FEDERAL MARITIME COMMISSION

DOCKET NO. 75–45

MADEPLAC S.A. INDUSTRIA DE MADEIRAS

v.

L. FIGUERIEDO NAVEGACAO S.A.
A/K/A FROTA AMAZONICA S.A.

ADOPTION OF INITIAL DECISION

April 12, 1978

This proceeding was initiated on the basis of a complaint filed by Madeplac S.A. Industria De Madeiras (Madeplac or Complainant) against L. Figueriedo Navegacao, S.A. a/k/a Frota Amazonica (Amazoncia or Respondent) alleging a freight overcharge on cargo shipped from Savannah, Georgia, to Manus, Brazil, aboard Respondent's vessel, the Salimoes. As a result of the alleged overcharge, Madeplac asserts a violation of section 18(b)(3) of the Shipping Act, 1916 and seeks reparation in the amount of $24,461.18.[1] Administrative Law Judge William Beasley Harris in his Initial Decision concluded that: (1) Complainant had failed to meet its burden of proving a violation of section 18(b)(3) of the Act by Respondent, and; (2) the Respondent had properly classified and rated the cargo shipped by Complainant. Complainant filed exceptions to the Initial Decision to which Respondent replied. We denied that request for oral argument.

FACTS

On October 2, 1973, Madeplac, a Brazilian corporation engaged in the business of processing wood, shipped certain cargo from Savannah, Georgia to Manus, Brazil aboard a vessel of Amazonica. The bill of lading described the cargo as "Components for Construction of Pre-Fabricated Building (See Attached)."[2] Respondent rated the shipment as "Buildings, Portable, K.D., [Knocked down] In Sections or Set-Up", as published in

[1] Initially, Complainant sought reparations of $45,580.38.

[2] The attachment referred to in the bill of lading consists of an itemized list of the items moved under the bill of lading. (Exhibit 4).

its tariff (3rd Revised, page 85 of the Inter-American Freight Conference—Section A, Tariff No. 3 (FMC No. 7)).

Complainant contends that because the building was a "permanent structure" when assembled, the "portable" building classification does not apply to the shipment. As a result, and because no other tariff classification is allegedly applicable to the shipment as a single item, Complainant contends that such shipment must be rated for each of its separate parts.

Respondent denied the Complainant's allegations and asserted, *inter alia,* that the cargo was properly rated. Alternatively, Respondent contended that if the classification utilized was improper then the cargo should be rated on its individual parts which, in its view, would result in additional freight charges being assessed against Complainant.

Discussion

The Presiding Officer, in his Initial Decision, while granting Respondent's Motion to Dismiss, nevertheless declared that "this decision is on the merits of the case." He noted that while Complainant alleged in its complaint that it had been subjected to the payment of charges for transportation which were, when exacted and still are, in excess of those lawfully applicable in violation of section 18(b)(3) of the Shipping Act, 1916, "the evidence presented by the Complainant bears little resemblance to the allegations in its complaint and burden of proof."

In evaluating the evidence of record in this proceeding, the Presiding Officer points out that in reparation proceedings the claimant has the burden of establishing by a preponderance of the evidence that the respondent exacted charges for transportation in excess of those lawfully applicable. *Johnson and Johnson International v. Venezuelan Lines,* Dockets Nos. 71–46, 71–47, 16 F.M.C. 87, 93 (1973). The Presiding Officer then notes that although Complainant's expert witness testified that the cargo was improperly rated in spite of the bill of lading description (Exhibit 3) and the shipper's export declaration (Exhibit 5), that witness nevertheless was unable to determine if there had been an overcharge. Accordingly, the Presiding Officer found that the Complainant had failed to meet its burden of proving a violation of the Act by Respondent and granted Respondent's Motion to Dismiss.

The Presiding Officer also determined that the evidence of record in this proceeding supported the Respondent's rating of the cargo. This latter finding he explained as follows:

> In view of the contract (Exh. 1) and other references to its freight as one building, and *Websters Third New International Dictionary* definition of portable as . . . as adj., capable of being carried; n., something portable as—a portable schoolhouse or other building—the building to be transported to Manus, Brazil; the classification used by Respondent to rate the freight was proper.

Complainant urges the Commission to find that the Presiding Officer

erred. Complainant argues that it is not alleging that something other than what was shown on the bill of lading was actually shipped but rather that the Respondent misrated the cargo described on the bill of lading. Complainant submits that its evidence is unrefuted and unequivocally establishes that Respondent did, in fact, apply an improper rate.

According to Complainant its "unrefuted evidence" establishes that the components shipped were not a complete building nor, for that matter, a portable building, but rather the components for the construction of a prefabricated building. Complainant argues that, because Respondent's tariff does not contain such a classification, the shipment should be rated on its individual parts. Complainant concludes that it has met its burden of showing that the cargo was misrated and the Commission should reverse the Presiding Officer's Initial Decision and award the Complainant reparation.

Respondent supports the Presiding Officer's Initial Decision. Respondent argues that Complainant does not understand the law with respect to its burden of proof in reparation proceedings. Respondent contends that Complainant erred in assessing its burden in this case as follows:

> Our burden, as we see it, is to prove by a preponderance of the evidence that the respondent misrated the articles described in the bill of lading.

Respondent submits that this is a misstatement of the law. It is Respondents position that the Presiding Officer properly held that:

> To sustain a claim for reparations, a complaint must allege and prove that the respondent exacted charges in excess of those lawfully applicable in violation of section 18(b)(3) of the Shipping Act, 1916 as amended. (Respondent's Replies to Exceptions, page 2).

Respondent maintains that, even assuming that Complainant has established that the cargo was misrated, *i.e.*, misclassified, Complainant has not established that Respondent exacted charges in excess of those lawfully applicable as provided by its tariff in violation of section 18(b)(3). Respondent would have Complainant prove that Respondent misrated (misclassified) the cargo which resulted in the Respondent exacting charges in excess of those lawfully applicable. Respondent argues that Complainant has proved neither.

Respondent argues that evidence of record supports its contention that Complainant failed to meet its heavy burden of showing that the charges assessed were in excess of those lawfully applicable. For instance, Respondent points out that while the bill of lading (Exhibit 3) shows the cargo shipped as weighing 467,805 pounds and measuring 21,630 cubic feet, the attachment to the bill of lading (Exhibit 4) shows that the components weighed 466,563 pounds and measured 21,563 cubic feet. Respondent argues that this inconsistency and others[3] are indicative of the Complainant's failure to meet its heavy burden of proof.

[3] Respondent refers to various documents, including pleadings in this proceeding, wherein Complainant or its agent referred to the cargo as "a metallic structure", a "knocked down structure, a building"; and, in Complainant's Opening Brief, the "components of a building not a complete building."

Notwithstanding Complainant's alleged failure to meet its burden of proof, Respondent contends that the Presiding Officer correctly determined that the cargo shipped was properly rated. Respondent claims that Complainant was properly billed at the rate provided for "Buildings, Portable, K.D., In Sections or Set Up", which Respondent explains applies to: (1) portable buildings, (2) knocked down buildings, (3) buildings shipped in sections and (4) buildings shipped set up. Respondent submits that because the building was knocked down, the proper tariff rate was applied. Respondent concludes that even if the tariff required that the building be portable, as argued by Complainant, it was transported in a knocked down condition and was, *ipso facto,* a portable, knocked down building.

Discussion and Conclusions

The record supports the Presiding Officer's dismissal of the complaint because of the failure of the Complainant to carry its burden of proof. Furthermore, we agree with the Presiding Officer that the evidence of record supports the Respondent's classification of the cargo. We conclude, therefore, that the Presiding Officer's findings and conclusions are proper and adopt them as our own. However, we believe that some additional discussion is necessary.

In this proceeding Complainant has alleged that Respondent misrated the cargo and that this misrating resulted in an overcharge. Before these allegations can prevail, the Complainant must sustain a heavy burden of proof that the carrier misrated the cargo and that the misrating resulted in charges in excess of those lawfully applicable. *Ocean Freight Consultants v. Royal Netherlands S.S. Co.,* 17 F.M.C. 143 (1973); *Johnson & Johnson v. Venezuelan Line,* 16 F.M.C. 84 (1973).

