Rubber, Synthetic" and "Rubber, Crude or Raw," all rubber categories in the tariff described specific products or groups of products; and the item in question was sufficiently clear as published to advise synthetic rubber experts and laymen alike that butyl bales or other unprocessed, unvulcanized forms of synthetic rubber were the only types of goods entitled to the "Rubber, Synthetic" rate. Crestline Supply Corporation v. The Concordia Line and Boise-Griffin Steamship Co., Inc., 207 (212).

Where the provisions of a conference tariff relating to the assessment of handling charges on certain containers tendered at the carriers' container yards was ambiguous as to whether such charges were applicable to tenders made at yards within terminal dock areas, the ambiguity would be resolved in favor of the shippers. Thus, reparation was awarded to shippers which had tendered containers to container yards within terminal dock areas. It appeared that the conference intended to assess a handling charge on some containers and not others, and, in view of the fact that some carriers maintained container yards within their terminal dock facilities while others did not, the fair construction of the tariff would be that a handling charge could properly be assessed on containers tendered at container yards not within the terminal dock area. It would be expected, all other things being equal, that the costs incurred by carriers maintaining container yards outside their terminal dock areas would be greater. Thus, it would not have been unreasonable for cargo tendered at a container yard within a terminal dock area not be assessed such a charge. Dow Chemical International, Inc. v. American President Lines, Ltd., 531 (540–541).

— Trade name rules

Trade name rules (items of carriers' tariffs which prohibit the use for commodity rating purposes of bills of lading describing goods by trade name) govern only the rating of cargo by the carrier at the time of shipment and cannot be invoked as a bar to a later showing in a proper proceeding before the Commission as to the exact nature of the

commodity shipped. The trade name rule only governs the rating of cargo based on description in the bill of lading. Accordingly, in a Commission proceeding seeking refund of an alleged overcharge, a shipper was entitled to show that the goods shipped, which were described in the bill of lading as "raw drugs," consisted of Cerelose power, a trade name for dextrose, and should therefore have been shipped at the rate for "dextrose" and not at the higher "harmless drugs" rate. Abbott Laboratories v. Venezuelan Line, 426 (428).

Tariff rule requiring the application of a cargo N.O.S. rate where a bill of lading describes articles by trade names can only be invoked when an article is described on the bill of lading by trade name. In any event, claims cannot be defeated by simply reference to the rule but must be determined on the basis of the evidence as to the true nature of the cargo. If the evidence shows that a more specific tariff item fits the commodity shipped, claimant is entitled to be rated under that item. Carborundum Co. v. Royal Netherlands Steamship Co. (Antilles) N.V., 431 (434–435).

SECTION 19 REGULATIONS

Regulations to adjust or meet conditions unfavorable to shipping in U.S. foreign trade are amended to make it clear that Commission action under the regulations is discretionary; to indicate that the Commission was not concerned with mere differences in treatment of the vessels in U.S. foreign trade but is concerned with the effect those differences in treatments have upon U.S. foreign trade; to make it clear that the regulations apply to the acts of foreign governments or foreign owners, operators, agents, or masters; to indicate that the Commission is not limiting the application of the section dealing with who may file petitions for section 19 relief by specifically naming some of the persons who may file; to give foreign countries notice that the Commission will notify the Secretary of State when conditions unfavorable to shipping in the U.S. foreign trade apparently exist and that it may request that he seek resolution of the matter through diplomatic channels. Section 19 Regulations, 13 (14).

Regulation requiring the Commission to find conditions unfavorable to shipping in the U.S. foreign trade, when there was a failure to produce any information ordered by the Commission to be produced, is amended to make such action by the Commission discretionary. Id. (15).

Regulations promulgated to meet conditions unfavorable to shipping in U.S. foreign trade are not to be construed in any way whatsoever as a substitute vehicle by which agreements approved under section 15 of the 1916 Act might be contested. Likewise the new rules are not intended in any way to replace, modify, or limit the traditional criteria considered in connection with applications under section 15. Id. (15).

