DECISIONS OF THE

FEDERAL MARITIME COMMISSION

VOLUME 20

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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

July 31, 1978

Richard J. Daschbach, Chairman
Thomas F. Moakley, Vice Chairman
Karl E. Bakke, Member
James V. Day, Member
Leslie Kanuk, Member

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FEDERAL MARITIME COMMISSION

(46 CFR Part 536)

General Order 13; Docket No. 75–28

June 8, 1977

SUBMISSION OF REVENUE AND COST DATA, CONCERNING GENERAL RATE INCREASES AND CERTAIN SURCHARGES FILED BY COMMON CARRIERS, CONFERENCES, AND MEMBER CARRIERS OF RATE AGREEMENTS

NOTICE OF WITHDRAWAL OF PROPOSED RULE

AGENCY: Federal Maritime Commission

ACTION: Withdrawal of Proposed Rule

SUMMARY: This notice withdraws proposed rule requiring common carriers by water, conferences of such carriers and member carriers of such conferences operating in the foreign commerce of the United States to submit revenue and cost data to the Federal Maritime Commission in connection with general rate increases and certain surcharges filed with the Commission by such carriers or conferences. The Commission has determined to withdraw this rule at this time. The effect of such action is to refrain from imposing the proposed filing requirements.

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 rule proposed in this proceeding was published for public procedure on August 11, 1975 (40 F.R. 33688). As proposed, the rule required submission to this Commission of certain cost and revenue data by common carriers by water in the foreign commerce of the United States under the provisions of section 18(b)(5) of the Shipping Act, 1916 (46 U.S.C. 817, as amended). In response to the proposed rule, over 80 parties filed comments. Commission Hearing Counsel filed their Reply to those Comments, and Answers were thereafter received.

Opposition to the proposed rule by ocean carriers and conferences of carriers was premised largely upon alleged inadequacy of statutory authorization in the Commission to permit it to exercise general routine surveillance over the cost bases of rates in the foreign commerce of the United States. Shippers generally endorsed the proposed rule.

Upon consideration of the comments filed and reexamination of the rule proposed, its purpose and objectives, the Commission has decided to withdraw such rule at this time and discontinue the proceeding.

THEREFORE, IT IS ORDERED, That this proceeding be, and hereby is, discontinued.

AND, IT IS FURTHER ORDERED, That the rule proposed on August 11, 1975 and published on that date in the *Federal Register* (40 F.R. 33688) be, and hereby is withdrawn.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

Part 549—Regulations Governing Level of Military Rates

[GENERAL ORDER 29, AMDT. 2, DOCKET NO. 72-43]

June 10, 1977

Miscellaneous Amendments

AGENCY: Federal Maritime Commission

ACTION: Discontinuance of Proceeding/Revocation of Certain Rules

SUMMARY: Paragraph 549.5(b) of Part 549 is amended by revoking certain provisions pertaining to the use of a Uniform Capacity Utilization Factor (UCUF) in determining cargo unit costs in connection with carrier bids for the carriage of military cargo. Deletion of these provisions is necessary in light of evidence that UCUF has rarely affected bidding and the burden of UCUF reporting is extreme in comparison to its utility. Paragraph 549.5(b), as amended, will relieve carriers from the UCUF reporting requirements. The proceeding in No. Docket 72-43 is discontinued.

EFFECTIVE DATE: June 1, 1977

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:

Upon remand from the United States Court of Appeals for the District of Columbia, the Commission referred this proceeding to an Administrative Law Judge to determine whether the Uniform Capacity Utilization Factor "specified in Section 549.5(b) of the Commission's Rules should be amended or revoked as an arbitrary, unreasonable and discriminatory device for allocating per unit costs for military cargo bidding purposes; . . ."

Hearing Counsel have now filed a Motion to Dismiss this proceeding, seeking the elimination of UCUF on the grounds that UCUF has affected rate bidding only in the rarest instances and that the burden of carrier compliance with the UCUF reporting requirements is extreme by comparison to UCUF's utility. By Order served April 20, 1977, Administrative Law Judge Stanley M. Levy granted Hearing Counsel's motion and recommended "that the Commission issue an appropriate order revoking Section 549.5(b) of its rules," and dismiss the proceeding. We determined to review the Presiding Officer's ruling.

Upon consideration of Hearing Counsel's motion; the replies filed by American President Lines, Ltd., the Military Sealift Command, and Sea-Land Services, Inc., in support thereof; and the Presiding Officer's ruling; it is our opinion that there exists a sufficient and proper basis for discontinuing the proceeding and revoking the UCUF provisions.

We are not, however, revoking paragraph 549.5(b) in its entirety, as the Presiding Officer has recommended, albeit apparently unintentionally, but only those provisions relating directly to UCUF. Thus, subparagraphs (1), (3), and everything following the first sentence in subparagraph (2) relates to the implementation of UCUF and will be revoked. However, the first sentence in subparagraph (2), with the exception of the limitation to RFP "700, Second Cycle, only," and subparagraph (4) remain applicable and operative notwithstanding the elimination of the UCUF provisions and will accordingly be retained.*

THEREFORE, IT IS ORDERED, That, except as indicated above, the Presiding Officer's April 20, 1977 Order issued in this proceeding is hereby adopted.

FURTHER, IT IS ORDERED, That pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. § 503) and section 43 of the Shipping Act, 1916 (46 U.S.C. § 841a), Part 549 of Title 46, Code of Federal Regulations, is amended.*

FINALLY, IT IS ORDERED, That this proceeding be, and hereby is, discontinued.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

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*The first sentence in subparagraph (2) established that for purposes of tendering bids in response to RFPs a carrier's cargo unit costs will be determined on the basis of the actual number of cargo units carried. Subparagraph (4) applies to a carrier entering a bid for a route not presently served by it, and the 75 percent utilization factor provides a basis for the calculation of cargo unit costs for that *initial* bid.

*The text of the amendment is reprinted in 46 C.F.R. 549.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 403(I)

GUITERMAN COMPANY, INC.

v.

PRUDENTIAL LINES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

June 9, 1977

Notice is hereby given that the Commission on June 9, 1977, determined not to review the decision of the Settlement Officer in this proceeding served May 25, 1977.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 403(I)

GUITERMAN COMPANY, INC.

v.

PRUDENTIAL LINES, INC.

May 25, 1977

Reparation Awarded.

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER[1]

By complaint filed April 7, 1977, Guiterman Company, Inc., (complainant) alleges that Prudential Lines, Inc., (carrier) applied an incorrect measurement to a shipment of "Auto Parts" weighing 5,477 pounds, resulting in an overcharge of $2,118.69. While a violation of Shipping Act, 1916, is not alleged, it is presumed to be section 18(b)(3) which prohibits the assessment of freight charges in excess of those lawfully applicable at the time of the shipment.

The carrier allegedly denied the claim solely on the basis of Rule 11 of its tariff[2] which prohibits the payment of overcharge claims based upon alleged incorrect measurement unless such claims are presented to the carrier in writing before the cargo leaves its possession.

According to the complainant, the carrier, under Bill of Lading No. 2, dated July 23, 1976, transported a shipment of 24 packages of "Auto Parts" weighing 5,477 pounds from New York to Maracaibo, Venezuela. The carrier billed, and the complainant paid, freight charges based upon a measurement rate of $51.25 for 2,340 cubic feet or 58.5 measurement tons, plus a bunker surcharge and a tollage charge,[3] for a total of $3,279.20. The measurement of the packages were not shown on the bill of lading.

[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.

[2] United States Atlantic and Gulf—Venezuela and Netherlands Antilles Conference Freight Tariff FMC No. 2.

[3] The rate is published on 9th Revised Page 27A in Item 135 of the Conference tariff (see Footnote 2); and the Bunker Surcharge and Tollage Charge are provided in Item 9, 10th Revised Page 11A. The correctness of these rates and charges is not contested.

The complainant alleges that the shipment actually measured only 826.2 cubic feet, and in support of its allegation furnished copies of the invoice of the Chrysler Corporation from whom the complainant purchased the auto parts. Based upon the "actual" measurement, the shipment should have been rated as follows:

826.2 cubic feet—20.7 M/T @ $51.25	=	$1,060.88
bunker surcharge—20.7 M/T @ $4.80	=	99.36
tollage charge @ 10 cents per 2,000 lbs	=	.27
		$1,160.51

The complainant seeks reparation in the amount of $2,118.69. ($3,379.20 − $1,160.51 = $2,118.69)

In response to the served complaint, the carrier admits an overcharge based upon the Chrysler Corporation invoice, but states that a copy the corporation invoice did not accompany the cargo to the pier. Since it is no longer possible to remeasure the cargo in accordance with its tariff, the carrier requests that the complaint be dismissed.

In connection with the above, the carrier submitted with its response, a copy of a memorandum dated February 4, 1977, signed by the Vice Chairman, Associated Latin American Freight Conferences. The stated purpose of this memorandum is to insure that all members interpret the rules concerning the "Time Limit on Filing of Overcharge Claims" in a uniform manner. In pertinent part, this memorandum states " . . . member lines *must not* consider claims, regardless of merit, for errors in weight, measurement, or description of contents once the cargo has left the carriers' possessions."

There is no question that the carrier was correct in denying the claim under its tariff, and in fact, was required to. The alleged error in measurement was not brought to the carrier's attention in sufficient time for it to varify the shipper's figures.

However, in resolving disputes of this nature, the Commission has established, and consistently held, that the determining factor is what the complainant can prove based upon all the evidence as to what was actually shipped. Informal Docket No. 256(I), *Union Carbide Inter-America v. Venezuelan Line,* Order on Review of Initial Decision, November 12, 1973; *Western Publishing Co., Inc. v. Hapag Lloyd A.G.,* 13 SRR 16 (1972). Where the shipment has left the custody of the carrier, however, and the carrier is thereby prevented from personally verifying the complainant's contentions, the Commission has held that the complainant has a heavy burden of proof and must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim. *Western Publishing Co., Inc. v. Hapag Lloyd A.G.*, cited above; *Johnson & Johnson International v. Venezuelan Lines*, 13 SRR 536 (1973); *United States v. Farrell Lines, Inc.*, 13 SRR 199, 202 (1973); *Colgate Palmolive Peet Co. v. United Fruit Co.*, 11 SRR 979, 981 (1970).

The documents submitted in support of the claim are sufficiently cross referenced so as to leave no doubt that the Chrysler Corporation invoice is a true representation of the actual weight and measurement of *each* piece or package of the shipment transported under the carrier's Bill of Lading No. 2 dated July 23, 1976. Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to retain compensation greater than it otherwise would be entitled to under its applicable tariff. The complainant has sustained the necessary heavy burden of proof required for the award of reparation in the amount of $1,160.51; and it is hereby awarded.

(S) WALDO R. PUTNAM,
Settlement Officer.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–8

CAPITAL CITY STEVEDORES, INC.

v.

GREATER BATON ROUGE PORT COMMISSION

NOTICE OF DETERMINATION NOT TO REVIEW

June 8, 1977

Notice is hereby given that the Commission on June 8, 1977, determined not to review the order of dismissal served in this proceeding May 13, 1977.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 76–8

CAPITAL CITY STEVEDORES, INC.

v.

GREATER BATON ROUGE PORT COMMISSION

May 13, 1977

ORDER DISMISSING PROCEEDING WITHOUT PREJUDICE

Background

Hearing in this complaint case was scheduled to commence on August 10, 1976, in Baton Rouge, Louisiana. Upon confirmation that the complainant and respondent had reached a settlement agreement the said commencement of hearing was cancelled (memorandum dated August 9, 1976). The parties submitted to the presiding Administrative Law Judge their August 23, 1976, stipulation and agreement of settlement. The presiding Judge in an order dated September 3, 1976, suggested the parties reconsider, modify and resubmit the stipulation and agreement of settlement. Subsequently, the parties submitted their September 30, 1976, stipulation and agreement of settlement containing amendments.

Under date of October 15, 1976, the proceeding was stayed, at the request of the complainant, and referred to the Commission for its determination as to the agreement's subjectivity to section 15 of the Shipping Act of 1916.

The Commission on April 27, 1977, served its Order on Remand in the proceeding, finding, *inter alia,* the agreement not to be subject to section 15, and remanding the proceeding to the presiding Administrative Law Judge for any further action deemed necessary.

On April 28, 1977, the presiding Judge served a directive to the parties to submit within ten (10) days written suggestions or form of order to dispose of this proceeding.

DISCUSSION

One of the purposes behind the April 28, 1977, directive was to continue to give all parties full opportunity to be heard in this proceeding and to participate fully in its resolution. All parties to this proceeding, the complainant Capitol City Stevedores, Inc., the respondent Greater Baton Rouge Port Commission, and intervenor Hearing Counsel, responded.

The complainant in a letter dated May 6, 1977 (received May 9, 1977), submitted a suggested form of "Order Dismissing Proceeding Without Prejudice," but requested that matters be held in abeyance for a period of thirty days, because the complainants have "recently learned there has continued a pattern of acts on the part of the Port Director, presumably with the respondent's authorization . . . which . . . might well constitute acts of non-compliance with the terms of the agreement." At the end of the thirty days complainant proposes to advise whether it agrees to an entry of an order dismissing the proceeding without prejudice or to amend its complaint.

The respondent in a letter dated May 9, 1977 (received May 12, 1977), submitted a proposed Order Dismissing Proceeding Without Prejudice, which is word for word, similar to that proposed by the complainant.

Intervenor Hearing Counsel in a letter dated and received May 9, 1977, recommends "that the instant proceeding be discontinued subject to the agreed terms of settlement being properly implemented."

There has been in this proceeding an answer filed to the complaint, and a stipulation and agreement of settlement the full text of which is attached as Appendix A to the October 15, 1976, Order Staying the Proceeding Pending Commission Action. Under the order proposed by complainant and respondent the proceeding may be renewed upon a showing of non-compliance with the stipulation and agreement of settlement. Such a provision is deemed sufficient protection for the parties. Complainant's request to hold this proceeding in abeyance for thirty days for the complainant then to decide it agrees with the order of dismissal or to file an amended complaint seems to seek an unwarranted advantage. To grant such request would sanction giving an unwarranted advantage, as well as tacitly approving the filing of an amended complaint, so should not be granted. And, further holding in abeyance of this proceeding beyond that provided in the following order serves no regulatory purpose beneficial to all concerned.

Wherefore, upon consideration of the above (using specifically the language of the complainant and respondent submitted separately, in the proposed form of order) and whereas the

"Complainant and respondent having entered into a Stipulation and Agreement of Settlement dated August 23, 1976, as amended September 30, 1976, disposing of the issues presented by the complainant, and the Commission having determined by Order served April 27, 1977, that said Stipulation and Agreement is not subject to Section 15 of the Shipping

Act, 1916, as amended, and that approval thereof under said setion 15 is not required it is, therefore, in accordance with the terms of said Stipulation and Agreement, hereby,

"*Ordered,* that the above-captioned proceeding be and it is hereby dismissed without prejudice to the renewal of said proceeding upon a showing of non-compliance with any of the terms and conditions of the aforesaid Stipulation and Agreement of Settlement, as amended."

(S) WILLIAM BEASLEY HARRIS,
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.

NOTICE OF DETERMINATION NOT TO REVIEW

June 15, 1977

Notice is hereby given that the Commission on June 15, 1977, determined not to review the order of dismissal of complaint and discontinuance of proceeding served in this matter May 19, 1977.

By the Commission.

[SEAL] (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.

May 19, 1977

DISMISSAL OF COMPLAINT AND DISCONTINUANCE OF PROCEEDING

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 container 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:

Orderd: 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

ORDER DENYING RECONSIDERATION

June 24, 1977

By Report and Order served March 18, 1977, the Commission held that four independent ocean freight forwarders had violated section 16 First of the Shipping Act, 1916, and section 510.24(b) of the Commission's Rules by providing freight forwarding fees to the General Services Administration (GSA) at nominal, noncompensatory fees with the intention of recouping their losses out of the brokerage fees generated by such relatively large shipments.

The National Customers Brokers & Forwarders Association of America, Inc., and the New York Foreign Freight Forwarders &Brokers Association, Inc. (Petitioners), have filed a "Petition for Reconsideration in Part" (Petition) requesting the Commission to adopt a specific rule[1] which would set a "rate floor" on amounts licensed forwarders could bid for GSA forwarding services contracts different from that applicable to commercial shipments.

According to Petitioners, this rule is necessary to (1) curtail future section 510.24(b) violations on government shipments and (2) eliminate "the morass of indecision" caused by the absence of firm standards limiting the extent to which licensed forwarders may vary the forwarding fees they assess different shippers. No factual support for either proposition was tendered.

The Commission's choice of enforcement procedures is largely discretionary and we believe our decision in Docket No. 74–10 establishes reasonable boundaries of permissible conduct which are discernible to conscientious licensees. At least for the present, we prefer to handle the problem—and nothing identifies it as a major problem—of preferential

[1] Petitioners want the following language added to present section 510.24(b) of the Rules:

Provided, however, That with respect to shipments handled for a government agency the forwarding fee shall not be less than the average freight forwarding fee recovered by the licensee on commercial accounts in the preceding fiscal year.

forwarding fees on government shipments by an *ad hoc* process of investigation and adjudication and not by the adoption of regulations directed only to government shipments.

Contrary to the stated impression of Petitioners, our March 19, 1977 Report does not generally condone variations between commercial and government forwarding fees. Only variations grounded upon demonstrable economies of scale in providing the forwarding services in question are permitted. It is true that enforcement of this standard requires a case-by-case determination of a forwarder's operating costs, but such specific inquiries are typical in instances of section 16 preference and would be no less necessary under the standard proposed by Petitioners.[2] THEREFORE, IT IS ORDERED, That the "Petition for Reconsideration in Part" of National Customers Brokers & Forwarders Association of America, Inc., and New York Foreign Freight Forwarders & Brokers Association, Inc., is denied.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

[2] *I.e.*, "the average fee charged commercial shippers during the preceding fiscal year." Such information is not systematically and publically maintained at the Commission or elsewhere; it would have to be developed in an appropriate hearing.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 357(I)

PAN AMERICAN HEALTH ORGANIZATION

v.

PRUDENTIAL-GRACE LINES, INC.

ADOPTION OF DECISION

June 27, 1977

The Commission by notice served May 31, 1977, determined to review the decision of the Settlement Officer in this proceeding served May 12, 1977. Upon completion of review it has been decided that the decision of the Settlement Officer be adopted as the decision of the Commission.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 357(I)

PAN AMERICAN HEALTH ORGANIZATION

v.

PRUDENTIAL-GRACE LINES, INC.

Reparation Awarded.

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

Pan American Health Organization (complainant) claims $279.39 from Prudential Grace Lines, Inc., now Prudential Lines, Inc. (respondent) for alleged freight overcharge based on commodity classification as well as measurement tons on a shipment described as Lab Apparatus from New York, New York to Lima, Peru via the SANTA CRUZ on bill of lading No. 14 dated October 11, 1974. Complainant alleges a violation of Section 18(b)(3) of the Shipping Act, 1916.

On May 12, 1976, respondent advised the complainant that its complaint had been declined. The main reason was that it was an "old shipment which took place from New York *October 18, 1974.*" The complaint was filed with the Commission on July 9, 1976, well within two years after the cause of action accrued, and is in conformity with the filing requirements of Section 22 of the Shipping Act, 1916.

The shipment was made by Wheaton Glass Company, a division of Wheaton Industries which utilized a freight forwarder located in New York. The bill of lading was made out for 85 cartons of Lab Apparatus measuring 179 cubic feet. The complainant was billed and paid for 85 cartons measuring 180 cubic feet (4.5 measurement tons) at a rate of $169.75, which is in the Atlantic and Gulf/West Coast of South America Conference S.B., SA–12 Freight Tariff F.M.C. No. 1 at 8th Revised Page 81, and is a contract rate applying on Laboratory Apparatus, Testing (Item 508) and also Laboratory Equipment or Supplies, N.O.S. (Item 509) which amounted to $763.88. Neither party has questioned the bunker surcharge of $8.25 per ton as freighted which was assessed, i.e., $8.25

[1] This decision became the decision of the Commission June 27, 1977.

(4.5) = \$37.13. The total of the freight charges and bunker surcharge paid by complainant was \$763.88 + 37.13 = \$801.01.

Complainant's computation of the overcharge follows:

"Paid by Complainant	\$801.01
should be: 146 11/12 cu. ft. at \$125.50/40 cu. ft.	461.21
14 8/12 cu. ft. at \$72/40 cu. ft.	27.00
16 7/12 cu. ft. B.S.C. at \$8.25/40 cu. ft.	33.41
Total should be	\$521.62
Overpaid:	\$279.39"

Complainant asserts:

"This shipment actually consisted of 79 cartons of Glass Bottles measuring 146 11/12cubic feet and 6 cartons of Stoppers and Seals measuring 14 8/12cubic feet. The bottles were valued at over \$700 per 2000 pounds. Item 150 on 9th Rev. Page 42 of Atlantic and Gulf/West Coast of South America Conference Freight Tariff F.M.C. No. 1, to which respondent is a party, publishes a rate of \$125.50 w/m for 'Bottles, Glass, Empty, N.O.S. in tight packages: N.O.S.' On 11th Rev. Page 152 of said tariff, respondent publishes a Class 25 rating for 'Closures: Barrel, Bottle, Can, Drum, Jar, Pail of Tube and Accessories.' 7th Rev. Page 138 of that tariff shows the Class 25 rate to be \$72 w/m."

I have verified the contents of the above paragraph which I find to be correct with the exception of the cubic measurement of the shipment which I compute to be slightly higher. Said cubic measurement will be covered in detail later herein.

The claim is accompanied by Invoice No. X74–450 submitted by Wheaton Glass Company to complainant covering the commodities shipped on the SANTA CRUZ which plainly shows that the shipment consisted of 79 cartons of glass bottles, 3 cartons of stoppers and 3 cartons of seals. The invoice also shows the cubic measurement per carton, weight per carton, price per carton and the total number of cartons of each commodity shipped. Also submitted with the claim is a letter with a Wheaton International letterhead, the subject of which is:

"Your #2681
Our Invoice X74–450 of Sept. 30, 1974
Pan American Health Division Order #9366–2
Prudential Bill of Lading #14 of 10/8/74
85 Cartons Bottles, Stoppers & Seals"

The letter refers to the shipment containing the chronological numbers of the cartons, the total number of cartons of each product, the contents of each group of cartons, *the dimensions of each carton,* the cubic feet size of each carton, *the total cubic feet of each group of cartons*, and *the total cubic feet of all cartons in the shipment*. The information in this letter which is not contained in the invoice is the dimensions of each carton, the total cubic feet of each group of cartons, and the total cubic feet of all cartons in the shipment as underscored above.

Respondent states that with the exception of the bill of lading, the attachments to the complaint were not provided respondent at the time of shipment and should receive no consideration in passing on the validity of the claim. Respondent further denies any overpayment was made to it and refers to Item 2 (*q*) of the conference tariff which provides:

> "Wherever this tariff provides different rates on a commodity dependent upon type or kind and adequate description is not stated in the bill of lading, it will be assumed that it is of a type or kind subject to the highest of the rates provided on the commodity and freight will be assessed accordingly."

Respondent alleges that since *no* specifics, other than "85 CARTONS: LAB APPARATUS" were on the bill of lading the cargo was subject to the rate assessed.

With respect to respondent's defense, reference is made to Informal Docket No. 321(I) *Abbott Laboratories* v. *Alcoa Steamship Company* served April 8, 1975, in adopting the decision of a Settlement Officer which awarded reparations the Commission held:

> "This Commission also has previously considered the argument that one's tariff requires that inadequate cargo description on the bill lading be assessed the highest tariff rates. In *Western Publishing Company, Inc.* v. *Hapag-Lloyd A.G.* we determined that, notwithstanding the description in the bill of lading what actually moves as shown by all the evidence determines the applicable rate and have since upheld that rationale."

In addition reference is made to Informal Docket No. 256(I) *Union Carbide Inter-American* v. *Venezuelan Line*, 17 F.M.C. 181 (1973) wherein the Commission in its order on review of initial decision held at page 182:

> "The Examiner would also deny the claim on the basis of lack of proof as to what was actually shipped. Claimant has submitted a commercial invoice dated April 16, 1969 in its attempt to show that the shipment consisted of Polyvinyl Chloride Resin. Marks and numbers on the bill of lading are identical to those on the invoice. Union Carbide's order number 184599-2 appears on both documents. Each document lists the quantity as 440 bags. The Examiner found that the weight on the invoice differed from that on the bill of lading 22,000 lbs v. 22,880 lbs.). However, our examination shows that while the 22,000 lbs. figure does appear on the invoice as the net weight the same invoice also shows a gross weight of 22,880 lbs. the same as on the bill of lading.
>
> "It must therefore be concluded that the invoice and bill of lading refer to the same shipment.
>
> "The invoice describes the commodity as 'Union Carbide Vinyl Resin QAHR'. Claimant correctly points out that the Commission in Informal Docket 93(I) determined that a Union Carbide Vinyl Resin, Q series, qualified to be rated as 'Polyvinyl Chloride Resin', the rating sought here by claimant.
>
> "Under these circumstances we conclude that the burden of proof has been met and the claim should be awarded. ($147.57). It is so ordered."

The complainant has submitted the subject invoice covering the shipment as well as a letter from his supplier interrelating the bill of lading, invoice and letter.

Following is a submittal by complainant of what was moved:

NUMBERED CARTON	QUAN. OF CARTONS	CONTENTS	MEASUREMENTS[2]	CU. FT. EACH	TOTAL CU. FT.
#1/9	9	S-205 bottles	16"x13 1/2"x12"	1-5 (1.543)	12-9 (13.887)
#10/79	70	S-18B1 bottles	22"x13 3/4"x10"	1-11 (1.910)	134-2 (133.700)
#80	1	224154 Stprs.	19 1/8"x14 1/8"x12"	1-10 (1.847)	1-10 (1.847)
#81/82	2	224154 Stprs.	21"x15"x15"	2-9 (2.734)	5-6 (5.468)
#83	1	224183 Seals	19 1/8"x14 1/8"x12"	1-10 (1.847)	1-10 (1.847)
#84/85	2	224183 Seals	21"x15"x15"	2-9 (2.734)	5-6 (5.468)
85 CARTONS			EXACT TOTAL CUBIC FEET		161-7 (162.217)

Complainant paid for the movement of 180 cubic feet, alleging that only 161–7 cubic feet moved. I have carefully reviewed these computations and have arrived at a slightly higher figure of 162.217 cubic feet (see the above computations in parenthesis), which I will use in computing this claim.

As developed by complainant, supported by documentation submitted with the claim the movement did consist of bottles, stoppers and seals. The 79 cartons of bottles weighed 3,183 pounds, or 1.59 short tons. Dividing this weight ton figure into the invoice value of the bottles of $2,476.70, a valuation figure of $1,557.61 per ton of 2,000 pounds is arrived at. As complainant alleges, Item 150 on 9th Revised Page 42 of the conference tariff contains a contract rate of $125.50 per weight or measurement ton on Bottles, Glass, Empty, N.O.S. in tight packages: N.O.S. actual value over $700.00 per 2,000 pounds to Group 4 ports. Callao, Peru (a Group 4 port) was the port of discharge for this shipment consigned to Lima, Peru.

Also, as complainant alleges, on 11th Revised Page 152 of the conference tariff a Class 25 rating is given to Closures: Barrel, Bottle, Can, Drum, Jar, Pail or Tube, and Accessories which is a class rate of $72.00 per weight or measurement ton to Group 4 ports.

The invoice, and letter, part of the latter appearing above clearly indicate that the bottles, stoppers and seals were all shipped in separate cartons.

Following is a computation of the charges that properly apply on the subject shipment.

Paid by Complainant		$801.01
Correct charges per computations herein:		
79 cartons of bottles—147.587-3.689 MT	($125.50)	462.97
6 cartons of bottle closures—14.630/40-.366 MT	($72.00)	26.35
Bunker surcharge 162.217/40-4.055 MT	($8.25)	33.45
		$522.77
Due Complainant		$278.24

[2] Per Item 2 of the conference tariff. All fractions under 1/2" shall be dropped. Where a fraction of exactly 1/2" occurs in one dimemsion, it shall be taken to the next full inch.

This claim, as submitted by complainant with the supporting documentation of the bill of lading, invoice, and letter from the seller of the subject goods is adequately substantiated.

Total reparation of $278.24 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

DOCKET NOS. 75–4 and 75–5

DEPARTMENT OF DEFENSE AND MILITARY SEALIFT COMMAND

v.

MATSON NAVIGATION COMPANY

DENIAL OF PETITION FOR RECONSIDERATION

June 30, 1977

The Military Sealift Command (MSC) has filed a Petition for Reconsideration of the Commission's Order on Appeal of Dismissal served February 2, 1977 in this proceeding. Upon reconsideration, the Commission is requested "to reverse the dismissal of these proceedings and remand them to the Presiding Administrative Law Judge for further hearings and decision. . . ." Matson Navigation Company (Matson) and Commission Hearing Counsel have filed replies opposing MSC's Petition.[1]

MSC sets forth six "errors" in our Order which allegedly warrant a reversal of the dismissal of these proceedings. While generally the matters raised by these alleged errors have either been properly disposed of previously in our February 2 Order or are immaterial to a final disposition of these proceedings, additional discussion of some of these matters may be warranted to ensure that MSC and any "reviewing court" fully understand the basis for our dismissal of these proceedings.

Reduced to its essentials, MSC's Petition raises two fundamental issues, *i.e.:* (1) whether the Commission's Order upholding the Presiding Officer's Supplemental Order itself meets the requirements of the Administrative Procedure Act (APA) and the Commission's Rules of Practice and Procedure, (2) whether under *any theory* MSC could be said to have met its burden of proving that Matson's "departure from a long standing practice of separate, simplified rates is an unreasonable practice" in violation of section 18(a) of the Shipping Act, 1916 and section 4 of the Intercoastal Shipping Act of 1933.[2]

[1] Because this proceeding was instituted prior to May 19, 1976, the effective date of a recent amendment to section 502.62 of the Commission's Rules which allows for the filing of replies to Petitions for Reconsideration, the filing of replies by Matson and Hearing Counsel is technically improper. However, under the circumstances, and pursuant to the waiver authority of section 502.10 of our Rules, we will accept and consider the replies submitted.

[2] Underlying this issue is, of course, the basic legal question of whether the repeal of section 6 of the Intercoastal Shipping Act of 1933 precludes the establishment of class rates for MSC.

Each of these issues and the positions of the parties thereon will now be considered and discussed *seriatim.*

Compliance With APA

MSC contends that the Presiding Officer and the Commission erred in failing to make adequate findings and conclusions as required by the APA and our own Rules of Practice and Procedure. It is MSC's position that our February 2 Order fails to sufficiently indicate the grounds for its affirmance of the Presiding Officer's Supplemental Order dismissing MSC's complaint in this proceeding; that the Supplemental Order itself did not correct the deficiencies present in the first dismissal, and that the Supplemental Order fails to meet the requirements of the APA and our Rules in deciding *all* material issues presented on the record or raised by the parties in their motions on dismissal.

Matson, on the other hand, argues that our Order was in effect a ruling *de novo* on the motions to dismiss and, in view of the fact that the Commission made its own findings and conclusions which disposed of this matter, the contentions of MSC with respect to alleged deficiencies in the Presiding Officer's Supplemental Order are not relevant. Matson concludes that our dismissal of the proceeding was entirely proper given the absence of any justification for the imposition of class rates.

Hearing Counsel takes the position that the Commission did decide those issues "material" to a dismissal of these proceedings noting that the Commission need not resolve every issue raised in a proceeding, *Union Mechling Corporation v. United States,* 390 F. Supp. 411.[3] In this regard, Hearing Counsel submit that MSC has failed to meet its burden of proof with respect to the two primary arguments upon which it bases the alleged violations of section 18(a) of the Shipping Act, 1916 and section 4 of the Intercoastal Shipping Act, 1933. In response to MSC's assertion that Matson is obligated to continue offering military class rates because such rates have been available for a long period of time, Hearing Counsel contends that such a view has no support in law. Hearing Counsel also asserts that MSC's second argument relating to its alleged inability to comply with MILSTAMP (Military Standard Transportation Movement Procedures) was properly disposed of by the Commission in its finding that "MSC's problems in complying with MILSTAMP do not, in and of themselves, provide a proper basis for finding Matson's present rate structure in violation of section 18."

We find little support for MSC's allegations of procedural defects in our February 2, Order. Under the APA, an agency which issues opinions in narrative and expository form may do so without making separate findings of fact and conclusions of law, provided that the agency's findings and conclusions on material issues of fact, law, or discretion, are indicated with such specificity as to advise the parties and any reviewing

[3] MSC itself concedes "that a reviewing court would not remand a case for failure to pass on all issues raised on the record if sufficient of those issues have been decided correctly to dispose of the case."

court of their record and legal basis.[4] Further, an agency need treat only *material* issues of fact, law, or discretion, and is not required to make findings and conclusions, and give reasons therefor, on collateral issues or issues not relevant to its decision.[5]

The Presiding Officer concluded in his Supplemental Order that MSC had failed to meet its burden of proving that Matson's failure and refusal to file appropriate military class rates is an unjust and unreasonable practice within the meaning of section 18(a) of the Shipping Act, 1916 and section 4 of the Intercoastal Shipping Act of 1933. In so doing, the Presiding Officer rejected MSC's argument that Matson's present "practice" of not using class rates constitutes a violation of the Shipping Acts. We agreed with his conclusion on this point. In addition, we considered the Presiding Officer's specific endorsement and adoption of the reasoning of Matson, Hearing Counsel, HGFAA, Hawaii and Guam and the positions taken by them as set forth in their briefs, as well as a statement of his own reasoning and conclusions, as sufficient to comply with the APA and our own Rules. The Presiding Officer's Order adequately and sufficiently apprised the parties, and any potential reviewing court, of the basis for the determinations reached therein. MSC's assertion notwithstanding, the Presiding Officer's Supplemental Order goes far beyond his initial order of dismissal, which we remanded for insufficiency. As we noted in our remand order, the Presiding Officer's initial order failed to supply any reasons or basis whatsoever for his conclusions in dismissing the complaints. His subsequent order did, in our opinion, resolve those inadequacies.

However, whatever the merits of the Presiding Officer's Supplemental Order, our February 2, Order, in effect addresses and disposes of the relevant issues raised *de novo* and, to that extent, cures any procedural or substantive failings that may be argued to exist in the Presiding Officer's ruling. We took great pains in our February 2, Order to explain in detail the reasons for the decisions made on each material issue of fact, law, or discretion, presented so as to leave no doubt as to the bases of our action. We amplified the Presiding Officer's dismissal in order to resolve what we considered to be the critical legal issue in this proceeding; *i.e.*, the availability of class rates for MSC subsequent to the repeal of section 6 of the Intercoastal Shipping Act, 1933. Our determination that class rates could be established was, in turn, predicated upon a showing that the parties seeking such rates could justify them on valid transportation factors. Also, class rates for government cargoes must be related to the commercial rate structure to ensure that commercial rates do not subsidize government rates. These factors are important, inasmuch as they relate to MSC's burden of proof and our dismissal which was based

[4] Attorney General's Manual on the Administrative Procedure Act, p. 86 (1947).

[5] *Minneapolis & St. Louis Railway Co. v. United States*, 361 U.S. 173; *Deep South Broadcasting v. FCC*, 278 F.2d 264 (C.A.D.C.); *Stauffer Laboratories, Inc. v. FTC*, 343 F.2d 75 (CA 9); *Brotherhood of Maintenance of Way Employees v. United States*, 221 F. Supp. 19 (ED Mich.), aff'd 375 U.S. 216; *Union Mechling*, *supra*.

on the absence of any proper justification in the record to support a finding that Matson's failure and refusal to file appropriate military class rates violated the Shipping Acts.

MSC's Burden of Proof

The next point raised by MSC is significant because it goes directly to the proof presented by it in support of its case against Matson. MSC cites as "error" the Commission's conclusion that MSC has failed to establish "demonstrable cost savings" or "transportation factors" necessary to support a simplified rate system.

MSC contends that Congress, in repealing section 6 of the Intercoastal Shipping Act of 1933, only intended to limit rate reductions on government cargo to situations where cost savings could be shown. According to MSC, there was no intention to allow class rates only when cost savings could be realized. MSC is of the opinion that the continuation of separate, simplified rate systems for purposes such as a solution of documentary problems is allowable, and that such systems are legally permissible even in the absence of cost savings. According to MSC, as long as rates on government cargo cover the fully allocated costs of its transportation plus a fair share of the carrier's profit, such rates could be different and indeed, lower than commercial rates. However, in the event that it is determined that a simplified rate system must be tied to demonstrable costs savings, MSC believes that these proceedings presently include sufficient data to support such rates. Specifically, MSC cites certain General and Administrative expenses as inappropriate to MSC cargo and argues that these expenses should not be allocated to that cargo. MSC alleges that the Commission overlooked evidence relating to the exclusion of these costs and expenses.

It is next urged by MSC that transportation factors such as cost of service, competition and value of service are all relevant in finding that military rates that neither burden nor subsidize commercial cargo are valid. However, MSC is vague as to how these factors should be applied to the subject proceeding, stating only that cost of service is "concededly important" and is covered in the record of this proceeding.

Matson, in rebuttal, takes the position that MSC:

> . . . incorrectly assumes that rates which are reduced to a level lower than those paid by commercial shippers for the same cargo under the same conditions do not involve any element of subsidizing or discrimination, unless they are non-compensatory.

According to Matson there is nothing in the legislative history of Public Law 93–487 which supports MSC's proposition of reduced military rates without adequate justification.

Matson argues that those "demonstrable cost savings" cited by MSC in its petition amount to no more than $6,520.00 (entertainment expenses) and that this figure is *de minimis* in light of Matson's operating expenses of well over $100,000,000 per year. Other expenses such as costs for stuffing and unstuffing containers and store door pick-up and delivery are allegedly already excluded from MSC costs because it does not use these services.

Hearing Counsel argue that the record clearly supports the Commission's determination that MSC's justification is insufficient to establish class rates and that MSC has failed to prove that Matson's current practices are unlawful. Hearing Counsel see little merit in MSC's argument that rates for military cargo be set at a level that will provide Matson "a return equivalent to the fully allocated costs of transporting those classes of cargo plus an appropriate return on its investment in the trade" in light of Congressional intent that government cargo rates be established on the same basis as commercial rates.

The burden of proof in a proceeding commenced by the filing of a formal complaint is upon the complainants as the proponents of the order requested of the Commission. (46 C.F.R. 502.155). In this proceeding MSC challenged Matson's decision not to reestablish special class rates for government cargoes subsequent to the repeal of section 6 of the Intercoastal Shipping Act, 1933. MSC contended, *inter alia,* that:

> Matson's failure to continue a long standing practice of a separate, simplified rate system for application to cargo shipped by MSC is a violation of Section 18(a).

The Presiding Officer, in his dismissal concluded that MSC had not met its burden. We affirmed his ruling in our February 2, Order. MSC's primary and indeed, only justification for finding Matson's current practices unlawful was the problems encountered by MSC in complying with MILSTAMP in rating military cargoes under the commercial rate structure. This allegedly results in MSC paying a higher rate than is appropriate because it cannot furnish an adequate description of the cargo to permit selection at the lowest proper commodity rate in Matson's tariff. We found that the justification and proof advanced by MSC was insufficient to support a determination that Matson was in violation of section 18(a).