In this proceeding Complainant's contentions as to the description of the cargo have been inconsistent. At various times Complainant has referred to the cargo as a building (the complaint), a complete structure K.D. (Exhibit 9); not a building at all but rather the components for the construction of a building (Complainant's opening brief). In its complaint, Complainant alleged that while the cargo was a building, it was not "portable" and thus should be rated on its individual parts. In its Opening Brief and in its Exceptions, Complainant argues that the cargo was not a building at all but rather individual components which must be individually rated.

Furthermore, even assuming that Complainant has established that the Respondent misclassified the cargo, the evidence with respect to the weight and amount of the cargo is inconsistent, thus clouding the Complainant's demand for reparations. As noted by Respondent and found by the Presiding Officer, the bill of lading (Exhibit 3) indicates that the shipment consisted of 7 boxes, 24 crates, 33 bundles and 109 pieces, a total of *173* pieces, measuring 21,630 cubic feet and weighing *467,805*

pounds. Yet, the attachment to the bill of lading (Exhibit 4) shows the shipment as weighing *466,353*[4] pounds and measuring 21,563 cubic feet; and the export declaration indicates that the shipment consisted of *176* packages.

In summary, the Complainant has failed to meet its burden of showing that the Respondent misrated the cargo which resulted in charges in excess of those lawfully applicable. Rather, the evidence of record in this proceeding supports the Respondent's classification of the cargo.

The bill of lading described the cargo as "Components for the Construction of Pre-Fabricated Buildings (See Attached.)" The Respondent's tariff (Ex. 22) provided that commodities shipped disassembled shall be rated as a unit instead of applying rates for various parts comprising the unit. The record here indicates that the cargo consisted of the necessary parts to assemble the structure in Brazil although there was testimony that some masonry work was done on the construction site. The freight shipped consisted of pre-cut, drilled and punched parts that merely needed assembly in Brazil. Furthermore, although the completed building is of considerable size, and not portable when assembled, this does not negate the fact that the disassembled building was transported by Respondent, thereby evidencing its portability.

The shipper's export declaration itself is evidence that the size of a completed prefabricated structure does not alter the portability of a building. The export declaration (Exhibit 5) described the cargo as "Prefabricate (sic) Buildings of Aluminum." The Schedule B commodity number designated for the cargo was 69.2040, which is entitled "Prefabricated and portable buildings of aluminum." The Schedule B commodity number has listed thereunder prefabricated aircraft hangers, exhibit halls, garages, henhouses, silos, and tool sheds, all of which are of considerable size when set up. By virtue of their size these buildings are not readily portable when assembled, yet when disassembled in prefabricated sections, these structures are readily portable.

Finally, even assuming that Complainant has established that Respondent misclassified the cargo described in the bill of lading, Complainant has not met its burden of showing that the charges collected were in excess of those lawfully applicable. While Complainant's expert witness testified that the cargo was misclassified, he further testified that based on the testimony and evidence presented by Complainant, he could not determine if there had been an overcharge. In fact, the witness testified that if he rated the cargo based upon the testimony and evidence of record he would have assigned an N.O.S. classification to most of the cargo, which would have resulted in additional freight charges being assessed.

Accordingly, upon careful consideration of the record, the exceptions and reply thereto, we conclude that the Presiding Officer's factual findings and his conclusions with respect thereto were supported and correct.

[4] The net weight shown on Exhibit 4 is 458,421.

Exceptions not specifically discussed have nevertheless been reviewed and found either to constitute reargument of contentions already properly disposed of by the Presiding Officer or to be otherwise without merit. We therefore adopt the Initial Decision as our own and make it part hereof.

It is so Ordered.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 75–45

MADEPLAC S.A. INDUSTRIA DE MADEIRAS

v.

L. FIGUEIREDO NAVEGACAO, S.A.
A/K/A FROTA AMAZONICA, S.A.

April 13, 1977

Reparation: Complaint Dismissed.

William Levenstein for Complainant.

Michael J. Connelly for Respondent.

Jack E. Ferrebee, Commission's Office of General Counsel for subpoened[1] Commission employee.

INITIAL DECISION ON REMAND[2] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

This complaint case seeks reparation for alleged violations of Section 18(b)(3) of the Shipping Act, 1916. The complainant, Madeplac S.A. Industria de Madeiras (Madeplac) alleges that in violation of the said section it has been subjected to the payment of charges for transportation of freight on respondent's carrier *Salimoes,* from Savannah, Georgia, to Manaus, Brazil, in excess of charges lawfully applicable. Madeplac seeks from L. Figueiredo Navegacao, S.A. A/K/A Frota Amazonica, S.A. (Amazonica), named as respondent, reparation in the sum of $44,580.38 plus interest at 6% per annum from the date of payment of the alleged overcharge.

The complaint in this proceeding was filed October 24, 1975 (served October 29, 1975). Notice of the filing of the complaint was published in the *Federal Register* November 4, 1975 (Page 51224, Vol. 40, No. 213).

On February 3, 1976, at a hearing held in Washington, D.C., upon the respondent's argument that the freight moved under an October 2, 1973 Bill of Lading No. 26, on an irrevocable letter of credit, amounting to

[1] "A subpoena for the attendance of a Commission employee . . . shall be served upon the General Counsel . . . ." Rule 9(e) Commission's Rules of Practice and Procedure, 46 CFR 502.135.

[2] This decision became the decision of the Commission April 12, 1978.

prepayment of freight charges, and the complaint was not filed until October 24, 1975, not within the two years the Statute of Limitation in Section 22 of the Shipping Act provides, that the Commission was without jurisdiction, the Presiding Administrative Law Judge agreed and dismissed the complaint.

The complainant appealed to the Commission. The Commission on July 20, 1976, served its order remanding the proceeding for further hearings and findings, consistent with the order remanding, as may be appropriate.

On remand, pursuant to notice served July 21, 1976, a prehearing conference was held August 4, 1976. The parties entered into twenty (20) stipulations. The official stenographic report of the prehearing conference consists of pages 1 through 35. The date set at the prehearing conference for hearings to commence was October 6, 1976. Subsequently, at the request of the respondent the hearing date was changed to November 10, 1976.

The hearings on remand began on Wednesday, November 10, 1976, continued and concluded on November 11, 1976. The complainant presented two witnesses and the respondent presented two witnesses. Twenty-six (26) exhibits were identified, of which fourteen (14) were received in evidence (Exhs. 1, 2, 3, 4, 5, 9, 11, 13, 19, 21, 22, 23, 25 and 26); three (3) were not received in evidence (Exhs. for identification No. 20, 24(a) and 24(b)); the remainder were not asked to be received in evidence. The official stenographic report of the hearings consists of 2 volumes covering pages 1 through 185.

COMPLAINANT'S PRESENTATION TO PROVE ALLEGATIONS IN COMPLAINT

Madeplac called as a Witness John R. Prince, Jr., President of Bobbitt International Limited. Witness Prince substantially testified:

Bobbitt International Limited, domestically are general contractors and Butler Building dealers; internationally are a design and sales organization. Mr. Prince was involved in the sale of a Special Butler Building to Madeplac in Manaus, Brazil. He typed and signed the pro forma proposal and contract agreement between the parties which is Exh. 1 (Tr. 52). The contract calls for "one 150′ wide × 650′ long × 23′ 8″ eave height Type LRF II Special BUTLER Building . . . ." (Exh. 1) The equipment for the building, a plywood plant, was designed and laid out by a Mr. Kye from Canada (Tr. 52). Mr. Prince determined what parts were needed in order to put the building together. Butler Manufacturing Co. actually manufactured the components that were shipped (Tr. 15).

The price of the material sold, including material, inland freight and export crating was $220,000 (Exh. 1). Mr. Prince put together the prices of the components from the price book, a standard thing that Butler has (Tr. 35). He buys the material from the price book at the standard price Butler has (*Ibid*). Mr. Prince paid Butler Manufacturing Co. a net total of

$139,039 for the entire shipment that was shipped (Tr. 44). The total material cost of $198,511 (Exh. 1) is the price for which Mr. Prince sold all the materials (Tr. 46). The $220,000 price of the material sold (Exh. 1) did not include ocean transport charges (Tr. 10). The buyer of the building was supposed to pay the freight charges for shipment (Tr. 25). Bobbitt was paid for the material by a letter of credit (Tr. 10).