SECURITY FOR THE PROTECTION OF THE PUBLIC

Since respondents were not the owners, operators or charterers of the vessels involved in the case, they did not violate section 2 of Public Law 89–777 which provides that each owner or charterer of an American or foreign vessel having berth accommodations for fifty or more passengers, and embarking passengers at U.S. ports, shall establish, under Commission regulations, his financial responsibility to meet any liability he may incur for death or injury to passengers or other persons on voyages to or from U.S. ports. Windjammer Cruises, Inc. and Windjammer Cruises, Ltd., 112 (122).

In boarding passengers for a cruise on a vessel at Mayaguez, P.R., respondent violated both section 3 of Public Law 89–777 and the implementing regulations, in that it did, in the United States, arrange, offer and sell passage to 29 passengers on a vessel

having berth or stateroom accommodations for 50 or more passengers, embarking passengers at a U.S. port, without there first having been filed with the Commission such information as the Commission deemed necessary to establish respondent's financial responsibility or other security for indemnification of passengers for nonperformance of transportation and without there being in force and effect a Certificate (Performance) issued to or covering respondent. The law makes no exception for single occurrences. Id. (122–123).

The language of P.L. 89–777 is clear and unambiguous, and leaves no doubt that its provisions apply to all vessels which embark passengers at U.S. ports and which have stateroom accommodations for 50 or more persons even if the operations of the vessel otherwise fall within the jurisdiction of the ICC. The legislative history shows the intent of Congress to protect passengers from default by any passenger vessel and to avoid evasions of law. American Cruise Lines, Inc., 420 (422).

SURCHARGES

The Commission promulgates a regulation to provide nonexclusive procedure by which a conference of carriers operating in U.S. foreign commerce and under an approved dual rate (system) may justify and impose uniformly applied currency surcharges on all rates within the scope of its dual rate contract on less than 90-day notice when necessary because of depreciation of the conference's tariff currency. Currency Adjustment Surcharges, 4.

The computation and justification for currency adjustment surcharges by a conference is founded on a calculation of "major operating currencies" and the percentage of expenses incurred by a conference and its members in those currencies. The percentage of expenses information is to be maintained up to date by the conferences, and those figures submitted to the Commission on a quarterly basis. Id. (5).

Currency surcharges imposed must be removed or reduced when the tariff currency appreciates in relating to other major operating currencies. Id. (6).

A conference may select its own base date to compare relative currency values in connection with imposition of a currency adjustment surcharge. The date must be specified in the conference dual rate contract. No base date may be chosen which antedates the day on which the amended contract is submitted to the Commission for approval. Id. (6).

Currency adjustment surcharges imposed by a conference may be made applicable to the conference trade as a whole or to particular trades or segments of trades covered by the terms of the dual rate contract and the tariff of the conference involved. Id. (6).

Any currency adjustment surcharge imposed by a conference must be kept completely separate from the general rate structure of the conference. Id. (7).

A currency adjustment surcharge imposed by a conference shall take place in increments of two percent or more. Id. (7).

TARIFF CIRCULAR NO. 3: See Rates

TARIFFS

Where an ambiguity exists in a tariff, then the tariff must be construed in such a manner so as to resolve the ambiguity in favor of the shipper. Moreover, the Commission has long recognized that tariff terms should be interpreted reasonably. United States Lines, Inc., 100 (102).

If an ICC regulated carrier and a section 1 water carrier offer a through international

service, they must file a tariff listing their through rate and their respective rate "divisions" or "portions." Austasia Container Express, 512 (519).

Inasmuch as respondent is a common carrier by water in foreign commerce within the meaning of section 1 of the 1916 Shipping Act, it must file a tariff which fully complies with Part 536 of the Commission's Rules. Id. (521).