Arguments by MSC that the record contains evidence of cost savings are without merit. Certain of the cost elements which MSC believes should be excluded, such as costs for stuffing and unstuffing containers, store door pick-up and delivery are not assessed against MSC because it does not use these services. Other costs are either insignificant or are applicable to MSC on the same basis as any other shipper of westbound commodities. MSC's own witness testified that while there "would *probably* be some differences between these costs [*i.e.*, actual costs of shipping a military container from Matson's container yard on the west coast to its Honolulu container yard] for military containers and costs for commercial containers, . . . the difference probably would not be great." (emphasis added) (Exhibit 12, p. 6–7)

Simply stated, under any theory advanced in this proceeding, MSC failed to establish sufficient justification (*i.e.*, transportation factors including cost of service considerations) to warrant a conclusion that

Matson's practice of assessing military cargoes the commercial rate structure is unlawful. This is the critical determination reached by the Presiding Officer in his Supplemental Order of Dismissal and reaffirmed by the Commission in its Order on Appeal of Dismissal and again in this Denial of Petition for Reconsideration.

Having determined that MSC has failed to support its claim that Matson's refusal to file military class rates is an unjust and unreasonable practice, it is unnecessary to consider the appropriate *level* of any class rates that might be established. Any confusion that may have arisen from our earlier discussion regarding the *level* of the class rates, as opposed to the *form* of such rates, stems from MSC's insistence that class rates be established at a level significantly lower than Matson's existing container rates.

The remaining two alleged errors raised by MSC have little or no bearing on our dismissal of these proceedings. First, the Presiding Officer's reliance upon MSC's noncompliance with MILSTAMP requirements as a ground for dismissal is not significant in view of our determination that MSC's problems in complying with MILSTAMP do not, in and of themselves, provide a proper basis for finding that Matson's current practices are unlawful. Secondly and similarly, MSC's allegation of error in the matter of the Commission's authority to order Matson to establish a separate, simplified rate structure for MSC's use, is mooted by MSC's failure to prove a violation of the Shipping Acts requiring some form of correction. Section 4 of the Intercoastal Shipping Act of 1933 allows the Commission to "determine, prescribe and order enforced a just and reasonable . . . practice" only upon a finding by the Commission that an existing practice is unjust and unreasonable. Such is not the case here.[6]

THEREFORE, IT IS ORDERED, That the Military Sealift Command's Petition for Reconsideration of our Order on Appeal of Dismissal is denied.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

[6] MSCconsiders these last two points; *i.e.* lack of authority in the Commission to order Matson to grant the relief requested and MSC's failure to comply with the MILSTAMP requirements to describe its cargo by full noun nomenclature as the only two grounds raised by the Presiding Officer which provide a basis for dismissing the proceeding. Further, it is contended by MSC that the Commission did not consider these two bases in its Order on Appeal of Dismissal. MSC is mistaken on both counts. We discussed both points in our Order (p. 6) and *specifically* rejected each as we do herein, as necessary to the proper disposition of these proceedings given the other findings made.

FEDERAL MARITIME COMMISSION

No. 74-27

CARTON- PRINT, INC.

v.

THE AUSTASIA CONTAINER EXPRESS STEAMSHIP COMPANY

NOTICE OF DETERMINATION NOT TO REVIEW

July 6, 1977

Notice is hereby given that the Commission on July 6, 1977, determined not to review the order of dismissal of the Administrative Law Judge in this proceeding served June 8, 1977.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 74–27

CARTON-PRINT, INC.

v.

THE AUSTASIA CONTAINER EXPRESS STEAMSHIP COMPANY

June 8, 1977

Complainant, a shipper of paperboard, filed a complaint alleging that respondent ACE, a common carrier by water, through its agent, quoted a rate on a shipment of paperboard but later revised the rate assessed upon the shipment, causing an increase in freight of $2,716.65, for which complainant seeks reparation. The consignee in Australia, however, paid the freight, not complainant. Complainant further alleges that the rate paid was unjust, unfair, and unreasonable and appears to allege violations of sections 18(b)(1), 18(b)(3), and section 15 of the Shipping Act, 1916. Upon consideration of respondent's motion to dismiss, it is found as follows:

(1) Even under the most favorable reading of the complaint together with furnished materials, complainant fails to state a cause of action primarily because it has not paid the freight and cannot show that any alleged violation was the proximate cause of injury to itself;

(2) The essence of the complaint, an alleged overcharge by respondent, would normally raise a valid issue under section 18(b)(3) of the Act but for the fact that no rates were on file, but even if a valid allegation were made, the consignee would have standing to seek reparation, not the complainant;

(3) The section 15 allegation must be dismissed since the complainant does not even allege that there was an agreement between carriers or even name a second carrier;

(4) A section 18(b)(1) allegation would be sustainable but the Commission has already found ACE to have violated that law in another case; but even so, failure to file a tariff cannot be shown to have been the proximate cause of any injury to complainant based uionconsignee's payment of an additional $2,716.65 in freight;

(5) Complainant should have obtained a valid assignment of the consignee's claim to confer standing on itself or the consignee could have filed the complaint itself. Not having done these things, it is too late for complainant to obtain an assignment or for the consignee to file a complaint in view of the two-year statute of limitations in section 22 of the Act.

Since complainant is not represented by counsel, it is advised that it has an automatic right to appeal these rulings to the Commission.

COMPLAINT DISMISSED

NORMAN D. KLINE, Administrative Law Judge.

Respondent Austasia Container Express (ACE) has filed a motion to dismiss the complaint. ACE contends that it is not a common carrier by water subject to the Commission's jurisdiction[1] and that complainant has no standing to bring this action because complainant suffered no pecuniary or real injury in connection with the sole shipment which is the subject of the complaint.

In support of its motion ACE states that the shipment moved on a freight collect basis, meaning that the consignee in Australia, not complainant, paid the freight and that according to Commission decisions, complainant has no standing to recover reparation, having suffered no specific injury or pecuniary harm. ACE contends that the only way in which complainant could seek reparation because of an alleged overcharge would be by means of a valid assignment of the consignee's claim. Even were such an assignment to be made now, however, ACE contends that under applicable case law, the assignment would have to be treated as a new claim and therefore would be barred because it would fall beyond the two-year statute of limitations set forth in section 22 of the Shipping Act, 1916, 46 U.S.C. 821. This fact does not prejudice complainant because complainant never suffered injury or had any rights to be prejudiced in the first place, ACE argues.

Following the filing of the motion, I sent complainant a letter explaining its rights to file a reply and granted a short extension of time in consideration of the fact that complainant has no attorney representing it and has expressed unfamiliarity and confusion with regard to the Commission's rules in the past. See my letter dated March 25, 1977. Even prior to this time, after the Commission has decided that ACE fell under the jurisdiction of the Shipping Act, 1916 (the Act), and had failed to file its tariff with the Commission in violation of section 18(b)(1) of the Act, I advised complainant of the problem concerning its standing. See Procedural Notice, February 25, 1977.

In response to the motion to dismiss, complainant has filed a letter written by its President, Mr. M. R. Hatch, Jr., dated April 23, 1977, together with documents. The letter does not show that a copy was served on respondent.[2] In the letter Mr. Hatch states that the motion

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[1] Actually, the motion states that "complainant" is not a common carrier by water subject to the Commission's jurisdiction. This is obvious typographical error. In any event the Commission has decided that ACE is a carrier subject to its jurisdiction in Docket No. 73–66, *Austasia Container Express, etc.—Possible Violations of Section 18(b)(1)and General Order 13*, February 7, 1977. This decision is under appeal before the U.S. Court of Appeals for the District of Columbia Circuit. (*Austasia Intermodal Lines, Ltd. dba Austasia Container Express et al. v. F.M.C.*, Civil No. 77–1236.). There has been no stay of the Commission's decision and order therein issued by the Court. Accordingly, I am bound to reject respondent's argument on this matter and will not discuss it further.

[2] By transmitting this letter and the attached documents to me without sending a copy to ACE, complainant has violated the Commission's rules against *ex parte* communications. See 46 CFR 502.11, recently issued by the Commission in Docket No. 76–66, *Extraneous and Ex Parte Communications*, March 11, 1977. For the benefit of complainant who is not represented by counsel, I advise Mr. Hatch that it is forbidden for a party to a proceeding to send me or the Commission documents without sending copies to ACE if the documents concern the merits of the case rather than purely procedural questions. So serious is a breach of the rule that I am even authorized to dismiss

"completely ignores the complaint of the actual consignee whereby he paid more than double for freight on same commodity that we shipped to him on Conference steamers; and further attempts to dismiss the rate originally quoted on a steamer contract that they simply do not honor or refer to in this case. It is quite certain that the consignee was hurt terribly by the exorbitant charge assessed and we acted to aid him in this instance." Mr. Hatch states furthermore that "we acted to aid him [i.e., the consignee] in this instance" and that the consignee "expected us to secure a refund of overpaid freight based on what we were advised and in turn advised him, and we have suffered damage in that was the last order he placed with us and more than means a loss of business through him in Australia."

Discussion and Conclusions

According to applicable principles of law, motions to dismiss are to be construed against the moving party and in the light most favorable to complainant. Movants for dismissal must accept facts alleged by complainant as true for the purposes of ruling on the motion and the motion will not be granted unless it appears beyond doubt that complainant can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41 (1957), *Schenley Industries, Inc. v. N.J. Wine & Spirit Whole. Ass'n.,* 272 F. Supp. 872, 875–76 (D.N.J. 1967); *Continental Collieries v. Shober,* 130 F. 2d 631, 635 (10 Cir. 1942); *Dewitt Motor Company v. Chrysler Motor Corporation,* 391 F. 2d 912 (6 Cir. 1968). Motions to dismiss are granted sparingly in order to make sure that a complainant is not improperly denied an opportunity to prove his case and have his claim adjudicated on the merits. 5 Wright & Miller, *Federal Practice and Procedure,* § 1357, p. 598; *Hospital Building Company v. Trustees of Rex Hospital,* 511 F. 2d 678, 680 (4 Cir. 1975). Even if it appears unlikely that a complainant can prove his case, he is nevertheless entitled to try. *Continental Collieries v. Shobert,* cited above, 130 F. 2d at p. 635.

Although the complaint is not entirely clear in its language, the attached documents furnish some explanation as to the origin of the controversy. It appears that complainant was under the impression that the rate on a shipment of 34 rolls of paperboard to Australia in January 1974 would be $114 per 200 lbs. plus a 10.67 percent surcharge, as quoted by ACE's agent. However, ACE later remeasured the shipment, claimed it discovered a larger cubic measurement than complainant had indicated, and rated it on a measurement basis. ACE informed complainant later that all ACE's rates were on a weight/measurement basis, not weight only, and

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the complaint because of it. 46 CFR 502.11(6) and (7). However, bearing in mind complainant's lack of counsel, I will do no more than transmit the letter and documents to the Commission's Secretary for inclusion in the official file and will furnish a copy to ACE. I must strongly urge complainant to make sure that in the future, any correspondence with the Commission must be made known to ACE. Furthermore, as I later note, if complainant appeals my rulings, it must file an original and 15 copies with the Commission as well as furnish ACE one copy of the appeal. 46 CFR 502.114; 502.118.

that, as remeasured, the shipment qualified for the measurement basis. The result was an increase in total freight of $2,716.65, which complainant seeks to recover.[3] Complainant had prior to booking the shipment, however, advised its buyer in Australia, the subsequent consignee, that the rate would be $114 per 2,000 lbs. plus surcharge.[4] Again, judging from the documents which complainant has submitted, it appears that the consignee was unable to pass on the additional freight costs to his customer and as a result lost money on the sale.[5] Furthermore, the consignee still expects recovery of the additional freight either from complainant or from ACE. At one point this consignee (McCormack International Pty. Ltd.) informed complainant that the consignee did not wish to adopt complainant's suggestions as to how to recover his loss (by approaching "various companies and Government offices") and expected complainant to obtain recovery, stating that complainant was "the only real access we have to obtaining the freight refund."[6]

Complainant is actively pursuing this matter. In a letter dated April 9, 1977, from Mr. Hatch, complainant's president, to the consignee, Mr. Hatch advised the consignee of recent developments including the subject motion to dismiss. Mr. Hatch informed the consignee that complainant's attorney did not feel qualified to handle the type of case involved and requested advice as to whether complainant "should seek counsel for you in Washington, D. C. . . ." Significantly, Mr. Hatch states that "we [i.e., complainant] were acting only as shipper and did not suffer any loss. "

If we assume that the complaint raises a valid issue under section 18(b)(3) of the Act because of an overcharge by ACE and further assume that complainant could prove that the shipment should have been rated on a weight basis,[7] it is apparent that respondent is correct in asserting that complainant would have no standing to seek reparation. In order to seek reparation in a section 18(b)(3) overcharge case, complainant must either show that he has paid the freight or has a valid assignment of the claim from the person who did pay the freight. *Trane Co. v. South African Marine Corp.*, 16 SRR 1497, 1501 (1976); *Ocean Freight Consultants, Inc. v. The Bank Line, Ltd.*, 9 F.M.C. 211, 212–213 (1966);

[3] See letter of G. W. Scherkenbach, President of ACE, April 22, 1974, sent under cover of Mr. Hatch's letter to the Commission, attention of Mr. John E. Cograve, August 6, 1974.

[4] See letter from John G. McCormack, Managing Director, McCormack International Pty Ltd., May 27, 1974.

[5] See letter from John G. McCormack, dated March 30, 1974.

[6] See letter from Mr. John C. McCormack, May 27, 1974. Complainant had suggested to the consignee that he lodge a protest with the U.S. Embassy, commercial attache, in Australia, and also contact two conferences, the Australia-New Zealand Conference, and the Pacific Coast-Australasian Tariff Bureau. See Letter from Mr. Hatch to Mr. McCormack, May 21, 1974. The letter does not explain in what way these conferences could give relief to Mr. McCormack in connection with the alleged overcharge in question.

[7] Even on the facts submitted by complainant, however, it appears that complainant's contentions regarding the correct measurement of the shipment may not be sustainable if the case were to go to hearing. In one of his letters, Mr. Hatch admitted to the consignee that complainant "had no idea of the diameter of these rolls," that is, that it came as a surprise to complainant when ACE measured the rolls, found them to measure differently than complainant had believed, and rated them on the basis of that measurement. See letter of Mr. Hatch to McCormack International, May 21, 1974.

Oakland Motor Car Co. v. Great Lakes Transit Corp., 1 U.S.S.B.B. 308, 311 (1934); cf. *Pennsylvania RR Co. v. International Coal Min. Co.*, 230 U.S. 184, 203 (1913). Here complainant not only shows no assignment of the claim from the consignee but admits it did not pay the freight or suffer any loss. See letter of Mr. Hatch, April 9, 1977, cited above. Had this case merely been one arising under section 18(b)(3), this fact might end the matter and the portion of the complaint relating to the claim for reparation could be dismissed. However, there are interesting complications.

The complaint is drafted in a confusing manner. In its own words, it alleges as follows:

> IV. That by reason of the facts stated in the foregoing paragraphs complainant has been subjected to the payment of rates (3) unjust and unreasonable in violation of section 18(b)(1) of the shipping act; or
>
> V. That the agreement, modification, or cancellation is unjustly discriminatory or unfair as between carriers, etc. (as provided in section 15).
>
> VI. That complainant has been injured in the following manner: To his damage in the sum of $2716.65.
>
> VII. Wherefore complainant prays that respondent be required to answer the charges herein; that after due hearing and investigation an order be made commanding said respondent (and each of them) to cease and desist from the aforesaid violations of said act, as amended, and establish and put in force and apply in future such other rates (fares or charges, etc.) as the Board may determine to be lawful (and also pay to said complainant by way of reparation for the unlawful charges hereinabove described the sum of $2716.25 plus reasonable interest costs, for loss incurred by non-use this money, or other such sum as the Board determines to be proper as an award of reparation); and that such other and further order or orders be made as the Board determines to be proper in the premises.

This draftsmanship shows obvious unfamiliarity with the Shipping Act. The repeated reference to the "Board" is of no consequence. However, under the Administrative Procedure Act (APA) and pertinent case law, respondents are entitled to reasonable notice of the matters of fact and law asserted so that they may be able to prepare their defense.[8] I am constantly bearing in mind that complainant is not represented by counsel and that this Commission is not a court but an administrative agency which is not bound by hard and fast technical rules. See *Oakland Motor Car Company v. Great Lakes Transit Corp.*, cited above, 1 U.S.S.B.B. at 311 (1934). However, there are limits to the indulgence even of an administrative agency toward one who pleads a case before it. See *Ace Machinery Company v. Hapag Lloyd Aktiengesellschaft*, Docket No. 76–5, Order, October 7, 1976, p. 5. As already seen, complainant has conceded in its own correspondence that it suffered no loss and that it was the consignee who paid the alleged overcharge of $2,716.65. This contradicts the allegation in paragraph VI. of the complaint and undermines paragraph VII. as well. As for paragraph V. which invokes section 15 of the Act, there are no allegations of fact which even mention that

[8] 5 U.S.C. 554(b)(3); *Imposition of Surcharge by the Far East Conference*, 9 F.M.C. 129, 141 (1965); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

there is more than one carrier or that there is an agreement between carriers which should be modified or cancelled.[9] That leaves paragraph IV.

Paragraph IV. refers to section 18(b)(1) of the Act and read in the light most favorable to complainant, section 18(b)(3) as well, although the text refers merely to "(3)." Furthermore the nature of the violation is described as relating to rates which were "unjust and unreasonable." However, section 18(b)(1) refers to the requirement that tariffs be filed and section 18(b)(3) to the requirement that carriers in the foreign commerce of the United States adhere to the rates specified in their tariffs.[10] Neither of these provisions of law refers to "unjust or unreasonable rates." The only provision of section 18(b) which has to do with unreasonable rates is section 18(b)(5), which authorizes the Commission to disapprove any rate on file which it finds to be "so unreasonably high or low as to be detrimental to the commerce of the United States." 46 U.S.C. 817(b)(5). However, even if I could amend the complaint for the benefit of complainant and specify that section 18(b)(5) was properly invoked, there can be no award of reparation retroactively under that law and the statute requires the disapproved rate to have been on file, which rate was not on file. See *Commodity Credit Corporation v. American Export Lines, Inc.*, 15 F.M.C. 171, 191 (1972); *Federal Maritime Commission v. Caragher*, 364 F. 2d 709, 717 (2 Cir. 1966).

If one reads the various letters and materials submitted by complainant, one can reasonably interpret the complaint as intending to raise an issue under section 18(b)(3). Respondents address themselves to this issue in their motion as well as other matters. However, section 18(b)(3) is based on the premise that a rate is on file with the Commission. The statute is violated if the carrier charges "a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in the tariffs *on file with the Commission. . . .*" 46 U.S.C. 817(b)(3). (Emphasis added.) Technically, then, there could have been no violation of section 18(b)(3) of the Act by ACE since, as the Commission found in Docket No. 73–66, cited above, ACE had no tariff on file with the Commission during the relevant period of time.[11]

I now turn to the fact that the complaint can be interpreted to mean that ACE violated section 18(b)(1) by failure to file its tariff, although the complaint does not state this fact in such words. Again, this is a

[9] In paragraph VII., furthermore, the complainant asks for a cease and desist order against "said respondent (and each of them)" etc. but does not identify who these other respondents are supposed to be. Perhaps complainant meant to name Nauticus Shipping Corporation as a respondent. However, the information furnished by complainant identifies Nauticus merely as an agent of ACE and there is no allegation that ACE and its agent have entered into a section 15 agreement, much less whether such an agreement would fall under section 15 in the first place. It is questionable whether the agent would be subject to the Act at all. See *Trane Co. v. South African Marine Corp.*, cited above, 16 SRR at p. 1506, and *Cont. Distrib'g Co., Inc. v. Cia. Nacional de Nav.*, 2 U.S.M.C. 724, 725 (1945).

[10] See 46 U.S.C. 817(b)(1) and (b)(3).

[11] This does not mean that a carrier can therefore benefit by not filing its tariff as required by law. The carrier is, of course, subject to civil penalties for failure to file and, as I will discuss, is still subject to a reparation action for violation of section 18(b)(1).

construction most favorable to complainant and is based not only on the complaint itself but the information furnished by complainant and the Commission's decision in Docket No. 73–66, cited above. As respondents point out, however, complainant must show that the violation, i.e., failure to file, was the *proximate* cause of *specific* injury to complainant. See *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, cited above 1 U.S.S.B. 308 at 310–311; *Waterman v. Stockholms*, 3 F.M.B. 248, 249 (1950); *West Indies Fruit Co. v. Flota Mercante Grancolombiana*, 7 F.M.C. 66, 70 (1962); *Ballmill Lumber and Sales Corp. v. Port of New York, et al.*, 11 F.M.C. 494, 510–511; *Trane Co. v. South African Marine Corp.*, cited above, 16 SRR at page 1501, footnote 9; *Eden Mining Co. v. Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41, 47–48(1922). In the *Eden Mining Co.* case, the Commission stated:

> It cannot be inferred from the language used [i.e. section 22] that compensation for other than the actual damage incurred is to be granted . . . While . . . the fact of discrimination . . . may be proved and the board find accordingly, in respect to awarding reparation under section 22 of the act for injury alleged to have been caused by such discrimination, the fact of injury and the exact amount of pecuniary damage must be shown by further and other proof before the board may extend relief . . . Inasmuch as these violations have been discontinued, and no *specific injury to complainants* was proved, the complaint is dismissed. (Emphasis added.)

In *Waterman v. Stockholms*, cited above, the Commission stated:

> It has long been established by the courts and Government agencies having jurisdiction in such matters that (a) *damages must be the proximate result of violations* of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss does not afford a basis for reparation. 3 F.M.B. at pp. 248–249. (Emphasis added.)

In *Ballmill Lumber and Sales Corp. v. Port of New York*, cited above, the Commission found violations of sections 16 and 17 of the Act but refused to award reparation, stating:

> Section 22 of the Act states that we "may" direct the payment of reparation. The language is permissive and hence the mere fact of a violation of the statute does not necessitate the grant of a reparation award. *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 621 (1966). . . . However, we are not convinced that the nature of the violations is such as would warrant the requested reparation award. Furthermore, we are not satisfied that the damages alleged by Ballmill are real or *whether the alleged damages are sufficiently related to the violations of the Act.* 11 F.M.C. at p. 510. (Emphasis added.)

Failure to file a tariff does not automatically result in an award of reparation. In *J. G. Boswell Co. v. American-Hawaiian S.S. Co.*, 2 U.S.M.C. 95, 104–105 (1939), the Commission held that complainants were not entitled to reparation in such a case "unless the sum *paid by complainants* amounted to an unjust or unreasonable exaction for the service rendered." (Emphasis added.)

Here, complainant alleges injury in the amount of $2,716.65, the amount of the alleged overcharge which complainant did not pay. Complainant furthermore states in response to the motion to dismiss that it suffered damage because it has not had any more orders from the consignee in Australia and has consequently lost business in Australia. It is, of course, not established or even alleged that ACE's failure to file its tariff caused complainant's consignee never to place another order with complainant. The correspondence from the consignee suggests other reasons for this development related to the alleged overcharge and perhaps to high costs of transportation to Australia or other costs of complainant's merchandise. See letter of Mr. McCormack, March 10, 1977. Elsewhere it appears that the Australian consignees may have discontinued doing business with complainant because of complainant's refusal to give the consignee a credit for the alleged freight overcharge. See letter of Mr. McCormack, May 27, 1974; also letter of Mr. McCormack dated March 30, 1974.

Again, interpreting all of the proffered information in the light most favorable to complainant, at best one could perhaps say that the alleged overcharge by ACE injured the consignee directly but only indirectly injured complainant. But was this injury or any injury caused by the failure of ACE to file its tariff in violation of section 18(b)(1)? Even had ACE filed its tariff, the same controversy most certainly would have arisen after ACE remeasured the shipment in question and increased the freight paid by the consignee. The remeasuring by ACE had nothing to do with the fact that ACE had not filed its tariff with the Commission. As the Commission is well aware from innumerable complaints alleging overcharges in violation of section 18(b)(3) in connection with tariffs which are filed, the filing of a tariff does not eliminate disputes over the correct measurement or nature of the commodity shipped. Therefore, the failure of ACE to file its tariff could not reasonably be construed to be the proximate cause of injury to complainant even under the most favorable reading of the complaint and all the information furnished by complainant in support thereof. Indeed, the complaint does not even allege that ACE failed to file its tariff or that such failure was the cause of injury to anyone.

What, then, if anything, can be done to salvage this complaint or to remedy an injury, if indeed ACE caused any injury? Regrettably for the consignee and complainant, even if ACE's failure to file a tariff in violation of section 18(b)(1) had been alleged and could be found to be the proximate cause of injury to the consignee,[12] the consignee, as the information furnished indicates, chose not to file its own complaint but to relay upon the efforts of the shipper-complainant who has admitted to the consignee that it has been acting only "as an intermediary and it may be

[12] In the realm of theory, one could perhaps argue that failure to file a tariff in violation of section 18(b)(1)is the proximate cause of loss of all rights which would have been established had the tariffs been lawfully filed, for example, the right to seek recovery for an overcharge under section 18(b)(3) or the right to seek disapproval of a rate under section 18(b)(5). Although one case seemed to hold that the measure of damages in cases involving failure to file tariffs depends upon a showing of payment *in excess of an unjust or unreasonable* amount, as noted above, perhaps another measure of damages could be the value of the party's right to file an overcharge claim under section 18(b)(3), which right could be measured by the amount of the overcharge. However, if the alleged overcharge occurred more than two years ago, as in the instant case, this measure of damages might be improper since it would circumvent the policy underlying the two-year period of limitations.

that the statute of limitations has run out." See letter from Mr. Hatch to *McCormack International Pty Ltd.*, April 9, 1977. To save the cause of action under an overcharge theory, i.e., assuming that the complaint has validly alleged a violation of section 18(b)(3) even though no rates were on file, a simple solution would have been for the shipper-complainant to have obtained a valid assignment of the claim for consideration.[13] In other words, complainant could have bought the claim from the consignee, thereby satisfying the consignee and perhaps eliminating any strained relationships between shipper and consignee that may have ensued as a result of the remeasuring episode. Indeed, as certain correspondence discussed above indicates, the consignee had itself suggested to the complainant that complainant ought to make good on the overcharge if ACE did not. Complainant, however, chose to continue as a self-styled "intermediary" for the consignee and the consignee chose not to file its own complaint. Both parties therefore assumed certain risks. The former risked possible dismissal for lack of standing and violation of the Commission's rule prohibiting practice before the Commission by firms or corporations on behalf of others (46 CFR 502.28). The latter risked loss of its right to seek recovery by not filing its complaint within the prescribed two year period of limitation.

Application of the Statute of Limitations

If, as respondent contends, and as case law seems to hold, an assignment of the consignee's claim to the shipper-complainant at this date would be treated as a new complaint and thus be time barred,[14] the result may be regrettable from complainant's standpoint but delay in filing a sustainable complaint beyond a permissible period of time established by law is not excusable on the ground that a person did not know the law or understand its procedures.

The two-year period of limitation prescribed in section 22 is a non-waivable jurisdictional prerequisite for the filing of a complaint seeking

[13] Even if the only valid cause of action is that arising under a section 18(b)(1) theory, i.e., failure of ACE to file its tariff (but the complaint does not even allege either a failure to file or that failure to file caused injury to complainant), complainant could have obtained an assignment from the consignee and perhaps conferred standing on itself to recover pecuniary injury suffered by the consignee, assuming that failure to file the tariff was the proximate cause of injury to the consignee. Of course, anyone can file a complaint alleging violation of the Shipping Act even without showing injury, i.e., without a claim for reparation. See *Trane Co. v. South African Marine Corp.*, cited above, 16 SRR at p. 1501 and cases cited therein. In this instance, however, there is no need to litigate the issue of ACE's failure to file under section 18(b)(1) since that violation has already been found by the Commission in Docket No. 73–66, cited above, assuming complainant wishes to refile a new complaint, which, unlike the present complaint, clearly alleges such violation.

[14] See *Trane Co. v. South African Marine Corp.*, cited above, 16 SRR at p. 1508, footnote 17, and cases cite therein, especially *Ocean Freight Consultants, Inc. v. The Bank Line Ltd.*, 5 SRR 609 and 829, where this Commission treated the filing of an assignment as starting a new complaint even though there was no change in complainants. This is not a case in which the complaint clearly states a cause of action and shows standing to recover reparation so that an amendment to the measure of damages portion of the complaint would be permissible even at this late date. See *Heterochemical Corp. v. Port Line, Ltd.*, 12 SRR 223 (1971). Nor is this a case in which the complainant was at all times the agent or "manager" of the principal's vessel, which had been placed at a disadvantage in violation of section 16 First of the Act, so that a clarification to the complaint could be permitted despite the passage of more than two years. See *Chr. Salvesen Ltd. v. West Michigan Dock & Market Corp.*, 9 SRR 1154 (1968); 12 F.M.C. 135, 141 (1966). Here, complainant has itself stated that "we were acting only as shipper" and "we have been acting as an intermediary." See Letter from Mr. Hatch to the consignee, April 9, 1977.

reparation. *U.S. Borax & Chem. Corp. v. Pac. Coast European Conf.*, 11 F.M.C. 451, 471–472 (1968), *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602, 612 (1959). Although in some cases hardships may result for failure to comply with such a statute of limitations, the general rule is that the period of time contained in these statutes cannot be extended except under unusual circumstances not present here.

As stated in 51 American Jurisprudence (Am Jur) 2d, Limitation of Actions, § 138,p.708:

> While most courts give recognition to certain implied exceptions arising from necessity, it is now conceded that they will not, as a general rule, read into statutes of limitation an exception which has not been embodied therein, however reasonable such exception may seem and even though the exception would be an equitable one. . . . Undoubtedly a hardship will result in many cases under this rule, but the court may construe only the clear words of the statute, and if its scope is to be enlarged, the remedy should be legislative rather than judicial. (Footnotes and citations therein omitted.)

There are certain recognized exceptions to this strict rule, such as when a party is prevented from bringing an action by a supervening paramount force, legal injunction or other proceeding, by war, duress, fraudulent concealment, and the like. See 51 Am Jur 2d, cited above, § 140, p. 711; § 170 et seq. But there is no extension of time beyond the statutory limitation because of a party's inability to bring suit, absence or nonresidence of a party, or evasion of process, *Id.*, § 138, p. 709. A party's ignorance of his right to sue or lack of knowledge of the facts does not extend the statutory time either. *Id.*, § 146, p. 715. Even courts of equity will apply a statute of limitations "if the cause of action was known or might have been known by the exercise of vigilance in the use of means within reach." *Id.*, § 146, p. 716. Cf. also *Gruca v. United States Steel Corporation*, 495 F. 2d 1252, 1259 (3 Cir. 1974) (uncertainty of the law is no excuse);[15] *Marrerro Morales v. Bull Steamship Co.*, 279 F. 2d 299, 301 (1 Cir. 1960) (principle applicable not only to ignorance of substantive legal rights but also to ignorance of the procedures of law).

If an original complaint fails to state a cause of action, a later amendment falling beyond the statutory period will be time barred. *Id.*, § 218, p. 777. Nor can a later amendment name new parties or a new cause of action without being time barred if filed beyond the period of limitation. *Id.*, § 218, p. 777. However a later amendment curing defects in an earlier complaint may be considered as merely perfecting the same cause of action and be allowed even if falling beyond the time period. *Id.*, § 223, p. 780. Under certain circumstances, furthermore, if an original complaint is not defective and is brought by one party having standing on

[15] Certain comments of the Court bear repeating in this case. Thus, the Court stated:

> Clarity of the violation or uncertainty of the law are not factors which operate to excuse a party's delay. . . . The promptness which is demanded is not a naked assertion of a claim but the commencement of an action by the filing of a complaint. One cannot sit back, wait years for someone else to act as his stalking horse, and then ride the coattails of a favorable judicial decision irrespective of the delay involved. 495 F. 2d at p. 1259.

The analogy especially to the consignee's behavior in this case is obvious.

behalf of himself and others similarly situated in class-type suits, the naming of other plaintiffs at a later date is permitted even if done beyond the statutory period. See *Culver v. Bell & Loffland,* 146 F. 2d 29, 31 (9 Cir. 1945); *Marsh v. United States,* 97 F. 2d 327, 330 (4 Cir. 1938); *Wright v. United States Rubber Co.,* 69 F. Supp. 621, 624–625 (S.D. Iowa 1946); *Kam Koon Wan v. E. E. Black, Limited,* 75 F. Supp. 553, 564–565 (D. Hawaii 1948), affirmed, 188 F. 2d 558, cert. denied 342 U.S. 826.

I can find no circumstances in the present case which could permit the two-year period of limitation prescribed in section 22 of the Act to be extended under any of the foregoing doctrines, assuming the shipper-complainant were to obtain an assignment from the consignee at this late date or that the consignee itself would choose to file a complaint. As mentioned above, the fact that the consignee was in Australia and may not have been familiar with its rights does not constitute reason to extend the statutory period. Nor does the fact that my initial decision found no jurisdiction over ACE constitute a valid excuse for the parties' failure to exercise whatever rights to sue they possessed. My initial decision, as it states explicitly, and as is known in the law, did not constitute the agency's final decision on the matter and nothing prevented complainant from obtaining a valid assignment of the consignee's claim or the consignee from filing its own complaint during the pendency of the "appeal" from my decision. An action is deemed to be pending until its final disposition on appeal. 1 am Jur 2d, Actions, § 91.[16] As already noted, furthermore, an assignment of a claim has been treated by this Commission as well as the I.C.C. as a new complaint and would be time barred if filed now. As I have mentioned above, both complainant and the consignee have chosen to pursue the course taken, namely, that complainant will act as "intermediary" for the party having the real claim, i.e. the consignees, and they have accordingly run certain risks considering the fact that complainant, not paying the freight, had no standing to recover the alleged overcharge and made no efforts to obtain a valid assignment of the claim, and consignee chose not to file its own complaint. In addition, the complaint suffers from deficient draftsmanship and failure to make necessary allegations of fact. Under all these circumstances, I can find no reason in law or equity why the statute of limitations does not apply. However, as I mention below, the parties have an automatic right to appeal to the Commission to seek reversal of any or all of my rulings herein if the Commission disagrees with me.

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[16] The complaint case was held in abeyance pending the Commission's decision in Docket No. 73–66 at respondent's request. See letter dated October 8, 1974, from then presiding Judge John Marshall to Mr. Hatch. However, the letter merely stated that "further action will be withheld pending decision" of the other case. It did not prevent the filing of a complaint by the consignee or by complainant as assignee of the claim. There is some authority holding that the statutory period may be extended while a matter of general or governmental concern supporting the claim is being determined. However, even in these rare instances, there is no extension allowed if the party could have filed its claim in timely fashion during the pendency of the other determintaion. See 51 Am Jur 2d, § 140, p. 712, note 5.

ULTIMATE CONCLUSION

Even under the most favorable reading of the complaint, the complaint does not allege either a violation of law or compensable injury and the materials furnished by complainant, even if accepted as true, despite factual disputes, fail to show that complainant has suffered injury which was proximately caused by a violation of law by respondent.

The basis for the complaint, which is seriously deficient in its draftsmanship, appears to be that respondent ACE remeasured a shipment, arriving at a different result than that indicated by the shipper complainant, and billed the consignee accordingly. Had respondent maintained a tariff on file with the Commission and if complainant could prove that ACE's measurement was incorrect, this would not confer standing on complainant to recover reparation since the consignee, not complainant, paid the freight and complainant had never received a valid assignment of the claim from the consignee. However, respondent's tariff was not on file and the only violation of law which can be found is that arising under section 18(b)(1) of the Act. However, even then, complainant must allege and show that the failure to file a tariff was the proximate cause of injury to complainant. Yet the complaint does not even allege these facts and the supporting information furnished by complainant gives absolutely no indication that consignee's injury, which allegedly resulted from an overcharge of $2,716.65, was caused proximately or even remotely by ACE's failure to file its tariff. Complainant has admitted it suffered no loss and has acted only as an "intermediary" although suggesting elsewhere that it has lost business in Australia presumably because of the overcharge episode. Supporting information suggests other reasons for lost business but even if there were no such contrary information, the complaint does not allege that ACE's failure to file its tariff caused complainant's loss of business in Australia. Even on the most favorable reading of all complainant's information, it cannot rationally be argued that this controversy arising out of ACE's remeasurement of the shipment and consequent freight increase was caused by ACE's failure to file a tariff. Despite counless tariffs on file with the Commission, disputes over measurements or the nature of the commodities shipped, i.e., overcharge claims, continue to flow into the Commission.

Having chosen not to obtain a valid assignment of the consignee's claim and not having paid the freight itself, complainant ran the risk of being unable to show standing to seek reparation. The consignee similarly chose not to file its own complaint and ran the risk of losing its rights to do so with the passage of two years after the alleged overcharge occurred. Although perhaps regrettable that possible injury may not be remediable, claims of unfamiliarity with the law or its procedures are not accepted as reasons to extend a statute of limitations.

Since complainant is not represented by counsel, I am advising complainant that it has the right to file an appeal with the Commission asking the Commission to reverse my rulings herein and reinstate its complain. See 46 CFR 502.153. If complainant wishes to appeal, it must normally file such appeal within 10 days of date of service of these rulings and must serve 15 copies of its appeal with the Commission and one copy on respondent's counsel. 46 CFR 502.114. I also advise complainant that it may request the Commission for permission to file an appeal beyond the 10-day period (which, for other cases filed after this complaint, was changed to 15 days). Such requests should be directed to Mr. Joseph C. Polking, Acting Secretary, Federal Maritime Commission, Washington, D. C. 20573, Tel. (202)–523–5725. If complainant files no appeal, the Commission may nevertheless review my rulings, in which event the Commission will notify the parties. Otherwise, absent appeal or review, my rulings will become final within 30 days. 46 CFR 502.227(c).

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

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 545; DOCKET NO. 71–75]

RULES GOVERNING THE FILING OF AGREEMENTS BETWEEN COMMON CARRIERS BY WATER AND/OR "OTHER PERSONS" SUBJECT TO THE SHIPPING ACT, 1916

July 7, 1977

NOTICE OF WITHDRAWAL OF PROPOSED RULE

AGENCY: Federal Maritime Commission

ACTION: Withdrawal of Proposed Rule.

SUMMARY: This notice withdraws a proposed rule providing guidelines relating to the filing of certain types of agreements for scrutiny pursuant to section 15 of the Shipping Act, 1916. The Commission has determined that various issues raised in the course of the proceeding require further analysis requiring the withdrawal of the proposed rule at this time. The effect of this action is to permit the currently effective guidelines of 46 C.F.R. § 530.5 to remain in effect.

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:

This proceeding was instituted by a Notice of Proposed Rulemaking published August 13, 1971, (36 F.R. 15128) with the intention of establishing rules governing the filing of agreements covering the lease, license, assignment or use of marine terminal property or facilities or other agreements of a similar nature between common carriers by water and/or "other persons" subject to the Shipping Act, 1916. Upon the request of various interested parties and good cause appearing, the proceeding was postponed until further notice on October 14, 1971 (36 F.R. 19982).

A number of parties had filed comments in response to our Notice of Proposed Rulemaking. Many of these comments reflected concern and confusion over the rules proposed in this proceeding as they relate to agreements involving stevedores and stevedoring contracts.