The complainant, without objection from the respondent, presented that the respondent, in response to requests for admission, had admitted:

1. On November 16, 1973, Agencias Mundiais S.A., was the agent of respondent in Manaus, Brazil, authorized to accept payments of freight charges for shipments delivered by respondent at Manaus, Brazil.

2. On November 16, 1973, said agent received the sum of three hundred eighty-five thousand three hundred and seventeen cruzeiros and eighty-six centaros (cr.385,317.86) in payment of the $62,551.60 freight charge made by respondent for the carriage of cargo from Savannah, Georgia, to Manaus, Brazil, under its *Salimoes* Bill of Lading No. 26, dated October 2, 1973, and issued its receipt No. 1964, for said payment.

3. That receipt No. 1964 (Exh. 21) may be translated to read that the payment referred to therein was received from Madeplac and that such payment was in fact received from a representative of the complainant.

4. That the copy of the said receipt is a true and correct copy of said receipt No. 1964 and is signed by an official or employee of said agent authorized to issue and sign said receipts.

The complainant introduced Exhs. 3 and 4 which were received in evidence. Exh. 3 is a copy of Bill of Lading No. 26, dated October 2, 1973, which covered the shipment herein (Tr. 24). Exh. 4 is the attachment to the Bill of Lading, listing the components shipped thereunder (Tr. 28). Referring to Exh. 4, Mr Prince stated package No. 1 described "Jack (one)" was a structural pipe column, with a hydraulic jack (Tr. 29), a piece of equipment used to assemble the building. As to package No. 2, "lockrivet guns" were tools (Tr. 30) "2 jacks" worked in combination with the final jack, "vertical support angles," all had to do with closing in the gable of that building (Tr. 30). A gable is the area between the top of the roof and the flat planes, the eave, a sort of triangle.

Packages No. 101 through No. 105 included hardware and caulk (Tr. 30). Packages No. 106 and No. 107 were structural bracing pieces for bracing the building. Package No. 108 is a misprint, cutters is supposed to be gutters (Tr. 31). Packages No. 108 to 111 are all light sheetmetal for framing the gutters. Then 112, with the exception of 125, 126, are aluminum sheets for the roof. 124, 125 and 126 are the panels, the sheets to go on that gable (Tr. 31). The remaining items are structural steel, consisting of beams, columns and eave struts, which consist of crates 130 to 270 (Tr. 31). Mr. Prince paid $86,130 for the column and roof beams (Tr. 43) which weighed 395,982 pounds (Tr. 44).

The components were all single pieces and the steel components were painted with a red oxide to prevent rusting during shipping (Tr. 32).

Mr. Prince viewed the building in Manaus on two occasions. The building has masonry walls that were supplied locally (Tr. 53).

The complainant called as a witness, under subpoena, the Commission's Assistant Chief, Office of Tariffs and Intermodalism, L. Merrill Simpson. He qualified as an expert in transportation (Tr. 63,) reading, construing and interpreting tariffs (Tr. 60). Mr. Simpson, referring to the B/L 26 description of goods "Components for Construction of Prefabricated Building (See Attached)," said he examined the respondent's tariff applicable herein and did not find such a rate (Tr. 61). And, absent a rate for a building, or the component parts of the building, he would rate each of the components that were made a part of the Bill of Lading that appear in the attachment (Exh. 4) (Tr. 64).

Rule 1(b) (Exh. 23) of the tariff reads:

> Rating of K. D. shipments and packages of mixed freight—Parts of Commodities
> Commodities shipped disassembled shall be rated as a unit instead of applying rates for various parts comprising the unit unless otherwise specified.
> Where packages contain more than one commodity, freight must be assessed on said package on the highest rated commodity in the packages.
> Whenever rates or ratings are provided for on commodities named in this tariff, the same basis will apply to parts thereof, when so described on the ocean bills of lading, except where specific rates or ratings are provided for such parts.

It was Witness Simpson's opinion, on the basis of the B/L description and the evidence regarding the size of the finished building, that the tariff item "Buildings, Portable, K. D. in Sections on Set-up" does not cover the articles shipped because the tariff item requires that the building be a portable building and he doesn't believe a building which components weigh 469,805 pounds is a portable building (Tr. 78). Witness Simpson is of the opinion this freight should have been rated for each component shown in the package list (Tr. 106). He testified that from looking at document (Exh. 4), Witness could not clearly tell how the goods should have been rated (Tr. 107). And, also, if told by the shipper the shipment was one building, he would have no alternative but to go to an NOS rate (Tr. 123). Further, if one did not know what the components were, an NOS rate would be resorted to (Tr. 124). If he were required to rate this shipment today, Witness Simpson, except for the aluminum sheets and the hardware would rate it NOS (*Ibid*). He does not know that there was an overcharge based upon all the evidence submitted so far (Tr. 125). It is his opinion that the freight should not have moved under the classification "Buildings, Portable, K. D. in Sections or Set-up."

According to Witness Simpson, when a building is knocked down, it is no longer a building, but components or sections of a building (Tr. 131).

The complainant rested his case. The respondent moved to dismiss the complaint (Tr. 155) on the basis the complainant's expert witness had testified that, based upon everything that he heard, there was no way of concluding there had been an overcharge in this shipment of the freight

(*Ibid*). Also that the complainant had not shown any facts to show that any other rate should be applied. The motion was taken under advisement by the Presiding Administrative Law Judge (Tr. 156, 158, 159).

RESPONDENT'S PRESENTATION

The respondent put on and completed its case.

In its defense, the respondent called Witness Michael Carroll, who is employed by Butler Manufacturing Co. as National Accounts representative. He is familiar with the LRF II Butler Building. He introduced what is in evidence as Exh. 19, pictures of Butler LFR II Building and Exh. 26, the specifications of Butler Manufacturing Co. as to how the company designs the LRF II (Tr. 163).

The respondent called Witness Joseph Urso, who is employed by TTT Ship Agencies, Inc., New York, as line manager for Amazonica (Tr. 179). TTT became the general agent for Amazonica March 1, 1976 (Tr. 180). He testified Amazonica (then L. Figueiredo) first became aware Madeplac was dissatisfied with the freight charges November 16, 1973 (Exh. 13) (Tr. 180). The formal written claim was received July 8, 1974 (Tr. 181) from Ocean Freight Consultants appointed by Madeplac to act on its behalf. It was agreed with Ocean Freight Consultants (per a Mr. Bilby) that the principals of Amazonica would abide by any decision of the Interamerican Freight Conference with regard to this controversy (Tr. 182). The Interamerican Freight Conference sent a letter saying the correct rate was assessed.

The complainant offered no rebuttal (Tr. 182).

The respondent renewed its motion to dismiss the complaint in this proceeding (Tr. 183). The Presiding Judge kept the motion under advisement and directed that the parties in their brief address the motion.

BRIEFING

Madeplac served and filed on January 12, 1977 a 21 page opening brief. Amazonica, on February 15, 1977 served (received February 17, 1977, in the Office of the Secretary of the Commission) a 25 page reply brief. On March 7, 1977, Madeplac filed a 10 page reply brief.

In ruling on the renewed motions to dismiss at the close of all evidence, the Presiding Administrative Law Judge is entitled to take into consideration all evidence presented both before and after the initial motion to dismiss at the close of the complainant's evidence. *Wealden Corp. v. Schweig*, CA–5th, 1973, 482 F (2d) 550, 552.

It is from the stipulations between the parties, official stenographic reports, the exhibits received in evidence and the papers filed in this proceeding that the Presiding Administrative Law Judge finds the following facts.

FACTS

1. Complainant Madeplac S. A. Industria de Madeiras is a corporation incorporated under the laws of Brazil, engaged principally in the processing of wood. Its principal place of business is located in Manaus, Brazil.

2. The respondent L. Figueiredo Navegacao, S.A. A/K/A Frota Amazonica, S.A. is a common carrier by water. Frota Amazonica is a successor in interest to L. Figueiredo Navegacao.

3. At all times relevant herein, Amazonica was a common carrier by water serving the trade from Savannah, Georgia, to Manaus, Brazil; and, Amazonica was a member of the Interamerican Freight Conference (I.A.F.C.).