Complainant shipper in a reparation proceeding alleging that it should not have been assessed handling charges on certain containers pursuant to conference tariff, which had admitted that such charge was proper pursuant to the tariff on containers tendered to carriers at their container yards, was not estopped from asserting that tender at container yards within the carrier's terminal dock area was tender at the docks within the meaning of the tariff. Dow Chemical International, Inc. v. American President Lines, Ltd., 531 (538).

Proceeding to determine the legality under sections 16, 17 and 18(b) of the 1916 Shipping Act as amended "consolidation allowance" provisions contained in tariffs is discontinued. The amended rules had been replaced under court order by the original rules to the satisfaction of all affected interests. The order of investigation referred only to the amended rules and did not cover a broad study of consolidation rules in general. The Commission takes no position at this time as to merits of issues alleged by Hearing Counsel to have survived the cancellation of the amended rules. Consolidation Allowance Rules, 735 (736–738).

Tariffs of 35 nonvessel operating common carriers are cancelled in view of the fact that they do not actively solicit or provide common carrier services. It is misleading to the public, potentially unfair to competing carriers, and an administrative burden on the staff, for "paper" tariffs to be kept on file for possible use if it should suit the narrow purposes of the persons issuing them to quickly enter the trade, but otherwise describing a nonexistent service. Such a situation contravenes the implicit requirements of sections 18(b)(1) through (3) of the Shipping Act, which necessitate the prompt submission of accurate information concerning the services offered by a common carrier, including the suspension of all or any part of the operations described by its published tariff. Publication of Inactive Tariffs by Independent Carriers in the Foreign Commerce of the United States, 774 (775).

A transshipment tariff was cancelled on the date notice of cancellation was received by the Commission, not on the prior date when the Commission received notice of the cancellation of the underlying transshipment agreement. The Commission's rules do not provide for the automatic cancellation of transshipment tariffs on receipt of notice that an underlying transshipment agreement has been cancelled. As long as the tariff did not include an amendment or provision which purported to cancel it, the tariff contained the only legal rates the carrier could have charged for the transshipment service covered by that tariff, even though the actual provision of such service would have violated section 15 of the Shipping Act. States Steamship Co., Far East/USA Household Goods Tariff No. 2, FMC-9, 793 (796–797).

A tariff has one major purpose—to prevent rebates and other types of unjust discrimination by publicly stating the rates to be charged all eligible shippers. Tariff filings are neither adjudicatory matters nor finally determinative of individual rights or privileges. Once accepted by the Commission, a tariff must be adhered to by the publishing carrier and shipper alike. To retroactively declare a duly accepted tariff void for noncompliance with the Commission rule which requires that a permanent tariff modification (here, cancellation of a tariff) be filed within 15 days of receipt of a temporary amendment would contravene the regulatory scheme established by most federal common carrier statutes, including the Shipping Act. Id. (797).

A tariff notice was effective on receipt by the Commission where it did not increase rates, but eliminated the services altogether. Id. (797).

The Commission's Rules do not indicate how or when a tariff submission is "accepted for filing," but provide for the rejection of tariff matter in certain instances. It is generally assumed that a tariff which is not rejected by the close of business on its stated effective date has been accepted for filing. Where there is an after hours telex filing, a "rule of reason" applies. If the tariff submission is in proper form it is accepted retroactively. If significant errors exist, then the tariff is rejected as expeditiously as possible on the theory that it was never accepted and not on the theory that it was void *ab initio*. Id. (797).