Considering the time lapse since the institution of this proceeding and the technological changes which have occurred in the operation of terminals, the Commission has decided to withdraw the proposed rule, discontinue the present proceeding, and to review the entire matter of terminal agreements in order to determine what further action should be taken.

THEREFORE, IT IS ORDERED, That this proceeding be, and hereby is, discontinued.

AND IT IS FURTHER ORDERED, That the rule proposed on August 13, 1971 and published on that date in the *Federal Register* (36 F.R. 15127) be, and hereby is withdrawn.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 501

U. S. DESPATCH AGENCY

v.

SEA-LAND SERVICE, INC.

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

July 6, 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 July 6, 1977.

It is Ordered, That applicant is authorized to waive collection of $875.00 of the charges previously assessed U. S. Despatch Agency.

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 501 that effective June 14, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period June 14, 1976, through August 17, 1976, the U. S. State Department Project Rate on 'Office Supplies, Paper, Soaps, Typewriters and Accessories and Furniture', minimum 1600 ft. per container is $187.50 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.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 501

U. S. DESPATCH AGENCY

v.

SEA-LAND SERVICE, INC.

Application granted.

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

By application filed December 6, 1976, Sea-Land Service, Inc., seeks permission to waive collection of a portion of the freight charges on a shipment of office supplies consigned to the American Ambassador, Tehran, weighing 22,414 pounds and measuring 2,000 cubic feet from Elizabeth, New Jersey, to Tehran, Iran, on June 10, 1976. The applicable rate at the time of shipment was $205 per ton of 40 cubic feet, minimum 1,600 cubic feet per container.[2] This rate resulted in aggregate freight charges of $10,250.00. The rate sought to be applied is $187.50 per ton of 40 cubic feet, minimum 1,600 cubic feet per container.[3] This rate would have resulted in total freight charges of $9,375.00. Permission to waive collection of $875 is requested.

Approximately June 7, 1976, Sea-Land's sales personnel made a verbal commitment with the complainant to reduce its existing through Project rate of $205.00 M on the involved articles from Elizabeth, N. J., to Tehran, Iran, to $187.50 M. Based on this commitment, a booking for one containerload was made, to move within about one week's time. The agreed rate was required to be competitive with an identical rate already in effect via a competitive carrier, American Export Lines. Instructions were given to the tariff publication department on June 7 to file the reduced rate to become effective June 14 so that it would be in effect if the shipment moved on Sea-Land's weekly sailing scheduled for June 16. Through clerical error, compounded by misunderstanding between sales and pricing personnel, the request for publication was restricted to the

[1] This decision became the decision of the Commission July 6, 1977.

[2] Sea-Land Service, Inc., Tariff 251, FMC No. 124, Original page 22–B.

[3] Sea-Land Service, Inc., Tariff 251, FMC No. 124, 2nd Revised Page 22–B.

single entry for "Furniture, Office" instead of to all entries with the exception of "Effects, personal" in the Project Rate item. The request was received by tariff publications on June 9 and telegraphic filing was made on June 11 as reflected on 1st revised page 22–B of the applicable tariff. Unknown to pricing and tariff publication personnel, the shipment was delivered to Sea-Land's terminal in time for loading on its weekly sailing which departed on June 10, the *SS Sea-Land Market*. Bill of lading, dated June 10, was issued on that sailing. Freight charges were assessed in the amount of $10,250.00 at the then applicable rate of $205.00 M on original page 22–B of the tariff. The shipper entered the rate of $187.50 M that he had been promised on the face of the bill of lading and reduced the billed freight charges to that basis when paying his freight bill.

When the error in tariff publication was brought to the attention of pricing personnel, it was corrected to the agreed basis by telegraphic filing effective August 17, 1976, as reflected on 2nd revised page 22–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 92, *Special Docket Applications,* Rules of Practice and procedure, 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.

[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.

Through clerical error Sea-Land failed to file and publish the intended rate. This is the type of error that section 18(b)(3) was fashioned for.

It is therefore found:

1. There was an inadvertent failure to file and publish the intended rate;
2. The waiver will not result in discrimination among shippers;
3. Prior to requesting permission to waive collection of a portion of the freight charges Sea-Land 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, Sea-Land will be permitted to waive collection of $875 from the U. S. Despatch Agency on the June 10, 1976, shipment.

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

WASHINGTON, D.C.,
June 9, 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. 500

SADAGEH TRADING INC.

v.

SEA-LAND SERVICE, INC.

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

July 6, 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 July 6, 1977.

It is Ordered, That applicant is authorized to waive collection of $4,059.38 of the charges previously assessed Sadageh Trading 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 500 that effective October 6, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from October 6, 1976 through October 27, 1976, the rate on 'Automobile, Parts', minimum 20 WT per container is $375.00 per 2,240 lbs, 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.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 500

SADAGEH TRADING INC.

v.

SEA-LAND SERVICE, INC.

Application granted.

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

By application filed December 1, 1976, Sea-Land Service, Inc., seeks permission to waive collection of a portion of the freight charges on a shipment of automobile parts (head lamps, nuts, and bolts) consigned to Order of Bank Sepah, Tehran, Iran, aggregating 41,755 pounds (shipped as 44,800 pounds) from New York to Tehran, Iran, on October 3, 1976. The rate applicable at the time of shipment as $375.00 W/M, Min. 20 tons of 40 cu. ft. or 2,240 pounds. The rate sought to be applied is $375.00 per 2,240 pounds, Min. 20 W.T. or 44,800 pounds. This rate would have resulted in total freight charges of $7,500.00. Therefore permission to waive collection of $4,059.38 is requested.

Sadageh Trading, through its freight forwarder, Trans-International Forwarders, Inc., called Sea-Land for a rate quotation on automobile parts from Elizabeth, New Jersey, to Tehran, Iran. Sea-Land quoted but did not publish $375.00 per 2,240 pounds, minimum 44,800 pounds per container on September 24, 1976. On September 29, 1976, a review of cargo bookings for the Sea-Land *Resource* scheduled to sail October 6, 1976, revealed a container of automobile parts for which no rate was published. In a subsequent telephone discussion with the forwarder it was disclosed that negotiations between the shipper, forwarder and consignee were consummated on the basis of the firm telephone quotation made by Sea-Land on September 24 as the forwarder was led to believe the rate quote would be published. A telex filing was made by Sea-Land to cover the movement. The filing was made on September 30, 1976, to become effective October 6, 1976. The rate was inadvertently filed on the basis of

[1] This decision became the decision of the Commission July 6, 1977.

40 cubic feet or 2,240 pounds, whichever resulted in the greater freight charge. When the discrepancy was noted, a telex rate filing was made correcting the filing by including a minimum weight per container of 20 weight tons. A corrected publication was made 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 as further implemented by Rule 92, *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:

1. There was clerical error due to an incorrect filing of 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

[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.*

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 $4,059.38.

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

WASHINGTON, D.C.,
June 9, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 510

IDECO RIGS AND EQUIPMENT OPERATIONS

v.

LYKES BROS. STEAMSHIP COMPANY, INC.

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

July 6, 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 July 6, 1977.

It is Ordered, That applicant is authorized to waive collection of $7,443.09 of the charges previously assessed Ideco Rigs and Equipment Operations.

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 510 that effective September 8, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from September 8, 1976, through February 4, 1977, the rate on 'Oil Well Supplies, 1 Rig weighing 64.36 LT and measuring 11,787 cu. ft. Port Arthur/Rotterdam' is $20,000 lumpsum, subject to all applicable rules, regulations, terms and conditions of said rate and 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.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 510

IDECO RIGS AND EQUIPMENT OPERATIONS

v.

LYKES BROS. STEAMSHIP COMPANY, INC.

Application granted.

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

By application filed March 1, 1977, Lykes Bros. Steamship Company, Inc., seeks permission to waive collection of a portion of the freight charges on a shipment of oil well supplies consigned to IDECO Rigs and Equipment Operations, weighing 114,300 pounds and measuring 11,786.71 cubic feet from Port Arthur, Texas, to Rotterdam on September 8, 1976. The rate applicable at the time of shipment was Oil Well Supplies NOS \$87.75 per 2,240 pounds or 40 cubic feet, plus \$50.75 per 2,240 pounds or 40 cubic feet heavy lift.[2] The rate sought to be applied is Oil Well Supplies Lumpsum \$20,000.00.[3] Therefore, permission to waive collection of \$7,443.09 is requested.

In August 1976, Lykes Bros. Steamship Co., Inc. and IDECO Rig & Equipment Operations negotiated a lumpsum rate of \$20,000 Berth Terms, Beaumont/Rotterdam to cover the movement of one rig weighing 64.36 long tons and measuring 11,787 cubic feet. Lykes requested the Gulf European Freight Association's secretary to conduct a poll on September 1, 1976, asking the conference members for their concurrence by September 7, 1976. The concurrence was forthcoming September 7, and the secretary issued instructions for a tariff filing effective September 8, 1976, for a thirty day period in the GEFA Tariff No. 2 (FMC–2). Due to GEFA's tariff clerk's inadvertence in failing to file the \$20,000 lumpsum rate, that rate was not filed until September 16, 1976, and even then a clerical error was made by filing the rate as effective September 20, 1976, expiring October 19, 1976. Moreover although the rig was originally

[1] This decision became the decision of the Commission July 6, 1977.

[2] Gulf European Freight Association Tariff No. 2 (FMC–2).

[3] Same tariff of rates, Thirty-first revised page 94.

booked to move Beaumont, Texas/Rotterdam, it was necessary to shift the barge from Beaumont to Port Arthur because the Beaumont gantry was out of service, and this fact was not communicated to the CEFA tariff clerk to permit correction of the rate. Consequently, at the time the shipment was loaded on September 8, 1976, there was no tariff entry to cover this shipment other than the NOS rate on oil well supplies.[4]

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 92, *Special Docket Applications,* Rules of Practice and procedure, 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)[5] 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[6] 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 an inadvertence in failing to file a new rate.

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[4] The shift from Beaumont to Port Arthur was due to the carrier's inability to perform at the original port of origin and in no way affects the original error which gives rise to the grant of this application.

[5] 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.*

[6] 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.*

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 one hundred and eighty days from the date of shipment.

Accordingly, permission is granted to Lykes Bros. Steamship Company, Inc., to waive collection of a portion of the freight charges represented by $7,443.09.

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

WASHINGTON, D.C.,
June 10, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 520

RIVIANA INT'L., INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

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

July 6, 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 July 6, 1977.

It is Ordered, That applicant is authorized to waive collection of $10,819.59 of the charges previously assessed Riviana Int'l., 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 520 that effective November 26, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from November 26, 1976, through December 16, 1976, the rate on 'Rice, packed' minimum 500 LT for shipment, Houston/Rotterdam was $49.00 W FO, 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.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 520

RIVIANA INT'L., 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 Rule 92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Lykes Bros. Steamship Co., Inc. (Lykes Bros. or Applicant), has applied for permission to waive collection of a portion of the freight charges on a shipment of American milled rice, which moved from Houston, Texas, to Rotterdam, Netherlands, under Lykes Bros. bill of lading dated November 26, 1976. The application was filed May 24, 1977.

The subject shipment moved under Gulf European Freight Association (GEFA) Agreement No. 9360–3 Tariff No. 2, FMC–2, 13th revised page 112, effective November 15, 1976, for the item "Rice, brewers, broken, milled, clean, packed." The aggregate weight of the shipment was 1,127,250 pounds. The rate applicable at the time of shipment was $70.50 per long ton (weight only). The rate sought to be applied is a negotiated rate of $49 per long ton, free out, with a minimum of 500 long tons per shipment (also weight only), pursuant to GEFA Tariff No. 2, FMC–2, 14th revised page 112, effective December 16, 1976, for the item "Rice, packed—a/c Combi, Lykes and Sealand only . . . Houston/Rotterdam—thru January 16, 1976."

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $35,478.18. Aggregate freight charges at the rate sought to be applied amount to $24,658.59. The difference sought to be waived is $10,819.59. The applicant is not aware of any other

[1] This decision became the decision of the Commission July 6, 1977.

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

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

Lykes Bros. offers the following as grounds for granting the application:

> In November 1976, Lykes Bros. Steamship Co., Inc., negotiated with *Riviana International, Inc.* of Houston an ocean rate of $49.00/2240 lbs. free-out min. 500 LT (long ton) per shipment covering a shipment of 503 LT of bagged rice, to move on TILLIE LYKES, Position 1816, Voyage 33, from Houston to Rotterdam. (See attachment #1, telex exchanges reflecting negotiated and agreed rate of $49.00/2240# F.O. min 500 LT per shipment.)
>
> Cargo was loaded on November 26, 1976, B/L (bill of lading) dated accordingly and cargo rated at the negotiated rate of $49.00/2240 lbs. free out min. 500 LT per shipment (See attachment #2 B/L 15 covering shipment of Riviana Int'l., Inc.) and shipper paid ocean freight of $24,658.59 basis the negotiated rate (See attachment #3, invoice reflecting billing/payment by shipper).
>
> Due to a clerical error, Lykes Bros. Steamship Co., Inc. inadvertently failed to file the agreed rate covering the above shipment and this rate was not filed in the Gulf European Freight Association Tariff No. 2 (FMC-2) until December 16, 1976 for a 30 day period.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90-298), and Rule 92(a), *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 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 negotiated rate for shipments of the subject commodity weighing a minimum of 500 long tons, 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, Lykes Bros. filed a new tariff which set forth the rate on which such waiver would be based.

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[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).

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

Accordingly, permission is granted to Lykes Bros. Steamship Co., Inc., to waive collection of a portion of the freight charges, specifically the amount of $10,819.59. An appropriate notice will be published in Lykes Bros. tariff.

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

WASHINGTON, D.C.,
June 9, 1977.

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–56

MCALLISTER BROTHERS, INC.

v.

NORFOLK & WESTERN RAILWAY COMPANY

NOTICE OF DETERMINATION NOT TO REVIEW

July 13, 1977

Notice is hereby given that the Commission on July 13, 1977, determined not to review the order of dismissal in this proceeding served June 15, 1977.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 76–56

McAllister Brothers, Inc.

v.

NorfolkWestern Railway Company

June 15, 1977

MOTION TO DISMISS GRANTED

Complainant McAllister Brothers, Inc., has charged respondent the Norfolk & Western Railway Co. with violations of sections 16 and 17 of the Shipping Act, 1916.

McAllister, a New York corporation, operates tugboats engaged in docking and undocking operations at the Port of Norfolk. In charging N&W with violations of section 16 and 17 McAllister alleged that N&W either itself or through wholly owned subsidiaries operated marine terminals at Norfolk and furnished wharfage, dock, warehouse or other terminal facilities in connection with common carriers by water which conduct made N&W an other person subject to the Shipping Act, 1916, and subject to the Commission's jurisdiction.

In the operation of these terminal facilities N&W was alleged to have entered into an exclusive agreement with a tugboat operator for the performance of docking and undocking services at those Norfolk facilities, and that the use of N&W terminals was conditioned on the assessment of a charge by N&W for tug services even though docking and undocking would be performed by an operator other than the one under contract to N&W.

McAllister alleges that this places him at decided disadvantage and effectively precluded him from competing for tug business at N&W terminals, i.e., carriers could only employ McAllister at severe penalty—double charges for tugboat services. These alleged actions of N&W were said to be unduly prejudicial to McAllister in violation of section 16 First and to constitute an unreasonable practice under section 17 of the Shipping Act.

N&W in its answer denied that it was an "other person" subject to the Shipping Act and that it violated the Shipping Act.

In answering the complaint N&W clarified its terminal operations at the Port of Norfolk. N&W itself operates coal piers at Norfolk and through a wholly owned subsidiary it operates piers at Norfolk "over which merchandise other than coal are transferred to and from vessels." These are called by N&W "merchandise piers." According to N&W it has not entered into any exclusive arrangement with a tug operator for docking and undocking at any of the merchandise piers. It has, however, entered into such an arrangement for operations at the coal piers—in fact this practice goes back some 50 years. Finally N&W denies that it has ever assessed or threatened to assess double charges for tug services at its coal piers, and argues that the exclusive tug arrangement is made necessary by conditions existing at the coal piers and by competitive circumstances.

At the prehearing conference it began to appear that an evidentiary hearing might not be necessary in this case. A procedural schedule was set up whereby after discovery was completed, complainant would advise me whether it wished to continue the proceeding. In response to this schedule counsel for complainant advised that McAllister did not "intend to pursue its complaint to the point of obtaining adjudication of its substantive allegations." McAllister did, however, wish to obtain "an adjudication on the record that the Commission does not have jurisdiction over the activities described in McAllister's complaint." To this end McAllister & N&W were to enter into a stipulation and on the basis of that stipulation N&W was to file a motion to dismiss the proceedings and McAllister would not oppose the motion. The stipulation and motion have now been filed. The stipulation is set for in full below:

STIPULATION

Pursuant to Rule 10(v) of the Federal Maritime Commission's Rules of Practice and Procedure, 46 C.F.R. 502.162, it is hereby stipulated by and between the Norfolk & Western Railway Company ("N&W") and McAllister Brothers, Inc. ("McAllister") that the following statements of fact are accurate:

(1) McAllister is an operator of tugboats used for the docking and undocking of vessels in Norfolk and other United States East Coast ports.

(2) The N&W owns and operates the Lamberts Point Coal Piers ("LPCP"), located at Norfolk, Virginia, which is used to load coal transported over the Norfolk & Western's railroad system, upon vessels for transportation to ports in the United States and foreign countries.

(3) No commodity other than coal is loaded at LPCP, and no commodities of any kind are unloaded at LPCP.

(4) Lamberts' Point Docks, Incorporated, a wholly-owned subsidiary of the N&W, operates merchandise piers at Norfolk which are utilized to load and unload general merchandise cargo between N&W railroad cars and vessels.

(5) No coal is loaded upon vessels at the merchandise piers.

(6) The vessels that call upon LPCP carry shiploads of coal and are engaged on the

basis of a charter or contract of affreightment between the vessel owner or operator and the purchaser or the seller of the coal.

(7) The vessels calling upon LPCP do not hold themselves out to carry coal for any person other than the person that contracts for their services.

(8) The vessels calling upon LPCP do not solicit any cargo other than the coal transported under contract, they do not advertise a sailing schedule, they do not publish a tariff or the carriage of coal from Norfolk, nor have they filed a tariff at the Commission for such carriage.

(9) The N&W has entered into an operating agreement dated February 10, 1968 with Coal Terminal Towing Corporation ("Coal Terminal") to provide docking and undocking assistance at LPCP.

(10) The Coal Terminal agreement does not apply to docking and undocking assistance provided at the merchandise piers, and there is no other agreement between the N&W, or any of its subsidiaries, and any other tugboat operator for the provision of docking and undocking assistance at the N&W's merchandise piers.

On the basis of the foregoing facts, N&W moves to dismiss the complaint for lack of jurisdiction in the Commission. N&W correctly notes that McAllisters complaint turns upon the existence or application of an exclusive agreement for tugboat operations at piers owned or operated by N&W or its subsidiary. Since no such agreement exists at any of the merchandise piers, the complaint is concerned only with operations at N&W's coal piers (LDCP).

Since N&W is not a common carrier by water Commission jurisdiction of N&W is dependent upon the finding that N&W is an "other person" subject to the Shipping Act. Such a person is defined as:

> . . . any person not included in the term "common carrier by water," carrying on the business of . . . furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water. 46 U.S.C. § 801.

A terminal operator is not an "other person" if the only vessels calling at its piers are not common carriers. *New Orleans Steamship Ass'n v. Bunge Corp.*, 6 SRR 336 (1965), and *Agreement No. T-2719*, 13 SRR 800 (1973). (See also *Fall River Line Pier, Inc. v. International Trading Corp. of Virginia*, 399 F. 2d 413 (1st Cir. 1968)). Thus, if the vessels calling at LPCP are not common carriers, the Commission does not have jurisdiction of McAllister's complaint.

Although the Shipping Act does not define the term common carrier, the Commission has consistently held that Congress intended the Shipping Act to apply to common carriers at common law. *Carrier Status of Containerships, Inc.*, 6 SRR 483, 489 (1965), *Philip R. Consolo v. Grace Line Inc.*, 4 F.M.B. 293, 300 (1953), *Banana Distributors, Inc. v. Grace Line Inc.*, 5 F.M.B. 615, 620 (1959), and *Galveston Chamber of Com. v. Saguenay Terminals, Ltd.*, 4 F.M.B. 375, 377-378 (1954). The common law definition of common carrier most frequently cited in Commission precedent is the statement in *The Wildenfels*, 161 F. 864, 866 (2d Cir. 1908), where the court said:

> According to all the authorities, the essential characteristics of the common carrier are that he holds himself out as such to the world; that he undertakes generall, and for all persons indifferently, to carry goods and deliver them, for hire; and that his public

profession of his employment to be such that, if he refuse, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action.

Another definition, cited with almost equal frequency, is:

A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is, in genral, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey. *Propeller Niagra v. Cords*, 62 U.S. 41, 46 (1858).

At common law, therefore, a carrier is a common carrier if it holds itself out to carry goods for anyone. In adopting the common law definition the Commission stated in *Carrier Status of Containerships, Inc., supra,* at 489, that:

The Commission has examined the indicia of "common carrier at common law" on numerous occasions. The most frequently mentioned characteristic is that a common carrier by a course of conduct holds himself out to accept goods from whomever offered to the extent of his ability to carry.

The vessels calling at LPCP do not hold themselves out as common carriers. Rather, the vessels carry coal under contract or charter only for either the purchaser or the seller of the coal. The vessels calling at LPCP do not even hold themselves out to carry *coal* for all persons indifferently. They do not advertise a sailing schedule, they have not published a tariff for the carriage of coal, nor have they filed a tariff for such carriage at the Commission. No vessels other than the coal carriers call at LPCP.

From the foregoing it is clear that the vessels calling at LPCP are not common carriers, and thus the N&W does not provide terminal services "in connection with a common carrier by water." The N&W is not an "other person" with respect to its operations at LPCP and, consequently, the Commission does not have jurisdiction of LPCP's operations.

Accordingly, the complaint should be dismissed.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–2

SUN COMPANY, INCORPORATED

v.

LYKES BROS. STEAMSHIP COMPANY, INCORPORATED

NOTICE OF ADOPTION OF INITIAL DECISION

July 13, 1977

No exceptions having been filed to the initial decision of the Administrative Law Judge in this proceeding served June 16, 1977, and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on July 13, 1977.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 77–2

SUN COMPANY, INCORPORATED

v.

LYKES BROS. STEAMSHIP COMPANY, INCORPORATED

Through a combination of commodity misdescriptions and improper billing under a Standard Contract Rate rather than an Industrial Contract Rate, the complainant was overcharged for a shipment of oil well drilling supplies. Reparation awarded.

J. B. Como, Jr., International Transportation Manager of complainant corporation, for Sun Company, Inc., complainant.

Edward S. Bagley, of Terriberry, Carroll, Yancey & Farrell, for Lykes Bros. Steamship Co., Inc., respondent.

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

By complaint filed February 17, 1977, the Sun Co., Inc. (Sun or the complainant), alleges that in violation of section 18(b)(3) of the Shipping Act, 1916,[2] inapplicable rates were charged by the Lykes Bros. Steamship Co., Inc. (Lykes, the carrier or respondent) on a shipment of oil well drilling supplies, i.e., 265 boxes of drilling mud compound, 43 boxes of caustic soda, and 23 pallets of chemical products, which was shipped from New Orleans, Louisiana, to Antofagasta, Chile, in transit to Bolivia. The bill of lading was dated February 12, 1975; however, the shipment did not arrive in Antofagasta until March 7, 1975, and payment of the freight charges was made on March 10, 1975. Total freight charges paid amounted to $46,504.85, including bunker surcharge and tolls. The complainant alleges that, after correcting for cargo misdescriptions and applying the Industrial Contract Rate, the proper aggregate freight charges should have totalled $38,103.30.

By consent of the parties and with the approval of the presiding officer, this proceeding has been conducted under the shortened procedure provided in Rules 181–187 of the Commission's Rules of Practice and Procedure (Subpart K, 46 CFR 502.181–187).

[1] This decision became the decision of the Commission July 13, 1977.

[2] 46 U.S.C. 817(b)(3), as amended.

The facts, figures and assertions are as set forth in Paragraphs I through IV of the complaint, and they are admitted[3] by the respondent, except for subparagraph III(m) wherein complainant claims that the respondent's "sole basis" for declining to refund the overcharge was the six-month rule in the tariff.[4] Respondent claims that, due to the descriptions submitted by complainant on the bill of lading and the complainant's failure to include the required proprietary clause[5] for the Industrial Contract Rate, the respondent had no alternative but to charge the higher rates assessed, as required by the conference rules (filed tariffs of the Atlantic & Gulf/West Coast of South America Conference). However, under the circumstances, respondent has no objection to adjusting the charges here involved and repaying the complainant the $8,401.55 demanded in the complaint, based on the cargo misdescription and inappropriate contract rate, if the Commission is satisfied "that complainant has met the 'heavy burden of proof' required" in such cases.

DISCUSSION

A cursory reading of the complaint and attached documentation generates an initial impression that the action is barred[6] by the two-year statute of limitations (§ 22 Shipping Act, 1916, 46 U.S.C. 821). However, supplemental documentation, including the check sent in payment of the freight charge, establishes that payment was actually made on or about March 10, 1975, thus bringing the claim well within the required two-year period.[7]

The carrier's "six month rule" in the tariff (Tariff Item 7(b), *supra*, note 4) is likewise of no effect in barring this claim. *Kraft Foods v. FMC*, 538 F. 2d 445 (1976); *Polychrome Corp. v. Hamburg-America Line*, 15 F.M.C. 221, adopted by the Commission 15 F.M.C. 220 (1972).

With regard to cargo misdescription, past Commission policy and judicial precedent have unquestionably declared that a shipper's misdescription of cargo can still afford a basis for later reparation relief, and that in cases involving alleged overcharges under section 18(b)(3) of the Act the controlling test is what the complainant shipper actually shipped, and is not limited to how the cargo was described on the bill of lading. *Union Carbide Inter-America v. Venezuela Line*, 17 F.M.C. 181, 182 (1973);

[3] The answer does not expressly use the term "admit"; however, rather than strike this form of answer as constituting an improper pleading, thus exalting form over substance, I find the phrase "We are in basic agreement with the facts and contentions . . . in Paragraphs I thru IV" to be the legal equivalent of "We admit. . . ."

[4] Tariff Item 7(b) requires all claims for overcharge to be submitted to the carrier within six months after shipment.

[5] The missing proprietary cargo clause was supplied later, by sworn affidavit dated December 28, 1976; copy attached to complaint.

[6] Bill of lading is dated February 12, 1975; complaint was filed (received) at the FMC on February 17, 1977.

[7] Section 22, Shipping Act, 1916, provides that reparation claims must be filed "within two years after the cause of action accrued." See also 46 CFR 502.63. By judicial decision and Commission rulings, the two year period starts either upon delivery of the cargo to the carrier or *upon payment* of the freight charges, whichever is later. *Southern Pacific v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 534 (1918); *Commercial Solvents Corp. v. Moore-McCormack Lines, Inc.*, 16 SRR 1631, 1632, fn. 3 (Jan. 4, 1977).

Abbott Laboratories v. Moore-McCormack Lines, Inc., 17 F.M.C. 191, 192 (1973); *Western Publishing Co. v. Hapag Lloyd A.G.*, 13 SRR 16, 17 (1973). With regard to a shipper being charged a higher rate when he is already entitled to be assessed under a special contract rate, section 18(b)(3) also makes it abundantly clear that a carrier is strictly bound to adhere to the terms of the tariff as filed. "This mandate applies not only to the rates published therein, but to the various terms, rules, regulations and conditions included within that tariff which are as much a part of the tariff as are the rates themselves." *Kraft Foods v. Moore McCormack Lines*, 17 F.M.C. 320, 322 (1974), rev'd. on other grds. 538 F. 2d 445; see also *Louisville & Nashville Ry. v. Maxwell*, 237 U.S. 94 (1915); *Boston & Maine RR v. Hooker*, 233 U.S. 97, 112 (1914).

In cargo misdescription cases, where the shipment has left the custody of the carrier and the carrier is thus prevented from personally verifying the complainant shipper's (new) description, the Commission has held that the complainant has a "heavy burden of proof" and must establish, with reasonable certainty and definiteness, the validity of the claim. *Western Publishing Co. v. Hapag Lloyd A.G.*, 13 SRR 16, 17 (1973); *Johnson & Johnson Intl. v. Venezuelan Lines*, 16 F.M.C. 87, 94 (1973); *Colgate Palmolive Peet v. United Fruit Co.*, 11 SRR 979, 981 (1970). It is usually the case, as it is here, that the carrier in classifying and rating a shipment must look to the information supplied him by the shipper or freight forwarder. Accordingly, we cannot "fault" the carrier for relying on descriptions set forth on the subject bill of lading. However, in determining whether reparation should be awarded in a given case, i.e., whether section 18(b)(3) has been violated vis-a-vis the filed tariffs, "a tariff is a tariff" and the controlling test is finally what the complainant shipper can prove was actually shipped.[8]

In applying the foregoing principles to the facts of the instant case, I find that the respondent is a common carrier engaged in transportation by water from ports in the United States to ports in Chile, and, as such, is subject to the provisions of the Shipping Act, 1916, as amended; that respondent is a member of the Atlantic & Gulf/West Coast of South America Conference, S.B.SA–12,Freight Tariff, FMC–1, and, as such member, is required to charge freight rates in accordance with such filed tariff; that under bill of lading dated February 12, 1975, the respondent transported aboard its vessel *Stella Lykes* from New Orleans to Antofagasta, Chile, the commodities described in the first paragraph of this decision; and that the respondent charged and the complainant paid aggregate freight charges totalling $46,504.85, including bunker surcharge and tolls.

The complainant freely admits that its foreign freight forwarder

[8] "Neither mistake, inadvertence, contrary intention of the parties, hardship nor principles of equity permit a deviation from the rates, rules and regulations in the carrier's filed tariff." *Kraft Foods v. Moore McCormack Lines*, 17 F.M.C. 320, 323 fn. 4 (1974); *Louisville & Nashville Ry. v. Maxwell*, 237 U.S. 94 (1915); *Union Carbide Inter-America v. Venezuelan Line*, 17 F.M.C. 181, 182 (1973).

incorrectly described the shipment for rating purposes, i.e., the bill of lading description for drilling mud compounds should have indicated value per freight ton, some products were described by trade names, and a proprietary clause required by tariff rules[9] for the activation of the Industrial Contract Rate was inadvertently omitted.

The complainant qualifies for the "Industrial Contract Rates" by virtue of Contract No. 514 in effect with the Conference since January 30, 1975; and the missing proprietary clause was submitted with sworn affidavit on December 28, 1976. Accordingly, I find that the complainant was entitled to have its shipment rated on the basis of the "Industrial Contract Rates" in the filed tariff, and its total freight charges must be adjusted downward to reflect that rate basis. See also *Cities Service Intl. Inc. v. Lykes Bros.*, 16 SRR 847 (1976).

The complainant's freight forwarder also mistakenly used the trade names "Bit Lube," "Drilling Detergent" and "Pipe Lax" in the descriptions on the bill of lading, thus resulting in the respondent rating all such items as "Cargo, N.O.S.," a higher freight rate category than was appropriate, due to the carrier's reliance on Tariff Item 2(r) which allowed this procedure in just such circumstances. However, such trade name rules govern the rating of cargo by carriers only 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. *Carborundum Co. v. Royal Netherlands Steamship Co.*, 16 SRR 1634, 1637–38 (Jan. 5, 1977). Furthermore, rules of tariff construction also require that the more specific of two possible applicable tariff items must apply. *Corn Products Co. v. Hamburg-Amerika Lines,* 10 F.M.C. 388 (1967).

Relying on the shipper's description on the bill of lading, the carrier assessed the following charges on the subject shipment:

265 boxes, drilling mud compounds, 708,000 pounds & 16,727 cubic feet, $35,754 based on $101/2000 pounds, per 12th revised page 154;

43 boxes, caustic soda, 81,450 pounds & 2,082 cubic feet, $2,416.96 based on $59.25/2000 pounds, per 34th revised page 123;

23 pallets, chemical products (bit lube, drilling detergent & pipe lax), rated as "Cargo, N.O.S.", 43,075 pounds & 1,193 cubic feet, $4,585.59 based on $153.75/40 cubic feet, per 5th revised page 149.

The bunker surcharge and tolls bring the total aggregate freight charge to $46,504.85. Although the tolls remain the same, the bunker surcharge amount changes when the shipment is assessed according to the revised cargo descriptions; thus, applying the Industrial Contract Rates and the new descriptions the revised freight charges would be as follows:

[9] Tariff Item 1050, page 218, conference tariff referred to above (text).

Tariff Page & Item #	Commodity		Freight Charges
10th rev. p. 40, #140	Macogel, as Bentonite 415,900# at $70.75/2000#	$14,712.46	
8th rev. p. 218, #1050	Less 5%	735.62	$13,976.84
6th rev. p. 217, #1050	Caustic Soda, 81,450# at $52.75/2000#		2,148.24
1st rev. p. 192, #15 & *8th rev. p. 212	Aluminum Stearate, 54 cft at $76.00/40 cft		102.60
7th rev. p. 215, #1050	Spersene, as Drilling Mud Compound, Value over $500 but not over $700/2000#, 162,900# at 95.50/2000#		7,778.48
7th rev. p. 215, #1050	Resinex, as Drilling Mud Compound, Value over $1000/2000# 70,500# at $129.25/$2000#		4,556.06**
7th rev. p. 215, #1050	Magcophas, as Drilling Mud Compound, Value over $700 but not over $1000/2000# 20,990# at $112.25/2000#		1,178.06**
7th rev. p. 215, #1050	Stabil-Hole, as Drilling Mud Compound, Value over $300 but not over $500/2000# 13,550# at $85.50/2000#		579.26
7th rev. p. 215, #1050	Kwik Seal, Medium & Fine, as Drilling Mud Compound, Value over $700 but not over $1000/2000# 23,300# at $112.25/2000#		1,307.71
7th rev. p. 215, #1050	Bit-Lube, as Driling Mud Compound, Value over $1000/2000# 26,850# at $129.25/2000#		1,735.18**
7th rev. p. 215, #1050	Drilling Detergent, as Drilling Mud Compound, Value over $1000/2000# 13,675# at $129.25/2000#		883.75
7th rev. p. 215, #1050	Pipe Lax, as Drilling Mud Compound, Value over $1000/2000# 2,550# at $129.25/2000#		164.79
	Ocean Freight Total		$34,410.97**
	Bunker Surcharge		
	54 cft at $8.25/40 cft		11.14
	831,575# at $8.25/2000#		3,430.25
	Tolls		249.76
	Total		$38,102.12**

*The complaint specifies "9th rev." but this is an obvious tyographical error.
**After correction of minor computational errors in complaint.

As can be seen from the above list, the eight items from "Spersene" down to "Pipe Lax" have all been treated as simply different forms of drilling mud compound. The respondent carrier was not provided with a statement of value for drilling mud compounds nor was value indicated on the bill of lading. The carrier therefore arbitrarily rated drilling mud compounds at "actual value not over $300 per freight ton but not exceeding $500 per freight ton." Complainant shipper maintains that four[10] of such items should have been rated at "actual value over *$1,000 per freight ton*" as required by tariff page 8, item 2(h), to which class rates for drilling mud compounds are made subject. As indicated in the above list, the other four[11] drilling mud items should have varying minimum values of over $300, over $500 and over $700, as appropriate. Documentation attached to the complaint establishes that the eight items referred to above should, more properly, have been classified as drilling mud compounds, although the carrier's confusion on the point is understandable. As admitted in the complaint, "drilling mud compounds and drilling mud additives are elusive terms." Other than for transportation rating purposes, the petroleum industry considers the two terms synonymous. There is, however, a specific description published in the tariff for "oil well drilling muds" (tariff page 215, item #1050) and the Customs Export Schedule B provides a description for drilling mud under the subcategory "clays and other refractory minerals." The confusion is compounded by the fact that drilling mud does not really exist, as such, until the materials making it are mixed at the job site; thus, the term "drilling mud" is somewhat of a fiction when used for cargo rating or Customs export purposes. Accordingly, it seems that the term "drilling mud compounds," for commodity rating purposes, can only be applied to those products which become a composite part of the compound at the oil well drilling site. (Otherwise there can be *no* single commodity item which could ever come under this specifically named item in the tariff.) Of course, this would still exclude any component product for which there is already a more specific description and freight rate in the filed tariff.

CONCLUSIONS

I find that the complainant shipper has sustained its heavy burden of proof with regard to the alleged cargo misdescription and has established, with reasonable certainty and definiteness, the validity of its claim. I also find, as mentioned earlier, that the complainant was entitled to have its shipment rated on the basis of the Industrial Contract Rates. By application of these revisions to the original charges assessed by the carrier, I find that section 18(b)(3) of the Act was violated to the extent that the freight charges exceeded the revised amount calculated in the Complaint (repeated *supra*—totalling $38,102.12) after correction of minor computational errors.

The complainant was overcharged $8,402.73 and reparation is awarded in that amount. Because of the confusion caused by the complainant's improper description in the bill of lading and the complainant's own failure to submit the required proprietary clause at that time, no interest is awarded. Respondent will make repayment to the complainant within

[10] Resinex, Bit Lube, Drilling Detergent and Pipe Lax.

[11] Spersene, Magcophas, Stabil-Hole and Kwik Seal.

thirty (30) days from the issue date of this decision, or in such time as the Commission may later direct.

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

WASHINGTON, D.C.,
June 16, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 512

CORNING GLASS WORKS

v.

NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE

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

July 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 July 13, 1977.

It is Ordered, That applicant is authorized to refund $3,165.00 of the charges previously assessed Philips Gloelampen-fabrieken.

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 512 that effective September 20, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from September 20, 1976, through September 29, 1976, the service one rate on 'Lamps, Semi-Finished Sealed Beam, other than Auto,' minimum 800 cft. per container is $52.75 WM, 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.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 512

CORNING GLASS WORKS

v.

NORTH ATLANTIC CONTINENTAL FREIGHT 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 Rule 92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), the North Atlantic Continental Freight Conference (the Conference or Applicant) has applied for permission to refund a portion of the freight charges on a shipment of lamps, which moved from Baltimore, Maryland, to Amsterdam, The Netherlands, under Atlantic Container Line bill of lading dated September 22, 1976. The application was filed March 17, 1977.

The subject shipment moved under North Atlantic Continental Freight (NACF) Conference Tariff No. 29, FMC–4, 12th revised page 250, item 812.4316.565, effective September 20, 1976 ("Lamps, semi-finished, sealed beam, other than auto"). The aggregate weight of the shipment was 95,370 pounds and measured 1551 cubic feet. The rate applicable at time of shipment was $52.75 per long ton or 40 cubic feet, whichever is greater (W/M), and with a minimum of *1600* cubic feet per container. The rate sought to be applied is the same $52.75 W/M but with a minimum of *800* cubic feet per container. (Each of the three containers here involved had *less* than 800 cubic feet per container.) This latter rate with the reduced minimum was pursuant to prior negotiation and was reflected in NACF Conference Tariff No. 29, FMC–4, 13th revised page 250, item 812.4316.555, effective September 29, 1976.

Aggregate freight charges payable pursuant to the rate applicable at time of shipment amounted to $6,330. Aggregate freight charges at the rate sought to be applied amount to $3,165. The difference sought to be

[1] This decision became the decision of the Commission July 13, 1977.