4. At all times relevant herein, the applicable tariff for shipments carried by Amazonica from Savannah, Georgia, to Manaus, Brazil, was Interamerican Freight Conference, Section A, Tariff No. 3 (FMC No. 7).

5. Amazonica's general agent is, and at all times relevant herein was, Atlantic Coast Agencies, Inc.

6. Bobbitt International, Ltd., a subsidiary of G. E. Bobbitt Company, Raleigh, North Carolina, is a Butler Builder, *i.e.*, Bobbitt has a Butler franchise to market the Butler pre-engineered building in the Raleigh area.

7. On October 2, 1973, Amazonica issued its Bill of Lading No. 26 (Exh. 3) to cover the shipment in question here by Bobbitt International, Ltd., from Savannah, Georgia, consigned to the order of Banco Frances E. Italiano Para A American do Sal, Manaus, in Manaus, Brazil (the parties stipulated that Madeplac was the consignee of the shipment which moved under B/L 26—Stipulation 9, prehearing conference transcript, p. 8), on the M/S *Salimoes* a vessel of respondent.

8. On Bill of Lading No. 26, the shipment was described as "Components for Construction of Pre-Fabricated Building (See Attached)." Butler Manufacturing Co. manufactured the components that were shipped, to meet the needs for a building to be used in Bobbitt International, Ltd.'s business. Bill of Lading No. 26 indicates the shipment consisted of 7 boxes, 24 crates, 33 bundles and 109 pieces, a total of 173 pieces weighing 467,805 pounds (stipulated by parties—stipulation 11, prehearing Tr. 8) and measuring 21,630 cubic feet. B/L 26 was marked "Feight Collect." (Exh. 4 lists 173 packages weighing 466,353 pounds and measuring 21,563 cubic feet. Exh. 5 says the shipment totaled 176 packages, *i.e.*, 10 boxes, 24 crates, 33 bundles and 109 pieces.)

9. On the shipper's export declaration (Exh. 5) the cargo was described as 1 unit "Prefabricated Buildings of Aluminum." The Schedule B Commodity No. was listed as 691.2040 indicating the cargo was categorized by Bobbitt as "Prefabricated and Portable Buildings of Aluminum" (*Ibid*).

10. The material shipped was sold by Bobbit International, Ltd. to Madeplac as one 150 foot wide × 650 foot long × 23 feet 8 inch eave

height Type LRF II Special Butler Building for total material costs of $198,511.00; Inland Freight $9,639.00, Export Crating (60,080 pounds) $11,850.00. Total FOB $220,000.00. Total weight 671,279 pounds (Exh. 1).

11. Prior to the date of shipment, a letter of credit (irrevocable credit—dated August 7, 1973) in favor of Bobbitt International, Ltd. for the account of Madeplac, was issued in the amount of $176,000.00 covering "1 building of steel construction with aluminum finishing, Butler special, type LRF II—FOB Manaus." (English translation of Portuguese Exh. 2), accompanied by one full set of clean "on board" Ocean Bill of Lading . . . showing the amount of freight both in figures and words, issued to the Banco Frances E. Italiano Para A America Do Sul, Manaus, evidencing shipment from any U.S.A. port to Manaus.

12. On October 2, 1973, the tariff rate for carriage from Savannah, Georgia, to Manaus, Brazil, was $128.50 per weight or measurement ton for any of the following:

(a) Tools (stipulation 12—prehearing Tr. 8)
(b) Hardware (stipulation 15—prehearing TR. 8)
(c) Cargo not otherwise specified in the tariff (stipulation 19—prehearing Tr. 12).

13. On October 2, 1973, the tariff rate for the carriage of aluminum sheets from Savannah, Georgia, to Manaus, Brazil, was $111.00 per weight or measurement ton (stipulation 14, prehearing Tr. 8, 9).

14. Respondent billed for its service on the basis of a rate of $112.50 W/M as provided in its tariff for "Buildings, Portable, K. D. in Sections or Set-up." The charges were computed at $112.50 per 40 cubic feet for 20,825 cubic feet ($58,570.31) plus $112.50 per 2,240 pounds for 79,272 pounds ($3,981.29) ($58,570.31 + $3,981.29 = $62,551.60) (Exh. 3; stipulation 16, 17; prehearing Tr. 10).

15. The respondent's freight charges of $62,551.60 were correct if the aforementioned tariff provisions (Buildings, Portable, K. D., in Sections or Set-up) properly covered the cargo (stipulation 17; prehearing Tr. 10).

16. On November 16, 1973, respondent received $62,551.60 as payment of the freight charges billed for the shipment of the cargo (stipulation 15; Exh. 21).

17. The respondent did not have custody of the cargo at any time on November 16, 1973 or any time thereafter (stipulation 20).

18. The complainant did not present a claim for adjustment of the freight charges until after the shipment had left the custody of the respondent. It was not until July 8, 1974, more than six months after the date of shipment that the complainant presented a written claim for adjustment through its authorized agent Ocean Freight Consultants, Inc. (Exh. 11; Tr 181).

Discussion

The complainant alleged in Paragraph IV of its complaint and had the burden of proving that it has " . . . been subjected to the payment of

charges for transportation which were, when exacted and still are, in excess of those lawfully applicable, in violation of Section 18(b)(3) of the Shipping Act, 1916, as amended, injuring complainant to his damage in the sum of $44,580.38." The respondent in its answer denied each and every allegation contained in Paragraph IV of the complaint.

The complainant neither in its opening brief nor reply brief made any mention of the motion to dismiss. The respondent arguing in its reply brief the complainant has failed to meet its heavy burden of proof on the issue of whether the freight charges were proper, merely mentions the pendency of the motion (p. 21).

As trier of fact, the Presiding Administrative Law Judge, in considering the evidence, is not bound to view it in a light most favorable to the complainant, with all attendant favorable presumptions, but is bound to take, and took an unbiased view of all the evidence, direct and circumstantial, and accredited such weight as he believed it entitled to receive. (See *Allred v. Sasser,* 7 Cir., 1948, 170 F (2d) 233.) He did not concern himself with whether the complainant made out a *prima facie* case. (See *Emerson Electric Co. v. Farmer,* CA–5, 1970, 427 F (2d) 1082, and *Ellis v. Carter,* CA 9, 1964, 328 F (2d) 573.) Instead he weighed the evidence, resolving any conflicts in it and decided for himself where the preponderance lies.

The evidence presented by the complainant bears little relevance to the allegations in its complaint and burden of proof. The allegation in the complaint is as indicated above. Nevertheless, the complainant states, *inter alia,* "We are alleging that the respondent incorrectly and improperly rated the articles described on their bill of lading. A determination of the lawful rate is a question of law . . . . Here the Commission, as required by Section 22 of the Act, is called upon to determine the lawful rate(s) for the shipment involved" (complainant's reply brief, p. 4, 5). The Presiding Administrative Law Judge strongly points out that prior to reaching the determination of law and application of Section 22 of the Act by the Commission suggested by the complainant, that under the pleadings the complainant must go forward.

The complainant, under the pleadings, has the affirmative of the issue whether the respondent exacted charges for transportation in excess of those lawfully applicable, in violation of Section 18(b)(3) of the Shipping Act, 1916, as amended. And, upon the complainant rests the burden of sustaining its allegations of fact by a preponderance of evidence.

The Bill of Lading No. 26 described the freight as "Components for Construction of Pre-fabricated Building (See Attached)." The respondent billed for its services on the basis of a rate of $112.50 W/M in its tariff for "Buildings, Portable, K. D. in Sections or Set-up." Witness Simpson was of the opinion the freight should not have moved under that classification, but he did not know that there was an overcharge based on the evidence. The Shipper's Export Declaration (Exh. 5) describes the goods as "Prefabricated buildings of aluminum" net quantity, "1 unit." The

complainant's agent, Ocean Freight Consultants, Inc., referred to shipment of "Plant structures—knocked down" (Exh. 9). Witness Simpson, the complainant argues (opening brief, p. 9), testified that under the tariff item "Buildings, Portable, K. D. in Sections or Set-up" the building must be a "portable" building and that the description that does not cover any building that is not portable.