TERMINAL LEASES

Terminal lease agreement between the City of Anchorage and Sea-Land Service, Inc., providing for a shift of Sea-Land's preferential berth from Terminal 1 to Terminal 2 on February 1, 1976 will not be temporarily approved. Severe icing occurs at Anchorage, and there is the real possibility that Totem's vessel could be damaged because of the mooring and weather conditions. Totem will not berth at Terminals 2 and 3 during the severe icing conditions because of the risk to the vessel and her crew. If Totem cannot use POL-Terminal 1, even on a first-come-first-served basis, it may be forced to leave the trade, at least temporarily. Totem's refusal to use Terminals 2 and 3 is reasonable. Continuation of Totem's service to Anchorage is in the public interest and should be maintained if possible. Continued use of Terminal 1 by Sea-Land in a preferential basis is contrary to the public interest in violation of section 15 of the 1916 Act, in that there is a real possibility that it will serve to effectively preclude Totem from offering a competitive service during severe icing conditions. Therefore, the presently approved agreement between the City and Sea-Land which gives Sea-Land preferential berthing rights at Terminal 1 will be disapproved effective February 5, 1976, unless the parties, prior to that date, amend the agreement to provide that effective February 5, 1976, such preferential berthing rights shall not apply during the months of February through April 1976. Agreement Nos. T–1685, as Amended and T–1685–6: Between the City of Anchorage and Sea-Land Service, Inc., 69 (79–80).

Agreements providing for preferential berthing rights at Anchorage, Alaska, are ambiguous in that no agreement between the parties exist as to what charges can be paid once the preferential calls provided in the agreements are exceeded. As long as the ambiguity exists the agreements are contrary to the public interest and cannot be approved. Therefore, before approval can be accorded to the agreements, the parties must modify them to clarify the ambiguity. Agreement No. T–1685, as Amended, and T–1685–6: Between the City of Anchorage and Sea-Land Service, Inc., 440 (445).

Agreements giving carriers preferential berthing rights at Anchorage, Alaska, are contrary to the public interest and not approvable unless modified to ensure that another carrier has sufficient terminal space available for cement discharging operations. Id. (446).

The critical determination with respect to the approvability of preferential berthing agreements at Anchorage, Alaska, is whether they are unjustly discriminatory or unfair as between carriers, exporters or importers, or operate to the detriment of the commerce of the United States, or are contrary to the public interest, or are otherwise in violation of the Shipping Act. While admittedly, both agreements will result in certain delays and disruption of operations of other carriers, overall, these delays and disruptions will be minimal and certainly not of such magnitude as to preclude approval. Commission

consideration of both agreements must take into account the public interest factor, as it exists at the time of approval; however, the fact that the only carrier vigorously opposing approval will have significantly less dependency upon the Anchorage docking facilities once the oil pipeline is completed cannot be ignored. The record will not support a finding that either agreement, as modified, is contrary to the public interest. Id. (450–451).

Agreement between Anchorage and a carrier, providing for construction by and use by the carrier of trestles, was part and parcel of an agreement between the parties giving the carrier preferential berthing rights at Anchorage, and the construction and use of the trestles prior to approval of the berthing agreement was a clear violation of section 15 of the Shipping Act. The construction and preferential use of the trestles was described with sufficient particularity to include it within the berthing agreement. That agreement was replete with references to the trestles and whole sections of the trestle construction agreement were repeated verbatim therein. Id. (454).

Violation of section 15 of the Shipping Act by construction and use of trestles at Anchorage, Alaska, prior to Commission approval, does not preclude approval of the underlying preferential berthing agreement between Anchorage and carrier which constructed and used the trestles, if the agreement is otherwise approvable under the standards of section 15. Id. (454).

Carrier party to a preferential berthing agreement will be held to the terms of its agreement and required to berth its vessels on a preferential basis "approximately one time per week." "Approximately" means that the carrier will be limited to one preferential call per week unless it is unable, by reason of weather conditions, an emergency to its scheduled vessel, or other conditions beyond its control to make a preferential call during a given week. In such circumstances, the carrier will be permitted to double its preferential calls in a subsequent week. As an alternative to doubling its calls, the carrier may employ a replacement vessel to make a scheduled preferential call without providing the required 15 days' notice. Further, the carrier must provide the port with prompt notice of its inability to make a preferential call as scheduled, and its intent to utilize one of the two alternatives. Id. (455–456).