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

refunded is $3,165. The applicant is not aware of any other shipment of the same commodity which moved via Atlantic Container Line or the same conference (NACF) during the same time period at the rates involved in this shipment.

The Applicant offers the following as grounds for granting the application:

> We omitted to note in complainant's application (to the Conference) for waiver of September 20, 1976 general rate increase, a request to also reduce minimum requirement to 800 cft per container in order to cover movements in 20 ft. containers. When complainant was advised of rate action (by the Conference) the omission was pointed out to conference chairman and promptly handled at next NACFC meeting as evidenced by change shown on 13th rev. page 250 which was eff. September 29, 1976. By this time the shipment herein referred to had been transported.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 92(a), *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.

Although the nominal "complainant" in this proceeding is the shipper, Corning Glass Works, the documentary evidence discloses that the freight charge on this "Freight Collect" shipment was paid by Incotrans, as agent for the consignee, Philips Gloelampen-fabrieken of Einhoven, The Netherlands. Accordingly, any refund of freight charges must go to Incotrans, for the benefit of Philips Gloelampen-fabrieken, the party that ultimately bore the freight charges.

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 new rate (new minimum) for shipments of the subject commodity, 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 refund of a portion of the freight charges will not result in discrimination among shippers.

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

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

Accordingly, permission is granted to Atlantic Container Line to refund a portion of the freight charges, specifically the amount of $3,165. An appropriate notice will be published in the tariff of the North Atlantic Continental Freight Conference.

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

WASHINGTON, D.C.,
June 20, 1977.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–8

HAWAIIAN MARINE LINES, INC. PROPORTIONAL RATES ON LUMBER BETWEEN OREGON AND HAWAII

ORDER OF DISCONTINUANCE

July 22, 1977

The tariff matter subject of this investigation has been cancelled effective June 30, 1977. Accordingly, no further purpose would be served by continuation of this investigation and the proceeding is hereby discontinued.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

[DOCKET 77-24; GENERAL ORDER 37]

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

Part 543—Financial Responsibility for Oil Pollution, Alaska Pipeline

July 26, 2977

AGENCY: Federal Maritime Commission

ACTION: Final Rule

SUMMARY: The Federal Maritime Commission hereby issues regulations which will enable vessel operators to comply with subsection (c) of section 204 of the Trans-Alaska Pipeline Authorization Act. That subsection makes the owners and operators of vessels which carry oil which has been transported through the trans-Alaska pipeline, jointly, severally, and strictly liable for damages resulting from the discharge of oil from such vessels. That subsection further requires that financial responsibility for $14 million be demonstrated before such oil may be loaded aboard a vessel. This rule is to provide the manner by which that financial responsibility can be demonstrated to the Federal Maritime Commission, and to provide for the issuance of Certificates attesting to that demonstration.

EFFECTIVE DATE: This rule is effective upon publication in the *Federal Register.*

FOR FURTHER INFORMATION CONTACT:

Leroy F. Fuller, Director
Bureau of Certification and Licensing
Federal Maritime Commission
1100 L Street, N.W.
Washington, D. C. 20573
(202) 523-5840

SUPPLEMENTARY INFORMATION:

By publication in the *Federal Register* of June 15, 1977, the Commission proposed to promulgate a new Part 543 of Title 46 of the Code of Federal Regulations implementing the financial responsibility provisions of the Trans-Alaska Pipeline Authorization Act (the Act). Comments from the public were invited with respect to those proposed rules. Because the Commission was informed that oil from the North Slope of Alaska was to be pumped through the pipeline commencing in June of 1977, with the loading of that oil aboard vessels at Valdez, Alaska, to commence in late July or early August of 1977, the Commission provided that comments were to be filed on or before July 5, 1977. Upon the request of the Water Quality Insurance Syndicate, which asserted that it is the leading pollution liability insurer in the United States, the deadline for the submission of comments was extended to July 8, 1977.

Comments with respect to the proposed rules were received from (1) Atlantic Richfield Company (Arco), (2) Exxon Company, U.S.A., (3) the Standard Oil Company (Sohio), (4) International Ocean Transport Corporation (International), (5) the International Group of Mutual Shipowners Protection and Indemnity Associations, and the International Tanker Indemnity Association, Limited (Group), (6) the Water Quality Insurance Syndicate (Syndicate), (7) the United States Department of the Interior, and (8) the State of Alaska. The comments fall into two main categories: those dealing with procedural matters, and those dealing with the substance of the regulations.

In the first category, Exxon and Sohio informed the Commission that they intend to load oil at Valdez, Alaska on July 28, and July 15, respectively, and requested a waiver of the requirement that applications for certificates be filed 45 days in advance of the loading date.[1] International asserted that a new certificate for liability under the Act is an unnecessary duplication of certificates; that the Commission should not require that the original of the certificate be carried aboard the vessel, but that it be maintained at the home office of the certificant, with a copy aboard the vessel; and that the requirement that the certificates be renewed every two years is an unnecessary burden upon the certificants. The State of Alaska urged that underwriters should be specifically amenable to suit in Alaska, British Columbia, and the three states adjacent to the Pacific Ocean; that the Commission's insurance form and guaranty form should explicitly provide that the termination of insurance or guaranty does not affect the liability of the insurer or guarantor for incidents occurring prior to the date of termination; and that the insurance form appended to the proposed rules should be made the policy of insurance issued by the insurer to the vessel operator, instead of it being only a representation to the Commission that there is such insurance in force.

In the second category, several commentators urged the Commission

[1] Due to the recent disruption of the operation of the pipeline, Sohio's loading has been delayed until July 26, 1977.

to require that, in addition to those vessels actually loading oil at the terminal facilities of the pipeline at Valdez, Alaska, any vessels carrying such oil, whether by transshipment, lighterage, or other reason, prior to the time that the oil is first brought ashore at a port under the jurisdiction of the United States, also be required to evidence their financial responsibility in accordance with these regulations. Several commentators also urged that the United States and the Trans-Alaska Pipeline Liability Fund should be the only ones afforded the right of direct action against underwriters, thereby denying any other potential claimant the right of direct action. The Group would go further, and would permit the right of direct action, only if the underwriter shall have the same defenses in an action brought by a claimant against the underwriter, as the underwriter would have in an action brought by the assured against the underwriter, such as, the defense of wilful misconduct on the part of the vessel operator. Arco asserted that the "quick assets" test for a self-insurer, found in section 543.6(a)(3) of the proposed rules, is impossible for it or any other oil company to meet. The Group echoed that sentiment, but the State of Alaska favored the quick assets test. The Water Quality Insurance Syndicate, which is comprised of 28 insurance companies selling marine insurance in the United States, stated that it will not provide insurance to cover the liabilities imposed by the Act, but asserted that the Act does not permit a direct action by a claimant against an underwriter.

The most extensive comments were provided by the Group. The International Group of Mutual Shipowners Protection and Indemnity Associations is comprised of 16 mutual protection and indemnity associations, which are each comprised of several shipowning companies. By means of assessments upon each member, insurance is provided to each member. The risks of the Group are further underwritten by the underwriters at Lloyds. The International Tanker Indemnity Association, Limited (ITIA) is the insurance arm of the Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP). As its name implies, TOVALOP is an association of companies owning oil tankers, which, among other purposes, was constituted to provide insurance to its members covering the risk of liability for oil pollution. The underwriters at Lloyds also provide excess insurance to ITIA.

In addition to some comments already mentioned above, the Group asserted that the liability of an operator, of an insurer, for both Federal Water Pollution Control Act (FWPCA) liability and Trans-Alaska Pipeline Authorization Act liability, does not exceed $14 million in the aggregate. The Group wished to indicate its insurance of a particular vessel by the issuance of an addendum or amendment to the Commission's existing insurance form FMC-225, which deals with the insurance of the liability of vessels under the FWPCA (46 C.F.R. 542). The Group also wished to change the definition of "operator", so as to expressly include therein an owner and any owner *pro hac vice*, even if not technically a demise charterer. Lastly, the Group asserted that the insurer should be permitted to cancel its insurance upon 30 days' notice to the Commission.

Oil is currently flowing through the trans-Alaska pipeline enroute to the port of Valdez, Alaska. The Commission is informed that, within the next week, the oil will have reached the port, ready for loading aboard vessels for transportation to other places in the United States. Vessels are not permitted to load oil, unless the owner or operator of that vessel has established its financial responsibility to meet its liability under the Act. These regulations provide the methods by which that financial responsibility may be established, and for the issuance of certificates attesting to that financial responsibility. Without those certificates, the oil may not be loaded aboard the vessels at Valdez. Consequently, the Commission finds that, in order not to delay the transportation of oil from Alaska to other parts of the United States, the public interest requires that these rules be made effective immediately upon their publication in the *Federal Register;* and hereby does so provide.

The broad purposes of the Trans-Alaska Pipeline Authorization Act, as gleaned from its text and legislative history, are to provide for the construction of the trans-Alaska pipeline without further environmental challenge; to extract the petroleum located in the reserves of the North Slope of Alaska, so as to make available that petroleum to meet the energy needs of the United States; to protect the environment, property, and persons from injury resulting from the extraction and movement of that petroleum, including injury resulting from its ocean transportation; and to provide for the repair of or compensation for any injury sustained as a result of that extraction and transportation.

The purpose of these regulations is to assure that adequate funds will be available within reach of the courts of the United States, to pay all persons suffering injury as the result of oil pollution occasioned by the transportation of North Slope oil to other parts of the United States. The term "persons" is intended to refer to any individual or entity permitted to make a claim under the provisions of the Act. These regulations are designed to provide the maximum protection to the public, without being unduly burdensome. Any ambiguity in these regulations should be resolved in a manner most likely to provide the maximum protection to the public.

There follows hereafter a section by section analysis of these final rules. The comments received with regard to the proposed rules are discussed in connection with the sections of the rules to which they are applicable.

Section 543.1, Scope. The proposed rules required demonstration of financial responsibility only with respect to vessels which actually load oil at terminal facilities of the trans-Alaska pipeline. Comments urged that the requirement to demonstrate financial responsibility be extended to the operators of all vessels, whether or not actually loading oil at the terminal facilities of the pipeline, if those vessels carry North Slope oil during any segment of the journey between the terminal facilities of the pipeline and the point where that North Slope oil is first brought ashore at a port under the jurisdiction of the United States. Paragraph (1) of subsection (c) of section 204 of the Act provides:

> Notwithstanding the provisions of any other law, if oil that has been transported through the trans-Alaska pipeline is loaded on *a vessel at the terminal facilities of the pipeline*, the owner and operator of *the vessel* (jointly and severally). . .shall be strictly liable without regard to fault. . .for all damages. . .sustained by any person or entity. . .as the result of discharges of oil *from such vessel*. (Emphasis supplied)

Thus, the first paragraph of the subsection clearly indicates that the owner and operator of the vessel which actually loads oil at the terminal facilities of the pipeline are liable for the discharges of oil from that vessel, but would appear to exclude any on carrying vessel from that strict liability.

However, the seventh paragraph of the subsection provides, that "[s]trict liability under this subsection shall cease when the oil has first been brought ashore at a port under the jurisdiction of the United States." Thus, that seventh paragraph casts doubt whether the first paragraph of the subsection was intended to apply only to the vessel originally loading the oil, for if strict liability does not cease until the oil has been first brought ashore, and if the oil is transshipped from the vessel which loaded it in Alaska, to another vessel for on carriage to a U.S. port, the strict liability does not cease, but the vessel which loaded it in Alaska can no longer discharge that oil, and, consequently, cannot be liable for a discharge.

It could be argued that the Congress determined that the greatest risk was to be found in vessels which actually loaded the oil in Alaska, and that discharges from only those vessels were to be protected by the Act, leaving the liability for discharges from any on carrying vessel to be determined under other applicable laws, including the Federal Water Pollution Control Act, and the several state statutes imposing liability for oil pollution. The report of the Committee of Conference, wherein the differences between the House and Senate versions of the Act were resolved, contains language supporting an interpretation that the Act is limited to vessels which originally load the oil in Alaska.[2] There, the conferees stated that:

> It is expected that tankers as large as 250,000 deadweight tons will transport North Slope crude to ports on the West Coast of the United States and elsewhere. Oil discharges from vessels of this size could result in extremely high damages to property and natural resources, including fisheries and amenities, especially if the mishap occurred close to a populated shoreline area.
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> . . .
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> The Conferees concluded that existing maritime law would not provide adequate compensation to all victims, including residents of Canada, in the event of the kind of *catastrophe which might occur*. (Emphasis supplied)

[2] Conference Report, H.R. Rep. No. 93–624, 93d Cong., 1st Sess. (1973).

Conference Report, p. 28. Thus, it can be argued that the Congress, anticipating that supertankers would be loading the oil in Alaska, sought to protect against discharges from those large vessels, and not from the smaller vessels which might be involved in the on carriage of the oil.

However, it can also be argued that the Congress intended that any vessel carrying North Slope crude should be subjected to the strict liability imposed by the Act. It can be argued, as the Department of the Interior does argue, that the specific language in paragraph (7) of subsection (c) of section 204 of the Act, dealing with the cessation of strict liability, should govern the more general imposition of liability contained in paragraph (1) of that subsection. Language can also be found in the Conference Report to support that interpretation. Thus, the Conference Report stated, that "[s]ubsection (c) imposes on the owner or operator of a vessel that is loaded with *any oil* from the trans-Alaska pipeline strict liability without regard to fault for damages sustained by any person as the result of discharges of oil from such vessel." (Emphasis supplied) Conference Report, p. 24. Again, the Conference Report states, that "[s]ection 204(c) provides, for vessels that transport North Slope oil in the coastal trade, liability standards that are much stricter than those that apply to vessels that transport *other oil in the coastal or foreign trade*." (Emphasis supplied). Conference Report, p. 28. Lastly, the conferees stated, "[c]onsequently, the Conferees established a rule of strict liability for damages from discharges of the oil *transported through the trans-Alaska Pipeline* up to $100,000,000." (Emphasis supplied). Conference Report, p. 28.

The Department of the Interior, in its comments to the Commission regarding the proposed rules, stated that it is the agency charged with the implementation and interpretation of the Act, and that it interpreted the Act so as to impose strict liability upon all vessels engaged in any segment of the transportation of North Slope oil, until such time as that oil is first brought ashore at a port under the jurisdiction of the United States. The Department of the Interior, in its rules implementing the Act, provided that strict liability applied to all such vessels. 43 C.F.R. 29.7

When the broad purposes of the Act are considered, to wit: to push ahead with the construction and operation of the trans-Alaska pipeline without permitting further environmental challenge, and to provide compensation for injuries sustained as a result of the production and transportation of Alaskan oil; and in view of the position taken by the Department of the Interior in its final rules regarding this subject, the Commission concludes that the sounder interpretation of the Act is that its financial responsibility provisions apply to all vessels engaged in any segment of the transportation of trans-Alaska pipeline oil between the terminal facilities of the pipeline and the port under the jurisdiction of the United States where that oil is first brought ashore.

Accordingly, the Commission intends these regulations to apply to any vessel which has on board, oil which has been transported through the trans-Alaska pipeline, at any time between the time the oil is originally loaded at the terminal facilities of the trans-Alaska pipeline and the time it is first brought ashore at a Port under the jurisdictional United States, regardless of the purpose for which the oil is aboard the vessel. These rules shall apply to vessels which originally load the oil in Alaska, as well as to those vessels which receive such oil from any source and for any purpose, until such time as it is first brought ashore at a port under the jurisdiction of the United States. By the words "brought ashore" the Commission means that point where the oil is physically located on or above dry land, inland of the mean high tide mark, and at rest in such manner as to preclude the movement of the oil seaward again without the intervention of an intentional act by some person.

Section 543.2, Definitions. Most of the definitions contained in this section are self-explanatory. The definition of oil (543.2(h)) is to be given an expansive meaning. The definition of operator (543.2(i)), as it appeared in the proposed rules, was as follows:

> 'Operator' or "Vessel Operator' means any person, including a demise charterer, who conducts or who is responsible for the operation of a vessel.

The Group requested that the definition be amended, so as to expressly include within its terms, an owner of a vessel, and any owner *pro hac vice,* whether or not technically a demise charterer. The Commission has not amended the definition in precisely the manner requested by the Group. Any person who conducts or who is responsible for the operation of a vessel is an operator within the meaning of the rule. The Commission has, in these final rules, made express reference to an owner or demise charterer to make it clear that he is to be considered as the operator, only if he is the person who conducts or is responsible for the operation of a vessel. In other words, so long as the person operates the vessel or is responsible for its operation, the person is an operator within the definition, whether or not the person is the titled owner of the vessel, a demise charterer of the vessel, any other owner *pro hac vice* of the vessel, or any other class of person. This definition of operator ties in with the reference in paragraph (g) of section 543.4 wherein it is stated that only an operator of a vessel may apply for a certificate. The Commission intends to exclude from participation in this certification program persons who do not actually operate a vessel and who are not responsible for its operation.

Section 543.3, General. The provisions of this section have been substantially expanded in these final rules. The expansion is in line with, and necessitated by, the expanded scope of the rules. By this section, the Commission intends to prohibit any vessel to receive oil that has been transported through the trans-Alaska pipeline, prior to the time that oil is first brought ashore at a port under the jurisdiction of the United States, unless the vessel actually has on board the original copy of the certificate required by the rules, and can produce that certificate to enforcement officials upon demand. Thus, the section applies to the original loading of that oil in Alaska, the subsequent loading of that oil at any other place, the transportation of that oil, the transfer of that oil from one vessel to another, and merely having the oil on board a vessel whether or not the vessel is transporting the oil, or merely storing it.

In paragraph (b) of section 543.3, the Commission makes reference to "Deepwater Port". That term is not intended to refer to any port with a deep harbor but only to a facility within the scope of the Deepwater Port Act of 1974, Public Law 93–627, as defined in paragraph (10) of section 3 of that Act.

Section 543.4, Certificates, How Obtained. In this section the Commission sets forth the procedure which persons shall follow in order to obtain an initial certificate or a renewal certificate. The applications may be filed only with the Commission in Washington, D. C., but the appropriate forms may be obtained at any of the Commission's offices. The rules require that the application be completely filled in. Applications with blank spaces will not be accepted for filing. In line with section 543.9, Fees, paragraph (c) of section 543.4 requires only that the application and the evidence of financial responsibility be filed at least 45 days prior to the date upon which the vessel to be certificated will need the certificate.[3] Fees may be paid at any time, but certificates will not be issued until the required fees have been paid. Because an individual may bind himself, and a partner may bind a partnership, and an officer of a corporation may bind the corporation, the Commission does not require any additional authority to be shown if such a person signs the application. However, if anyone else signs the application, the application must be accompanied with documentation of the authority of the signer to sign the application, which documentation must itself be signed by a person authorized to confer the authority.

Only persons who actually conduct or are responsible for the operation of a vessel may apply for a certificate. Owners of vessels may apply for a certificate, but only if the owner also operates the vessel.

The procedure for obtaining a renewal certificate has been moved from section 543.7, Certificates, Issuance, to this section 543.4. The Commission will not accept requests for renewal certificates which are filed more than 60 days prior to the expiration date of the existing certificate.

[3] Because there is insufficient time between the promulgation of these final rules and the date upon which trans-Alaska pipeline oil will be available for loading at Valdez, Alaska, for vessel operators to file application for certificates in accordance with the time requirements of section 543.4(c) of these rules, and because that lack of time was not caused by those operators, and because one of the purposes of the Act is to expedite the movement of oil from the North Slope of Alaska to other parts of the United States, the Commission finds that the public interest requires that the time period set forth in section 543.4(c) of the rules be waived. Accordingly, that paragraph is waived to the extent necessary to permit operators of vessels which are to load oil on or before September 5, 1977, to file an application for certificates covering those vessels any time during the months of July and August 1977, but, in any event, prior to the loading of oil aboard those vessels. This special waiver of the 45 day filing requirement is not to be construed as a waiver of any of the other requirements in section 543.3 of the rules. Thus, the fact that an application may be filed less than 45 days prior to the anticipated loading date does not mean that it will be possible for the Commission to issue certificates in time to permit the vessel to load as anticipated. Accordingly, operators are urged to file their applications for certificates as soon as possible.

However, requests for renewal certificates must be filed no later than 45 days before the expiration date of the existing certificate. Failure to comply with those time periods might well result in the existing certificate expiring prior to the date a renewal certificate is issued. The request for a renewal certificate must be complete at the time it is filed with the Commission. That is, all information required by the rule must be in the request at the time it is filed with the Commission. For the purposes of this rule, a request shall not be considered to have been filed unless it is complete.

All applicants and certificants have a continuing duty to keep the Commission informed of any change in facts having a bearing upon financial responsibility of the applicant or certificant. In the case of applicants, that duty is specified in paragraph (i) of section 543.4. That paragraph applies to both initial and renewal applications. It is the Commission's intention that the Commission shall be informed of any change in the facts contained in the application or supporting documentation, whether favorable or unfavorable to the applicant, before the Commission issues the certificate for which application has been made. Thus, the applicant should not wait the five days technically permitted by the rule, hoping that a certificate will be issued in the interim, for if such a certificate is issued, it might well be revoked immediately thereafter. Further, if the applicants shall fail to notify the Commission of the change within the five days, the Commission might well deny the application for the certificate. The denial would proceed pursuant to subparagraph (3) of paragraph (a) of section 543.8 of the rules.

Section 543.5, Financial Responsibility, Amount. The rules provide that the financial responsibility established under these rules (Part 543) shall be separate from, and in addition to, the financial responsibility, if any, required of a vessel operator by the Federal Water Pollution Control Act (FWPCA) and the Commission's Rules implemented pursuant to that statute (Part 542). Sohio and the Group asserted that the Act establishes a new scheme of liability for vessels carrying North Slope oil, replacing the scheme of liability established by the FWPCA, so long as those vessels are carrying North Slope oil, and that, consequently, vessels should only be required to evidence their financial responsibility in the aggregate amount of $14,000,000, rather than in the amount of $14,000,000 plus whatever amount would be required by the tonnage of the vessel under the FWPCA.

The Act may be interpreted in three different ways. First, it can be argued, as the commentators do, that the Act completely supplants the FWPCA, so long as the vessel is carrying trans-Alaska pipeline oil. Second, it can be argued that the Act provides additional liability for the benefit of substantially different claimants, and for substantially different injuries, so that, in the event of an oil spill, the vessel operator could be liable to all claimants, including the United States, under the Act, and also be liable to the United States under the FWPCA. Thus, the United

States would be able to recover its cleanup costs from the vessel operator under the provisions of the FWPCA to the limit of liability provided in that statute, and the United States could also recover any additional cleanup costs, and other claimants could recover their damages, against the vessel under the Trans-Alaska Pipeline Authorization Act, up to the $14,000,000 limit of that Act, even though the claims arose out of the same incident. Third, it could be argued that the strict liability for $14,000,000 imposed upon the vessel operator by the Act is an initial substitute for the strict liability imposed upon the operator under the FWPCA, but that the operator would still be liable under the FWPCA, up to the limits of liability imposed by that statute, for any cleanup costs which exceeded the proportional share of the United States of the $100,000,000 maximum liability under the Act, if the total claims arising out of one incident exceeded that $100,000,000.

Paragraph (3) of subsection (c) of section 204 of the Act provides:

> Strict liability for all claims arising out of any one incident shall not exceed $100,000,000. The owner and operator of the vessel shall be jointly and severally liable for the first $14,000,000 of such claims that are allowed.. . .The Fund shall be liable for the balance of the claims that are allowed up to $100,000,000. If the total claims allowed exceed $100,000,000, they shall be reduced proportionately. The unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law.

Paragraph (9) of that subsection provides, that "[t]his subsection shall not be interpreted to preempt the field of strict liability or to preclude any State from imposing additional requirements."

The Conference Report contains language which would tend to support the first argument, that the Act entirely supplants the FWPCA. In the report the conferees stated:

> Strict liability is primarily a question of insurance. The fundamental reason for the limits placed on liability in the Federal Water Quality Improvement Act [$14,000,000] stemmed from the availability, or nonavailability, of marine insurance. Without a readily available commercial source of insurance, liability without a dollar limitation would be meaningless and many independent owners could not operate their vessels. Since the world-wide maritime insurance industry claimed $14 million was the limit of the risk they would assume, this was the limit provided for in the Federal Water Quality Improvement Act. There has been no indication that this level has since increased.
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> Accordingly, the Conferees adopted a liability plan which would make the owner or operator strictly liable for all claims *(for both clean-up costs and damages to public and private parties)* up to $14 million. This limit would provide an incentive to the owner or operator to operate the vessel with due care and would not create too heavy an insurance burden for independent vessel owners lacking the means to self-insure.
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> . . .[The financial responsibility section of the FWPCA] would be used to the extent it is consistent with the purposes of this Act; for example, references to tonnage limitations would not apply. Claims for clean-up costs would take precedence over other claims thereby preserving the provisions of the Federal Water Quality Improvement Act.
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> . . .
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> The States are expressly not precluded from setting higher limits or from legislating in any manner not inconsistent with the provisions of this Act. (Emphasis supplied)

Conference Report, pp. 28–29. Thus, it can be argued that the language contained in paragraph (9) of subsection (c) of section 204 of the Act, dealing with preemption of the field of strict liability, was not intended to diminish the preemption effected by the Act with regard to strict liability under federal law, but was only to provide that the Act did not preempt the field with regard to state legislation. It can be argued that the Congress recognized that $14,000,000 was the dollar limit which the maritime insurance industry was willing to underwrite. Consequently, the Congress substituted a flat $14,000,000 liability in the Act for the variable $100 per gross ton liability in the FWPCA. Under this interpretation the liability of a vessel under the Act would attach when the vessel loads trans-Alaska pipeline oil, with the liability of vessel under the FWPCA terminating at that point. The liability of the vessel under the Act would continue until such time as the trans-Alaska pipeline oil was offloaded from that vessel, with the FWPCA liability again attaching to the vessel at that point of unloading.

However, that language in the Conference Report is also susceptible of a slightly different interpretation. Thus, according to the second argument, the Congress intended the Act to open strict liability up to claimants other than the United States and for damages other than clean-up. Because of the expanded number of claimants and damages, the Congress increased the liability of the vessel from $100 per gross ton to $14 million. The Congress realized that strict liability was an unrealistic standard unless a dollar limitation was applied to that liability. The emphasis there is on some limitation, not the amount. Because $14 million was the figure used as the maximum liability in the FWPCA, the Congress carried that dollar amount over into this Act. Further, the conferees,

> expected that tankers as large as 250,000 deadweight tons will transport North Slope crude to ports on the West Coast on the United States and elsewhere. Oil discharges from vessels of this size could result in extremely high damages to property and natural resources, including fisheries and amenities, especially if the mishap occurred close to a populated shoreline area.

Conference Report, p. 28. Thus, it can be argued that the Congress recognized that the damage which might ensue from the transportation of trans-Alaska pipeline oil, including the volume of oil which would have to be cleaned up by the United States, in the event of a discharge from a large tanker, would be much greater than the damage against which the FWPCA was intended to protect. To the extent that the United States was limited to recovery under the Act, other claimants will have a reduced pool of money from which to recover their damages. Consequently, it can be argued that the Congress intended the liability provisions of the Act to be in addition to the liability provisions already existing under the FWPCA.

For purposes of the third interpretation, we have hypothesized a tanker of 40,000 gross tons, which is involved in an incident which results in damages totalling $120 million, including $20 million in clean-up costs to the United States and $100 million in damages, for clean-up or otherwise, to persons other than the United States. Paragraph (3) of subsection (c) of section 204 of the Act provides that the first $14 million of that $120 million liability shall be apportioned to the vessel operator. $86 million of that $120 million liability would be apportioned to the Fund. Because the total claims are $120 million, the Act requires payment to each claimant to be reduced proportionately. As a result, the United States would receive only $16 million for its $20 million clean-up claim. The other claimants would receive only $84 million of their $100 million in claims. The remaining $20 million in claims, consisting of $4 million in claims by the United States for clean-up, and $16 million in claims by other claimants, may, under the Act, "be asserted and adjudicated under other clapplicable Federal or state law." The Federal Water Pollution Control Act is another Federal law, arguably applicable to the incident. Thus, the United States could proceed against the vessel operator under the FWPCA for an additional $4 million in clean-up costs. Because the vessel was of a size of 40,000 gross tons, the vessel operator would be liable for $100 per gross ton, or $4 million. Thus, it can be argued that, while the Act is intended to supplant the FWPCA so long as the total claims arising out of any one incident do not exceed $100 million, the Act allows the United States to recover for its clean-up costs under the FWPCA is the total damages arising out of any one incident exceed the $100 million limitation of the Trans-Alaska Pipeline Authorization Act.

The Group, being uncertain of the interrelation between the FWPCA and the Trans-Alaska Pipeline Authorization Act, would have the Commission interpret the Act in such a manner so as to conclude that vessel operators are not liable under the FWPCA in any incident covered by the Act. But, in these rules it is not necessary for the Commission to decide the question of liability. The Commission is charged with administering the financial responsibility provisions of both the FWPCA and the Trans-Alaska Pipeline Authorization Act. The Commission does not determine the liability of the vessel operator, but only makes certain that the vessel operator has sufficient assets to pay any liability to which it might be subjected by the FWPCA and/or the Act. Since reasonable arguments can be made that liability would attach to a vessel operator under both the FWPCA and the Trans-Alaska Pipeline Authorization Act for damages arising out of the same incident, the Commission must require that financial responsibility for both of those potential liabilities be evidenced, before certificates of financial responsibility are issued. If the Commission does not require evidence of financial responsibility for both potential liabilities, and the Act is later construed as holding an operator liable under both statutes, there might well be insufficient assets to meet that liability.

Thus, section 543.5 requires that an applicant for a certificate under these rules (Part 543) must demonstrate to the Commission that it will be able to pay claimants proceeding under the Act, the $14,000,000 for which the operator is made strictly liable under the Act, and, as a separate and distinct matter, that it will be able to pay claimants proceeding under the FWPCA the amount of money for which the FWPCA makes the applicant strictly liable, which amount is calculated in accordance with Part 542 of the Commission's rules. The evidence of insurance, bond, guaranty, self-insurance, or other method of establishing financial responsibility provided under Part 542 of the Commission's Rules, may NOT be used as evidence of financial responsibility for any portion of the $14,000,000 required to be demonstrated by these rules. However, the Commission does not express thereby any view as to whether the liability of an operator in any one incident shall be greater than $14,000,000.

Section 543.6, Financial Responsibility, How Established. This section sets forth the methods whereby the financial responsibility of applicants and certificants may be established and maintained, including reporting requirements and the forms to be used in the various methods. While the Commission will issue a certificate based on a properly completed application, accompanied by the required fees, and supported by evidence of financial responsibility complying strictly with *any one of the first four methods* set forth in paragraph (a) of this section, resort to a combination of methods will only be permitted, in the discretion of the Commission, if the Commission is satisfied that the public will be adequately protected by such combination. If an applicant seeks to establish its financial responsibility by a combination of methods, the applicant may, in the Commission's discretion, be required to furnish additional undertakings.

The methods of establishing financial responsibility are: insurance, bond, guaranty, self-insurance, and any other method, but the last only if it is specially justified to, and found acceptable by, the Commission. The first three methods are demonstrated by the applicant by the filing with the Commission of Forms FMC–225P, FMC–226P, and FMC–227P, respectively. The fourth method, self-insurance, has very extensive and detailed requirements, but drew only brief, albeit blunt, comment. The proposed rules contained the requirement that a vessel operator, wishing to self-insure, maintain, in the United States, quick assets $14 million in excess of current liabilities, and net worth also in the amount of $14 million. Such assets were defined as those which could be converted into United States currency within 30 days. Arco asserted that neither it, nor any other oil company, could meet that test. However, no reasons were given for that assertion. The Group merely echoed that sentiment, also failing to give any reason.

The Commission originally proposed the quick assets test for two purposes. First, the Commission wished to assure that self-insurers would have funds available to pay claims of injured persons expeditiously, without having to delay such payments during an extended period of time to liquidate sufficient assets. Second, the experience of the Commission with self-insurers under the Safety of Life at Sea Act, revealed that the working capital of a certificant can dissipate virtually overnight, and, in any event, well before the Commission would have notice of that change in the financial condition of the certificant. The Commission was of the view that, by requiring that a certificant maintain quick assets in the amount of $14 million, which would only be a portion of the certificant's working capital, a substantial buffer was interposed to alleviate the risk presented by the rapid dissipation of working capital. In line with that second purpose, the proposed rules required more frequent reporting of assets by certificants than is required in the present water pollution certification and passenger vessel certification programs.

However, the precise wording of the self-insurance requirement in the proposed rules, to wit: "quick assets $14 million in excess of current liabilities," went beyond the intent of the Commission. That requirement would impose an unreasonable burden upon applicants. For example, the annual financial reports of two of the largest oil companies in the United States show that these companies each had current assets of approximately $6 billion and current liabilities of approximately $4 billion. That would result in working capital of $2 billion. The precise wording of the proposed rules would require quick assets in the amount of $14 million in excess of the current liabilities. In the case of these two oil companies, this would require their maintaining quick assets of $4,014,000,000, so that their quick assets would exceed current liabilities of $14 million. That was not the intent of the Commission. It was intended that the self-insurer maintain at least $14 million of working capital, and, that at least $14 million of those current assets would be "quick assets".

The Commission has reconsidered the quick assets test altogether, and has determined to abandon that test in favor of a modified working capital test. Very few of the claims arising under the Act will be of the type which may be settled within a period of one month from the date of claim. Unlike the nonperformance of passenger transportation, where the amount of the claim of the passenger left stranded on the pier is quickly determined, and provable, by the receipts for the passage monies paid, the validity of a claim of a beach front property owner for damages resulting from oil pollution might well be open to dispute both as to the existence of damage and as to the dollar cost of that damage. Consequently, the Commission no longer perceives the settlement of claims within 30 days as a realistic goal, so one of the bases for its adopting a quick assets requirement in the proposed rules is no longer valid.

Further, the Congress intended that self insurance be a viable alternative method of establishing financial responsibility. The Act makes reference to subsection (p) of section 311 of the Federal Water Pollution Control Act as the mechanism for evidencing financial responsibility under the Act. Paragraph (1) of that subsection specifically provides for self-insurance as a method of evidencing financial responsibility. In the Conference Report on the Act, the conferees stated that, "[t]his limit [$14 million] would provide an incentive to the owner or operator to operate the vessel with due care and would not create too heavy an insurance burden for independent vessel owners *lacking the means to self-insure.*"

(Emphasis supplied) Conference Report, p. 29. Lastly, "quick assets" is not a commonly recognized term in accounting. The Commission foresees a virtually unlimited number of disputes as to which assets might properly be included within the term "quick assets." The Commission does not wish to impose a heavy burden upon applicants for certificates, unless that burden is required by, or contributes significantly to, the purposes of the Act. Because of the burden imposed by the quick assets test, and the perceived difficulties in its implementation, the Commission has determined that the financial responsibility of self-insuring applicants should be measured by reference to their working capital and net worth.

While the more frequent reporting requirements imposed by the rules will alleviate in some measure the risk of dissipation of the working capital of a self-insurer, prior to the time when the Commission could take action to revoke a certificate, those reporting requirements do not, alone, adequately balance that risk. One of the goals sought to be achieved by the quick assets test, to wit: a buffer sufficient to permit the Commission to perceive diminishing assets in time to require substitute evidence of financial responsibility before the public is injured, is still an essential concern of the Commission. So as to assure that an applicant is and will continue to be financially able to pay $14,000,000 in damages under the Act, the Commission is now requiring in these rules that the applicant/certificant demonstrate that it has working capital and net worth each in the amount of $19,000,000 in order to obtain a certificate for only one vessel.

Because the vessel operator is strictly liable for $14,000,000 in damages arising out of each incident, and because the likelihood that an operator will be involved in more than one incident increases with the increase in the number of vessels operated by a particular certificant at any given time, the Commission has required applicants wishing to be issued certificates for more than one vessel to establish that they have additional assets available to pay the damages arising out of multiple incidents. However, because the dollar amount of the probable damages to which an operator may be exposed by reason of the operation of more than one vessel at any given time is not directly proportional to the number of vessels operated, the increase in assets required for self-insured operators of more than one vessel progressively decreases for each additional vessel. Thus, the self-insured operator of more than one vessel is required to have only $5,000,000 in additional assets for the second vessel, $4,000,000 for the third vessel, $3,000,000 for the fourth vessel $2,000,000 for the fifth vessel, and $1,000,000 for the sixth vessel. No additional assets will be required for the seventh and subsequent vessels. Thus, the maximum amount of working capital and net worth which will be required from a self-insurer is $34,000,000, respectively.

Because one of the purposes of the Act is to provide to claimants a ready source of funds to compensate them for any injuries for which they may be entitled to recover under the Act, the Commission requires that the assets of a self-insurer, which may be included in computing the required working capital and net worth, must be located in the United States. Thus, working capital, acceptable for the purposes of these rules, is calculated by determining the amount of the current assets of the applicant which are located in the United States, and deducting from those current assets all of the current liabilities of the applicant, *wherever they are owed.* Similarly, net worth is calculated by determining the amount of the total assets of the applicant which are located in the United States and deducting from those assets the amount of all liabilities of the applicant, *wherever those liabilities are owed.*

Lastly, the amount required of a self-insurer under these rules is in addition to the amount required of the applicant under Part 542 of the Commission's rules, if the applicant holds a certificate under that Part 542 *as a self-insurer.* For example, an applicant who is required to show $4,000,000 under Part 542, must show the Commission $23,000,000 in working capital and net worth to get a certificate for one vessel under these rules. The requirement of additional assets imposed by subparagraph (3) of paragraph (a) of section 543.6 is different from the general requirement for separate and distinct financial responsibility imposed by section 543.5 of these rules, in that it is limited to applicants and certificants under these rules (Part 543) who are also self-insurers under Part 542 of the Commission's rules. In the event a self-insuring applicant or certificant under these rules (Part 543) holds a certificate under Part 542 of the Commission's rules by reason of insurance, bond, or guaranty, the applicant or certificant under this Part 543 is required only to demonstrate working capital and net worth in the amounts required under section 543.6(a)(3), that is $19,000,000 for one vessel, plus $5,000,000 for the second vessel, etc., so long as the insurance, bond, or guaranty under Part 542 remains in force.

Subparagraph (3) of paragraph (a) of section 543.6 requires an applicant to submit, with its application, its annual financial reports for its last fiscal year preceding the date of application. The Commission recognizes that an application for a certificate might be filed between the end of the applicant's fiscal year and receipt by the applicant of the certified financial reports for that fiscal year. In such an eventuality, it is the intention of the Commission that the applicant shall file, with the application, the certified financial reports for the last fiscal year for which certified reports have been received by the applicant. The applicant would then file with the Commission the certified financial reports for the fiscal year just ending, immediately upon receipt of those reports by the applicant.