Besides the description of the freight above, there is the description in the contract between the parties (Exh. 1) for ". . . one . . . type LRF II Special Butler Building." "One 150′ wide × 650′ long × 23′ 8″ eave height type LRF II Special Butler Building" (*Ibid*).

On the basis of the whole record, the complainant has not sustained the burden of showing by a preponderance of the evidence violation by the respondent of Section 18(b)(3) of the Shipping Act. It is well established that a carrier should not be lightly or perfunctorily found to have violated the Act and, hence, liable for reparation. Each claim should be carefully weighed on its own merits and reparation awarded only where the evidence of violation is proved by a preponderance of the evidence—especially, as here, where the goods in question have left the carrier's custody or control. See *Johnson & Johnson International v. Venezuelan Lines,* Docket Nos. 71–46, 71–47, 16 FMC 87, 93 (1973). The shipper and not the carrier must bear a heavy burden of proof to establish his claim in cases such as this. Claimant here has failed to provide the requisite proof of its contention.

Further, in view of the contract (Exh. 1) and other references to its freight as one building, and *Webster's Third New International Dictionary* definition of portable—as adj., capable of being carried; n., something portable as—a portable schoolhouse or other building—the building to be transported to Manaus, Brazil; the classification used by the respondent to rate the freight was proper.

The Presiding Administrative Law Judge *finds* and *concludes* that the complainant did not meet the burden of proving violation by the respondent of Section 18(b)(3) of the Shipping Act, 1916, as amended. The complainant has not presented evidence to meet such a burden. The evidence presented fails to show a right to relief.

This decision is on the merits of the case. The motion of the respondent to dismiss the complainant should be granted.

FINDINGS AND CONCLUSIONS

Upon consideration of all the aforesaid, the Pending Administrative Law Judge *finds* and *concludes,* in addition to the findings and conclusions hereinbefore stated:

(1) The complainant has failed to meet its burden of proving violation of Section 18(b)(3) of the Act by the respondent.

(2) The respondent's motion to dismiss the complaint for such failure should be granted.

WHEREFORE, IT IS ORDERED, subject to review by the Commission, as provded in the Commission's Rules of Practice and Procedure, that:

(A) The motion of respondent to dismiss the complaint here, be and hereby is granted.

(B) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–31

CHEVRON CHEMICAL INTERNATIONAL, INC.

v.

BARBER BLUE SEA LINE

Complaint dismissed. Complainant failed to state a claim upon which relief may be granted.

William Levenstein for Complainant.

Raymound T. Frias, Vice President, Barber Steamship Lines, Inc., as Agent for Respondent.

REPORT

April 17, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke, James V. Day and Clarence Morse, *Commissioners*)

The proceeding came before the Commission on exceptions from Complainant Chevron International, Inc. to the Initial Decision of Administrative Law Judge William Beasley Harris denying reparation for alleged freight overcharges on a shipment described in the bill of lading as "BP 225 (Oloa 219) LUBRICATING OIL ADDITIVES IN BULK", carried by Respondent Barber Blue Sea Line from New Orleans, Louisiana, to Port Kelang, Malaysia.

Pursuant to a Bulk Oil Agreement entered into by the parties,[1] Complainant paid freight charges in the amount of $31,844.32, computed on the basis of $85.00 per long ton plus $17.50 applicable surcharge. Respondent had not published that rate in its tariff and maintains that the agreement was for the carriage of bulk cargo exempt from the filing requirements of the Shipping Act.

At the time of shipment, the Atlantic-Gulf/Singapore, Malaya & Thailand Conference had opened the rate on lubricating oil additives

[1] The agreement is used in the Atlantic-Gulf/Singapore Malaya & Thailand Conference for the shipment of bulk oil. Barber Blue Sea Line is a member of the Conference.

leaving its members free to file individual rates subject to a $70.50 per long ton minimum.

Complainant points out that the Conference tariff required that Conference member lines furnish the Conference their rates "for filing with the Federal Maritime Commission" and concludes that:

> . . . since a carrier subject to the Shipping Act cannot lawfully carry cargo without having a rate for its service on file with the Commission and since *respondent did not file any rate other than the minimum rate to which it was a party*, the reduced rate of $70.50/LT is the only rate lawfully applicable to any shipment of the commodity that was carried by respondent at that time.[2] (Emphasis added)

We do not agree. Complainant admits that Respondent had not filed its own rate on lubricating oil additives under the open rate provision of the Conference tariff. Nor could the setting of a minimum for the member lines individual rates constitute the filing of a $70.50 rate by the Conference. Complainant's suggestion that because Respondent was a "party" to the $70.50 minimum agreement, such minimum is "the only rate lawfully applicable" is wholly without merit. There is absolutely no offered or known support for Complainant's theory that reparation should be granted on the basis of a nonexistent rate.

We affirm therefore the Presiding Officer's denial of reparation but solely for Complainant's failure to state a claim upon which relief can be granted. Accordingly, for the purpose of this claim, we see no need to determine whether or not the shipment of Complainant consisted of bulk cargo exempt from the requirements of section 18(b)(3) of the Shipping Act, 1916.

It is therefore ordered that the complaint be dismissed and the proceeding discontinued.

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

[2] Complainant cites no cases or legislative history to support its interpretation of section 18(b) of the Act.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–31

CHEVRON CHEMICAL INTERNATIONAL, INC.

v.

BARBER BLUE SEA LINE

ERRATUM

In the Report served April 17, 1978, herein, the heading inadvertantly stated that Commissioner Morse voted in favor of the Report. Commissioner Morse concurred in the result; his concurring opinion is attached.

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

Commissioner Clarence Morse, concurring.

I concur in the result. I would deny reparations because the Bulk Oil Agreement covering the shipment of lubricating oil additives in bulk is an agreement for carriage of bulk oil cargo specifically exempted from the tariff filing requirements of Section 18(b)(1), Shipping Act, 1916, 46 U.S.C. 817.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 443(I)

KFC INTERNATIONAL SALES

v.

ATLANTIC LINES

NOTICE OF DETERMINATION NOT TO REVIEW

April 12, 1978

Notice is hereby given that the Commission on April 12, 1978 determined not to review the decision of the Settlement Officer in this proceeding served April 4, 1978.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 443(I)

KFC INTERNATIONAL SALES

v.

ATLANTIC LINES

Reparation Awarded.

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

KFC International Sales (complainant) alleges that Atlantic Lines (carrier) incorrectly rated a shipment of "Plastic Insulated Mugs," resulting in an overcharge of $1,162.00 (including a 25 percent port congestion charge). A claim filed with the carrier was denied on the basis that it was not timely filed.

The carrier, in response to the served complaint, admitted that the claim was denied solely in accordance with page 11 of the Conference tariff[2] which prohibits the payment of overcharge claims not presented to the carrier within six months after the date of the shipment. However, the carrier stated that the claim would have been denied on its merits had it been timely filed.

According to the claimant, the carrier, on November 24, 1976, issued its prepaid bill of lading No. 90 covering a shipment containing *inter alia,* 334 cartons of "Plastic Insulated Mugs" measuring 448 cubic feet (11.20 measurement tons) from Miami, Florida to Port of Spain, Trinidad. The carrier apparently assessed the tariff class 23 rate of $191.00 W/M applicable to "Plastic Goods, N.O.S." resulting in a charge of $2,139.00 for this portion of the shipment.[3]

The complainant contends that at the time this shipment moved, the carrier's tariff provided a first class rate of $108 W/M from Miami to Port of Spain, Trinidad, for "Plastic or Paper Products . . . viz: Bowls, Cups, Forks, Knives, Plates, Spoons," on 15th Revised Page 60 of its tariff. In

[1] Both parties having consented to the informal procedure of 46 CFR 502.301–34 (as amended), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] Leeaard & Windward Islands & Guianas Conference Freight Tariff FMC No. 1.

[3] The *total* shipment weighed 19,949 pounds and measured 1,007 cubic feet. The carrier billed, and the complainant paid bill of lading charges totalling $4,837.26.

the opinion of the complainant, the plastic insulated mugs in this shipment *should have been rated under this description which produces a charge of* $1,209.60.