Leases to certain back-up areas at Anchorage, Alaska, are not subject to section 15 of the Shipping Act. This determination is based not only on a review of the leases but on a consideration of the interrelationship between preferential berthing leases and the back-up area leases. There is no basis in the record on which it can be found that the back-up leases were part of the total understanding between the parties. Id. (457–458).

To the extent that certain modifications of preferential berthing agreements reflect the understanding of the parties with regard to the future implementation of the agreements, they should be filed for approval pursuant to section 15 of the Shipping Act before they are implemented. Id. (459).

The Commission has previously disapproved terminal practices under Shipping Act, section 17, second paragraph, which did not recover fully distributed costs. As a general rule, all terminal users are expected to pay their own way. Nonetheless, "noncompensatory" is not synonymous with "unreasonable." Justifications can be and have been accepted for terminal tariffs or leases with noncompensatory features. In this case, the terminal lease agreements would be at least incrementally profitable, and, if implemented as month-to-month tenancies, would not bind either party to a particular level of rents for more than 30 days. Agreement No. T–2880, as Amended, 680 (684).

Although the record offers no reason to disapprove the minimax concept or the particular charges proposed in lease agreements between the Port Authority and carriers or terminal operators, the Commission cannot ignore the fact that the only basis for the

lessees' use of the involved piers to date which was not violative of section 15 was under the Port Authority's public tariff and the parties have not adhered to that tariff. The tariff contains no provisions for monthly "on account" billing (pending approval of the agreements) with subsequent adjustments nor does it permit extensions of credit in the unusual amounts and periods which have been extended to several proposed lessees. Moreover, in the case of two piers, one lessee was allowed to continue its exclusive occupancy for five months after the prior lease expired before the Port even declared those facilities to be public piers. This course of conduct represents at least a cooperative working arrangement which was not reduced to writing, filed and approved by the Commission as required by section 15 and constitutes a violation of that statute. It also represents a violation of the Commission's rules by the Port Authority. The section 15 violation has not proximately injured an objecting terminal operator and it is not entitled to reparations. Id. (684–685).

Terminal lease agreements between the Port Authority of New York and New Jersey and carriers or terminal operators are section 15 agreements within the jurisdiction of the Commission and all the parties to the agreements are carriers or other persons subject to the 1916 Shipping Act. Id. (698).

TERMINAL OPERATORS: See also Terminal Leases

Action of carriers in stopping payment of "heading" charges on shipments of cotton to Houston, but continuing to make such payments at Galveston and Corpus Christi did not violate section 16 and 17 of the Shipping Act, 1916. There was no basis for a determination that carriers are selectively absorbing costs at Galveston and Corpus Christi which should be paid by their shippers or are otherwise unfairly discriminating against the Port of Houston. The record did not support the argument that the "heading" charges paid by the carriers are not true operational costs customarily associated with vessel loading and included in ocean freight rates without itemization. Nor did the record support the conclusion that the delivery of export cotton bales to the carriers at Galveston and Corpus Christi was completed only after the challenged "heading" services are performed. No Shipping Act authority holds that completion of delivery is the sole criterion for allocating cargo handling expenses between shipper and carrier, and a flat policy which makes the validity of a given division of such expenses depend on the moment a carrier chooses to issue a cargo receipt would be arbitrary in the extreme. Port of Houston Authority v. Lykes Bros. Steamship Co., Inc., 192 (200).

The Port of Houston failed to establish why its 1963 decision authorizing a uniform cotton "unloading" fee (paid by the shipper) which includes positioning bales in the transit shed should necessitate a change in Galveston's and Corpus Christi's pre-existing cotton handling practices ("heading" charges paid by carriers). The burden of proof in a section 22 complaint proceeding is always on the complainant. Id. (200).