The rules provide, in subdivision (iv) of subparagraph (3) of paragraph (a) of section 543.6, that self-insurers shall notify the Commission within five days of the date the self-insurer knew, or had reason to believe, that the amounts of working capital or net worth had fallen below the amounts required by subparagraph (3) of paragraph (a) of section 543.6. That requirement is but a specific example of the general continuing duty imposed upon all applicants and certificants to keep the Commission informed of changes which affect the financial condition of the applicant or certificant. The self-insurer is permitted only five days to make this notification because, in the case of self-insurers, time is of the essence. Similarly, the annual financial reports, the six-month financial reports, and the quarterly affidavits must be filed with the Commission at the stated times. Because the financial condition of a certificant can change drastically with little warning, the Commission intends that the deadlines for these reporting requirements be strictly complied with. The importance of these requirements is forcefully brought home by the provision that the certificates of a self-insurer who fails to timely file the reports required by subdivisions (i) and (ii) will be revoked by the Commission, on short notice to the certificant, *merely because the reports were not timely filed,* whether or not the reports are actually filed later and evidence a satisfactory financial condition. The Commission wants to stress that it expects these reports will be filed on time, and that self-insurers, faced with a deteriorating financial condition, will not delay the filing of their reports in the hope that their financial condition will improve, or in an attempt to load just one more vessel before the deteriorating financial condition is brought to the attention of the Commission. It is to guard against those risks that the revocation of certificates for failure to timely file the reports has been included in these rules and will be strictly enforced.

Because there may exist methods of establishing a vessel operator's financial responsibility other than those specifically set forth in these rules, the Commission has added as a fifth method, a catch-all provision to paragraph (a) of section 543.6. The catch-all method, newly incorporated into the rules, does not extend to modifications of the other four methods of establishing financial responsibility provided for in the rules. Specifically, the catch-all provision does not permit waivers of the amounts of assets required of a self-insurer, or to the reporting requirements imposed upon self-insurers. Rather, the catch-all method is intended to apply to a new method, for example, a letter of credit, or a rider or endorsement to an insurance policy, or some other form of financial responsibility heretofore unexamined by the Commission if, upon examination, the Commission finds it acceptable. The Commission does not intend the catch-all provision to be used with any frequency, and will require that an applicant who wishes to establish his financial responsibility by some other means other than those incorporated its graphs (1) through (4) of paragraph (a) of section 543.6 demonstrate that the new method is in the public interest by reference to identifiable and provable factors.

Subparagraph (4) of paragraph (a) of this section permits the filing of a guaranty as evidence of financial responsibility. In this method, one person (the guarantor) promises to stand for the debt of another (the guarantee). Often the guarantor is a parent or other corporate affiliate of the guarantee. By this subparagraph the Commission requires the guarantor to *establish that it has the* resources to make good on its guaranty. Thus, a guarantor must meet the same requirements as to working capital and net worth and the same reporting requirements as a self-insurer under these rules. Because a guarantor under these rules could also be a self-insurer in its own right under these rules, and/or under Part 542, and/or a guarantor under Part 542, these rules require a guarantor to demonstrate and maintain working capital and net worth each equal to the total of the obligations of the guarantor, as a guarantor and as a self-insurer. When calculating the amount of assets required of a guarantor, the amount shall not be calculated by reference to the total number of vessels which it guarantees or self-insures, rather, separate calculations shall be made for each operator which it guarantees and for its own self-insured vessels.

In paragraph (b) of section 543.6 the Commission permits the insurance form or the surety bond form to be signed by more than one insurer or surety, respectively. However, that permission is granted only if those underwriters undertake joint and several liability for the risks evidenced by the documents signed. Because the joint liability undertaken by the underwriters, when executing an insurance form or surety form jointly, will make each of the underwriters liable for the full $14,000,000 evidenced by the document, each underwriter signing must be financially able to carry that $14,000,000 risk, without regard to the specific division of risk agreed to among them.

The proposed rules provided, in section 543.6(c), that any insurance form, guaranty, or bond provided as evidence of financial responsibility under the rules, shall expressly permit direct action by the claimant against the underwriter; and further provided that, in any such direct action, the underwriter will be entitled to invoke only those rights and defenses permitted by the Act. The forms appended to the rules contained a consent to direct action and that limitation on the rights and defenses. The Group and the Water Quality Insurance Syndicate vigorously asserted that direct action is not permitted by the Act. The Syndicate took the position that no direct action is permitted, while the Group would permit a direct action only by the United States and the Trans-Alaska Pipeline Liability Fund, excluding direct action by any other claimant.

The Act provides, in paragraph (3) of subsection (c) of section 204, that the owner and operator of the vessel shall be jointly and severally liable for the first $14 million of claims that are allowable under the Act, and further provides that, "[f]inancial responsibility for $14,000,000 shall be demonstrated in accordance with the provisions of section 311(p) of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1321(p)) before the oil is loaded." Paragraph (3) of subsection (p) of section 311 of the Federal Water Pollution Control Act provides:

> Any claim for costs incurred by such vessel [a vessel subject to the Federal Water Pollution Control Act] may be brought directly against the insurer or other person providing evidence of financial responsibility as required under this subsection. In the case of any action pursuant to this subsection such insurer or other person shall be entitled to invoke all rights and defenses which would have been available to the owner or operator if an action had been brought against him by the claimant, and which would have been available to him if an action had been brought against him by the owner or operator.

Paragraph (1) of that subsection (p) of section 311 requires certain vessels to evidence their financial responsibility in the amount of the lesser of $100 per gross ton or $14 million, to meet the liability to the United States to which such vessel could be subjected under section 311. Subsections (f) and (g) of that section make vessels, and third parties, liable to the United States for the costs the United States has incurred in cleaning up the discharges of oil or hazardous substances from vessels subject to the Federal Water Pollution Control Act. Thus, paragraph (3) of subsection (p) of section 311 of the FWPCA gives to all claimants under that statute, a right of direct action against an underwriter, but permits that underwriter to assert, in any such direct action, any defenses which the vessel operator would have been entitled to assert against the claimant, and any defenses which the underwriter would have been able to assert against the vessel operator, if the claim had been brought against the underwriter by the vessel operator instead of by the claimant.

There is no provision in the Trans-Alaska Pipeline Authorization Act which expressly grants a right of direct action against the underwriter by any claimant. The Act only refers to the FWPCA as the controlling statute with regard to the demonstration of financial responsibility under the Act. In the Conference Report, the House and Senate conferees stated:

> Since the Federal Water Quality Improvement Act has an existing mechanism for establishing proof of financial responsibility, reference was made to the appropriate provision (13 U.S.C. 1321(p)). Such provision would be used *to the extent it is consistent with the purposes of this Act;* for example, references to tonnage limitations would not apply. (Emphasis supplied).

Conference Report, p. 29. Thus, the Congress intended that the financial responsibility provisions of the FWPCA should be used when establishing financial responsibility under the Act, but only to the extent that those provisions are consistent with the purposes of the Act, apparently recognizing that the purposes of the Trans-Alaska Pipeline Authorization Act were different from those of the FWPCA.

The Water Quality Insurance Syndicate asserted that:

> The Act does not grant, nor does it even suggest, the right of a claimant to make claim directly against the insurer. Section 543.6(c) of the proposed regulations purports to grant to claimants the right to institute claims directly against the insurer. This constitutes an attempt to create a new cause of action against the insurer,—this can be done only by the legislature. In the absence of a statute to the contrary, there is no privity between an injured party and a liability insurer and the injured party cannot bring a direct action against the insurer.

It certainly cannot be said that Congress was unmindful of the possibility of direct action against an insurer. Direct action was permitted in the Water Quality Improvement Act of 1970, then was continued by the 1972 amendments. The omission of direct action must be taken as a deliberate act of Congress. On these facts, we feel that your Commission should not deviate from the provisions of the Act.

The concept of privity of contract, generally, would not prevent a cause of action by a person other than the contracting parties, here the insurer and its assured, merely because the other person was not expressly made a party to the contract. The concept of third party beneficiary recognizes that a third person might have been intended to benefit from the contract between two parties, thereby permitting the third party to rely on undertakings in the contract in a claim against the promisor, here the insurer. While the concept of third party beneficiary has not been applied to liability insurers, it has been applied to life insurance companies. Consequently, the concept of an insurer being held to answer directly to one not expressly party to the contract of insurance is not totally alien to the common law. Even so, the Commission, by these rules, does not create a new cause of action against the insurer, rather, the Commission, as a condition of accepting insurance as adequate evidence of financial responsibility under the Trans-Alaska Pipeline Authorization Act, requires the insurers to *consent* to be sued by claimants. It is, among other reasons, that consent of the insurer which would give rise to the cause of action by the claimant against the insurer, not the regulations of the Commission.

While it can be argued, as the Syndicate has, that the failure of the Congress to mention direct action in the Act was a conscious act precluding direct action, the better interpretation is that the Congress intended all of the provisions of section 311(p) of the FWPCA to apply to the establishment of financial responsibility under the Act, insofar as those provisions are consistent with the purposes of the Act. A grant of direct action by the claimant against the insurer, expressly contained in the FWPCA, is decidedly consistent with the purposes of the Act, for one of its purposes was to provide expeditious and easy compensation to claimants suffering injury as a result of discharges of oil. Consequently, the Commission concludes that the claimant has a right of direct action against the underwriter under the Trans-Alaska Pipeline Authorization Act.

However, the Group, while not denying the right of direct action generally, asserted that it is available only to the United States and the Trans-Alaska Pipeline Liability Fund. The Group presented no arguments as to why that should be the case. An argument can be made that, while the right of direct action against the underwriter is included within the Act by reason of the specific provision therefor in the FWPCA, that specific provision only runs to the United States in the FWPCA. Consequently, the argument would go, only the United States has a right of direct action against the underwriter under the Act. It could be further argued that, since the Fund, although established as a nonprofit corporate entity, is actually an instrumentality of the United States, the Fund should enjoy the same rights of direct action as does the United States.

However, the Congress did not use the words "United States" in that paragraph of the FWPCA which provides a right of direct action against the underwriter. The Congress used the word "claimant." Thus, the FWPCA granted a right of direct action by all claimants under that statute. When that provision was included within the Trans-Alaska Pipeline Authorization Act by reference, the Congress intended, similarly, to grant a right of direct action to all claimants under the latter Act as well. The Commission concludes that the more expansive interpretation is more consistent with the purposes of the Act, and, adopts it in these rules.

There remains the question of what defenses are available to the underwriter in such a direct action. The Group asserted that it should have all the defenses which it would have under the FWPCA. No reasons were given for that assertion. It can be argued that, if a right of direct action against the underwriter is found in the Trans-Alaska Pipeline Authorization Act by reason of its reference to the FWPCA, then the defenses which are permitted to that direct action in the FWPCA must follow the grant of the right of direct action.

Contrarily, the House and Senate conferees stated that the FWPCA's financial responsibility provisions were to be used only to the extent they were consistent with the purposes of the Trans-Alaska Pipeline Authorization Act. The FWPCA granted the vessel operator several defenses not permitted to the vessel operator under the Trans-Alaska Pipeline Authorization Act. Under the Act, the vessel operator may escape strict liability, only if it can prove that the damages were caused (a) by an act of war, (b) by the negligence of the United States or other governmental agency, or (c), with respect to a particular claimant, by the negligence of that claimant. The Trans-Alaska Pipeline Authorization Act did not include the defenses of act of God, and causation in a third party without regard to whether or not that third party was negligent, both of which defenses are available under the FWPCA. Thus, it can be argued that the Congress intended that persons injured by discharges of trans-Alaska pipeline oil should bear a substantially smaller portion of the risk of loss than they do under the FWPCA. If the underwriters are permitted to assert against the claimant all of the defenses they would be permitted to assert against their assured, that shifting of the risk of loss would be diminished.

Thus, on balance, the Commission concludes that, to the same extent that the Act includes the right of a direct action by all claimants against the insured by its reference to section 311(p) of the FWPCA, the Act also includes the defenses to such a direct action which the underwriter would have under the FWPCA, but only to the extent that those defenses are consistent with the purposes of the Trans-Alaska Pipeline Authorization Act, and these final rules so provide. Clearly, the defenses of act of God, and causation in a third party without regard to the negligence of that third party, and causation in any third party other than the United States or other governmental entity, are not consistent with the purposes of the Act, and would not be available to an underwriter in any action brought pursuant to the Act. Further, while certain defenses which an underwriter would have against its assured in an action brought by the assured against the underwriter, which go to the very existence of a contract of insurance, such as, fraud in the execution, might be available to an underwriter in an action brought against the underwriter by a claimant under the Act, not all defenses which an underwriter might have against its assured in an ordinary contract of insurance would be available to the underwriter under the Trans-Alaska Pipeline Authorization Act. For example, the defense of wilful misconduct on the part of the vessel operator is inconsistent with the purposes of the Act. While public policy might favor a defense of wilful misconduct on the part of the vessel operator in an action by the operator against its insurer pursuant to a contract of hull insurance, the policy considerations in the hull insurance situation do not obtain in this situation involving injury to third parties and their property resulting from oil pollution. In the hull insurance situation, public policy dictates that the vessel operator, who wilfully and wrongfully scuttles the vessel in deep water, should bear the full extent of the loss which that wrongful act occasioned, so as to deter others from engaging in similar wrongful acts. If the insurer may escape paying its assured for the scuttled vessel, only the assured will suffer. But, in the oil pollution situation, aside from the loss of the vessel, the wilfully wrongful operator might well not suffer at all, while the injured claimant would bear the full burden of the injuries resulting from the oil which escaped from the scuttled vessel. This is particularly true in the case where the vessel operator is one of those corporations whose sole assets are the vessel operated by the corporation, which vessel is heavily mortgaged. In such a situation, although the vessel operator would be liable up to $14 million to the person injured as a result of the escaping oil, that vessel operator would have no assets, other than insurance, to pay the claimant, because the vessel would no longer exist or, even if it were not a total loss, the mortgagee would recover all or most of the proceeds from the sale of the vessel. Thus, the claimant would receive no monies from the operator, and, if the underwriter was permitted to interpose the defense of wilful misconduct on the part of the vessel operator, no monies from the underwriter either. But, one of the purposes of the Act was to assure that the individual claimant would be compensated, and that the risk of that compensation be borne by those transporting the oil, either as self-insurers, or through the premiums paid to an underwriter. A particular vessel is permitted to carry trans-Alaska pipeline oil only after the United States is informed that the operator of that vessel has sufficient funds, by insurance or otherwise, to pay the damages for which the operator is made liable under the Act. The Commission will issue a certificate attesting to the world that a particular vessel operator, operating a particular vessel, has sufficient funds to pay those damages. The Commission does so, upon the representation of an insurer that the liability of the operator is insured. If the insurer is then permitted to assert, by reason of some act over which the Commission has no control, that the protection of the insurance is no longer there, the purposes of the Act will be soundly defeated. Consequently, the Commission concludes that the Act should not be interpreted so as to include the defense of wilful misconduct on the part of the operator.

In paragraph (f) of this section 543.6 is found another example of the continuing duty of certificants to keep the Commission informed of changes in data relevant to the financial responsibility of those certificants. To the extent the reporting requirements set forth in paragraph (f) are different from the reporting requirements set forth in subdivision (iv) of subparagraph (3) of paragraph (a) of this section, self-insurers must also comply with this paragraph (f).

Section 543.7, Certificates, Issuance. This section, amng other things, requires that the original copy of the certificate issued pursuant to these rules be carried on board the vessel, provides that the certificate will expire at a date certain, not more than two years from the date of issue, and provides that the certificate will be void if there are any erasures on or alterations of the certificate, or if the certificant is not the operator of the vessel named on the certificate. Those provisions are largely enforcement tools designed to prevent the unlawful use of certificates, and to facilitate a regular check on the validity of certificates. The ultimate purpose of these enforcement tools is to assure that the public is adequately protected.

International Ocean Transport Corporation asserted that it was unnecessary to require a new certificate under these rules, in addition to the existing certificate under Part 542 of the Commission's rules, that the Commission ought to allow any copy rather than the original of the certificate to be carried aboard the vessel, and that the renewal of certificates is an unnecessary burden upon certificants. Because the two statutes, the Act and the FWPCA, cover separate and distinct liabilities, different defenses, and different dollar limitations, and because of the practical problems involved in the revocation of certificates when the insurance covering the liability under one statute is cancelled, but the insurance under the other statute is not cancelled, the Commission concludes that two distinct certificates, one under Part 542 and one under Part 543, is the least burdensome method of carrying out its duties under the two statutes.

By requiring that the original certificate be kept on board the vessel, and that all certificates be returned to the Commission every two years, the Commission will be able to prevent the unlawful use of certificates. If the certificant were permitted to have on board the vessel a copy of the original certificate, enforcement officials would not be in a position to know whether the certificate had been returned to the Commission for revocation. Further, permitting the certificant to keep the original at its office, rather than aboard the vessel, would facilitate the deception of enforcement officials, for the certificate could be altered, and a copy of the altered certificate, whereon the alteration would be more difficult to detect, could be kept aboard the vessel. In like manner, expiring certificates will permit the Commission to weed out unused certificates, and will facilitate the enforcement of Commission revocation. Even if the certificant does not return the certificate, eventually, it will be invalid on its face.

Paragraph (b) of section 543.7 provides the procedure to be followed when the certificant ceases to be the operator of the vessel named on the certificate. The certificant is required to return the certificate to the Commission, and, by completing the reverse side of the certificate, inform the Commission of the nature of the change. In the event the certificant is unable to return the certificate, the certificant is required to provide the same information to the Commission by letter or other written means.

Section 543.8, Certificates, Denial or Revocation. In this section, the Commission sets forth the five reasons for denying an application for a certificate, or revoking one already issued. Subparagraph (1) of paragraph (a) of that section is intended to have broad effect. Thus, if an applicant or a certificant, or anyone acting on their behalf, shall wilfully make any false statement to the Commission in connection with the certificate being applied for, or the certificate held, the Commission may revoke the certificate or deny the application for a certificate, even though the applicant or certificant has demonstrated that it has the assets required by these rules. Although the subparagraph speaks in terms of applications or requests for certificates and the retention of certificates, the subparagraph applies to all dealings between the Commission and applicants or certificants with regard to the certification process.

Similarly, subparagraph (3) of paragraph (a) of this section would permit the Commission to deny or revoke a certificate for failure to comply with the Commission's inquiries, regulations, or orders, without regard to whether the applicant or certificant has demonstrated that it has the assets required by these rules. Subparagraph (4) of paragraph (a) of the section relates only to the annual financial reports, the six-month financial reports, and the quarterly affidavits required of self-insurers by subdivisions (i) and (ii) of subparagraph (3) of paragraph (a) of section 543.6 of these rules. The emphasis here is upon the timely filing of those required documents, and reflects the Commission's intention to closely police self-insurers. Even if the required statements are filed, if they are not filed on time, the certificate may be denied or revoked by the Commission.

Subparagraph (5) of paragraph (a) of this section extends to the cancellation or termination of any undertaking, even if the undertaking were filed as a portion of the evidence of financial responsibility where an applicant or certificant establishes its financial responsibility by a combination of methods, as permitted by paragraph (a) of section 543.6 of these rules. Thus, if an applicant or certificant were to establish its financial responsibility by maintaining in the United States only a portion of the working capital and net worth required by subparagraph (3) of paragraph (a) of section 543.6, with the balance of the assets being evidenced by a surety bond, the certificate would be revoked, if the bond were cancelled or terminated, even though there were no change in the working capital or net worth of the certificant.

Before denying an application for a certificate or revoking a certificate which it has issued, the Commission will inform the applicant or certificant of its intention, and will afford the applicant or certificant a period of time to show the Commission that the basis for its intended denial or revocation is not true. However, the period of time afforded varies according to the urgency of the action. Thus, where the Commission intends to revoke a certificate because an undertaking is to be cancelled or terminated, the Commission will revoke the certificate effective either with that cancellation or termination, or ten days after the date of the Commission's notice of intention to revoke, whichever is later. Similarly, if the reason for the intended revocation is the failure of a self-insurer to timely file the annual financial report, or the six-month financial report, or the quarterly affidavits, required by subdivisions (i) and (ii) of subparagraph (3) of paragraph (a) of section 543.6 of the rules, the revocation shall be effective 10 days after the date of the Commission's notice of intention to revoke. In both those situations the certificant shall be afforded the opportunity of a hearing, but that hearing shall be brief and circumscribed. The hearing shall be limited to permitting the certificant to show that, in the first case, the undertaking has not been cancelled or terminated, or to produce other evidence of financial responsibility in accordance with these rules, and, in the second situation, that the required financial statements were filed on time. Thus, in both those situations the issues are very limited, and would not require an evidentiary hearing. Indeed, only the briefest of hearings would be required. In both those situations the risk to the public attendant upon permitting a certificant to retain a certificate is so great that expedited resolution of the questions is mandatory.

Before effecting denials of applications or revocations of certificates on any other grounds, the applicant or certificant will be afforded 30 days after the date of the notice of intention to deny or revoke to request a hearing. If a timely request for a hearing is submitted to the Commission, the Commission will grant a hearing. However, the nature of the hearing will depend upon the context of the particular case. For example, the Commission will not order a full scale evidentiary hearing, unless there are disputes as to material facts. Since the Commission, in its notice of intention to deny or revoke, will state the reasons for the intended action, there will not be any disputes as to material facts unless the applicant or certificant, in its request for a hearing, disputes specific facts. A general denial, or vague assertions, will not be sufficient to precipitate lengthy hearings.

In its comments, the Group asserted, with respect to this section, that an insurer should be permitted to cancel an insurance certificate upon 30 days' notice to the Commission. That comment appears to proceed from a misunderstanding of this section. The Group appears to confuse its "certificates of insurance" with the certificates issued by the Commission after an applicant has established its financial responsibility. This section refers to the certificates issued by the Commission, not "certificates of insurance." The cancellation or termination of those latter certificates is provided for in the insurance form appended to, and incorporated within, these rules.

The four forms to be used in complying with these rules have been incorporated within the rules by reference. The forms are to be interpreted so as to be consistent with the rules, and with the purpose of the Act which these rules implement, to wit: the maximum protection of the public. Form FMC–224P, Application for Certificate of Financial Responsibility (Alaska Pipeline), is intended to provide the Commission with information as to identity, organization, location and vessels of each applicant. The form must be submitted to the Commission when an applicant applies for its first certificate under these rules. Thereafter, so long as the applicant holds at least one certificate, addition of vessels, changes in names of vessels, and deletion of vessels may be accomplished by letter, telegraph, or other writing. The application form is not required for those subsequent changes. Similarly, a certificant applying for a renewal of its existing certificate may do so by letter, telegraph, or other writing. However, when the application form is first submitted it must be complete. That is, all spaces on the application form must be filled in.

Forms FMC–225P, FMC–226P, and FMC–227P are the forms for insurance, surety bond, or guaranty. Each of those forms is an undertaking by an underwriter to provide sufficient monies to compensate persons making claims under the Act. Those undertakings are of indefinite duration, and may be terminated only in accordance with the provisions contained in the undertaking. Specifically, those undertakings may be terminated only by written notice to the Commission and to the vessel operator, received by the Commission at least 30 days prior to the effective date of the termination. However, even though notice of termination might be given to the Commission and the vessel operator, the vessel operator might, prior to the effective date of that termination, load trans-Alaska pipeline oil for a voyage which would continue beyond the stated effective date of termination. Consequently, the forms provide that, notwithstanding the notice given, the undertaking shall not terminate until the voyage, begun prior to the stated termination date, has been completed, and all of the oil off-loaded from the vessel. That provision will assure that there are assets available to pay claims which might arise out of that voyage in progress. The forms designate an agent in the

United States empowered to receive process relating to the Act or these rules, and further provide that the Secretary of the Commission will be that agent, in the event the designated agent cannot be served.

The State of Alaska urged that underwriters should be specifically amenable to suit in Alaska, British Columbia, Washington, Oregon and California. Alaska argued that the greatest amount of vessel traffic will occur within, or adjacent to, those five jurisdictions, thereby subjecting those jurisdictions to an increased likelihood of injury. According to Alaska, direct action against an underwriter is of little value to an Alaskan native, when the agent for service of process is located in New York City. The comment of Alaska has some merit, however, its implementation would raise practical difficulties. If the Commission were to require an agent for service of process in those five jurisdictions, it would appear necessary to also require an agent for service of process in other states, such as Georgia and Louisiana, where Deepwater Ports are likely to be constructed, and virtually any other State of the United States perceiving a substantial likelihood of oil pollution injury.

The Department of the Interior's rules regarding claims settlement specifically provide that a claimant may present its claim to the Trans-Alaska Pipeline Liability Fund, in lieu of suing the operator or its underwriter, if the operator or its underwriter does not timely settle the claim of the claimant.[4] Thus, the Alaskan native would be able to receive compensation for injury without leaving the State. The Fund would then proceed against the underwriter wherever the underwriter might be found. Further, while certain operators might make only one call at a given port, it is likely that most of the operators transporting trans-Alaska pipeline oil will return to the various ports on several occasions, thereby permitting the local residents to obtain jurisdiction over the operator in the local courts. Lastly, if the claim exceeds $10,000, jurisdiction would lie in United States district court, either under the federal question rule or, arguably, under subsection (n) of section 311 of the FWPCA, which grants jurisdiction to the district courts for any action arising under that section. In the district courts, venue will lie, among other places, in the district where the cause of action arose, which would include the district where the claimant sustained the injury. Since the jurisdiction of the several district courts extends throughout the United States, the district court for the District of Alaska would have jurisdiction over the agent located in New York City. In the view of the Commission, the increased burden upon underwriters which would result from maintaining agents in the several States, outweighs the benefits to the public which would result from imposing that requirement.

The form of bond, FMC–226P, provides that, "termination [of the bond] shall not affect the liability of the Surety in connection with an

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[4] In any event, the Interior rules provide that *all* claims are to be physically delivered to the Fund, which has an office in Alaska, which will then send the claims on to the owner, operator, and underwriter.

incident occurring prior to the date such termination becomes effective." The insurance form, 225P, and the guaranty form, 227P, as proposed, provided that the insurance, or guaranty, are applicable only in relation to incidents giving rise to claims occurring between the effective date of the document and its termination. The insurance and guaranty forms do not contain the specific language, as to liability for incidents prior to termination, which is contained in the bond. Alaska urged the Commission to insert that specific language in the insurance and guaranty forms so as to preclude any argument that the liability is somehow different. As the State of Alaska concedes, the same result is obtained by the language presently contained in the insurance and guaranty forms. However, the addition of the specific language requested by Alaska would make more certain the liability of the insurer or guarantor for incidents occurring prior to the termination of the insurance policy or guaranty, and that language has been incorporated into Forms FMC–225P and FMC–227P.

The insurance form, FMC–225P, is a representation from the insurer to the Commission, that it has insured a particular vessel operator for the liabilities to which the vessel operator might be subjected pursuant to the Act. The form is not the actual insurance policy issued by the insurer to its assured. Alaska urged the Commission to require the insurer to file with the Commission a uniform endorsement to existing insurance policies, which would contain the actual language of the policies. Alaska was concerned that the actual policy of the insurer might differ from that represented by the insurer to the Commission.

The Commission's rules on the FWPCA (Part 542) provide that an applicant may evidence its financial responsibility by providing to the Commission a duplicate original of its insurance policy. If the applicant does so, to be acceptable to the Commission, that policy must contain a uniform endorsement incorporating into the policy, the liability imposed by the FWPCA. Alternatively, the applicant may submit to the Commission a certificate of insurance, wherein the insurer represents to the Commission that the applicant is insured by it against the liabilities imposed by the FWPCA. The latter method is that which is incorporated into these rules dealing with trans-Alaska pipeline oil pollution liability (Part 543). Of the more than 25,000 vessels certificated by the Commission under the FWPCA, the Commission has received only one insurance policy containing the uniform endorsement. All other applicants for certificates, relying upon insurance as the evidence of financial responsibility, have submitted the representation of the insurer that the applicant is insured by it. That method has worked well, and has not impaired the claims of the United States against vessel operators and their insurers under the FWPCA. Consequently, the Commission did not include the optional uniform endorsement method within the proposed rules regarding trans-Alaska pipeline oil. In the view of the Commission, the fear of Alaska, that claimants might be injured, if the policy of insurance differed from the representation made to the Commission, is not well founded.

Having represented to the Commission, for the purposes of causing the Commission to issue a certificate of financial responsibility, that a policy of insurance containing certain liabilities existed, an insurer is estopped from asserting that such a policy does not exist, or that the policy which does exist has terms and conditions different from those represented to the Commission. Consequently, that comment of Alaska has not been adopted.

The insurance form, FMC-225P, provides insurance to the limit of $14 million per incident. Similarly, the guaranty, Form FMC-227P, has a limit of liability of $14 million per incident. However, the bond is in a definite penal sum, without regard to the number, if any, of incidents in which vessels operated by the principal of the bond are involved. The bond is a schedule bond, and, in accord with the Commission's decision on self-insurance, the penal sum varies with the number of vessels listed in the schedule. For one vessel, the penal sum is $14 million. That sum differs from the $19 million required of a self-insurer for one vessel because the extra $5 million in working capital and net worth required of a self-insurer is intended to be a buffer as protection against the rapid dissipation of the assets of the self-insurer. That protection against dissipation is not required in the case of a bond, as the ability of the surety company to pay, is policed by other governmental agencies. Notwithstanding the maximum penal sum of $29 million, where there are six or more vessels listed in the schedule of the bond, the surety would not be liable for more than $14 million in any one incident, as the vessel operator is not liable for more than that amount. Because the bond is in an inflexible amount, the bond provides that the surety is not discharged of its obligation to pay the penal sum unless the principal shall pay, or the surety shall keep the Commission informed of all suits filed, judgments rendered, and payments made by the surety under the bond. This requirement is to permit the Commission to require a certificant to obtain additional evidence of financial responsibility where the surety has paid a portion, or all, of its obligation under the bond. If this requirement were not present, the Commission would not know when a surety had paid all that it was obligated to pay under the bond, thereby leaving a certificant without the assets required by the Act.

Accordingly, Subchapter B of Chapter IV of Title 46 of the Code of Federal Regulations is amended by the addition of a new Part 543.*

*The text of the amendment is reprinted in 46 C.F.R. 543.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–3

STATE OF ALASKA ON BEHALF OF TLINGIT-HAIDA PURCHASING ASSOCIATION AND ALL OTHERS SIMILARLY SITUATED

v.

PELICAN COLD STORAGE, INC., AND ALASKA OUTPORTS TRANSPORTATION ASSOCIATION, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

August 3, 1977

Notice is hereby given that the Commission on August 3, 1977, determined not to review the order of dismissal served by the Administrative Law Judge in this proceeding July 11, 1977.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 77–3

STATE OF ALASKA ON BEHALF OF TLINGIT-HAIDA PURCHASING ASSOCIATION AND ALL OTHERS SIMILARLY SITUATED

v.

PELICAN COLD STORAGE, INC., AND ALASKA OUTPORTS TRANSPORTATION ASSOCIATION, INC.

July 11, 1977

ORDER DISMISSING COMPLAINT

By joint motion dated June 23, 1977, the above-captioned complainant (State of Alaska) and both respondents (Pelican and Alaska Outports) have requested that the subject complaint be dismissed and the proceeding terminated, including as part of the motion papers a "Notification of Satisfaction of Complaint" setting forth the precise terms and conditions of settlement. The motion is unopposed.[1]

In its complaint filed with the Commission on February 22, 1977, the State of Alaska, by its Attorney General, alleged certain violations of sections 15 and 16 of the Shipping Act, 1916, charging the respondents with unlawfully discriminating against the Tlingit-Haida Purchasing Association (THPA) and other similarly situated shippers. The complaint requested that the Commission issue a cease and desist order against the discriminatory practices, an order that the respondents make their facilities available to all AOTA members on an equal basis, and that reparations be awarded in favor of THPA pursuant to section 22 of the ACT.

In addition to the terms and conditions of the settlement, the "Notice of Satisfaction of Complaint" also contains a recitation of certain stipulated facts (mainly jurisdictional and conceding, for purposes of this proceeding, that both respondents are subject to the requirements of the Act) and stipulated agreements for the payment of damages and counsel

[1] In order to facilitate reception and consideration of Hearing Counsel's views on the subject motion, Hearing Counsel's March 17 Petition to Intervene has been granted effective immediately prior to their filing response to the Motion to Dismiss.

fees (by Pelican to THPA), as well as a reservation of rights for the State of Alaska to proceed further and separately in the courts under State or Federal antitrust laws, should it later choose to do so.

The factual basis for the complaint mainly revolved around the denial of cargo space to THPA shipments by Alaska Outports (AOTA) ships from the freight terminal in Seattle to Pelican Cold Storage (PCS) docks in Pelican, Alaska, allegedly because the groceries, bait and fishing gear shipments would compete directly with the same items sold in the PCS company store. PCS is the dominant shipper in the AOTA membership organization and PCS and AOTA have an interlocking directorate, as well as sharing the same building in Seattle as their general offices. Although THPA was also a member of AOTA, it was the only member denied cargo space on AOTA ships.

The complainant agrees that, for purposes of this proceeding, its complaint has been satisfied by the respondents, and joins with the respondents requesting dismissal of the action. Both the law and Commission policy favor settlement. *Consolidated International Corp. v. Concordia Line,* 14 SRR 1259 (1975); *Merck, Sharp & Dohme, Intl. v. Atlantic Lines,* 14 SRR 232 (1974); Rules of Practice and Procedure, Rule 91, 46 CFR 502.91. I see no useful regulatory purpose to be served in continuing this proceeding, nor any public interest benefit in doing so. Accordingly, the Motion to Dismiss the Complaint is *GRANTED* and the proceeding is terminated.

Pursuant to the terms of the stipulation, payment of the agreed liquidated damages and counsel fees is to be made within thirty (30) days of the date of this Order, and the Commission is to be notified within seven (7) days thereafter that payment has been made.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–32

ARTIC LIGHTERAGE COMPANY-PROPOSED INITIAL TARIFF IN THE WESTERN ALASKA TRADE

NOTICE OF DETERMINATION NOT TO REVIEW

August 3, 1977

Notice is hereby given that the Commission on August 3, 1977, determined not to review the order of discontinuance of the Administrative Law Judge in this proceeding served July 7, 1977.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 76–32

ARCTIC LIGHTERAGE COMPANY — PROPOSED INITIAL TARIFF IN THE WESTERN ALASKA TRADE

July 7, 1977

PRESIDING ADMINISTRATIVE LAW JUDGE ORDER (1) FINDING INITIAL TARIFF NOT UNREASONABLE, (2) DISCONTINUING PROCEEDING

Joseph H. Delehant and *Mark P. Schlefer* for Respondent Arctic Lighterage Company

Edward A. Ryan and *Alan F. Wohlstetter* for Complainants (22 named in Order of Investigation and Hearing; Teller Commercial Company added by Amendment (see November 9, 1976 prehearing conference transcript, page 9). (In a letter dated February 22, 1977, signed by Attorney Wohlstetter, it is stated, *inter alia*, ". . . received notification from complainants of their inability to incur further expenses in the proceeding because additional funds were no longer available. Despite the lack of financial support, we did not formally withdraw our representation of the complainants, because in view of our past efforts on their behalf we have maintained an interest in the proceeding. . . ."

Charna J. Swedarsky and *John Robert Ewers,* Director of Bureau of Hearing Counsel for Commission's Bureau of Hearing Counsel.

Arrum M. Gross, Attorney General State of Alaska, *Joseph K. Donohue,* Assistant Attorney General, and *Bruce M. Botelko,* Assistant Attorney General, for Intervener State of Alaska.

The Commission, pursuant to sections 18(a) and 22 of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Act, 1933, directed by its June 11, 1976 Order of Investigation and Hearing (published in the *Federal Register June 16, 1976, Vol. 41, Number 117), this investigation into the lawfulness of Arctic Lighterage Company's (Arctic) initial Tariff FMC–F No. 1. And, whether said tariff is unreasonable under section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933.*

Background

On May 12, 1976, Arctic filed an initial joint FMC/ICC Tariff (ICC Case No. 36362) to become effective June 15, 1976. The FMC portion of

Arctic's Tariff FMC–F No. 1 provides lighterage rates between ships and anchorage and shore at Nome and Kotzebue, Alaska, and commodity rates between ships anchorage and shore at Nome and Kotzebue and various coastal points in Alaska on the Bering Sea and Arctic Ocean. Arctic's proposed tariff sets forth the seasonal operation commencing on June 1 and terminating on September 15.

A prehearing conference was held herein on November 9, 1976. Hearings began on March 29, 1977. Hearing Counsel stated, *inter alia,* it had ". . . made a careful analysis based on the information supplied . . . by Arctic. We were not able to determine the actual rate of return, but after making certain adjustments to their asset values and changing some of the methods of allocation that we had disagreement with, the result that we reached was still what we consider to be not an unreasonable rate of return, which was 17.35 percent with an operating ratio of 88.05 percent." (Tr. 8, 9.) (See Exh. 2, p. 2.)

The parties present at the hearing agreed to continue discussions and to file a status report on or before April 29, 1977.

Also at the hearing, certain exhibits were identified, namely Exh. No. 1 for Identification, the direct testimony of Mr. William P. O'Shea, and Exh. No. 2 for Identification, the direct testimony of Thomas T. Morris, which included the General Order 11 Report of Arctic for 1976. (Tr. 28–30.) These identified exhibits were subsequently replaced by Exh. No. 1 (See Arctic Letter dated May 27, 1977 to Presiding Judge). Hearing Counsel in a letter to the Presiding Judge dated May 24, 1977, objected to receipt of Exhs. Nos. 1 and 2 for identification into evidence.

Under date of April 18, 1977, respondent Arctic served (received April 19, 1977) its Status Report after Conference with FMC Bureau of Hearing Counsel and Bureau of Industry Economics on April 12 and 13, 1977. The said status report asserted, in part, that after two days of dialogue among the participants, they came to substantial agreement on the financial data and analysis concerning the operations of Arctic as contained in Arctic's General Order 11 Report for the 1976 operating season. It was agreed to adjust FMC Vessel Operating Expense from 26.21% to 25.37%. Other changes of classification and amount were also agreed upon. As a result of the adjustments, Total Net *Loss* of Arctic FMC operations for the 1976 season is $169,764 (down from $229,694). Agreed to by Mr. Carey (See Exh. No. 2).

On April 29, 1977, Hearing Counsel served and filed its Status Report in which it is recognized that Arctic had already filed a status report providing a summary of the conference held on April 12 and 13, 1977; that Hearing Counsel had received the additional General Order 11 Report supporting workpapers Hearing Counsel requested be provided by Arctic; that Hearing Counsel intended to prepare a revised written statement reflecting its position based on the analysis and changes agreed upon at the conference.

Hearing Counsel submitted the analysis under date of May 24, 1977, as the revised Direct Testimony of James F. Carey, Staff Accountant, Federal Maritime Commission. This shall be identified as Exh. No. 2 for identification in this proceeding, and as such received in evidence as Exh. No. 2. Mr. Carey asserts in his notarized statement that he has made a careful and comprehensive analysis of the financial and operating data submitted by Arctic in the proceeding during the operation results for the period January 1, 1976 through December 31, 1976.

Respondent Arctic on June 1, 1977, served its comments on the revised direct testimony of Mr. Carey, and closed "With these qualifications and suggestions, respondent Arctic Lighterage Company has no objection to the marking for identification as an exhibit of the revised direct testimony of James F. Carey with supporting attachments."

The Intervener, State of Alaska, although not attending the hearing in this proceeding on March 18, 1977, served (received in the Office of the Secretary of the Commission on March 24, 1977) "Intervener's Brief."

Discussion

The respondent Arctic, after discussion with Hearing Counsel and technician, issued its statement of position (Exh. No. 1) presenting its case in chief to show the lawfulness of the Tariff, supported by Arctic's General Order 11 Reports. Both sides finally had come to agreement with regard to the figures in Arctic's General Order 11 Report for 1976, the underlying data and allocation methods, and the specific findings requested in the Commission's original Order of Investigation.