On the basis of the $108 rate shown above, the complainant seeks reparation in the amount of $1,162.00 as follows:

1. Food Preparations—340 cubic feet at $104	$ 884.00
2. Combo Buckets—215 feet at $94	505.25
3. Mugs—448 cubic feet at $108	1,209.60
4. Restaurant Supplies—4 cubic feet at $200	20.00
Subtotal	$2,618.85
5. Pt. Congestion—25 percent	$ 654.71
6. Other charges as billed	401.70
Total	$3,675.26

Paid $4,837.26–Should be $3,675.26–Overpaid $1,162.00

According to the carrier, had the claim been decided on its merits, it would have been denied on the basis that the $108 rate sought by the complainant is for ". . . disposable plastic items." The carrier states that it considered an insulated mug as a more expensive and sophisticated item than a plastic or paper cup and accordingly, applied the rate for "Plastic Goods N.O.S., actual value not over $150.00 per freight ton."

The carrier's tariff contains two descriptions under which "Plastic Insulated Mugs" could have moved, i.e.:

1. PLASTIC OR PAPER PRODUCTS, *including* Plastic Coated or Lined, viz.: Bowls, *Cups,* Forks, Knives, Plates, Spoons . . . Class 1 (underscoring supplied); and
2. PLASTIC GOODS, N.O.S., viz.: (see item 2–d).[4]

Obviously, in the absence of a *specific* commodity description for the involved article, it must be determined which of the two above items is the more specific. If the evidence shows that a more specific tariff item fits the commodity shipped, claimant is entitled to be rated under that item. *The Carborumdum Company v. Royal Netherlands Steamship Company (Antilles) N.V.,* decided January 5, 1977. Rules of tariff construction also require that the more specific of two possible applicable tariff items must apply. *Corn Products Company v. Hamburg-Amerika Lines* 10 FMC 388 (1967).

Webster's New Collegiate Dictionary, sixth edition, defines a *mug* as a ". . . kind of earthen or metal drinking *cup,* with a handle,—usually cylindrical, with no lip." (underscoring supplied) The fact that the dictionary uses the terms *earthen or metal* does not make a mug any less a cup merely because it is made of *plastic.*

The generic heading "PLASTIC OR PAPER PRODUCTS" published in the carrier's tariff stands alone. The qualifying statement that "Plastic

[4] This item is based on declared actual value and the ratings range from Class 12 for "actual value not over $150 per freight ton" to Class 23, "actual value over $500 per freight ton."

Coated or Lined, viz.: . . . cups . . . ." are *included* under the generic heading does little more than emphasize that fact, albeit, unnecessarily.

The carrier has used as its defense for assessing the "Plastic Goods, N.O.S." rate, the rationale that the generic item was intended to apply only to disposable plastic items, whereas, the N.O.S. rates were intended for more expensive and sophisticated items. The tariff does not reflect this rationale and, accordingly, the carrier's defense along these lines must fall. It may be that it was the carrier's intent to have the more expensive plastic product move under rates dependent upon value, however, under the tariff, as published, *all* plastic products would move under the lower Class 1 rate in the absence of a declared value.[5]

As previously stated, the Commission has held that the more specific of two possible tariff applications must prevail. "Plastic Insulated Mugs" are "Plastic Products" within the meaning of the generic tariff item and, accordingly, the N.O.S. rate has no application.

The complaint was filed with this Commission within the time limit specified by statutes[6] and it has been well-established by the Commission that a carrier's published tariff rule may not act to bar recovery of an otherwise legitimate overcharge claim in such instances.

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 effective tariff. The involved commodity was improperly rated by the carrier and the complainant was overcharged in the amount of $1,162.00.

Therefore, it is ordered that respondent Atlantic Lines be required to refund to complainant KFC International Sales the amount of overcharge in the sum of $1,162.00 with interest at six percent per annum if not paid within thirty days from the date this decision becomes final.

(S) WALDO R. PUTNAM,
Settlement Officer.

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[5] Where a tariff is ambiguous or doubtful, it should be construed against the carrier who prepared it. *United States of America v. Hellenic Lines Limited,* 14 F.M.C. 260 (1971). Also, see *Peter Bratti Associates, Inc. v. Prudential Lines, Ltd.,* 8 F.M.C. 375 (1964).

[6] The shipment was made in November 1976; the complaint was filed with the Commission in September 1977.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 429(F)

NATIONAL STARCH & CHEMICAL CORP.

v.

LYKES BROS. STEAMSHIP CO., INC.

ORDER ON REMAND

April 17, 1978

National Starch & Chemical Corp. filed a complaint asking reparation for alleged freight overcharges in the amount of $861.03 on a shipment described on the bill of lading as 40 drums of Liquid Synthetic Plastics (Catalyst B–29–9732) carried by Respondent Lykes Bros. Steamship Co., Inc. from New Orleans, Louisiana, to Guayaquil, Ecuador.

Respondent collected charges at the Cargo, N.O.S., Class 1 rate of $135.75 per 40 cubic feet. Complainant asserts that the proper rate was $62.00, provided under the description, "Resins, Synthetic; Non-hazardous N.O.S." Respondent's tariff conditioned the application of this rate on shipper describing ". . . on the bill of lading the specific Resin(s) being shipped; failing such specific description Resin(s) by such Bill of Lading shall be rated as Cargo, N.O.S. Class 1." (Note 1)

Respondent denied the claim on the basis of the tariff six-month rule and contended that it had an obligation to adhere to all the rules and regulations of the tariff.[1]

Administrative Law Judge William Beasley Harris granted reparation. The Presiding Officer first found that the six-month tariff rule was unenforceable under *Kraft Foods v. Moore McCormack Lines,* 538 F.2d 443 (D.C. Cir. 1976).

On the question of whether the description on the bill of lading, *i.e.*, "Liquid Synthetic Plastics No. 1 (Catalyst B 29–9732)", was sufficiently specific to comply with Note 1 of Respondent's tariff, the Presiding Officer held that Note 1 was unenforceable in light of *The Carborundum Company v. Royal Netherlands Steamship Co. (Antilles) N.Y.*, Commission Report in Docket 75–15, 16 S.R.R. 1634 (1977), which held that a

[1] Gulf/West Coast of South America Conference South Bound Freight Tariff No. 12, FMC No. 1, Item 740.

carrier's tariff rule could not preclude consideration by the Commission of the merits of a claim.

While unable to find a listing of Catalyst B–29–9732 in Hawley's Condensed Chemical Dictionary, the Presiding Officer nonetheless concluded that Complainant had adequately proved what was shipped and granted reparation. This determination was apparently made solely on the basis of a statement in Complainant's letter of September 16, 1976, addressed to Atlas Traffic Consultant Corp., which described the Catalyst B shipped as a "Resin, Synthetic; Non-Hazardous, (Acetone Formaldehyde condensation Polymer)". No other evidence was introduced in support of this statement.

Complainant was requested but refused to supply literature on the product shipped, on the ground that such evidence was "irrelevant to this matter". Therefore, the only proof as to the true nature of the product, in the absence of a listing in the dictionary, is Complainant's own description to its tariff consultant.

Hawley's Condensed Chemical Dictionary describes "Catalyst" as "Any substance of which a fractionally small percentage strongly affects the rate of a chemical reaction."[2] The same dictionary indicates that synthetic resins include synthetic rubbers, siloxenes and silicones, but *excludes water-soluble polymers (often called resins)* and calls for a distinction between a synthetic resin and a plastic.[3]

Section 18(b)(3) of the Shipping Act requires a carrier to charge only the rate provided in its tariff for the commodity it actually carried. As mentioned, the bill of lading covering the shipment at issue here describes such shipment as "Liquid Synthetic Plastics". Complainant, while seeking to change that description in the bill of lading to "synthetic resin", has offered no other proof but its own word to support its contention.

In light of the doubts arising from the chemical dictionary definition which excludes plastics from the class of synthetic resins as well as of Complainant's failure to supply literature concerning its own product, we are of the opinion that Complainant has not sustained the burden of showing with reasonable certainty that the product shipped was a liquid synthetic resin which should have been so classified and rated. Consequently we disagree with the Presiding Officer's conclusion that the shipper had adequately proven that what was shipped was something other than described in the bill of lading.