The Shipping Act does not require all carriers or all ports to offer identical services or engage in the same practices. Competition and innovation are encouraged. Local differences are permitted up to the point they unfairly injure shippers, ports or other persons protected by the Act. Id. (200–201).

There was no basis for finding that carriers violated section 18(b)(3) of the Shipping Act, 1916 by failing to file tariffs which state when the basic ocean freight rate will include "heading" charges on cotton shipments. The Port of Houston did not establish whether shippers or carriers primarily benefit from any particular aspect of cotton handling at Galveston or Corpus Christi, where carriers pay such "heading" charges. No one other than the carriers was identified as having a duty to pay for "heading" and

there was no indication that this practice materially affects the aggregate cost of shipping cotton at the various ports. The gravamen of the dispute lies not with the carriers' tariffs, but with those of the Port Authorities whose tariffs should be amended to reflect the actual unloading and heading practices followed by each port. Id. (201).

Practices of the Port of Houston Authority, in connection with the rental of heavy crane equipment, under which Houston's cranes have first priority on jobs, even to the extent of displacing private crane owners' equipment already working, violate sections 16 First and 17 of the 1916 Shipping Act, not only as applied against private crane operators, but also with regard to stevedores hiring private cranes. Houston has unjustly preferred itself to private crane owners and subjected stevedores hiring private crane owners to "bumping" and other unreasonable practices while exempting stevedores who own their own cranes from such practices. Perry's Crane Service, Inc. v. Port of Houston Authority of Harris County, Texas, 548 (549).

The Port of Houston's practice of giving itself first priority on cranes must be limited. Prior to the start of any job a stevedore should determine the availability of Houston's cranes and if there is one equally suitable for the job at hand then Houston should be given a preference as to furnishing a crane for that job. The limited preference is justified because of Houston's heavy investment in cranes and extensive labor-related expenses and guarantees; declining share of available crane work; the flexibility of private cranes in moving from one location to another—an option not open to Houston; the fact that private crane owners are using facilities constructed and paid for by Houston to conduct their private business; and the absence of any evidence that Houston is attempting to monopolize the crane rental business on its facilities. Limiting of the preference results in a practice which, while still preferential, is no longer undue or unreasonable—the key determination. The first call privilege, as modified, will require stevedores to select a Houston crane only if that crane is suitable for the job in the judgment of the stevedore in terms of size and expense as any available crane. Id. (551–552).

Practice of the Port of Houston, in connection with the rental of heavy crane equipment, of preferring its own cranes to the extent of "bumping" other crane equipment is unlawful and cannot be justified even if modified to allow Houston "bumping" privileges if it can furnish a more suitable crane for the job than that provided by the private crane owner. Assuming the unavailability of a Houston crane and the election by a stevedore to use a private crane for a particular job, that private crane owner should be permitted to perform the job to completion without "bumping" by a Houston crane. Id. (552).

The burden of proof in a proceeding involving the approvability of exclusive terminal lease agreements was upon the objecting terminal and Hearing Counsel, and the evidence adduced failed to establish that the Port Authority engaged in or is proposing to engage in anticompetitive, unduly preferential, or unreasonable practices. The Port Authority knew that the mini-max rentals were unlikely to be fully compensatory at cargo levels projected for 1973 and 1974, but this fact alone does not support a finding that the Port Authority was engaging in a predatory price cutting scheme aimed at other breakbulk terminal operations within the Port. When breakbulk tonnages dropped unexpectedly between 1969 and 1974 the Port Authority, as the owner of the modern, relatively expensive facilities, could offer them at terms the breakbulk market would accept or close them down completely. The Port Authority's choice of the former course of action could not be faulted under the circumstances. If only minimum rents are paid, the Port Authority would still net more income than it would closing the facilities. Thus, the users of other Port facilities would not be required to unfairly "subsidize" the operations. Agreement No. T–2880, as Amended, 680 (683).