Arctic and Hearing Counsel came to agreement on various adjustments to Arctic's actual General Order 11 Report for 1976, such as

1. $62,021 of administrative payroll taxes were reclassified from Account 485 to become 486.

2. Maintenance expenses—repairs of floating equipment, Account 402, increased from $330,218 to $414,077 an $83,859 increase. A corresponding decrease was made to accounts 404, 405, and 406.

3. Because of the adjustments made under 1 and 2 above, the Vessel Operating Expense total charged to the trade was reduced from $622,383 to $607,914. As a result, the Vessel Operating Expense ratio was reduced from 26.21% to 25.37%.

Arctic is a wholly-owned subsidiary of Puget Sound Tug and Barge Company, is how Arctic explains in part its equity capital (Exh. No. 1, p. 19) and further explains (*Ibid,* p. 20):

Arctic's revenues in the trade for the 1976 operating season was $921,373 and the total expense $1,126,554. The $1,126,554 ÷ $921,373 = 122.26% as the Operating Ratio.

All of the exhibits identified above have been considered and are received as exhibits herein. The transcript of testimony and exhibits, together with all papers and requests filed in this proceeding, constitute the exclusive record for decision. 46 CFR 502.169. All have been closely examined by the Presiding Administrative Law Judge. It is shown that Arctic operations take place in extremely cold temperature, in broken ice and in very shallow rivers—a rugged environment—all of which give rise to elevated expenses. No computation made with respect to the revenues and expenses shows them to be improper. All of the pertinent material to this case is on file for scrutiny by the public.

Upon consideration of the above and the entire record herein, the Presiding Administrative Law Judge *finds* and *concludes* that Arctic Lighterage Company's Initial Tariff in the Western Alaska Trade is not unreasonable under section 18(a) of the Shipping Act, 1916, and section 4 of the Intercoastal Shipping Act, 1933. The Tariff withstands the test of operating ratio, which Hearing Counsel's Staff Accountant Carey agrees is 122.26% (Exh. No. 2, p. 13), as does Arctic (Exh. No. 1, p. 21).

Arctic sustained a loss of $169,764 in the FMC Regulated Trade for the 1976 operating season. In view of that fact says Staff Accountant Carey, Arctic did not realize a Net Profit, there can be no rate of return on equity or rate of return on rate base. (Exh. No. 2, p. 13.)

The Tariff is not unlawful or unreasonable and should be permitted to remain in effect.

Undoubtedly, cooperation and willingness of counsel to engage in the production and exchange of materials in this proceeding to make a record containing supporting and underlying records and accounts by which to test the accuracy, sufficiency, probativeness and reliableness of material, or finding as to the lawfulness of the tariff under section 18 of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, without the necessity for lengthy oral hearings enures to the benefit of all concerned, especially their clients.

It is *ordered*,

(A) The Tariff in this investigation and hearing be and is found not to be unlawful or unreasonable and such Tariff shall continue in effect, until or unless otherwise changed or ordered.

(B) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–28

INTERNATIONAL PAPER COMPANY

v.

LYKES BROS. STEAMSHIP CO., INC.

DOCKET NO. 74–39

PETITION OF LYKES BROS. STEAMSHIP CO., INC. FOR DECLARATORY ORDER

NOTICE OF DETERMINATION NOT TO REVIEW

August 3, 1977

Notice is hereby given that the Commission on August 3, 1977, determined not to review the order of dismissal of the Administrative Law Judge in this proceeding served July 5, 1977.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 74–28

International Paper Company

v.

Lykes Bros. Steamship Co., Inc.

NO. 74–39

PETITION OF LYKES BROS. STEAMSHIP CO., INC. FOR DECLARATORY ORDER

July 5, 1977

MOTION TO DISMISS GRANTED

International Paper Company and Lykes Bros. Steamship Co., Inc., have filed a joint motion to dismiss these proceedings.

In 74–28, the complaint proceeding, International charges Lykes with violations of sections 16, 17, and 18(b)(3) of the Shipping Act, 1916, on the grounds that Lykes, a common carrier by water, refused to enter into an agreement with International which would have afforded special volume rates on certain commodities shipped by International. Subsequently, Lykes filed a petition for declaratory order (No. 74–39) which sought resolution of the controversy which arose by virtue of International's complaint.

Hearings were held and a briefing schedule adopted. Subsequently counsel for International requested that the briefing schedule be rescinded because Lykes and International were engaged in an earnest effort to find a basis upon which to settle the proceedings.

The present motion to dismiss is the result of that earnest, and as it turns out, somewhat lengthy effort. The joint motion is based upon certain tariff revisions by Lykes[1] which have "rendered moot and eliminated those tariff filing practices to which the original complaint of International Paper Company had been directed."

[1] See Attachment.

Both International and Lykes take the position "that there is no further reason to allow the proceedings to remain pending or to proceed further with the litigation . . . ."

Hearing Counsel perceive no further regulatory purpose to be served in continuing the proceedings. While Hearing Counsel have no objection to the dismissal of these proceedings, they are of the opinion that the allegations of past violations alleged in the complaint should be examined by the Commission's staff to determine if further action is necessary. Accordingly Hearing Counsel urge that I dismiss these proceedings and "recommend" that the Commission refer the record to the staff for evaluation.

I am in complete accord with the proposition that there is no further regulatory purpose to be served by the continuation of these proceedings. International no longer desires to pursue its complaint and Lykes wishes to withdraw its petition for declaratory order. No cease and desist order need be issued since the practices giving rise to these cases have already ceased. Any further consideration of the record in these cases with the view toward further proceedings on alleged past violations is singularly within the province of the Commission, and no recommendation from me seems either desirable or appropriate.

Accordingly, the motion to dismiss is granted.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–17

SEA-LAND SERVICE, INC. AND GULF PUERTO RICO LINES, INC.—
PROPOSED RULES ON CONTAINERS

DOCKET NO. 74–40

PUERTO RICO MARITIME SHIPPING AUTHORITY—PROPOSED ILA RULES
ON CONTAINERS

ORDER OF DISCONTINUANCE

August 10, 1977

Docket No. 73–17 was originally instituted to determine whether the so-called "50 mile container rules" proposed by Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc. violated section 14 Fourth, 16 First, and 18(a) of the Shipping Act, 1916 and section 4 of the Intercoastal Shipping Act of 1933. Subsequent to the institution of this proceeding Sea-Land proposed a revision to its tariff rules which it claimed would cure the infirmities leading to the investigation. However, these revisions were likewise placed under investigation by the Commission.

During the period in which this investigation progressed Sea-Land and Gulf Puerto Rico Lines withdrew from the Puerto Rican trade and the Puerto Rico Maritime Shipping Authority (PRMSA) superseded them as an ocean common carrier in that trade. Preparatory to its entrance in the trade, PRMSA filed its tariff which set forth provisions identical to those already under investigation. Therefore, the Commission placed PRMSA's proposed tariff rules under investigation; consolidated the new investigation (Docket No. 74–40) with the existing Docket No. 73–17; and ordered that the record already adduced in the earlier docket be used to the fullest extent possible to develop the issues in the new proceeding.[1]

The tariff rules at issue in this proceeding were a direct outgrowth of certain collective bargaining provisions negotiated between multi-employer bargaining units and the International Longshoremen's Association (ILA). Of the three multi-employer bargaining units which might have had

[1] Subsequent amendments to the PRMSA tariff were also incorporated within the ongoing investigation.

an interest in these proceedings only the Council of North Atlantic Shipping Associations (CONASA) intervened and took and active role in the proceeding. CONASA argued the validity of these tariff rules as pure collective bargaining provisions and their consequent immunity to the authority of the Shipping Act or this Commission.

The PRMSA tariff rules at issue in this proceeding in general provided as follows: (1) Containers owned, leased or used by a carrier which contains consolidated loads coming from or going to any point within a 50-mile radius of the port involved; or (2) containers which come from a single shipper, which is not the manufacturer, into which the cargo has been consolidated by other than the shipper's own employees and which containers come from any point within the 50-mile radius; or (3) containers designated for a single consignee, from which the cargo is deconsolidated by other than the consignee's own employees within the 50-mile radius and which is not warehoused in accordance with other rules shall be loaded or unloaded or transfered by ILA labor. Failing the use of ILA labor the shipper or consignee was subject to a penalty of $1,000 per container.

This proceeding progressed over the course of numerous months of hearing before an Administrative Law Judge. Following these months of hearing, an Initial Decision was issued, exceptions to that decision were filed, replies were submitted and the case was heard by the Commission on oral argument.

Simultaneously with the investigation by this Commission of the lawfulness of PRMSA's tariff rules, the lawfulness of the underlying collective bargaining provisions was also being challenged both in the federal courts and before the National Labor Relations Board (NLRB).

The NLRB concluded that the Respondent ILA, *et al.*, had in fact violated the National Labor Relations Act as alleged. The Board concluded:

> We find that by maintaining, giving effect to, and enforcing the contract and agreements known as the rules on containers . . . respondent[s] . . . violated section 8(e) of the Act. We also find that by threatening to assess and by assessing liquidated damages as provided in the above described agreements, thereby threatening, restraining, and coercing, . . . [other parties] with an object to force those persons engaged in commerce to cease doing business with [the consolidators] Respondent ILA violated . . . the Act.

Thereafter, Respondents petitioned the United States Court of Appeals for the Second Circuit for review of the order of the National Labor Relations Board. The Board cross-filed for enforcement of its order. The Court of Appeals for the Second Circuit found that the Board order was based on substantial evidence and sound analysis and its enforcement was justified as prayed by the NLRB.

Respondents sought review of the decision of the Court of Appeals on certiorari before the Supreme Court. However, the Supreme Court denied certiorari, allowing the decision of the Second Circuit to stand.

During the course of the various appeals on the decision of the NLRB, PRMSA filed a note in its tariff, effective February 29, 1976, which provides in pertinent part as follows:

> The determination . . . by the NLRB . . . affects the continued validity of the Rules on Containers as set forth herein. Such decision has been appealed to the U.S. Court of Appeals for the Second Circuit.
>
> In the meantime, the New York Shipping Association, Inc. as management's representative, has informed PRMSA that the NYSA "have been advised by the International Longshoremen's Association, AFL-CIO that they will take no action against the NYSA or its members requiring them to enforce such rule."
>
> Therefore, the Rule set forth herein shall not be enforced until a determination of the validity of the Rule is made by the proper court of law or further advice is given from the parties of the Collective Bargaining Agreement.

In the light of this tariff provision, the decision of the Court of Appeals for the Second Circuit, and the denial of certiorari by the Supreme Court, the proposed rules of the Puerto Rico Maritime Shipping Authority which form the basis for this proceeding have been effectively withdrawn. Since these rules are not to be enforced by PRMSA, it is the decision of the Commission that no action by this Commission is required with respect to findings as to the lawfulness of the proposed tariff rules.

Our determination not to take action on the proposed rule in light of their effective withdrawal should not be construed in any sense to indicate a conclusion by this Commission with respect to its authority over these rules were they attempted to be enforced at any time. We decide here, simply, that there are no rules before us which require any determination by us as to their validity under the Shipping Act.

THEREFORE, IT IS ORDERED, That this proceeding be, and hereby is, discontinued.

By the Commission.*

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

*Vice Chairman Morse opposes discontinuance of the proceedings.

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.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 490

FOOTNER AND COMPANY , INC.

v.

SEA-LAND SERVICE, 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, Nonmotorized 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 CFT 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.

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[3] For the 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. 77–10

AGREEMENTS NOS. 10072 AND 10072–1

NOTICE OF DETERMINATION NOT TO REVIEW

August 10, 1977

Notice is hereby given that the Commission on August 10, 1977, determined not to review the order of discontinuance in this proceeding served July 12, 1977.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 77–10

Agreements Nos. 10072 and 10072–1

ORDER DISCONTINUING PROCEEDING

July 12, 1977

By motion dated June 16, 1977, Cruise Lines International Association (CLIA or proponent) gave notice that it was withdrawing its request for approval of the subject agreements and requested that the proceeding be discontinued. Hearing Counsel's reply[1] to CLIA's motion supported dismissal. The replies of the Association of Retail Travel Agents (ARTA)[2] and the American Society of Travel Agents, Inc. (ASTA)[3] both opposed discontinuing the proceeding, although for somewhat different reasons.

As indicated in the Commission's April 26, 1977 Order of Investigation and Hearing, Agreements #10072 and #10072–1 were filed for approval by CLIA pursuant to section 15 of the Shipping Act, 1916. #10072 provided for a conference of passenger lines in the passenger and cruise line trade in North America. CLIA sought approval for the Conference members to meet, develop and agree on activities designed to promote shipboard holidays on voyages marketed in North America. #10072 also sought authority for the Conference to represent member lines in dealing with industry conferences, associations, and governmental agencies, and also to represent member lines in matters relating to the qualifications and appointment of travel agents. #10072–1, known as "Administrative Rules," provided for the internal administration of the Conference (Article A) and rules governing travel agents (Article E).

The Commission's April 26 Order named four organizations as protestants in this proceeding—the American Automobile Association (AAA), ARTA, ASTA and the U.S. Department of Justice (DOJ). All four had earlier filed objections to all or parts of the subject Agreements.[4]

The two Agreements would have provided, *inter alia*, for a $100 agency

[1] Dated July 5, 1977.

[2] ARTA's "Answer" is dated June 21, 1977.

[3] ASTA's "Answer" is dated July 7, 1977.

[4] The Department of Justice had asserted that the entire process of joint regulation of the travel industry—from the appointment of agents, to setting the agents' commissions, to power to terminate the agent's appointment—would be a *per se* violation of the antitrust laws, constituting a group boycott in violation of Section 1 of the Sherman Antitrust Act, and also horizontal price fixing in violation of Section 1.

fee to be collected by the Conference from each travel agent, for the Conference to set commission levels and specific maximums to be paid to travel agents, that only travel agents qualified and appointed by the Confefence may receive remuneration, that all appointed travel agents be bonded by a bonding agency acceptable to the Conference, and that in consultation and cooperation meetings with other conferences and organizations there was no provision for participation by the travel agents themselves or their representatives.

CLIA's Motion to Discontinue Proceedings and withdrawal of their request for approval of the two Agreements states that "this withdrawal does not constitute any expression or concession by CLIA on the merits of the Agreements but is based solely upon the unwillingness of the CLIA lines to bear the burdens and expenses of litigation of these matters at this time."

ARTA's reply in opposition to discontinuing the proceeding argues that while it does not question CLIA's right to withdraw the subject two Agreements, "(t)here are still questions to be answered." ARTA then goes on to assert that because CLIA has stated in a news report (clipping attached to ARTA reply) that CLIA will "continue to function as an organization dealing solely with the promotion of cruising and education of travel agents," that, therefore, its documents of organization, by-laws and other pertinent agreements are subject to approval of the Commission and "are an issue to be disposed of in this proceeding." ARTA argues that the proceeding should continue and merely shift its focus from the subject Agreements "to the underlying agreements serving as the foundation for the International Passenger Steamship Association and the Pacific Cruise Conference."

I find nothing in the Commission's April 26 Order[5] or in Commission precedent that would authorize me to disregard the proponent's voluntary withdrawal of the very Agreements that are specified to be the precise subject of investigation and hearing, and to unilaterally "shift the focus" (i.e., change the subject) of the proceeding to another area that is of great interest to a designated protestant. This is not to say that the Commission lacks power to, *sua sponte,* initiate a new investigation into any area it believes may be violative of the Shipping Act, 1916.[6] Nor does it mean that an aggrieved party is totally without remedy if one believes he is being injured by a clear violation of the Act, for there are provisions for

[5] The Commission's April 26 Order, *inter alia,* states specifically as follows:

(T)he Commission is of the opinion that Agreements Nos. 10072 and 10072-1 should be made the subject of a public hearing and investigation to determine whether *these Agreements* should be approved, disapproved, or modified under the standards set by Section 15 of the Shipping Act, 1916.

NOW, THEREFORE, IT IS ORDERED, That the Commission commence an investigation and hearing pursuant to Section 22 of the Shipping Act, 1916, to *determine whether Agreements Nos. 10072 and 10072-1* should be approved, disapproved, or modified. . . .

IT IS FURTHER ORDERED, That in the event there is any modification of *these Agreements,* such modification shall be filed with the Commission, and shall be made subject to this investigation. . . .(Emphasis added.)

[6] The Commission has broad investigatory powers. Shipping Act, 1916, §§22, 27, 29; see also *Federal Maritime Commission v. Port of Seattle* (9 Cir. 1975) 521 F.2d 431, 432.

complainants to bring actions pursuant to the Act,[7] as well as for the FMC staff, acting on complaints, to investigate alleged violations outside the framework of the instant proceeding. As Hearing Counsel point out in their reply to the motion, any protest or criticism that ARTA or any other party may have about the authority still retained by CLIA under its other existing and Commission-approved section 15 agreements[8] should be specifically directed to those agreements, and any allegation of improper concerted activities not covered by an approved section 15 agreement should be investigated by the staff independent of this particular docketed proceeding.

ASTA also opposed the Motion to Dismiss, although it supports the general concept of the Agreements—the concept of a unified cruise line conference with a uniform system of fitness requirements for travel agents. ASTA opposed the severe qualification requirements for travel agents in the subject CLIA Agreements, lack of a voice by the travel agents in proposed conference activities, and the establishment of agents' commission levels. However, ASTA argued that this proceeding is an appropriate forum for the Commission to make a public interest examination of the conditions common to much of the passenger steamship industry, and asserts that "(b)ecause of the similarities between the objectionable provisions of CLIA's Agreements and those of other cruise conference agreements, the Commission should make its examination broad, so as to inquire into such industry-wide practices."

For the reasons set forth above in disposing of ARTA's opposition to discontinuance and, again, without intimating any limitation on the Commission's authority to broaden an investigation or initiate an entirely new one on a related subject area, I must reject ASTA's request to continue this proceeding in the face of a voluntary withdrawal by the proponent of the very Agreements that formed the sole basis, and *sina qua non,* for this investigation and hearing.

Accordingly, the Motion to Discontinue the Proceeding is *GRANTED.*

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

[7] See section 22, Shipping Act, 1916, 47 U.S.C. 821.

[8] Agreement No. 131 (Pacific Cruise Conference), Agreement No. 9856 (International Passenger Association), and Agreement No. 10071 (Cruise Line International Association Cooperative Working Arrangement).

FEDERAL MARITIME COMMISSION

DOCKET NO. 76–15

THOMAS P. GONZALEZ CORPORATION

v.

WESTFAL-LARSEN & CO. A/S

ORDER

August 15, 1977

This proceeding is before the Commission on exceptions by Westfal-Larsen & Co. A/S (WL) to a ruling by Chief Administrative Law Judge John E. Cograve dismissing a joint Petition for Declaratory Order filed by Westfal-Larsen and Thomas P. Gonzalez (Gonzalez). The subject Petition requested the Commission to determine whether the tariff of the Latin America/Pacific Coast Steamship Conference (Conference) applied to a shipment of beans from Ensenada, Mexico to Wilmington, (Los Angeles) California.

The essential facts are as follows:

Gonzalez and WL entered a charter party FIO contract for the transportation of a shipment of beans from Puntarenas, Costa Rica to Ensenada, Mexico[1] When WL's vessel with the shipment aboard arrived at Ensenada, Gonzalez was unable to take possession of the cargo. As a result, WL, at Gonzalez's instructions, discharged the shipment at Wilmington, California.

A controversy arose over WL's request for the payment of additional charges for the transportation from Ensenada to Wilmington. The additional amount allegedly due, computed according to the Conference tariff[2] on the Ensenada-Wilmington movement, was some $60,000. Upon WL's refusal to deliver the cargo, Gonzalez executed a letter agreement on May 15, 1975 and gave WL a check for $44,188.27[3] and a letter of credit for $60,000.

Thereafter, Gonzalez filed a complaint with the Commission in Docket

[1] The charter party provided for a negotiated rate of $25.00 per metric ton. Demurrage, stevedoring, storage and other charges were assessable against Gonzalez.

[2] WL maintained that as a member of the Conference, it was bound to apply the Conference tariff on a route covered by that tariff.

[3] This represented monies due under the charter party agreement.

No. 75–39, later amended, charging that WL's assessment of additional charges was unjust and unreasonable in violation of section 18(b) of the Shipping Act, 1916 and asking that WL be ordered to relinquish the letter of credit.[4]

Subsequently, in an attempt to resolve their differences, the parties filed the joint Petition for Declaratory Order asking the Commission to determine whether the Conference tariff applied to the Ensenada-Wilmington movement, and, if so, the amounts due under the tariff. The Conference was granted leave to intervene. Before a hearing could be held Gonzalez withdrew the complaint in Docket No. 75–39 and moved for leave to withdraw as joint petitioner and for dismissal of the Petition for Declaratory Order.

The Presiding Officer dismissed the proceeding. He found, in essence, that the issuance of a declaratory order was not likely to terminate the controversy, for even were WL to prevail on the merits, the Commission could not order a distribution of monies and WL would have to seek redress in the courts to collect any charges from Gonzalez. The Presiding Officer concluded, therefore, that a court would be a more suitable forum for the resolution of the controversy. Without addressing the merits of the Presiding Officer's findings and conclusions, we are denying the issuance of the requested declaratory order on a more fundamental ground.

The Petition before us raises the question of the applicability of the Conference tariff to the carriage from Ensenada to Wilmington. The Commission's Order referring the Petition to hearing likewise limits the inquiry to the Ensenada-Wilmington movement, as does the Presiding Officer's order granting the Conference leave to intervene. The fact, however, is that the shipment of beans at issue actually moved from Puntarenas, Costa Rica to Wilmington, California. As a result, and inasmuch as all parties to this proceeding have suggested in their pleadings that the Conference tariff might well be applicable to the entire carriage from Puntarenas to Wilmington, we are declining the requested issuance of a declaratory order within the framework of this proceeding.[5]

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order filed by Westfal-Larsen & Co. A/S and Thomas P. Gonzalez in this proceeding is hereby denied.

FURTHER, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

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[4] The amended complaint alleged violation of section 18(b)(2) and (3) for WL's attempt to impose common carriers rates to a charter party carriage in the absence of any provision in the tariff to that effect.

[5] The purpose of a declaratory order is to terminate a controversy or remove uncertainty and its issuance is completely discretionary with the Commission. 5 U.S.C. 554(e); 46 C.F.R. 502.68.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–5

AGREEMENT NO. 9973–3   AGREEMENT NO. 9863

ORDER DECLARING AVAILABILITY OF DISCOVERY, MODIFYING PROCEDURAL EVENTS AND DATES, AND DENYING STAY OF DISCOVERY

August 18, 1977

On March 31, 1977 the Commission instituted this proceeding in order to determine whether Article 1 of Agreement No. 9973 and Article 1 of Agreement No. 9863, whereby the parties to those agreements would have separate votes in conferences and other agreements to which they may be party, should be disapproved or modified pursuant to section 15 of the Shipping Act, 1916.

Agreement No. 9863 is between Blue Star Line, Ltd. and East Asiatic Company, Ltd., whereby those two carriers operate as a joint service in the trade between ports on the United States Pacific Coast and ports in the United Kingdom, the Republic of Ireland, and the Northern European Continent, including Scandinavia and Finland.

Agreement No. 9973 is among Johnson Line, and the aforementioned Blue Star Line, Ltd., and East Asiatic Company, Ltd., whereby those three carriers operate as a joint service in the trade between United States Pacific Coast ports, including Alaska and Hawaii, and ports and places in the United Kingdom, Republic of Ireland, and the European Continent, including Scandinavia and Finland, but excluding Mediterranean ports.

The question to be answered in this proceeding is whether or not the three aforementioned carriers should be permitted to vote separately, as compared to having only a single vote as a joint service, in any conference or other agreement to which they may be party.

The aforementioned three carriers were named Proponents in the Order of Investigation and Hearing herein; and United States Lines, Inc. and Sea-Land Service, Inc. were made Protestants in the proceeding. Hearing Counsel is party to the proceeding by rule. In the Order, the Commission limited this proceeding to the receipt of affidavits of fact and memoranda of law, until such time, if ever, that the Commission determined that a trial type evidentiary hearing or oral argument was necessary. Proponents were directed to file their affidavits and memoranda on or before May 1, 1977, and Protestants, and all other parties to the proceeding, were directed to file their affidavits and memoranda on or before May 31, 1977. Requests for a trial type evidentiary hearing were to be filed on or before May 1, 1977.

On April 14, 1977, Proponents petitioned the Commission to modify the Order of Investigation and Hearing so as to change the dates upon which affidavits of fact and memoranda of law were due to be filed with the Commission from May 1 for Proponents, and May 31, for all other parties to the proceeding, to June 1 and June 30, respectively. The asserted basis for the petition was counsel's inability to confer with Proponents' primary affiants until mid-May. Protestants and Hearing Counsel had no objection to the petition. On May 2, 1977, the Commission issued an order modifying its Order of Investigation and Hearing in this proceeding so as to alter the dates upon which, and the order in which, the parties to this proceeding would file affidavits and memoranda of law. As changed by the May 2, 1977 order, this schedule is as follows:

DATE	EVENT
May 20, 1977	Request for trial type evidentiary hearing.
May 31, 1977	Affidavits of Protestants and those interveners opposing the approval of the agreements.
June 14, 1977	Affidavits of Proponents and those interveners favoring the approval of the agreements.
June 21, 1977	Rebuttal affidavits of Protestants and those interveners opposing the approval of the agreements.
July 19, 1977	Opening memoranda of law by all parties.
August 2, 1977	Reply memoranda of law by all parties.

On May 12, 1977, Proponents, Protestants, and Hearing Counsel filed a Joint Motion for Modification of Procedural Events and Dates (Joint Motion), whereby the presently established dates would be delayed two months in each event. There are no interveners in this proceeding. The bases for the Joint Motion, as enunciated therein, follow verbatim:

> On May 2, 1977, the Commission served its Modification of Order of Investigation and Hearing (Modification) herein. That Modification substantially revised the procedural events as previously established. Protestants are currently re-evaluating the need to use discovery in this proceeding in light of the changes set out in the Modification. A dispute amongst the parties may develop in respect of whether there may be discovery in this proceeding. Such a dispute might have to be resolved by the Commission, and this will take some time.[1]
>
> Secondly, all parties have agreed to use the additional time which will be available to them as a result of the proposed revisions sought herein to determine what factual matters can be stipulated to by all parties in furtherance of limiting factual disputes.

On May 18, 1977, Proponents moved the Commission to issue an order declaring that discovery is not available in this proceeding (Declaratory

[1] Hearing Counsel — having been of the view that discovery did apply to this proceeding — commenced discovery in the form of interrogatories to the other parties within 30 days of the Original Order of Investigation. Protestants are of the view that discovery applies to this proceeding, and that the 30 days should be construed to run from the Commission's Modification. Proponents are of the view that discovery does not apply to this proceeding.

Motion). According to Proponents, discovery is not available in this proceeding: (1) because discovery is not always available in section 22 proceedings, for example, it is not available in rulemaking proceedings; (2) because this proceeding is essentially a section 15 proceeding, notwithstanding the reference to section 22 in the Order of Investigation and Hearing; and (3) because the Commission, in that Order of Investigation and Hearing, limited the proceeding to the submission of affidavits of fact and memoranda of law.

Also on May 18, 1977, Proponents filed a motion for stay of discovery, asserting that there is a strong likelihood that the motion for declaratory order will not be decided prior to the date on which responses to the discovery requests of Hearing Counsel and Protestants will be due. Proponents request the Commission to stay all discovery and responses until 15 days after the Commission's decision on the motion for declaratory order.

Central to each of the three motions is the question of whether discovery is available in this proceeding. Upon the resolution of that question depends the decisions on all three motions. Consequently, they are decided together.

A. Declaratory Motion

Section 27 of the Shipping Act, 1916, provides that in *all* proceedings under section 22 of the Act, discovery proceedings shall be available under rules and regulations issued by the Commission. The Senate Report accompanying Public Law 90–177, whereby section 27 of the Act was amended so as to permit discovery, stated that the discovery procedures "would be applicable only in adjudicatory proceedings arising under Section 22 of the Shipping Act, 1916. To the extent any proceeding under Section 22 of that Act is not adjudicatory in nature then the procedures. . .[for discovery] would not be available." S. Rep. No. 472, 90th Cong., 1st Sess., 2 (1967).

Proponents argue that discovery procedures are not available in every section 22 proceeding, citing *Uniform Rules and Regulations Covering Free Time on Import Containerized Cargo at the Port of New York,* 14 S.R.R. 1520 (ALJ 1975), as authority for the proposition that discovery is not available in rulemaking proceedings, even if conducted pursuant to section 22 of the Shipping Act. The case cited by Proponents was an interlocutory order of a Commission Administrative Law Judge, wherein the Presiding Officer ordered the commencement of oral hearings without further delay, and in doing so, ruled that discovery was not available in a true rulemaking proceeding with no adjudicatory aspects. Whatever the validity of the reasoning in that case, it is inapplicable here because this case is not a rulemaking proceeding.

The Senate Report indicates that the discovery procedures would be available in adjudicatory proceedings. The Administrative Procedure Act defines "adjudication" as the "agency process for the formulation of an order.. . ." 5 U.S.C. 551(7). "Order" is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making.. . ." 5 U.S.C. 551(6). Section 15 of the Shipping Act provides that the Commission shall approve, modify, or disapprove agreements by order. Hence, this proceeding is an adjudicatory proceeding. Under the actual words of section 27, and its legislative history, discovery is available, under rules and regulations promulgated by the Commission, in adjudicatory proceedings conducted pursuant to section 22.

The Commission did promulgate discovery rules under the authority of section 27 of the Shipping Act. Rule 201 provides that discovery is available in *all* proceedings under section 22 of the Shipping Act. 46 C.F.R. 502.201.

Proponents argue, however, that, notwithstanding the reference to section 22 in the Order of Investigation and Hearing, the instant proceeding is essentially a section 15 proceeding. Although not specifically stated, the inference which Proponents apparently wish the Commission to draw from that statement is that discovery is not available in a proceeding concerning the approval or disapproval of a section 15 agreement because such a proceeding is not a section 22 proceeding. Section 22 of the Act authorizes the Commission to conduct investigations into "any violation of" the Shipping Act. The phrase "any violation of" the Shipping Act includes inquiries concerning the approval or disapproval of agreements pursuant to section 15, as well as "violations" of the proscriptive provisions of the Shipping Act, *e.g.*, sections 14, 16, or 17. *Federal Maritime Commission v. Carragher, et al.*, 364 F. 2d 709 (2nd Cir. 1966); *Federal Maritime Commission and Ludlow Corp. v. DeSmedt*, 366 F.2d 464 (2nd Cir. 1966). Thus, it follows that discovery is available in proceedings instituted to determine the approvability, pursuant to section 15, of agreements, and the Commission has expressly so held. *Agreement 9813—Conference Agreement Transatlantic Freight Conference*, Docket No. 69–58, 11 S.R.R. 628 (1970).

Proponents also argue that, in this proceeding, and by extension, in all proceedings of this class, that is, affidavits and memoranda proceedings, the Commission has waived the applicability of the discovery rules.[1] The argument for waiver of discovery in this proceeding is founded upon the Order of Investigation and Hearing where the Commission provided:

> That this proceeding shall be limited to the submission of affidavits of fact and memoranda of law, replies thereto, and oral argument, if requested and/or deemed necessary by the Commission.

The argument is that the order instituting this proceeding, by its terms, limits it to only affidavits and memoranda, and, possibly, oral argument; that that specific limitation is inconsistent with the use of any other

[1] Rule 10 permits the Commission to waive any of the Rules of Practice and Procedure, with the exception of two rules not relevant here, in any particular case "to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires." 46 C.F.R. 502.10.

processes; and that the use of discovery is contrary to the purpose of such a shortened procedure, to wit: the expeditious conclusion of the proceeding. This argument also fails, for the limitation in this proceeding is upon the method whereby evidence and argument will be presented to the Commission, that is, affidavits and memoranda, vice oral testimony and cross-examination, but not upon the method whereby that evidence will be acquired by the parties to the proceeding, that is, by the use of discovery. Further, the Commission's waiver of rules is not to be implied, but is found only when express. Lastly, the use of discovery is not inconsistent with the expeditious resolution of this proceeding because the discovery rules provide that the parties may be ordered to commence the "hearing" prior to the completion of discovery.[2]

After considering all of the arguments for and against, the Commission concludes that discovery is and has been available in this proceeding, and that it is available in all section 15 proceedings conducted pursuant to section 22, except those in which the Commission expressly precludes discovery. This is so because: section 27 of the Shipping Act provides that discovery is available in all adjudicatory proceedings under rules promulgated by the Commission; the Commission has promulgated rules making discovery available in all section 22 proceedings; this is a section 22 adjudicatory proceeding; and the Commission has not waived the use of the discovery procedures in this proceeding.

B. Joint Motion

The effect of the Joint Motion, if granted, would have been to delay the receipt of the first affidavit in this proceeding from May 31, 1977 until July 31, 1977. Because of the delay engendered by the several motions filed in this proceeding, and the Commission's consideration of those motions, the Joint Motion has become moot.

However, the Commission will further delay the procedural events and dates so as to permit commencement and completion of discovery and the filing of the affidavits and memoranda required in this proceeding within a reasonable period of time from the date of this order. In this regard, the Commission concludes that the parties to this proceeding should have taken the opportunity presented by the delay caused by the instant motions to gather the data necessary to respond to discovery requests already made, and to have researched and formulated proper objections, if any, to those discovery requests, and to have determined what questions should be asked during the discovery phase of this proceeding.[3] Because the agreements which are the subject of this proceeding have been approved until the final order of the Commission in

[2] "Nothing herein shall be construed to preclude the Presiding Officer from ordering a hearing to commence before the completion of discovery and inspection procedures conducted pursuant to Subpart L." 46 C.F.R. 502.201(b)(2).

[3] Indeed, the parties represented to the Commission in the Joint Motion that they would use the time productively. Further, the Commission gave the parties notice in its order of May 31, 1977 that this proceeding would be resumed upon short notice.

this proceeding, it is desirable that the lawfulness of those agreements be determined at the earliest practicable date.

The schedule which the Commission shall hereinafter provide is the result of a balancing of the desire for expedition and for a full and adequate record relevant to the issues in this proceeding. In the absence of delay engendered by frivolous pleadings or unreasonable discovery requests or unfounded refusals to comply with proper discovery requests, that schedule will permit the achievement of both of those goals.[4]

C. Motion for Stay

The apparent purpose for the motion for a stay of discovery until 15 days after the Commission decides the Declaratory Motion seems to have been to protect Proponents from being subjected to discovery until after the Commission decided that question. Since the Commission has now determined that discovery is available in this proceeding, there is no longer any need to prevent Proponents from being subjected to discovery. Consequently, the motion for stay of discovery is moot, and it will be denied.

D. Suitability of the Affidavits and Memoranda Procedure

Having determined that discovery is available in this proceeding, the Commission is compelled to consider whether the proceeding, as presently constituted, is suitable to the purposes of this investigation. That procedure was adopted by the Commission for this case so as to provide for the expeditious resolution of this dispute. Unfortunately, the Commission is not constituted to handle, with the degree of expedition desired, the interlocutory matters relating to discovery. No collegial body may act as quickly as a single presiding officer. While the Commission could assign to one of its number the task of overseeing the discovery phase of this proceeding, because of the breadth of the responsibilities of the Commissioners, greater expedition would be achieved if one of the Commission's Administrative Law Judges were to perform that function. Consequently, the Order of Investigation and Hearing herein will be further modified so as to provide that this proceeding is referred to an Administrative Law Judge to oversee the discovery phase of this proceeding.

As referred, the Presiding Administrative Law Judge will rule on all discovery matters, and any other interlocutory matter within the scope of this proceeding up to the filing of the first affidavits required in this proceeding. The Presiding Administrative Law Judge will be authorized to delay the schedule of affidavits and memoranda, but only if that officer makes written findings of facts which that officer concludes constitute good cause for the delay, with due regard for the Commission's desire for expedition in this proceeding. Similarly, any waivers of rules, or enlarge-

[4] A request for a trial type evidentiary hearing shall not operate to delay any other date.

ments of time, which the Presiding Officer is authorized, by the Rules of Practice and Procedure, to grant, shall be supported by written findings of facts, which the Presiding Officer concludes constitute good cause for the delay or enlargement, with due regard for the Commission's desire for expedition in this proceeding.

On the date upon which Protestants are required to file their affidavits, as delayed, if the Presiding Officer does so, the jurisdiction of the Administrative Law Judge to which this proceeding is referred shall terminate, and those affidavits, and all subsequent documents filed in this proceeding shall be filed with the Commission. By this reference to an Administrative Law Judge, the Commission intends to permit orderly discovery, but to otherwise preserve the affidavits and memoranda character of this proceeding, and the expedition permitted by that character.

In line with that expedition, and because the parties to this proceeding have had sufficient time to determine what matters they wish to discover, and any proper objections thereto, and because this proceeding has been delayed too long as it is, the time within which a party may commence discovery, respond to discovery requests, interpose objections to discovery, seek protective orders regarding discovery, seek to compel compliance with discovery, reply to motions to compel discovery, and do any other act with regard to discovery, will be shortened to the date 15 days after the date of this order, or half the time prescribed by the Commission's Rules of Practice and Procedure, whichever is later.[5] While the Commission here shortens the time allowed for discovery matters, this general shortening is not to be construed so as to limit the authority of the Presiding Administrative Law Judge to further shorten or enlarge those times pursuant to the Rules of Practice and Procedure should good cause therefor, within the context of this order, appear to that officer.

In summary, the Commission concludes that discovery is available in this proceeding; that the Joint Motion should be denied in part; and that the Motion for Stay of Discovery should be denied.

THEREFORE, IT IS ORDERED, That the order of the Federal Maritime Commission, entitled, *Agreement No. 9973-3 and Agreement No. 9863*, "Order of Investigation and Hearing and Order of Approval of Agreement No. 9973-3 *Pendente Lite*", dated March 31, 1977, is further modified:

(a) By the addition of a new ordering paragraph therein, as follows:

IT IS FURTHER ORDERED, That this proceeding is referred to the Commission's Office of Administrative Law Judges for the sole purpose of overseeing the discovery phase of this proceeding; the Presiding Administrative Law Judge to have all the rights, powers, and duties in this proceeding as may be had by a Presiding Administrative Law Judge in any proceeding referred to that office; *Provided, however,* that the jurisdiction

[5] The shortened times apply to outstanding discovery requests as well as those to follow hereafter. Further, since the Commission has established a new schedule for discovery, affidavits, and memoranda, it is unnecessary to rule upon Protestants' assertion that the time within which discovery may be commenced should be construed to run from the Commission's order of May 2, 1977.

of the Office of Administrative Law Judges over this proceeding shall terminate on the date the affidavits of Protestants are due, as that date may from time to time be determined; and *Provided further,* that the Presiding Administrative Law Judge may enlarge the time within which requests for a trial type evidentiary hearing, affidavits, or memoranda shall be filed in this proceeding, only upon written findings of facts which constitute good cause, with due consideration for the expedition mandated in this proceeding; and *Provided further,* that any waivers of rules, or enlargements of time, which the Presiding Administrative Law Judge is authorized, by the Commission's Rules of Practice and Procedure, to grant shall be effected only upon the Presiding Administrative Law Judge's written findings of facts which constitute good cause, with due consideration for the expedition mandated in this proceeding.

and

(b) By deleting, in the fifth ordering paragraph thereof, as modified by the Commission's Order of May 2, 1977, the following dates: May 20, 1977, May 31, 1977, June 14, 1977, June 21, 1977, July 19, 1977, and August 2, 1977; and substituting therefor the following dates: December 9, 1977, December 27, 1977, January 10, 1978, January 17, 1978, February 7, 1978, and February 21, 1978, respectively.