The Initial Decision granting reparation is therefore vacated. In order to provide Complainant further opportunity to introduce corroborating evidence in support of its claim, the proceeding is remanded to the Presiding Officer for issuance of a Supplemental Decision, with the request that such decision be issued within 45 days from the date of the service of this Order.

[2] *Condensed Chemical Dictionary*, 8th Rev. Ed. by Gesnner G. Hawley (1971) at p. 177.
[3] *Id.* At p. 758.

IT IS ORDERED.
By the Commission.*

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

INFORMAL DOCKET NO. 429(F)

Commissioner Bakke, dissenting in part.

I would have reversed the Initial Decision and dismissed the complainant with prejudice. In my view, the majority decision to remand this case for the taking of further evidence can only encourage careless documentation by shippers or their agents in the first instance, less-than-diligent preparation and presentation of reparation claims and casual disregard of the dignity of legal requirements of proof in proceedings before the Commission.

A shipper (or his agent) must be charged with superior knowledge of the proper description of commodities being shipped, particularly where products having highly technical commodity designations, such as chemicals, are concerned. Accordingly, it is not unreasonable to attach a strong presumption of correctness to descriptive documentation prepared by the shipper or his agent, and a heavy burden of proof to overcome that presumption.

To be sure, honest error can occur, and statutory procedures are available for redress in that event. However, substantially more than uncorroborated allegations of error and self-serving assertions of the "correct" description must be adduced before relief can be granted. See *Merck, Sharp & Dohme,* 17 F.M.C. 244 (1973).

A litigant can reasonably expect only one opportunity to make his best case, and fails to do so at his peril. In this case, respondent sought by interrogatories to elicit independent corroboration of the alleged character of the goods shipped, but complainant refused to comply. Under the circumstances, it is my view that complainant has had his opportunity to overcome the presumption that the shipment was properly described on the bill of lading, has failed to establish by probative evidence that the alternative description urged is, in fact, correct, and has chosen to present the Commission with a "take it or leave it" challenge.

As the record now stands, the majority has concluded that complainant cannot prevail. I agree, and would end the matter there, rather than ordering remand. To reward complainant's willful intransigence at the trial level by appellate grant of another bite at the apple is curious jurisprudence to which I cannot, in good conscience, subscribe.

*Commissioners Bakke and Morse would reverse the Initial Decision and dismiss the complaint. Commissioner Bakke's opinion is attached.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER A—GENERAL PROVISIONS

[GENERAL ORDER NO. 16, AMDT. 22; DOCKET NO. 77-40]

April 17, 1978

Part 502—Rules of Practice and Procedure

Miscellaneous Amendments

AGENCY: Federal Maritime Commission

ACTION: Final Rules

SUMMARY: Rules of Practice and Procedure are amended to require that service of subpenas and discovery requests or motions directed against Commission staff personnel be served on the Secretary of the Commission; to authorize the General Counsel to appoint an attorney to represent Commission staff personnel who are involved; to permit rulings of the presiding officer to be appealed and to be reviewed by the Commission absent appeal in such matters; and to permit parties to file replies to appeals generally.

EFFECTIVE DATE: Upon publication in the *Federal Register*.

FOR FURTHER INFORMATION CONTACT:

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

SUPPLEMENTARY INFORMATION:

The Commission instituted this proceeding by Notice of Proposed Rulemaking published in the *Federal Register* on August 10, 1977 (42 F.R. 40452) to amend Rules 135, 209, and 153 of its Rules of Practice and Procedure (46 C.F.R. 502.135, 46 C.F.R. 502.209, and 46 C.F.R. 502.153). The purpose of these amendments was fully explained in the Notice cited above. The Maritime Administrative Bar Association (MABA) submitted

initial and supplemental comments. A discussion of the rules and comments follows.

1. Rule 135, 46 C.F.R. 502.135. This rule deals with subpenas of Commission staff personnel and subpenas for production of documentary materials in the possession of the Commission. The proposed changes would considerably enlarge the present rule to establish the procedures to be followed by parties seeking to subpena Commission staff personnel and to obtain production of documents both at a hearing and in connection with prehearing depositions. The amendments would provide for service of subpenas on the Commission's Secretary and conform the procedural schedule regarding prehearing depositions with that which applies to motions to quash subpenas served in connection with depositions. The rule would also be changed to authorize the General Counsel to designate an attorney to represent Commission staff personnel under subpena and to permit rulings of the presiding officer to be appealed or, absent appeal, to be reviewed by the Commission. Replies to appeals would be permitted and the filing of such appeals would automatically stay the presiding officer's rulings until the Commission acted on the matter.

MABA suggests that the subpena be served directly on the Commission staff member although not opposing service of a copy on the Secretary for his information and that of the Commission. MABA expresses dissatisfaction with the proposal that the General Counsel designate an attorney to represent the staff member, suggesting that the staff member be permitted to retain his own counsel. Moreover, MABA is concerned that the authority granted to the General Counsel would result in a "commingling of functions." MABA believes that the General Counsel would be supervising the attorney representing the staff member in the matter of reviewing the subpena or discovery request and would also be supervising another attorney in the event of appeal or on Commission review of the presiding officer's rulings. MABA also expresses concern that the Commission would be reviewing rulings of the presiding officer and fears that the Commission will overrule the presiding officer without having the benefit of the parties' views if no appeal has been filed. It also fears that the Commission will rule without stating its reasons and supporting evidence. MABA believes that matters arising under the rule should be reviewed by the courts rather than the Commission.

In its supplemental comments, MABA opposes the idea of permitting automatic appeals or review by the Commission in the case of subpenas and discovery directed against Commission staff personnel. MABA argues that such a procedure establishes disparate treatment among litigating parties. MABA contends that the proposed procedure is inconsistent with section 27 of the Shipping Act, 1916, and with the legislative history thereof. MABA contends that the Commission's staff member should follow the same procedure as do other parties, that is, move for leave to appeal to the Commission, and that in the event of refusal to comply with

a ruling of the presiding officer, the matter be tested in the courts. After careful analysis of these comments, the Commission believes that they are not persuasive and that the rule should be amended as proposed.

MABA's concern that service on the Secretary rather than on the staff member may not serve to inform the staff member of his obligations and that designation of an attorney to represent the staff member by the General Counsel will lead to improper "commingling of functions" is unwarranted. As explained in the Notice of Proposed Rulemaking, cited above, the rule change would eliminate the present inconsistencies and confusion as to the person on whom a subpena or discovery request is to be served. It would also provide a staff member with legal representation, something the present rule does not do, although in practice an attorney who is a member of the Office of the General Counsel has usually been designated to provide such representation. In previous practice, a staff member has been informed of the service of the subpena whether it had been served on the General Counsel or the Secretary. The staff member will continue to be informed. Furthermore, it does not follow that service on the Secretary deprives the staff member of his own views on the propriety of complying with a subpena or discovery order. Likewise, the designation of an attorney by the General Counsel is not intended to have this effect.

MABA's concern that appointment of an attorney by the General Counsel would lead to improper "commingling of functions" is based upon a wrong premise. MABA presumes that the General Counsel will supervise the designated attorney. In fact, that attorney will be free to represent the staff member before the presiding officer and the Commission without supervision by the General Counsel or by anyone whose interests may conflict with those of the staff member. The General Counsel would become involved only in the matter of advising the Commission when appeals are filed or the Commission decides to review on its own motion. Furthermore, to allay any possible remaining concern, the Commission would expect the General Counsel, whenever possible, to select an attorney from outside his office.