TRUCK DETENTION

With respect to truck detention payments by terminal operators at the Port of New York, the conditions under which a terminal operator would not be assessed a penalty under the rule are expanded to include Acts of God, fires, and serious accidents. However, "congestion" and "work slowdown" will not be included. Truck Detention at the Port of New York, 25 (26–27).

The purpose of the rule which provides that terminal operators at the Port of New York shall not be liable for the time consumed by receipt or delivery of cargo by marks other than by bill of lading, provided at the request of the shipper consignee or motor carrier, is to provide that the shipper-importer will be responsible for delays where the terminal operator is required to sort or separate shipments by marks. Additionally, the rule contemplates that as to a single motor carrier loading/unloading multiple LTL shipments, time, for purposes of the rule, shall not be computed separately for the loading/unloading of each shipment, but rather shall accrue during the entire period the vehicle is being loading/unloaded. This should not be confused with the rule dealing with several vehicles picking up/delivering multiple shipments on a single delivery order/dock receipt, where time shall be computed separately for each vehicle. Id. (27).

The rule establishing procedures to be followed by terminal operators at the Port of New York who elect to deliver breakbulk cargo to motor carriers prior to full discharge of the vessel is not concerned with situations involving the stripping of containerized cargo. Moreover, the rule does not require but merely permits the terminal operator to effect delivery before the vessel is discharged. Because one particular rule makes it the particular responsibility of the consignee or his agent (motor carrier) to determine when a cargo is available (at non-appointment piers) and another rule will not allow appoints unless the cargo is properly available, the terminal operator has to advise the motor carrier only when the cargo is so available. For example, until breakbulk shipments have been stripped from the container, there is nothing which obligates the terminal operator to make delivery as soon as the vessel discharges its unstripped containers. Id. (28).

Rule relating to truck detention at the Port of New York is amended to require that the terminal operator employee authorizing delivery of cargo prior to the vessel being fully discharged be identified. Id. (28).

Rule allowing the terminal operator at the Port of New York the option of selecting the system under which it will operate will not be amended to delete the non-appointment and combination procedures and keeping only the appointment system wherein truck detention time begins when the motor carrier arrives at the gate. However, the rule is modified to require that any change in the procedures at a given pier should only be made on 30 days notice and on filing of an appropriate tariff amendment. Id. (28–29).

Truck detention rule at the Port of New York which prohibits prelodging of delivery orders will not be altered. When a trucker does not have in his possession a full and complete delivery order on arrival at the pier, delay in fact occurs. Movement of cargo from the piers is appreciably slowed down while terminal personnel are straightening out the problems created by an incomplete or lost pre-lodged order. Id. (29).

Prelodging of dock receipts with marine terminals at the Port of New York does not create any significant truck detention at the Port. Delay at the Port is due to prelodging of delivery orders. In some situations prelodging of the dock receipt is the only practical solution if there is to be a prompt receipt of the export cargo in order that the motor carrier can unload as soon as it arrives at the piers. Prohibiting of dock receipts would disrupt pre-reserved shipping space since, in many instances, the ocean carrier

transporting the goods will insist on knowing, in advance, the size and amount of the shipment it has "booked"; and it would be unwise because it would lead to the misuse of blank dock receipts which would have to be left at inland points if no prelodging is permitted. Id. (30–31).

The Commission will allow the continuance of the practice of prelodging dock receipts with terminal operators at the Port of New York without any service fee. A $15 assessment fee would work only as a penalty by unreasonably burdening the shipper who is trying to export his product as quickly and cheaply as possible, and could drive the small inland shipper out of business. Id. (31).

The practice at the Port of New York of presenting open delivery order/dock receipt documents on less than truckload shipments will not compound the problem of cargo security at breakbulk terminals. By permitting a terminal operator to establish his own safeguards for the handling of LTL shipments, security would be improved. Id. (32).