IT IS FURTHER ORDERED, That the times provided in Rules 132(c) and 201 through 211 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.132(c), 502.201–502.211, are shortened to, in each instance, half the time prescribed in those rules, or to the date 15 days from the date of this order, whichever is later.

IT IS FURTHER ORDERED, That, except to the extent herein expressly granted, the May 12, 1977 Joint Motion for Modification of Procedural Events and Dates is denied.

IT IS FURTHER ORDERED, That the May 18, 1977 Motion for Stay of Discovery, filed by Johnson Line, Blue Star Line, Ltd., and East Asiatic Company, Ltd., is denied.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 370(I)

CONE MILLS CORPORATION

v.

TRAILER MARINE TRANSPORT CORPORATION (TMT)

ADOPTION OF DECISION OF SETTLEMENT OFFICER

January 30, 1978

The Commission, by notice served September 2, 1977, determined to review the decision of the Settlement Officer served August 10, 1977 in this proceeding. Upon review, the Commission finds the decision of the Settlement Officer denying reparation to be proper and well-founded and adopts it as its own.

Rule 230 of TMT's Tariff FMC–F No. 2 provides that the carrier may load other freight in the free space available in a container, while Rule 20–F provides for the assessment of rates based upon one hundred percent of the cubic capacity of the container if the shipper fails to furnish the cubic measurements of cargo rated on a cubic foot basis. Complainant here delivered the containers sealed thereby effectively preventing the carrier from utilizing whatever space might otherwise have been available. This, coupled with Complainant's failure to apprise TMT of the actual measurements of the cargo, as required by the carrier's tariff, warranted the assessment of freight charges based on the full cubic capacity of the container. By its actions and inactions, Complainant in effect leased and moved entire containers.

Our decision today is in full accord with the Commission's holding in *Borden v. Venezuelan Line,* Docket No. 76–2, Report served January 10, 1977, where we reiterated the principle set forth in *Kraft Foods v. Federal Maritime Commission,* 538 F.2d 445 (D.C. Cir. 1976) that no tariff rule may lessen the statutory period for seeking reparation provided in section 22 of the Shipping Act, 1916, as well as the Commission's policy of allowing recovery under the proper circumstances where due to inaccuracies in the shipping documents the carrier was led into assessing higher charges than provided in its tariff for what actually moved. In this case, what actually moved, and what Complainant was properly assessed for, were entire containers.

Vice Chairman Morse, concurring. I concur in the result. See my concurrence in *Cone Mills Corporation v. Trailer Marine Transport Corporation,* Informal Docket No. 369(I).

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 370(I)

CONE MILLS CORPORATION

v.

TRAILER MARINE TRANSPORT CORPORATION (TMT)

August 19, 1977

Reparation denied.

DECISION OF L. MERRILL SIMPSON, SETTLEMENT OFFICER*

Complainant seeks reparation in the amount of $4,217.91, claiming a freight overcharge on six shipments of cargo moving between October 27, 1975, and January 13, 1976, in trailer of Ryder Truck Lines, Inc., loaded by the shipper. The overcharge alleged was occasioned by the application of Rule 20F of TMT's Tariff FMC-F No. 2 which provides for assessment of rates based upon 100 percent of the cubic capacity of the trailer, if the shipper fails to furnish the cubic measurement of the cargo, on cargo which is rated on a per cubic foot basis. Rule 450B of the tariff prohibits a change in the cubic measurement after the cargo leaves the possession of the carrier. While no violation of the statute is alleged by Complainant it appears that the complaint is based upon a violation of Section 18(a), Shipping Act, 1916, 46 USC 817(a).

Respondent, TMT, in a letter dated March 6, 1976, encouraged the complainant to file a claim with the Commission and on March 17, 1976, in a letter addressed to the Commission indicated its support for the claim. This support by the carrier of the shipper's claim is misplaced. TMT is the maker of the tariff. It has and has had the ability to amend its rule so that no shipper would be placed in the position of paying for more space than was utilized caused by the failure to state the cubic measurements if the proper application of rates is its only concern. TMT has not altered Rule 20F and it continues to have application.

After this complaint was filed, the carrier consented to the informal

*This decision became the decision of the Commission January 30, 1978.

procedure of Rule 19, 46 CFR 502.301–304 but failed to include any response regarding the allegations therein.

I requested all of the documents received from the shipper and the bills of lading and invoices issued together with the cubic measurement of each container. Respondent complied. The documents furnished by TMT included:

(1) Ocean Bill of Lading covering each shipment and prepared by the respondent;
(2) Trailer receipt and inspection report;
(3) Ryder Truck Lines waybill;
(4) Complainant's shipping order.

Also furnished for some of the shipments was a usually incompleted form titled Shippers Export Shipping Instructions.

Respondent further advised that the interior cubic measurement of each container was 3200 cubic feet.

From the documents supplied, it is clear that TMT had knowledge of the description of the goods, the number of cartons and the total weight of each shipment. *None* of the documents furnished to the carrier reflected the cubic measurement of the cargo nor the inside cubic capacity of the trailer. The shipping order prepared by complainant, and supplied to the respondent listed carton numbers and the contents of each expressed in yards of material and the total *weight* of each shipment.

TMT received no documents which stated the cubic measurement of the cargo. The containers received were sealed and the seal numbers were recorded by both the motor carrier and respondent.

Containerized shipping had brought with it benefits and some problems for shipper and carrier alike. Shipments loaded by the shipper and/or unloaded by the consignee result in savings in handling costs to carriers. In this instance, these savings are translated into the carrier's rate structure through the publication of a truckload rate which is substantially less than the rate for goods moving loose across respondent's facility. This loading of the cargo by the shipper removes the practical ability of the carrier to determine what the measurements of the cargo are, without destroying those savings contemplated in the truckload rate assessed.

Furthermore, rule 230 of respondent's tariff provides in part that the carrier has the unrestricted right to load other freight in the trailer. This right is preempted if the carrier does not have knowledge of the amount of space available to it.

Rule 450B, taken alone would not be a basis for denying the reparations sought.

However, rule 20F places a reasonable duty upon the shipper necessary for both the proper application of rates and efficient carrier operation. It does not appear to be unjust or unreasonable.

The failure of the complainant to comply with mandatory provisions of a lawfully filed applicable tariff provision in and of itself is sufficient to require dismissal of its complaint. Accordingly, the claim of complainant for reparation is denied; and its complaint dismissed.

(S) L. MERRILL SIMPSON,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 369(I)

CONE MILLS CORPORATION

v.

TRAILER MARINE TRANSPORT CORPORATION (TMT)

ADOPTION OF DECISION OF SETTLEMENT OFFICER

January 30, 1978

The Commission, by notice served September 2, 1977, determined to review the decision of the Settlement Officer served August 10, 1977 in this proceeding. Upon review, the Commission finds the decision of the Settlement Officer denying reparation to be proper and well-founded and adopts it as its own.

Rule 230 of TMT's Tariff FMC–F No. 2 provides that the carrier may load other freight in the free space available in a container, while Rule 20–F provides for the assessment of rates based upon one hundred percent of the cubic capacity of the container if the shipper fails to furnish the cubic measurements of cargo rated on a cubic foot basis. Complainant here delivered the containers sealed thereby effectively preventing the carrier from utilizing whatever space might otherwise have been available. This, coupled with Complainant's failure to apprise TMT of the actual measurements of the cargo, as required by the carrier's tariff, warranted the assessment of freight charges based on the full cubic capacity of the container. By its actions and inactions, Complainant in effect leased and moved entire containers.

Our decision today is in full accord with the Commission's holding in *Borden v. Venezuelan Line,* Docket No. 76–2, Report served January 10, 1977, where we reiterated the principle set forth in *Kraft Foods v. Federal Maritime Commission,* 538 F.2d 445 (D.C. Cir. 1976) that no tariff rule may lessen the statutory period for seeking reparation provided in section 22 of the Shipping Act, 1916, as well as the Commission's policy of allowing recovery under the proper circumstances where due to inaccuracies in the shipping documents the carrier was led into assessing higher charges than provided in its tariff for what actually moved. In this case, what actually moved, and what Complainant was properly assessed for, were entire containers.

Vice Chairman Clarence Morse, concurring. I concur in the result but disapprove the basis used by the majority.

The Settlement Officer Held:

> The failure of the complainant to comply with mandatory provisions of a lawfully filed applicable tariff provision in and of itself is sufficient to require dismissal of its complaint. Accordingly, the claim of complainant for reparation is denied; and its complaint dismissed."

This quoted language is the only stated basis for the Settlement Officer's decision. I concur in that basis. However, upon review of the decision of the Settlement Officer, the Commission in its Adoption of Decision of Settlement Officer "finds the decision of the Settlement Officer denying reparation to be proper and well-founded and adopts it as its own." In so doing the Commission takes an action which is diametrically opposed to its decision in *Borden Inc. v. Venezuelan Line,* Docket No. 76–2 (1977), 17 S.R.R. 497, wherein the Commission held:

> The tariff rule construed in *Kraft* provided that: 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. By analogy to the weight or measurement situation, we hold that Complainant's failure to state the value at the time of shipment cannot deprive it of its statutory right to subsequently bring forth evidence on the issue of the value of the goods it actually shipped. *Nalco Chemical Co. v. Alcoa Steamship Co., supra, Colgate Palmolive Co. v. Grace Line, supra,* and other Commission decisions applying tariff rules similar to that found in this proceeding so as to deny shippers an opportunity to obtain reparations within the two-year limitation period of section 22 are overruled."

A duly filed and published tariff has the force of law. *State of Israel v. Metropolitan Dade,* 431 F.2d 925 at 928. *Valley Evaporating Co. v. Grade Line,* Inc., 14 F.M.C. 16 at 19–20 (1970).

A duly filed and published tariff rule may be found to be unlawful by this Commission only if the finding of unlawfulness is made after notice and opportunity to be heard on that issue. *Administrative Procedure Act,* 5 U.S.C. 551 *et seq.;* Sections 18(a) and 22, *Shipping Act,* 1916; and Section 2, *Intercoastal Shipping Act,* 1933. Neither such a finding nor such an issue, notice, and opportunity to be heard thereon are present in this case.

The following cases uphold the validity of and apply a tariff rule the same as, or similar in principle to, Tariff Rules 20D and 20F: *Davis v. Henderson,* 266 U.S. 92 (1924). *State of Israel, supra. Glama Dress Co. v. Mid-South Transports,* 335 I.C.C. 586 at 593 (1969). *Campbell, Wyant & Cannon Foundry Co. v. Interstate,* 346 I.C.C. 572, 574–575 (1974).

Strict compliance with Tariff Rule 20D is a condition precedent to the goods being rated at less than 100% utilization as provided in Tariff Rule 20F.

The principles of *Kraft Foods v. F.M.C.,* 538 F.2d 445 (D.C. Cir.,

1976) are not applicable. That case holds that any tariff rule or regulation which purports to lessen the two-year period specified in Section 22, Shipping Act, 1916, is void. The tariff rules here under consideration are rules which "... affect, or determine any part or the aggregate of such aforesaid rates ...". The inclusion of any such rules in the tariff is mandated by Section 18(b)(1), Shipping Act, 1916. That rule is no different in principle than other tariff rules which condition the granting of rates based on special packing or value, etc.; for example, for palletized cargo a requirement that the pallets be of specified dimensions and material or that high valued cargo must be declared on the bill of lading if a carrier's liability in excess of $500 per package is to apply; or having one rate for boxed automobiles and a higher rate for unboxed automobiles. It is Hornbook law that such must be strictly applied in rating shipments.

The majority states "Our decision today is in full accord with ... the Commission's policy of allowing recovery under the proper circumstances where due to inaccuracies in the shipping documents the carrier was led into assessing higher charges than provided in its tariff for what actually moved." In my opinion that statement is an oversimplification and imprecise statement of past decisions and disregards the mandate of sections 18(b)(1) and 18(b)(3), Shipping Act, 1916.

See also my dissent in *Borden Inc. v. Venezuelan Line, supra. Borden* should be reversed and tariff rules and regulations should be respected and applied except where a rule or regulation is void on its face or is duly found to be unlawful.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 369(I)

CONE MILLS CORPORATION

v.

TRAILER MARINE TRANSPORT CORPORATION (TMT)

August 19, 1977

Reparation Denied.

DECISION OF L. MERRILL SIMPSON, SETTLEMENT OFFICER*

Complainant seeks reparation in the amount of $4,444.11, claiming a freight overcharge on four shipments of cargo moving between July 27, 1975 and September 25, 1975, in trailer of Ryder Truck Lines, Inc., loaded by the shipper. The overcharge alleged was occasioned by the application of Rule 20F of TMT's Tariff FMC-F No. 2 which provides for assessment of rates based upon 100 percent of the cubic capacity of the trailer, if the shipper fails to furnish the cubic measurement of the cargo, on cargo which is rated on a per cubic foot basis. Rule 450B of the tariff prohibits a change in the cubic measurement after the cargo leaves the possession of the carrier. While no violation of the statute is alleged by Complainant it appears that the complaint is based upon a violation of Section 18(a), Shipping Act, 1916, 46 USC 817(a).

Respondent, TMT, in a letter dated March 6, 1976, encouraged the complainant to file a claim with the Commission and on March 17, 1976, in a letter addressed to the Commission indicated its support for the claim. This support by the carrier of the shipper's claim is misplaced. TMT is the maker of the tariff. It has and has had the ability to amend its rule so that no shipper would be placed in the position of paying for more space than was utilized caused by the failure to state the cubic measurements if the proper application of rates is its only concern. TMT has not altered Rule 20F and it continues to have application.

After this complaint was filed, the carrier consented to the informal

*This decision became the decision of the Commission January 30, 1978.

procedure of Rule 19, 46 CFR 502.301–304 but failed to include any response regarding the allegations therein.

I requested all of the documents received from the shipper and the bills of lading and invoices issued together with the cubic measurement of each container. Respondent complied. The documents furnished by TMT included:

(1) Ocean Bill of Lading covering each shipment and prepared by the respondent;
(2) Trailer receipt and inspection report;
(3) Ryder Truck Lines waybill;
(4) Complainant's shipping order.

Also furnished for some of the shipments was a usually incompleted form titled Shippers Export Shipping Instructions.

Respondent further advised that the interior cubic measurement of each container was 3200 cubic feet.

From the documents supplied, it is clear that TMT had knowledge of the description of the goods, the number of cartons and the total weight of each shipment. *None* of the documents furnished to the carrier reflected the cubic measurement of the cargo nor the inside cubic capacity of the trailer. The shipping order prepared by complainant, and supplied to the respondent listed carton numbers and the contents of each expressed in yards of material and the total *weight* of each shipment.

TMT received no documents which stated the cubic measurement of the cargo. The containers received were sealed and the seal numbers were recorded by both the motor carrier and respondent.

Containerized shipping had brought with it benefits and some problems for shipper and carrier alike. Shipments loaded by the shipper and/or unloaded by the consignee result in savings in handling costs to carriers. In this instance, these savings are translated into the carrier's rate structure through the publication of a truckload rate which is substantially less than the rate for goods moving loose across respondent's facility. This loading of the cargo by the shipper removes the practical ability of the carrier to determine what the measurements of the cargo are, without destroying those savings contemplated in the truckload rate assessed.

Furthermore, rule 230 of respondent's tariff provides in part that the carrier has the unrestricted right to load other freight in the trailer. This right is preempted if the carrier does not have knowledge of the amount of space available to it.

Rule 450B, taken alone would not be a basis for denying the reparations sought.

However, rule 20F places a reasonable duty upon the shipper necessary for both the proper application of rates and efficient carrier operation. It does not appear to be unjust or unreasonable.

The failure of the complainant to comply with mandatory provisions of a lawfully filed applicable tariff provision in and of itself is sufficient to require dismissal of its complaint. Accordingly, the claim of complainant for reparation is denied; and its complaint dismissed.

(S) L. MERRILL SIMPSON,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 491

MUNOZ Y CABRERO

v.

SEA-LAND SERVICE, INC.

Authority to waive collection of a portion of freight charges denied.

REPORT

August 23, 1977

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

To meet competition, Sea-Land Service, Inc. (Sea-Land) agreed to carry a shipment of common glassware from New York, New York to Bilbao, Spain, at a rate of $44.00 w/m in lieu of the $59.50 provided in its tariff. Due to an administrative error, Sea-Land failed to timely file the rate agreed upon. When the error was discovered, after the shipment was delivered to the carrier, Sea-Land filed a corrected tariff which, due to a subsequent clerical error, showed a rate of $40.00 w/m.

Sea-Land now seeks permission to collect freight charges at the $40.00 w/m rate, and to waive collection of the balance due under the rate of $59.50 applicable at the time of shipment.

Conceding that the $40.00 rate was not the rate agreed upon or the rate originally intended to be filed, Administrative Law Judge Thomas W. Reilly nevertheless found that: (1) there was an error in the tariff in effect at the time of shipment caused by Sea-Land's inadvertent failure to timely file the intended rate, and; (2) Sea-Land had met the other requirements of section 18(b)(3) of the Shipping Act, 1916. He accordingly granted Sea-Land permission to compute charges on the basis of the $40.00 w/m rate. We cannot agree.

The legislative history of the amendment to section 18(b) of the Shipping Act (Public Law 90–298)[1] which gave the Commission authority

[1] 46U.S.C. 817(b)(3).

to permit a carrier subject to its jurisdiction to make a voluntary refund or *to waive the collection* of a portion of the freight charges, clearly indicates that such waiver or refund was to be allowed where, as a result of a bona fide mistake, the carrier failed to file an "intended rate." Thus, the House Report accompanying the Bill which ultimately added the refund/waiver authority to section 18(b) states:

> 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.[2]

Likewise, the Senate Report[3] in setting forth the *Purpose of the Bill,* explains

> [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.* (Emphasis added)

Section 18(b)(3) requires that prior to applying for a refund or a waiver the carrier file a new tariff upon which "such refund or waiver will be based." When read in conjunction with the statements in the House and Senate reports, it is clear that "the new tariff" is expected to reflect a prior intended rate, not a rate agreed upon after the shipment.

While we recognize that should the application be denied the consequences of the carrier's consecutive errors would fall upon the shipper, nevertheless the authority granted by P.L. 90–298 to depart from the rigid requirements of section 18(b)(3) of the Act and to make a rate applicable retroactively is strictly limited and in our opinion would not extend to approve a rate which was never agreed upon or intended to be filed.

THEREFORE, IT IS ORDERED, That the Initial Decision of the Administrative Law Judge issued in this proceeding is reversed and permission to waive collection of a portion of the freight charges is denied.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473, 90th Congress 1st Sess. (1967)].

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* 90th Cong., 2d Sess. (1968).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 513

VELSICOL CHEMICAL CORPORATION

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING PARTIAL REFUND OF CHARGES

August 25, 1977

Sea-Land Service, Inc. has submitted the statement of concurrence duly executed by the shipper Velsicol Chemical Corporation, as directed by the Commission's Order on review, served in this proceeding on July 29, 1977.

The requirement of Rule 92, Appendix II(7) having thus been met, the Initial Decision of the Administrative Law Judge in this proceeding is hereby adopted as the decision of the Commission.

THEREFORE, IT IS ORDERED, That applicant Sea-Land Service, Inc. is authorized to refund $1,748.25 of the charges collected from Velsicol Chemical 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 No. 513, that effective October 17, 1976 for purposes of refund of freight charges on any shipments which may have been shipped during the period from October 17, 1976 through October 21, 1976, the rate on herbicides from Houston, Texas to Bilbao, Spain was $82.00 per ton at 2240 pounds, minimum 18 tons per container, 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.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 513

VELSICOL CHEMICAL 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 Rule 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 a shipment of herbicides, which moved from Houston, Texas to Bilbao, Spain under a Sea-Land bill of lading dated October 17, 1976. The application was filed March 21, 1977.

The subject shipment moved under Sea-Land Tariff No. 233, FMC–105, item #10720, 3d revised page 153 (effective June 16, 1976) and 7th revised page 171 (effective May 24, 1976), which was a cross-reference to "Chemicals, Non-Hazardous, N.O.S." This tariff covered shipments from U.S. Gulf ports to certain ports in Spain. The aggregate weight of the shipment was 14,640 pounds and it measured 777 cubic feet. The rate applicable at time of shipment was $166 W/M (per ton of 2,240 pounds or 40 cubic feet). The rate sought to be applied is $82 W (per 2,240 pounds), with a minimum of 18 WT per container, pursuant to Sea-Land Tariff No. 233, FMC–105, item 13160, 2d revised page 172, effective November 8, 1976 but telegraphically filed on October 21, 1976.

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amounted to $3,224.25 ocean freight plus wharfage and transfer charges, making a total of $3,291.96. Aggregate freight charges at the rate sought to be applied amount to $1,476 ocean freight plus the same identical wharfage and transfer charges, making a total of $1,543.71. The difference sought to be refunded is $1,748.25. The Applicant is not

[1] This decision became the decision of the Commission August 25, 1977.

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

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 ground for granting the application:

(4) Approximately October 12, 1976, Sea-Land's sales personnel made a verbal commitment with the complainant to reduce its existing through rates on Herbicides (rated as Chemicals, non-hazardous, N.O.S. per 7th Revised Page 171 and 3rd Revised Page 153) from Houston, Texas to Bilbao, Spain by amending the existing Item 13160 covering Insecticide to include Herbicides and Weed Killer Compounds (Attachment No. 1). Based on this commitment, a booking for one containerload was made to move on the S.S. Sea-Land *Producer* V.28 sailing Houston on October 17, 1976.

Instructions were given to the tariff publication department to file the reduced rate to become effective on the date of shipment. Through clerical error, compounded by misunderstanding between sales and pricing personnel, telegraphic filing was not made until October 21 (Attachment No. 2) as reflected on 2nd Revised Page 172 of the applicable tariff (Attachment No. 3).

When the shipment moved, the freight bill dated October 20 (Attachment No. 4) was issued and ocean freight charges were assessed in the amount of $3,224.55 at the then applicable rate of $166.00 per ton of 2,240 lbs. or 40 cu. ft. in Item 10720 on 3rd Revised Page 153 of the tariff (Attachment No. 5).

Complainant paid the charges through his freight forwarder and has claimed against respondent for refund of the excess charges he paid.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 92(a), *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 new rate for shipments of the subject commodity destined for Bilbao, Spain and having a minimum of 18 WT per container, as had been promised for shipper.

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[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 refund of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to refund a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such refund 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 a portion of the freight charges, specifically the amount of $1,748.25. An appropriate notice will be published in Sea-Land's tariff.

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

WASHINGTON, D.C.,
May 19, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL KOCKET NO. 509

VAN MUNCHING & COMPANY, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING PARTIAL REFUND OF CHARGES

August 25, 1977

Sea-Land Service, Inc. has submitted the statement of concurrence duly executed by the shipper Van Munching & Company, Inc., as directed by the Commission's Order on review, served in this proceeding on July 29, 1977.

The requirement of Rule 92, Appendix II(7) having thus been met, the Initial Decision of the Administrative Law Judge in this proceeding is hereby adopted as the decision of the Commission.

THEREFORE, IT IS ORDERED, That applicant Sea-Land Service, Inc. is authorized to refund $1,471.50 of the charges collected from Van Munching & 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. 509, that effective September 1, 1976 for purposes of refund of freight charges on any shipments which may have been shipped during the period from September 1 and 2, 1976, through March 19, 1976, the rate on beer kegs from Tampa, Florida to Rotterdam, Holland was $3.15 each, 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.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 509

VAN MUNCHING & COMPANY, INC.

v.

SEA-LAND SERVICE, INC.

Application granted.

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

By application filed February 25, 1977, Sea-Land Service, Inc., seeks permission to refund a portion of the freight charges on two shipments of beer kegs consigned to Van Munching & Company, Inc. aggregating 22,638 pounds from Tampa, Florida to Rotterdam, Holland, on September 1 and 2, 1976. The rate applicable at the time of shipment was $5.40 each.[2] This rate resulted in aggregate freight charges of $3,540.09. The rate sought to be applied is $3.15 each.[3] This rate would have resulted in total freight charges of $2,068.59. Therefore, permission to refund $1,471.50 is sought.

Sea-Land Service, Inc., is a participating carrier in the Gulf European Freight Association (GEFA) Tariff No. 2 (FMC–2), which names all-water rates from U.S. Gulf ports, including Tampa, Florida, to continental European ports in the Bordeaux/Hamburg range. Gulf ports at which Sea-Land vessels regularly call direct are Houston, Texas and New Orleans, Louisiana. Vessels also call direct at Jacksonville, Florida in the South Atlantic. To compete with carriers in the trade calling direct at other Gulf ports, Sea-Land published and filed its mini-landbridge Tariff No. 259, FMC No. 133 and ICC No. 104, naming joint through rail-water and motor-water rates from Tampa and other Gulf ports, effective June 20, 1976. The rates in Tariff No. 259 were published at the same level as the existing all-water rates in GEFA Tariff No. 2 (FMC–2). The all-water rate on the involved commodity in effect at the time Tariff No. 259 was being

[1] This decision became the decision of the Commission August 25, 1977.

[2] Sea-Land Service, Inc. Eastbound U.S. Gulf of Mexico/Europe Joint Container Freight Tariff No. 259, FMC No. 133 and ICC 1 No. 104, Item 40, Original Page 52.

[3] Same tariffs of rates. 1st Revised Page 52.

compiled was $3.15 each on Page 48 of GEFA Tariff No. 2 (FMC–2), having been reduced from $5.40 each by telegraphic filing effective March 19, 1976 per 3rd Revised Page 48. Through clerical error, Sea-Land's tariff publishing department failed to pick up 3rd Revised Page 48 and instead copied the rates appearing on 2nd Revised Page 48 on which the rate was $5.40 each. All three rates on Empty Beer Barrels and Casks appearing on 2nd Revised Page 48 of GEFA Tariff No. 2 were copied into Item 40 on Original Page 52 of Sea-Land Tariff No. 259, which became effective June 20, 1976. Sea-Land's shippers, including complainant, were advised that its mini-landbridge rates from Tampa and other Gulf ports in Tariff No. 259 were the same as the all-water rates published in the GEFA tariff. It was not until after the shipments that are the subject of this complaint had moved that the error in failing to publish the correct measure of rates in Item 40 on Original Page 52 of Sea-Land's Tariff No. 259 was discovered. The freight on each shipment was calculated at the erroneous but applicable rate of $5.40 each and was subsequently paid by the shipper. The rates in Item 40 were then promptly reduced to the GEFA level on 1st Revised Page 52 effective September 26, 1976. The rates actually published on 1st Revised Page 52 included an 8½ percent general increase that had become effective September 23, 1976 per 1st Revised Title Page of Tariff No. 259 which followed an identical general rate increase in GEFA Tariff No. 2 effective September 20, 1976, on Original Page Title 1.

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 92, *Special Docket Applications,* Rules of Practice and Procedure, 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 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:

[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.*

> 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 amended rate.

It is therefore found that:

1. There was an error due to an inadvertence in failing to file a new rate.
2. Such refund of a portion of the freight charge will not result in discrimination among shippers.
3. Prior to applying for authority to refund a portion of the freight charges, Sea-Land filed a new tariff which sets forth the rate on which such refund 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 refund a portion of the freight charges represented by $1,471.50.

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

WASHINGTON, D.C.,

[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

DOCKET NO. 76–53

AGREEMENTS NOS. 10040–2 AND 10153—AGREEMENTS IN THE UNITED STATES/GUATEMALA TRADE

NOTICE OF DETERMINATION NOT TO REVIEW

August 24, 1977

Notice is hereby given that the Commission on August 24, 1977 determined not to review the order of discontinuance served August 1, 1977 in this proceeding.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 76–53

AGREEMENTS NOS. 10040–2 AND 10153—AGREEMENTS IN THE UNITED STATES/GUATEMALA TRADE

August 1, 1977

PROCEEDING DISCONTINUED

By Order of Investigation and Hearing served September 22, 1976, the Commission instituted an investigation to determine whether Agreements Nos. 10040–2 and 10153 are unjustly discriminatory or unfair as between carriers, shippers, exporters or importers of the United States, are contrary to the public interest, or are in violation of the Shipping Act, 1916, 46 U.S.C. 801 et seq., and therefore, whether those agreements should be disapproved, canceled, modified or granted continued approval.

Flota Mercante Gran Centroamericana, S.A. (Flomerca), Coordinated Caribbean Transport, Inc. (CCT), and Pan American Mail Line, Inc. (PANAM), were made respondents. Hearing Counsel became a party pursuant to Rule 502.42 of the Commission's Rules of Practice and Procedure, 46 CFR 502.42.

Agreement No. 10153 is an arrangement between Flomerca and CCT whereby those respondents became associated for the transportation of cargo from Miami, Florida, to Guatemala.

Agreement No. 10040–2 is an extension of Agreement No. 10040, a cooperative working arrangement between Flomerca and Panam establishing Flomerca Trailer Service, a through trailer service in the trade between ports of Florida and ports of Santo Thomas de Castilla, Guatemala, and Puerto Cortez, Honduras, and via those ports to and from points in Guatemala, El Salvador and Honduras.

Agreement No. 10153 became effective August 13, 1975, and by its terms was to continue in operation until July 9, 1977. Agreement No. 10040–2 was approved pending the outcome of this investigation or until it expired under its terms on May 31, 1977.

On November 26, 1976, the Commission ordered the postponement of the procedural and discovery schedule, hearing and decision in this proceeding pending the final outcome of certain discussions with representatives of Flomerca.

On June 23, 1977, Hearing Counsel filed a Petition for Partial Dismissal and Discontinuance of the Proceeding, seeking to dismiss Panam, as a respondent, and to discontinue the proceeding as to Agreement No. 10040–2 because that agreement had expired. On July 15, 1977, Hearing Counsel filed a Motion for Dismissal and Discontinuance, urging dismissal of CCT and Flomerca, as respondents, and discontinuance of the proceeding as to Agreement No. 10153, as well as to Agreement No. 10040–2 because both agreements had expired.

Hearing Counsel also noted in its second pleading that there has not been filed any request to extend the life of either agreement.

On July 7, 1977, Panam replied to Hearing Counsel's Petition, stating that it agreed that the proceeding should be discontinued as to Agreement No. 10040–2 and that Panam should be dismissed as a respondent. By telephone, on July 18, 1977, counsel for CCT advised me that neither CCT nor Flomerca objected to nor opposed Hearing Counsel's Motion.

Since the agreements which are the subject of this investigation are no longer in effect, and in the absence of any request to extend the life of those agreements, the issues in this proceeding are moot. No useful regulatory purpose would be served by continuing this proceeding. Therefore, Hearing Counsel's Petition and Motion are granted. The proceeding is ordered discontinued.

One further matter needs comment.

In its Reply to Hearing Counsel's Petition, Panam incorporated a response, dated May 20, 1977, from its president to an earlier inquiry from the Commission's Chief, Office of Agreements, Bureau of Compliance. That response, among other things, pointed out that Panam "[dba] Pan Atlantic Lines elsewhere in its trade routes has elected to adopt the trade name, Flomerca Trailer Service for the Miami/Guatemala/Salvador/Honduras Trade, since the trade name shall become available on June 1st and since it shall certainly prove useful to the marketing efforts of [Panam] in that service."

By virtue of having been incorporated in the Reply, the May 20th letter came to the attention of Delta Steamship Lines, Inc. (Delta), an intervenor in the proceeding. Delta's president thereupon communicated certain comments to the Chairman of the Commission, by letter dated July 13, 1973, a copy of which was sent to me. Delta's letter included, among other things, a request that the Commission undertake a new investigation "into the relationship under which [Panam] has continued operation as Flomerca Trailer Service following the purported severance of its relationship with Flomerca. . . . As the Commission is aware, the name 'Flomerca' has long been utilized by and associated with the Guatemalan National flag carrier which, in turn, continues to operate as Flomerca Line between the U.S. Gulf and Guatemala."

However, Delta's letter makes no mention of Hearing Counsel's

Petition to discontinue the proceeding as to Agreement No. 10040–2. Neither in form nor in substance is it a proper pleading under the Rules of Practice and Procedure. Since Delta did not reply to the Petition within the 15 day time period prescribed by the Commission's Rules of Practice and Procedure, Rule 502.74(b), 46 CFR 502.74(b), Delta will be deemed not to have objected to nor opposed the relief sought by that Petition. In any event, the matters referred to in Delta's letter are beyond the scope of the order instituting this proceeding and need not be considered further by me.

Delta did not reply to the second pleading.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-51

PACIFIC COAST EUROPEAN CONFERENCE

v.

SOUTHERN PACIFIC MARINE TRANSPORT, INC., AND THE SOUTHERN PACIFIC COMPANY

PARTIAL ADOPTION OF INITIAL DECISION

August 25, 1977

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

This proceeding was commenced with the filing of a complaint by the Pacific Coast European Conference (PCEC) against Southern Pacific Marine Transport, Inc. (SPMT) and the Southern Pacific Company[1] alleging violations of sections 14b, 14 Fourth, 16, 17, 18(b)(5) and 44(c) of the Shipping Act, 1916.

While PCEC's original complaint presented various allegations concerning the activities of SPMT, Administrative Law Judge John E. Cograve (Presiding Officer), subsequently found that PCEC on brief "appears to have abandoned all but the 18(b) and 44(c) allegations" of its complaint. Accordingly, the Presiding Officer concluded that the only issues remaining to be resolved involved whether SPMT is a common carrier by water under the Shipping Act and/or whether its activities are those of a freight forwarder as defined in section 1 of that Act.

In his Initial Decision the Presiding Officer found that (1) SPMT was a non-vessel owning common carrier by water (NVOCC) and (2) SPMT was not carrying on the business of forwarding without a license. Exceptions to that decision were filed by PCEC and replies submitted by SPMT. The Commission heard oral argument.

In its exceptions, PCEC concentrates on the "initial and basic issue for determining prior to reparations," *i.e.*, the legal issue of SPMT's common carrier status. It is contended by PCEC that the Presiding Officer did not

[1] The complaint was later amended to substitute the Southern Pacific Transportation Company for Southern Pacific Company.

decide this "primary issue." According to PCEC, the Initial Decision "does not forthrightly hold SPMT to be a 'common carrier by water' within the meaning of the Act but to be 'a non-vessel owning common carrier by water within the meaning of the Shipping Act.' " PCEC not only takes issue with the Presiding Officer's conclusion that SPMT is an NVOCC, but, in addition, attacks his alleged failure to *specifically* find that:

> SPMT is not a common carrier by water under the Shipping Act.
>
> SPMT has not engaged in the transportation by water of passengers or property between the United States and a foreign country on the high seas on regular routes from port to port.[2]

In attacking SPMT's status as an NVOCC, PCEC argues that the Presiding Officer's decision effectively overrules the Commission's decision in Docket No. 815, *Common Carriers by Water—Status of Express Companies, Truck Lines and Other Non-vessel Carriers,* 6 F.M.B. 245 (1961), which established the concept of an NVOCC. According to PCEC, the facts in Docket No. 815 are distinguishable on the basis that SPMT, unlike the carriers in Docket No. 815, does not claim to assume liability for the entire journey, both land and sea. PCEC relies on the fact that SPMT "admits that it disclaims 'responsibility and liability' to its cargo," which, PCEC views as the "essence of the so called 'non-vessel owning common carriage by water' enacted by this Commission." According to PCEC, the Presiding Officer's decision, if allowed to stand, will introduce:

> ". . . a new 'concept of nonvessel owning common carrier by water' that is neither a carrier itself nor one who 'assumes the responsibility of a carrier' by issuing its own bill-of-lading accepting 'actual liability over the entire journey.' It will be, like SPMT itself, a 'person' that submits a schedule of port-to-port freight rates to the FMC in which it expressly disclaims any responsibility or liability for the transportation services that it pretends to offer to the shipping public. This novel concept of a common carrier by water is one whose 'tariff' claims to be a common carrier and whose bill-of-lading says 'not me.' "

SPMT supports all findings and conclusions set forth in the Initial Decision, including the Presiding Officer's determination that SPMT's statement of liability for port to port movements should be restated and clarified. SPMT argues that its operations fit squarely within the definition established by the Commission in Docket No. 815, and in General Order 4. (46 C.F.R. 510 *et seq.*)

The threshold issue in this proceeding is the interpretation to be applied to the definition of an NVOCC set forth in Docket No. 815, *supra*. PCEC contends that under the criteria outlined in that proceeding, an entity, in order to be considered an NVOCC, is required to assume liability for the

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[2] In light of the Presiding Officer's determination that SPMT is an NVOCC we do not consider it necessary to address this aspect of PCEC's exceptions. Suffice to say that an NVOCC is a "common carrier by water under the Shipping Act" (see footnote 3) *albeit* in a manner which differs from the historical concept of an ocean water carrier. As an NVOCC, SPMT is engaged in the transportation by water of property between the United States and foreign countries.

entire through movement including the land portion.[3] In so doing, PCEC relies primarily on the statement at p. 256 of the Commission's Report in Docket No. 815 that: "Actual liability as a common carrier over the entire journey including the water portion is essential."

The Presiding Officer, after much discussion of the Commission's decision in Docket No. 815, concluded that the Commission did not intend to require that an NVOCC's liability extend to the land portion of the movement for NVOCC status to attach. Inasmuch as we are adopting the Presiding Officer's initial decision which contains a comprehensive analysis of this matter we need not reiterate all the details contained therein. Suffice it to say that our review of Docket No. 815 fully supports the determination of the Presiding Officer on this point.

In Docket No. 815 we determined that a person or business association:

> . . . may be classified as a common carrier by water who holds himself out by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce, as defined in the Shipping Act, 1916; assumes responsibility or has liability imposed by law for the safe transportation of the shipments; and arranges in his own name with underlying water carriers for the performance of such transportation, whether or not owning or controlling the means by which such transportation is effected, is a common carrier by water as defined in the Shipping Act, 1916. At pages 256–257.

As can be seen, liability for the inland movement was not included within the definition and is immaterial to the Commission's exercise of jurisdiction over the water portion of the movement. While it is true that the parties involved in Docket No. 815 were all "initial carriers" who assumed liability for the inland movement, the fact remains that nowhere in the decision in Docket No. 815 did we impose *any* requirement that the NVOCC assume liability for the inland movement.

That being so, we find that the Presiding Officer's findings and conclusions regarding the status of SPMT as an NVOCC are proper and supported fully by the record. SPMT's activities fall generally within the concept of an NVOCC discussed in Docket No. 815 and SPMT is therefore, for all intents and purposes, an NVOCC.

PCEC next excepts to the Presiding Officer's finding that SPMT is not engaged in the business of forwarding. According to PCEC, the Presiding Officer erroneously reasoned that "(1) SPMT is an 'NVOCC' because SPMT is not a forwarder; (2) SPMT is not a forwarder because SPMT is an 'NVOCC.' " PCEC submits that the Presiding Officer should have found that SPMT performs forwarding service "*as a matter of fact.*" PCEC maintains that SPMT's testimony of record indicates that SPMT's activities encompass all of those services normally attributed to an ocean freight forwarder and the Presiding Officer "simply ignored" the proof presented in this regard. SPMT counters PCEC's contention that SPMT

[3] PCEC's alternative challenge to the NVOCC concept and the Commission's establishment thereof is without merit. The concept of an NVOCC has been firmly established and approved by the courts. *IML SeaTransit Limited v. United States*, 343 F. Supp. 32 (N.D. Cal. 1972) aff'd 409 U.S. 1002 (1972), rehearing denied 409 U.S. 1118 (1973).

acts as a forwarder citing testimony in the record to the effect that other freight forwarders did not consider SPMT to be a forwarder.