The Commission will not require that dock receipts lodged with terminal operators at the Port of New York be in exact conformity with the U.S. Standard Master or that the terminal operator be allowed complete discretion to determine the form or content of the dock receipt. A terminal operator will have discretion to vary the format of a document while he will be required to embody information therein to be applicable portwide. Id. (32).

All that is needed for the proper delivery of cargo at the Port of New York is a document containing information sufficient to properly identify the shipment to all parties concerned and to authorize its delivery. Id. (33).

Terminal operators at the Port of New York are allowed to refuse to complete or correct the documents necessary to effect the pickup or delivery of cargo. Id. (33–34).

Rule requiring motor carriers to arrive at a marine terminal at the Port of New York 15 minutes prior to his scheduled appointment is amended to provide that a motor carrier need only arrive in time to proceed directly for pickup or delivery of cargo. Id. (35).

Rule requiring that service periods be established for each business day at a terminal at the Port of New York operating on a nonappointment system will not be revised to require the terminal operator to publish in its tariff the daily capacity of each terminal facility and the number of vehicles to be scheduled in each service period. To adopt the revision would stifle any effect the rule would have in alleviating congestion at the Port. Id. (36).

Rule relating to the procedure for insurance of a time-stamped gate pass which will institute free time for the motor carrier in delivering or picking up cargo at marine terminals at the Port of New York will not be revised to require motor carriers, upon receiving their time-stamped gate pass to proceed to the delivery/receiving clerk's office for the purpose of being time recorded in the terminal operator's security log. To permit a terminal operator to record a different time in its own records for the commencement of free time is contrary to the purpose of the validation and entry procedures under which the validation time on the gate pass constitutes the official time for the commencement of free time. Id. (36).

Truck detention rule at the Port of New York is revised to eliminate the requirement that customs time stamp documents (customs will not issue time stamps) and to simplify the procedure by allowing the motor carrier, upon validation of his gate pass on arrival at the pier, to proceed directly to customs for the processing of his papers. Thereafter, the motor carrier's papers are presented to the delivery clerk of the terminal operator for the stamping of the gate pass, at which point, time for purposes of detention commences. Id. (37).

Rule permitting the terminal operator at the Port of New York to turn away motor carriers when the capacity of a terminal facility has been reached, but not before issuing preference slips for service on the next business day, will not be deleted. It is doubtful that vehicles will be turned away capriciously if service of those vehicles is possible. Moreover, a rule which would require a facility to exceed its capacity would not be workable. Id. (37–38).

Rule assessing a $15 penalty against a terminal operator at the Port of New York for refusing service to a motor carrier possessing complete documentation is revised to increase the penalty to $30. Id. (38).

Rule relating to assessment of a penalty of $15 on a motor carrier for failure to meet a scheduled appointment at a marine terminal facility at the Port of New York is revised to add a provision increasing the penalty to $30 if the motor carrier has been advised that special equipment will be required and he fails to meet his appointment. Id. (39).

Rule providing that if a motor carrier seeks and gets a scheduled appointment at a marine terminal facility at the Port of New York prior to issuance of a freight release of the subject cargo, the motor carrier will be penalized $15, is revised to assess the penalty on the terminal operator and to increase the amount to $30. Id. (39).

Rule providing for the assessment of a $15 penalty against the terminal operator at the Port of New York for wrongfully advising the motor carrier that cargo is ready and available is revised to provide for a penalty of $30. Id. (40).

Rule providing for the assessment of a $65 penalty against the terminal operator at the Port of New York who refuses service to a motor carrier holding an appointment, when the refusal is due to a lack of manpower, is revised to reduce the penalty to $30. A part of the obligation of the terminal operator to complete loading/unloading the motor carrier is the responsibility to foresee labor problems which would tend to delay operations. In the case of refusal to service a nonappointment vehicle as a result of labor's refusal to work overtime, the terminal operator is relieved of any liability. Id. (41).

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