We have closely examined the activities of SPMT and find no evidence that freight forwarding services were performed on shipments not handled by SPMT in its capacity as an NVOCC. It is not a question of determining whether SPMT performs "forwarding services *as a matter of fact*" as PCEC contends, but whether these services are rendered on shipments not carried under SPMT's own bill of lading. Provided SPMT only performs freight forwarding services in connection with its own shipments it need not be licensed by this Commission (46 C.F.R. 510.22). The record in this proceeding does not indicate otherwise.

PCEC also attacks the Presiding Officer's reliance on Docket No. 74–14, *Possible Violations of Section 18(a) of the Shipping Act, 1916, etc.*, 16 F.M.C. 425 (1975) for the proposition that:

> . . . if a person in fact performs as an NVOCC any assumption of liability on the part of that person is unnecessary because liability will be imposed upon him by law.

PCEC would distinguish that case on the grounds that the party in Docket No. 74–14, unlike SPMT here, was expressly disclaiming any kind of NVOCC status; that the trade involved in that proceeding was domestic commerce—not foreign commerce; and, that the instant proceeding was instituted pursuant to section 22 in contrast to Docket No. 74–14 which "appears to involve some sort of personal 'rulemaking' activity" of the Presiding Officer and Hearing Counsel. PCEC also takes issue with the Presiding Officer's reliance on Docket No. 74–14 for "precedential value" because "the Commission's 'Notice of Adoption of Initial Decision' recites that it was adopted upon 'the Commission's having determined not to review the same.' "

PCEC's challenge of the Presiding Officer's reliance on Docket No. 74–14, *supra,* is without foundation. PCEC's attempt to draw distinctions between Docket No. 74–14 and the instant proceeding ignores the fact that the imposition of liability upon an NVOCC referred to in the former proceeding and relied on by the Presiding Officer is a rule of general applicability and does not necessarily turn on the particular facts of each case. Thus, distinctions drawn on the basis of the trade or type of proceeding involved or the position taken by the parties as to their status are all irrelevant. Liability will be imposed by law regardless of these considerations if, as the Commission noted, "a person in fact performs as an NVOCC."

Further, there is no basis for PCEC's suggestion that the decision in Docket No. 74–14 is of questionable "precedential value." Upon adoption of an initial decision, that decision becomes *the decision of the Commission* regardless of the procedure used to effect that adoption. Until modified or overturned by subsequent Commission or court decisions the general rule regarding NVOCC liability expressed in Docket No. 74–14 is applicable to all such carriers.

Finally, PCEC denies that it "abandoned" issues raised under sections 18(b)(5), 16, 17, 18(b), 14b and 14 Fourth. PCEC explains:

> On the contrary, we stated in our 'Opening Brief' clearly and unequivocally that the allegations of the Complaint upon which Complainants claimed reparations would—under the Commission's Rule No. 15—be subject to separate proceedings. . . .

While admitting that it did not brief the allegations of SPMT's violations, PCEC contends that the record is complete for briefing under Rule 251.[4]

SPMT nevertheless contends that PCEC's rights have been foreclosed by its failure to introduce any evidence whatsoever concerning its operations and its claim of damages in the proceeding. SPMT notes that at the prehearing conference PCEC did not express any interest in severing the reparation issues for later consideration and raised no objection at that time to a full and complete trial of all issues on the date suggested by the Presiding Officer. SPMT argues that had PCEC seriously advanced the reparations issue at any stage of the proceeding SPMT would have presented shipper witnesses and would have been prepared to try any and all issues which PCEC might have raised. SPMT views PCEC's failures to do so as an abandonment of the reparation issue together with a number of other issues not pressed during the proceeding.

We believe that Complainant has misconstrued the language in Rule 251. This rule states in relevant part that in any proceeding in which reparation is sought,

> . . . the Commission will determine in its decision the issues as to violations, the injury to complainant, and right to reparation. If complainant is found entitled to reparation, the parties thereafter will be given the opportunity to agree or make proof respecting the shipment and pecuniary amount of reparation due before the order of the Commission awarding reparation is entered.

There is no basis for PCEC's assumption that the reparation issues would be considered in a *separate* proceeding. Rule 251 contemplates a two-tier procedure within the *same* proceeding with the reparation phase following a determination that a right to reparation exists; *i.e.*, upon a showing that a violation has occurred. The record here does not support any finding of the violations alleged let alone that reparations for such violation should be awarded.

While certain aspects of the allegations raised by PCEC are discussed in the record, the focus of attention was, for the most part, devoted to SPMT's carrier status. In its opening brief PCEC advised that it was seeking "the Commission's decision on the legal issue of SPMT's pretended 'ocean carrier' status." Again, on exception, PCEC saw the case as presenting "the claim to 'common carrier by water' status of SPMT, Inc." In its exceptions, PCEC advised that if SPMT were a *bona fide* common carrier it could not complain except with respect to the absorptions of drayage charges at the Gulf ports contrary to the tariff and the question of deferred rebate contracts. PCEC has had ample opportu-

[4] Since the filing of exceptions the Commission has redesignated the rules found in Part 502 of Title 46, Code of Federal Regulations. Rule 15 cited by PCEC is now designated as Rule 251.

nity to introduce evidence in support of these alleged violations, but refused to do so.[5] In light of PCEC's failure to furnish a full and complete record on these matters we do not believe that due process requires that this proceeding be remanded for further hearing without some additional assurance by PCEC that it is interested in actively litigating the alleged violations. In any event, and in view of our decision, PCEC might now wish to reconsider its legal options and pursue any further action against SPMT based on its NVOCC status.

Therefore, we are dismissing this complaint. PCEC is free to file a new complaint directed at those alleged violations of the Shipping Act, 1916, not addressed herein.

While this disposes of the pertinent exceptions raised by PCEC, there are some additional determinations made by this Presiding Officer which warrant further discussion.

The Presiding Officer found that the bill of lading issued by SPMT should be amended to clarify the contractual relationship between the actual shipper and SPMT as "carrier." We agree that such a clarification is necessary and are requiring that it be made.[6] We are also requiring that SPMT amend the title page in its tariff to delete the statement that the tariff is applicable to cargo moving on "Through Bill of Lading issued by the Carrier." SPMT has admitted that it does not issue a through bill of lading and reference to such on the title page is misleading.

The Presiding Officer also determined that while SPMT's bill of lading provides that all shipments are carried pursuant to the provisions of the Carriage of Goods by Sea Act (COGSA), SPMT's operations do not fit within the definition of a "carrier" as defined in COGSA. Because COGSA allegedly does not apply to SPMT the Presiding Officer concluded that SPMT's assumption of liability is "meaningless." Notwithstanding this finding, the Presiding Officer nevertheless determined that SPMT is liable for the water portion of the movement. In so doing, he relied on the Commission's decision in Docket No. 74–14, discussed earlier.

While we agree with the general proposition outlined in Docket No. 74–14 and its application to NVOCC's disclaiming any liability we do not consider it necessary or proper to decide whether NVOCC's are subject to the COGSA provisions. The applicability of COGSA to NVOCC's would appear to be a matter for the courts to decide.

It is well recognized that in the absence of any *statutory* or *contractural* provision to the contrary, and subject to several well-recognized exceptions, the liability of a common carrier by water for the loss of or injury to goods received by it for transportation is generally held to be that of an

[5] The Presiding Officer scheduled a hearing in San Francisco but was advised at the hearing that Complainants would present no witnesses and did not wish to cross-examine any of Respondent's witnesses. As a result, the testimony of these witnesses was entered into evidence without being subject to cross-examination.

[6] SPMT has already indicated its willingness to comply with this clarification.

insurer.[7] This carrier liability may be limited by special or express contract provided the agreed limitation is such as the law can recognize as just and reasonable and not inconsistent with sound public policy.[8] Finally, it has been held that a shipper may, consonant with public policy, assent to a limitation of liability by the acceptance of terms covering the contract of carriage contained in a bill of lading or tariff.[9]

Thus, if it is determined that an NVOCC is not a "carrier" under COGSA, liability would probably be imposed by law in conformance with the principles discussed above. The important consideration is that liability, in some form, will be imposed on an NVOCC as a "common carrier." The Presiding Officer so found and we agree. However, a determination as to whether an NVOCC's liability should be limited through application of COGSA is not only unnecessary to our ultimate resolution of the central issue raised in this proceeding *i.e.*, the matter of SPMT's status, but would also appear to be beyond the scope of the proceeding. Therefore, we are vacating that portion of the Presiding Officer's decision pertaining to the applicability of COGSA to SPMT.

THEREFORE, IT IS ORDERED, That the Initial Decision served in this proceeding is adopted in its entirety except that portion pertaining to the applicability of the Carriage of Goods by Sea Act to the operations of a non-vessel owning common carrier which portion is hereby vacated.

FURTHER, IT IS ORDERED, That SPMT will amend the title page in its tariff (Local Freight Tariff No. 2, FMC-2) to delete the statement that the tariff is applicable to cargo moving on "Through Bill of Lading issued by the Carrier."

FINALLY, IT IS ORDERED, That the complaint in this proceeding is, dismissed.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

[7] 70 AM JUR 2d § 513, 516.
[8] 14 AM JUR 2d § 537.
[9] 14 AM JUR 2d § 548, 549.

FEDERAL MARITIME COMMISSION

No. 74–51

PACIFIC COAST EUROPEAN CONFERENCE

v.

SOUTHERN PACIFIC MARINE TRANSPORT, INC., AND THE SOUTHERN PACIFIC COMPANY

April 7, 1976

Southern Pacific Marine Transport found to be a nonvessel-owing common carrier by water.

Southern Pacific Marine Transport found not to be carrying on the business of forwarding without a license.

Leonard G. James and *David C. Nolan* for complainant.

John MacDonald Smith and *Robert J. Corber* for respondents.

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

The Pacific Coast European Conference (PCEC), by its complaint in this case charges respondents Southern Pacific Marine Transport, Inc., and the Southern Pacific Company with violations of sections 14(b), 14 Fourth, 16, 17, 18(b)(5) and 44(c) of the Shipping Act, 1916. The charges stem from the operations of the respondent Southern Pacific Marine Transport, Inc. (SPMT).

A preliminary word concerning the record in this proceeding is needed. Although a hearing was scheduled in San Francisco, complainant chose not to call any witnesses or offer any testimony. Instead complainant chose to rest his case on a package of documents designated Exhibits 1A through 1G. Respondent offered certain shipper testimony but complainant did not desire to cross-examine the witnesses and their written direct testimony was admitted without objection (Exhibits 2–8). The foregoing together with two other documents—the deposition of Jack D. Burnett and the statement of B. R. Johnson constitute the entire record for decision in this case.

[1] This decision became the decision of the Commission August 25, 1977.

SPMT is the wholly-owned subsidiary of the Southern Pacific Company which latter also owns the Southern Pacific Railway system.

SPMT purports to operate as a "non-vessel owning common carrier" (NVOCC). It was created in 1967 to take advantage of the "non-vessel operating carrier" entity as created or recognized by a series of decisions by the Commission. SPMT has engaged in a variety of activities but the one which the Conference is complaining about is the "Gulf-to-Atlantic" shipping program inaugurated in 1973.

SPMT found after canvassing West Coast Shippers for "intermodal" opportunities for SPMT, that a number of shippers with cargo moving to North Atlantic and United Kingdom ports would be interested in the availability of alternate services through the Gulf.

SPMT found that on a "substantial" number of commodities the allwater rates on PCEC lines were more than the sum of the water rates from the Gulf plus the rail or motor carrier rates from California to the Gulf. The rate levels, as SPMT found them, appeared to offer California shippers savings if they would move their cargo through Gulf ports rather than through California ports.

However, SPMT's experience led them to realize that "a rate spread alone was not enough to generate cargo," primarily because "of the complications involved in the intermodal service." In the words of SPMT's president:

> It is not enough to load the traffic on the railroad in California in sufficient time to arrive at the port, and hope that everything works well . . . In practice, quite frequently it doesn't. Unless there is continual monitoring of the rail shipment until it arrives at the port city and is tendered to the ocean carrier there, there is always the possibility of delay, missed connections, detention charges, disputes with the steamship line over missed bookings, obtaining space, etc.

SPMT found in short that it was "not possible to put a through service together without monitoring the shipment from the time it is loaded on the train until the time it is tendered to the steamship carrier."

In the words of SPMT's president the "basic marketing strategy of the service has been to make available to West Coast Shippers a coordinated usable alternative service via Gulf ports which are [sic] competitive with the cost of all-water service from the Pacific Coast ports. . . ."

As described by its President SPMT's function is to act under its tariff as "shipper's agent," to monitor shipments made, for example, from California, while on the railroad until "received" by SPMT as an ocean carrier at a Gulf port. SPMT does not undertake responsibility for the actual transportation of the goods by inland carrier to the port city. SPMT only "monitors" the shipment through daily calls to the railroad.[2]

All of SPMT's business to date has been conducted under the existing rate structures, i.e., all of the traffic handled by SPMT has moved at the

[2] Not all SPMT's cargoes involve the "monitoring" of the inland movement. About 5 percent of SPMT's shippers arrange their own inland transportation and tender the cargo to SPMT at Houston, Texas.

rail, motor or water rates specified in the "underlying" carrier's respective tariffs.

SPMT offers a "volume incentive allowance" under which a shipper "agreeing to ship certain specified minimum tonnages of certain specified commodities during a period of 12 consecutive months," receives a discount from the applicable rate. Some examples from SPMT's current tariff are:

Commodities	*Annual Volume S/T*	*Allowance Per S/T*
Dried Fruit	9,000 tons and over	$6.00
	8,000 tons	5.00
	7,500 tons	4.00
Walnuts	2,000 tons and over	6.00
	1,500 tons	5.00
	1,000 tons	4.00
Dehydrated Onions-Garlic	200 tons and over	6.00
	150 tons	5.00

To quality for the volume incentive allowance a shipper must give SPMT notice that it agrees and commits itself to ship during 12 consecutive months commencing not earlier than one week from the date of the notice the required aggregate amount of the particular commodity. According to respondents' tariff, volume discounts are available only on some 7 or 8 commodities.

The following is the sequence of events involved in the handling of an SPMT shipment as described by J. D. Burnett, Manager-Marketing of SPMT.

The intending shipper files a letter of commitment to ship under the volume incentive rates.[3]

The shipper (or his forwarder) notifies SPMT generally by telephone, or an impending shipment to be made to a European port in the North Atlantic, and requests SPMT to secure appropriate space. SPMT then telephones the steamship line which will be used as its underlying carrier for the shipment and obtains a booking for space.

Next SPMT calls the shipper (or forwarder) and advises of the departure date. In about 5 percent of the cases, involving traffic originating at storage points in midwestern states, the shipper will make all arrangements to direct cargo to the port. In most cases, however, SPMT will be asked to coordinate the movement from the interior shipping point in California to the Gulf port. In the case of shipments which SPMT coordinates SPMT will suggest an approximate shipping date to meet the ship sailing from the Gulf port.

Some shippers will place their equipment orders with the railroad; others ask SPMT to do so. If SPMT is asked to do so, it will place the equipment order with the railroad on the "shippers behalf." In that event

[3] Since January 1, 1973, two shippers have used SPMT, and each used volume incentive, filing appropriate letters of commitment before doing so.

SPMT will ask the shipper whether he prefers to load rail cars or highway trailers.

On shipments for which rail equipment orders are placed by SPMT, SPMT will ask the rail carriers to place cars at the shipper's spur or, if trailers are used, to "spot" the trailers on a given date.

At this point an exchange of documents takes place. A rail bill of lading is given to the "shipper" and the local rail carrier employee signs for the cargo and handles the movement.

It is not clear who appears as shipper on the rail bill of lading. In a deposition taken of J. D. Burnett by complainant's counsel the following colloquy took place:

Q. Who is shown on that rail bill of lading?

A. The rail bill of lading shows the shipper SPMT—the firm involved.

Q. The actual importer of the goods or PACE? [PACE is the acronym for the Pacific Agricultural Cooperative for Export.]

A. It would be PACE.

In all instances the rail bill of lading shows SPMT as the consignee.[4]

SPMT's tariff while showing that all shipments handled under it will be "transported from origin port to destination port under carrier's[5] bill of lading," goes on to provide:

If carrier is requested to arrange transportation of the shipment between an interior point in the United States and a United States port, carrier will undertake to do so as Agent for the shipper, and shall use its best efforts to engage a competent domestic carrier to undertake such transportation. (Page 7 Item (e).)

SPMT's tariff further attempts to restrict its undertaking by the following clause:

When shipper requests SPMT to act as its agent for arranging transportation from an interior point in the United States to United States Ports and requests SPMT to take possession of the goods at an interior point for such purpose, the point at which SPMT takes possession of the goods shall be shown on the bill of lading as the point of receipt, but it shall be understood that receipt at such point is solely for the purpose of enabling SPMT as a shipper's agent to arrange for transportation by domestic inland carrier to the port at which SPMT shall take custody of the goods as carrier.

Thus, by its tariff SPMT denies common carrier liability for the inland portion of the through movement, i.e., from California (or some other inland point) to the Gulf ports whence it ships.

Additionally, SPMT's tariff goes on to provide:

In conjunction with such transportation [inland portion] SPMT shall accept and execute on behalf of the shipper, as shipper's agent, appropriate domestic inland bills of lading issued by the inland carrier to cover the transportation of the goods from point of actual receipt by SPMT to the United States port at which SPMT's undertaking as carrier under this tariff shall commence.

The rail movements to Houston/Galveston are made under boxcar rates, but the California railroads have a Plan VII piggyback service in

[4] See page 6 of SPMT's tariff for the provision under which SPMT will "execute" inland bills of lading.

[5] "Carrier" is defined in the tariff as SPMT (Page 4 Definition (b) of the tariff).

which highway trailers are furnished in substitution for boxcars on eastbound movements from California.

Under Plan VII, if the shipper agrees, two highway trailers are substituted for one boxcar. The railroad arranges for the spotting of the trailers and for the picking up and ramping of them as part of its service under the boxcar rates filed with the Interstate Commerce Commission. When SPMT coordinates the interior shipment, it will check with the inland carrier, generally daily, to trace the progress of the shipment in order to insure its going through on schedule.

SPMT alerts the ocean carrier or SPMT's transfer agent of the projected arrival of the rail shipment so that a timely transfer of the cargo to containers can be planned.

Some shipments are consigned directly to the ocean carrier who undertakes, under its ocean tariff, to transfer the cargo to containers at the Gulf port. In most cases, however, the cargo is transferred into containers for SPMT's account by its transfer agent. The transfer agent is Southern Pacific Transport Company of Texas and Louisiana, a motor carrier with a terminal at Houston, Texas, and with extensive operations in and about the Port of Houston.[6]

For shipments handled by the transfer agent, the agent will unload the trailers or rail cars, load the shipment into containers and dray the containers to the ocean carrier. The motor carrier or agent charges 15 cents per hundred pounds for palletized or unitized cargo and 25 cents per hundred pounds for loose cargo. Late in 1974 the motor carrier requested that it be paid an additional $25.00 per container where drayage was also required, and this amount is currently being paid in addition to the 15-cent—25-cent transfer charges.

Once loaded into containers, the cargo is tendered to the ocean carrier as a shipment moving for the "account" of SPMT. The ocean carrier issues a "memorandum" bill of lading to SPMT and bills SPMT, generally on a separate invoice, for the amount of freight owing under the ocean carrier's tariff.

SPMT prepares its bill of lading when the goods are loaded.[7] It is executed as an "on-board" bill of lading when the ocean carrier receipts for and acknowledges responsibility for the containers by the issuance of its "memorandum" bill of lading to SPMT.

The railroad issues its freight bill to SPMT as agent for the shipper. The ocean carrier issues its bill to SPMT for ocean transportation charges due, and the motor carrier at Houston issues its bill for just transfer or for transfer and drayage charges. SPMT then bills the shipper for (a) the

[6] Apparently all SPMT's shipments have moved only through the Port of Houston. It further appears that all shipments are actually currently being handled by the transfer agent.

[7] Although SPMT contends that it "assumes" full liability for the port-to-port movement, the bill of lading issued by SPMT contains the clause, "The terms of this bill of lading constitute the contract of carriage, which is between the shipper and the owner of the vessel designated to carry the goods." More about the purported assumptions of liability will be said later.

amount of the ocean transportation accruing under SPMT's tariff, (b) wharfage charges, and (c) rail charges.

Discussion and Conclusions

As already noted complainant has charged respondents with violations of sections 14(b), 14 Fourth, 16, 17, 18(b) and 44(c) of the Shipping Act, 1916. However complainant appears to have abandoned all but the 18(b) and 44(c) allegations, since on brief the only findings requested are that:[8]

(1) SPMT is not a Common Carrier by Water under the Shipping Act.
(2) SPMT's activities are those of a freight forwarder as defined in 46 U.S.C. 801.
(3) SPMT has not engaged in the transportation by water of passengers or property between the United States and a foreign country on the high seas on regular routes from port-to-port.[9]

Accordingly, the threshold determination to be made is that of the "status" of SPMT under the Shipping Act. SPMT of course claims to be a nonvessel-owning common carrier by water within the meaning of past Commission precedent interpreting the "definition" of common carrier by water contained in section 1 of the Act. SPMT purports to restrict its common carrier status to the port-to-port movement from ports in the U. S. Gulf to ports in the European North Atlantic.

A common carrier by water in foreign commerce is defined:

> . . . a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its districts, territories, or possessions and a foreign country, whether in the import or export trade. . . .[10]

Of course the above does not define as such the term "common carrier." However, the common carrier to be regulated under the Shipping Act is the common carrier at common law. See *Tariff Filing Practices of Containerships*, 9 F.M.C. 56, 62 (1962).

Originally it would appear that the common law restricted common carrier status to one who actually carried. *Railway Company v. Lockwood*, 84 U.S.351 (1873). However, "ownership" of a vessel was not for long a prerequisite of common carrier status. Thus, early on, persons contracting for space in common carriers were themselves held to be common carriers. *Bank of Kentucky v. Adams Express Co.*, 93 U.S. 174 (1876). Thus a time charterer of a vessel undertaking to carry for the public generally was held to be a common carrier even though it did not own the vessel. *Pendleton v. Benner Line*, 246 U.S. 353 (1918).

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[8] As already noted, at the hearing in this case complainant offered no witnesses of its own and did not choose to cross-examine those witnesses offered by respondent. Complainant was content to rely on certain exhibits introduced into evidence, none of which afford the basis for any findings on the violations alleged in the complaint but abandoned on brief.

[9] In the complaint the conference requests that SPMT's tariff be stricken from the Commission's files and that SPMT be ordered to cease and desist from the publication of the tariff and the solicitation of and participation in the services described under it.

[10] So-called ocean tramps are excluded.

This decided trend away from actual ownership of the vessel or other mode of carriage was recognized by the Commission[11] as early as 1939 in *Agreement 6210,* 2 U.S.M.C. 166 (1939), wherein the so-called Consolidated Olympic Line was found to be a common carrier by water even though it owned no vessels. The line of cases[12] developing the concept of the nonvessel-owning common carrier culminated in Docket 815, *Determination of Common Carrier Status, 6 F.M.B. 245 (1961) wherein the Commission, on the basis of past precedent and common law principles spelled out the criteria for determining NVOCC status under the Shipping Act, saying at pages 256–257:*

. . . a person or business association may be classified as a common carrier by water who holds himself out by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce as defined in the Shipping Act 1916; assumes responsibility or has liability imposed by law for the safe transportation of the shipments; and arranges in his own name with underlying water carriers for the performance of such transportation, whether or not owning or controlling the means by which such transportation is effected is a common carrier by water as defined in the Shipping Act, 1916. (6 F.M.B. at 256–257).

Complainant's first quarrel with respondents' position in this case is that their reliance on Docket 815 is misplaced because Docket 815 "was not an agency 'decision or agency rule' . . ." According to complainant it was announced "loosely" as a "general rule or interpretation" and was "offered merely to serve as a 'guideline'."[13] There follows some rather obscure references to the fact that "guidelines" are not "appealable" and are not "legally binding" and are not *"stare decisis"*.

If by this complainant means to argue that a person whose operations fall within the criteria established in Docket 815 may not be adjudged an NVOCC even after notice and hearing, the argument is fallacious in the extreme. In the first place the "guidelines" or "criteria" set out in Docket 815 are merely the culmination of a long line of precedents, both agency and common law, and even the courts have recognized the Commission's NVOCC concept. See *IML Sea Transit Ltd. v. United States,* 343 F. Supp. 32 (N.D. Calif. 1972), aff'd 409 U.S. 1002 (1972), rehearing denied, 409 U.S. 1118 (1973). The argument is of course without merit but complainant has another string to its bow.

In Docket 815 the parties under investigation were all either "motor truck companies, freight forwarders [or] express companies" each of which were "initial carriers" providing "the service of moving household

[11] For the sake of convenience the term Commission is used to encompass the various designations of the Commission's predecessors.

[12] See e.g., *Alaska Rates,* 2 U.S.M.C. 558 (1941); *Agreement 7260,* 2 U.S.M.C. 749 (1947); *Bernard Ulmann Co. Inc. v. Puerto Rican Express Co.,* 3 F.M.B. (1951).and Docket 74–14, *Possible Violations of Section 18(a) of the Shipping Act, 1916, etc.,* Mimeo. decision, November 16, 1975, (14 SRR 425).

[13] This characterization comes from the language of the decision which announces one of the purposes of the proceeding to be the determination of the status under the Shipping Act of the parties under investigation in the case "in order to arrive at a general rule or interpretation *applicable in the future to all persons* . . ." (6 F.M.C. at 248). (Emphasis mine.)

goods and other personal property from points in the United States to points overseas using both trucks or vans which they own or operate and ocean ships which they do not own or operate." These initial carriers offered their services to the public by advertisement and solicitation. They issued their own through bills of lading and generally assumed liability for safe arrival of the shipments. (6 F.M.B. 248–249)

Complainant urges that SPMT does not fit the criteria of Docket 815 because it is not an "initial carrier", it does not "issue [its] own bill of lading to the original shipper-consignor"[14] and does not assume "sole responsibility 'for the entire journey'." As for the last alleged discrepancy "responsibility for the entire journey", complainant refers to SPMT's asserted status as shipper's agent for the inland portion of the movement, i.e., in most cases the movement from California to the Gulf. At page 256 of its Report in Docket 815, the Commission said:

> Actual liability as a common carrier over the entire journey including the water portion is essential.

Complainant would appear to read this language as requiring SPMT to operate as a "common carrier" over the inland portion of the movement as well as the water portion. However, no authority either statutory or precedential (other than the referred to statement from Docket 815) is cited as conferring on the Commission the power to require a person to assume the status of a common carrier for inland line-haul movement over which the Commission would appear to lack statutory jurisdiction.

Although the statement in question, when removed from the circumstances of the case, can be read as complainant reads it, a close examination of the problem the statement was designed to redress makes it appear that it was intended to mean quite something else.

The examiner in his recommended decision in Docket 815 summed up the Commission's "standards" for common carrier status and concluded that:

> . . . a person who holds himself out by the establishment and maintenance of tariffs, by advertising and solicitation, and otherwise, to provide transportation for hire in interstate or foreign commerce, as defined in the Shipping Act; *assumes responsibility* for the safe *water* transportation of the shipments and arranges in his own name with the underlying water carriers for the performance of such transportation, whether or not owning or controlling the means by which such transportation is effected, is a common carrier by water as defined in the Shipping Act . . . (Emphasis mine.) (Quoted by the Commission at 6 F.M.B. 252–253.)

In commenting upon the examiner's summation, and in recasting it, the Commission did two relevant things. First it concluded that the "assumption or attempted assumption of liability" should not be the sole test, but

[14] Here complainant apparently refers to the issuance of a SPMT bill of lading for the inland portion of the movement because an SPMT bill is issued for the port-to-port or water portion.

[15] An example of the somewhat cavalier use of language in the Report in Docket 815 is the fact that actual or imposed liability is transformed from a "significant factor" to an "essential" indicia in less than the space of a paragraph.

rather that "the actual existence or imposition of liability is also a significant factor." This comment is immediately followed by the troublesome statement, "Actual liability as a common carrier over the entire journey including the water portion is essential."[15]

On the other hand the Commission altered slightly the examiner's expression of the liability standard which he had expressed as ". . . assumes responsibility for the safe water transportation of the shipments." As stated by the Commission the standard became ". . . assumes responsibility or has liability imposed by law for the safe transportation of the shipments. . . ." (6 F.M.B. 256.) The eliminated word is of course "water".

In Docket 815 some 14 parties to the case were found not to be common carriers by the Examiner and one other party's status was questioned by the Commission itself.[16] Of these parties only two are specifically dealt with in the Commission's Report—Weaver Bros. and Railway Express. In both cases the question of the "assumed responsibility" or "imposed liability" was directed not to the "land" portion of the movement but to the water portions. In the case of Weaver there was in its bill of lading an express disclaimer of liability for certain events when the property was not in its (Weaver's) actual custody, which the property of course was not when on board the underlying ocean carrier.

In discussing the problem presented by the Weaver disclaimer the Commission said:

> These provisions show that Weaver has not assumed sole responsibility to the shipper *for the safe water transportation of shipments*. Instead it is a "forwarding agent" for the "convenience" of the shipper insofar as the water transportation part of the journey is concerned. Because of the restricted nature of its undertaking to the public as evidenced by its agreement with shippers we find that Weaver has failed to bring itself within the definition of common carrier by water.[17] (Emphasis mine.)

Thus the simple question presented was whether Weaver was a common carrier by water— it was clear that Weaver was a common carrier as to the inland movement.

In the case of Railway Express the so-called Uniform Through Bill of Lading issued by Railway Express "cast some doubt as to the extent of its *assumed* liability"—again for the water portion of the through movement.[18]

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[16] It is of interest, and to me at least of significance, that the immediate problem confronting the Commission was the approval of a number of section 15 agreements. Thus the initial task of the Commission was to determine if certain voluntarily assumed obligations "qualified" the persons *assuming* those obligations as common carriers by water. The Commission was not, at least then, called upon to *impose* obligations upon anyone.

[17] The Commission is still speaking in terms of the responsibility for "safe water transportation of shipments."

[18] In commenting on Railway Express's bill of lading the Commission said:

> We do not pass on the legality of these disclaimers . . . If the provisions are valid Railway Express does not assume liability and would not be a common carrier under the Examiner's tests.

The Commission kept the proceeding open pending either the assumption of liability by Railway Express or the imposition of liability by "the Courts." In a Supplemental Report it was found that Railway Express *assumed* liability for the water portion. Weaver was also found to be a common carrier by water in the Supplemental Report on the basis of Weaver's revised bill of lading form which again *assumed* liability.

It will be remembered that the parties to Docket 815 comprised three categories, i.e., "motor truck companies, freight forwarders and express companies." They were all "initial carriers" using both trucks and vans which they owned or operated for the inland movement. They all issued their own bill of lading to the original shipper-consignor. Thus, the liability of the companies and forwarders for the inland movement was clearly established. The question before the Commission then—and this should be obvious—was not the status of "carriers" on the inland movement but whether these admitted common carriers by "land" were also common carriers by "water" within the meaning of the Shipping Act. The test of liability was therefore that of liability as a common carrier by *water*.

In short in no case has the Commission been called upon to do more than determine whether a "person" is a "common carrier by water."[19] Indeed, without exceeding its statutory boundaries how could it do more? Certainly the status of a person operating modes of carriage outside the Commission's jurisdiction is also outside the power of the Commission to control or determine.[20]

So, taking the controversial phrase in its overall context I conclude that what was really said is that where a "carrier's" liability for the inland movement of a combined land-water movement is not in issue, his liability for the water portion must be either clearly assumed or equally clearly imposed by law.

Perhaps it was the difficulty in succinctly phrasing the criteria under the facts presented in Docket 815 that led to the terse and, to me at least, misleading statement.[21] In any event the statement of the Examiner in the initial decision in Docket 815 of the criteria for NVOCC status under the Shipping Act is more precise and superior to the rather loosely formulated definition in the Commission's final report. In order to avoid further confusion the criteria should read:

> . . . a person[22] [may be classified as a common carrier by water] who holds himself out by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce as defined in the Shipping Act 1916; assumes responsibility or has liability imposed by law for the safe water transportation of the shipments and arranges in his own name with the underlying water carriers for the performance of such transportation, whether or not owning or controlling the means by which such transportation is effected, is a common carrier by water as defined in the Shipping Act.

[19] *The Interstate Commerce* Act 49 U.S.C. et seq. defines common carriers by rail, motor and interstate carriers by water and commits to the ICC their regulation. The Federal Aviation Act 72 Stat. 731 defines air carriers and commits their regulation to the Civil Aeronautics Board and the Federal Aviation Agency.

[20] I recognize that certain carriers or other persons subject to the original *jurisdiction of the Commission* can and do perform carriage or transportation which physically takes place on land and that these operations are sometimes *subject to the* Commission's jurisdiction, but here the situation is somewhat the reverse. See Docket 912, *Matson Navigation Co. Container Freight Tariffs*, 7 F.M.C. 480 (1963) and compare *Alaska Rates*, 2 U.S.M.C. 558 (1941).

[21] It could even have been that it was thought that there was no need to make the distinction.

[22] In the Commission's redrafting of the Examiner's criteria *they followed the word "person"* with "or business association." However, section 1 of the Shipping Act defines person as including corporations, partnerships and associations.

Accordingly, it is found that whatever SPMT may be under other Federal statutes, its failure to assume liability for the movement inland [generally speaking on this record the movement from California to a Gulf port] does not of itself preclude its being found a nonvesselowning common carrier by water within the meaning of the Shipping Act, provided of course it meets all the other criteria.

Despite its assertions that it "assumes" full liability for the water portion of the movement, SPMT's bill of lading clearly shows otherwise.

First SPMT's tariff defines "carrier" as being SPMT. Presumably this definition would apply throughout any transaction between SPMT and a "shipper." Yet the bill of lading issued by SPMT to the shipper provides, "The terms of this bill of lading constitute the contract of carriage, which is between the shipper and the owner of the ship designated to carry the goods." SPMT is obviously not the owner of the ship designated to carry the goods and by its own definition SPMT is not a shipper for the ocean carriage.

Thus SPMT would seem to attempt to exclude itself from the very contract of carriage for which it at the same time purports to "assume liability."

Additionally, the bill of lading purports to subject all shipments to the provisions of the Carriage of Goods by Sea Act (COGSA). However, COGSA defines a "carrier" as follows:

The "carrier" includes the owner or charterer who enters into a contract of carriage with a shipper (46 U.S.C. 1301).

SPMT is not the "owner or charterer [of a vessel] who enters into a contract of carriage with a shipper." Under the definition of "carrier" under COGSA, SPMT's assumption of liability is meaningless since COGSA does not apply to the operation of SPMT.[23]

However, in Docket 74-14, *supra* (note 12), the Commission concluded that if a person in fact performs as an NVOCC any assumption of liability on the part of that person is unnecessary because liability will be imposed upon him by law. Equally, any disclaimer of liability whether inadvertent or intentional is without meaning and standing alone "has no legal consequence in determining . . . carrier status."

For the foregoing reasons I conclude that as to the port-to-port movements here involved SPMT was a nonvessel-owning common carrier by water under the Shipping Act, 1916, notwithstanding SPMT's failure to assume liability for the inland portion of the shipments in question.

Notwithstanding, the fact that under Commission precedent the various questionable provisions concerning SPMT's liability for the port-to-port movements are without legal significance they are nevertheless conflicting

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[23] See e.g. *Bernhard Ulmann, supra*, where the COGSA defense was pleaded and was denied because the definition "carrier" did not apply to Ulmann, presumably because it was not an owner or charterer of a vessel. (3 F.M.B. 779; and *J. C. Penney Co. v. American Express Company*, 102 F Supp. 742 (D.C.N.Y. 1951), aff'd., 201 F. 2d 846.)

and can only serve to confuse users of SPMT's tariff.[24] The provisions hereinabove noted should be removed from SPMT's tariff and a clear statement of SPMT's liability substituted for them. (See 6 F.M.B. at 256 and 287, 288.)

Complainant's remaining allegation is that SPMT's activities are those of a "freight forwarder as defined in 46 U.S.C. 801" and that SPMT has fáiled to obtain a license as required by section 44 of the Shipping Act, 1916.

In an argument notable only for its rather obscure brevity, complainant simply asserts that SPMT's description of its business "coincides precisely with the definition of forwarding in section 1 of the Shipping Act, 1916." In support of this assertion complainant simply refers to the entire prepared testimony of SPMT's president which appears in Exhibit 9. There is no attempt by complainant to correlate the "salient" points of Exhibit 9 with their counterparts in the section 1 definition.

The business of forwarding is defined in section 1 of the Act as:

> . . . the dispatching of shipments by any person on behalf of others, by oceangoing common carriers in commerce from the United States, its Territories or possessions to foreign countries or between the United States and its Territories, or possessions or between such Territories and possessions and handling the formalities incident to such shipments.

At this point I am tempted to dismiss complainant's argument by simply stating that a review of the testimony in Exhibit 9 gives no clear demonstration that SPMT dispatches shipments on behalf of others by oceangoing common carrier. However in describing the reasons behind SPMT's offer to corrdinate inland movement its president said the following:

Someone has to know where it [the shipment] is, and make sure that it doesn't get delayed and forgotten, and make sure that it is promptly *tendered to the ocean carrier* upon arrival at the port city, and be prepared—if any hitch develops—to telephone the steamship line and the shipper immediately, rearrange bookings, and otherwise see that coordination problems are overcome. (Emphasis mine.) Complainant's argument then actually hinges on two factors. First, a conclusion that SPMT is not an NVOCC, and secondly, that since it is not an NVOCC, a construction of the language "tender to the ocean carrier" somehow converts SPMT into an ocean freight forwarder. As for the first, SPMT is in fact an NVOCC. As for the second, had SPMT's president said "tendered to the underlying ocean carrier" it would have been a more precise statement and one more in consonance with its status as an NVOCC. Rather than dispatching shipments for others, SPMT is tendering shipments to the underlying ocean carrier in its capacity as an NVOCC. Complainant offers no other reason for assigning forwarder status to SPMT. In short SPMT is not engaged in the business of forwarding as defined in section 1 of the Shipping Act, 1916, and therefore is not an unlicensed independent ocean freight forwarder in violation of section 44 of the above Act.

The foregoing disposal of the two remaining allegations in the complaint makes it unnecessary for me to deal with respondents' allegation that complaiant has waived its right to any reparation. SPMT is found to be a nonvessel-owning common carrier by

[24] I suspect that the conflict and confusion stems from SPMT's adoption of the bill of lading form used by vessel owners or operators.

water within the meaning of the Shipping Act, 1916. SPMT is found not to be engaged in the business of forwarding as defined in section 1 of the Shipping Act, 1916, and is not an independent ocean freight forwarder who must be licensed under section 44 of that Act. Accordingly, the complaint is dismissed.

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