MABA's concern that the change in procedure would depart from the principle of equality embodied in section 27 of the Shipping Act, 1916, or its legislative history has superficial appeal but ignores the unique status and responsibilities of the Commission. As we stated in the Notice of Proposed Rulemaking, cited above, the Commission is a government agency involved in law enforcement activities, unlike private litigants, and certain privileges against disclosure have been recognized in the law because of these unique responsibilities. See the Freedom of Information Act, as amended, 5 U.S.C. 552 (b). Unless the Commission itself has some control over the matter of prehearing discovery and disclosure directed against its own staff and documents in its possession, the Commission cannot adequately protect functions which may involve delicate and sensitive considerations of policy as to which presiding

officers may be unaware. MABA seems to assume, furthermore, that the Commission would always be overruling presiding officers in an effort to prevent disclosure. The rule change would also apply, however, to situations in which the presiding officer has denied a discovery request so that the Commission could also overrule him and order disclosure. Of course, as in any final ruling of the Commission, an aggrieved party ultimately has the right to judicial review. Finally, at worst a litigant might be deprived of access to general information in the possession of the Commission or a staff member, which information may or may not really be necessary to the development of the litigant's case. This is in contrast to the situation in which a party under investigation or accused of violations of law seeks access to relevant information for purposes of cross-examination of Commission staff members who testify against such party. In the latter situations, as MABA itself has observed, the Commission has adopted a procedure in which the presiding officer may rule upon the matter of production or disclosure and appeal to the Commission may be taken only by his leave. See *Delaware River Port Authority, et al. v. United States Lines, Inc., et al.*, 16 SRR 1546 (1976). It is obviously the latter type of situation in which a party might be prejudiced during the course of a proceeding if deprived of vital information rather than the former situation in which general preparatory probing is being conducted prior to hearing.[1] However, the Commission does not intend to deprive parties of vital information necessary for proper cross-examination nor conduct its investigations and present evidence in reliance upon secret, privileged information.

We are not persuaded by MABA's contentions that the Commission will be deprived of the views of the parties where no appeal is taken and that the Commission will not explain its reasons for its rulings. If an affected party wishes to present his views to the Commission in connection with a ruling of the presiding officer, he need only exercise his right to file an appeal within the prescribed period of time. In the event of review by the Commission, absent appeal, the parties' views as expressed to the presiding officer are on record and will be considered. MABA's contention that a statement of reasons explaining the Commission's rulings should be required erroneously presumes that the Commission will act contrary to law by issuing rulings without explanations.

2. Rule 209, 46 C.F.R. 502.209. This rule deals with the use of prehearing discovery processes directed to Commission staff personnel. It follows the same procedures as set forth in the preceding rule with regard to the designation of an attorney by the General Counsel and the matter of appeals from and review of the presiding officer's rulings. MABA's

[1] The distinction between general prehearing discovery and inspection and production of specific information for purposes of cross-examination has been recognized by the courts as well as by the Commission. The latter situation relates to the famous case of *Jencks v. United States*, 353 U.S. 657 (1957), and to Federal Rule of Evidence 612, 28 U.S.C.A. See 7 A.L.R. 3d 181, § 17; *Zuzich Truck Line, Inc. v. United States*, 224 F. Supp. 457, 461 (D. Kans. 1963); *United States v. Harrison*, 461 F. 2d 1127 (5th Cir. 1972) cert. denied, 409 U.S. 884.

comments regarding the proposed changes to this rule are identical with those directed to the previous rule and, as already discussed, are without merit.

3. Rule 153, 46 C.F.R. 502.153. The Commission proposed to amend this rule by permitting parties to file replies to motions for leave to appeal rulings of the presiding officer. The present rule fails to make such provision. As explained in the Notice of Proposed Rulemaking, this amendment would establish a fairer procedure, enable the presiding officer to rule after having the benefit of all views, and conform to current practice. MABA made no comments on this proposed amendment.

Having considered the comments on Rules 135 and 209 and found them to be without merit, the Commission is therefore adopting the amendments to the above three rules as originally proposed with slight clarifications.[2] Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553), and sections 27 and 43 of the Shipping Act, 1916 (46 U.S.C. 826, 841a), Part 502 of Title 46, Code of Federal Regulations, is hereby amended.*

EFFECTIVE DATE. Inasmuch as the expeditious adoption of these rules is desirable and inasmuch as they are procedural in nature, they shall be effective upon publication in the *Federal Register* and shall be applicable to all pending and future proceedings.

By the Commission.

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

[2] The last sentences of proposed rules 135(c) and 209(c) have been revised to clarify the effective date of rulings.
*The text of the ammendment is reprinted in 46 CFR 502.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

[GENERAL ORDER 7; DOCKET NO. 73–64]

April 18, 1978

Part 507—Self-Policing Systems

AGENCY: Federal Maritime Commission

ACTION: Final Rule

SUMMARY: This rule amends the self-policing rules of the Commission by requiring that self-policing of Commission approved carrier agreements be done by persons not otherwise employed by or having any financial interest in a party to such agreement, and that self-policing include self-initiated investigations. This rule also amends the reporting requirements to include a more precise description of the self-policing activities. The purpose and effect of these regulations is to provide for better self policing

EFFECTIVE DATE: To become effective July 1, 1978.

FOR FURTHER INFORMATION CONTACT:

Francis C. Hurney
Secretary
Federal Maritime Commission
Room 11101
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523-5725

SUPPLEMENTARY INFORMATION:

This rulemaking was initiated pursuant to section 43 of the Shipping Act, 1916, (46 U.S.C. 841) to enunciate and define the standards by which the Commission determines whether a particular ratemaking agreement is not adequately self-policed and therefore must be disapproved under section 15 of the Shipping Act, 1916. Furthermore, this rulemaking was intended to change the reporting requirements of self-policing activities in order to improve the ability of the Commission to determine whether a particular agreement is being effectively policed.

In response to the proposed rules many comments were received which were replied to by Hearing Counsel. Hearing Counsel's replies were answered by many of the original commentators. All of these comments have been considered by the Commission in promulgating the final rules. However, before the amended rules and the acceptance or rejection of the proposals of the commentators are explained, we think it is necessary to examine the rationale underlying "self-policing" as required by section 15 of the Shipping Act, 1916.

Section 1 of the Sherman Antitrust Act declares every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce to be illegal.[1] In interpreting that section, the Supreme Court has stated that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal. . . ."[2] Among the practices deemed to be unlawful in and of themselves are price fixing,[3] division of markets,[4] group boycotts,[5] and tying arrangements.[6]

Nevertheless, Congress has determined, first in 1916 and then again in 1961, that the transnational and nationalistic promotional setting in which the ocean liner industry operates is so commercially unique that there may be redeeming factors which make agreements fixing prices, dividing markets, or creating typing arrangements not only reasonable but desirable. Therefore, if the parties to an agreement which would otherwise be illegal *per se* can show that such agreement is required to fill a serious transportation need, necessary to secure important public benefits, or is in furtherance of a valid regulatory purpose of the Shipping Act, 1916, then it may be approved and receive immunity from the penalties of the Sherman Antitrust Act.[7]

However, when the Bonner Act amendments to the Shipping Act were passed in 1961, a requirement of effective self-policing was incorporated into section 15 as *quid pro quo* for antitrust immunity.[8] Thus, the duty to adequately self-police stems not from a finding by the Federal Maritime Commission of a need for policing, but rather *is an obligation imposed by law*. Furthermore, self-policing is an obligation which cannot be fulfilled *pro forma* but is one which requires *effective* positive conduct on the part of the conferences in return for continued recognition of the conference system.

Section 15 of the Shipping Act, 1916, requires the Federal Maritime Commission to determine which self-policing systems are effective and

[1] 15 U.S.C. 1.
[2] *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958).
[3] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).
[4] *United States v. Addyston Pipe and Steel Co.*, 85 F. 271 (6th Cir. 1898).
[5] *Fashion Originators' Guild of America v. F.T.C.*, 312 U.S. 457, 464 (1941).
[6] *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947).
[7] *F.M.C. v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968).
[8] Report on the Ocean Freight Industry, Antitrust Subcommittee, Committee on the Judiciary, H.R. Rep. No. 1419, 87th Cong., 2d Sess. (1972).

which are not and to disapprove thosehagreements which are inadequately policed. Hence, we have undertaken this rulemaking to prospectively determine and enunciate some of the standards by which self-policing systems will be judged to be adequate or inadequate.

Such a prospective determination and enunciation of some of the standards to be used in the future is not to be confused with adjudication as to whether those standards have been met in a particular case.[9] Although many parties contest the authority of the Commission to set such standards by rulemaking,[10] it is well settled that the Commission may make use of its rulemaking authority under section 43 of the Shipping Act, 1916, to define and articulate enforceable standards[11] to be used to judge the adequacy or inadequacy of self-policing.[12] In fact, a rulemaking proceeding appears to be both superior and preferable to case by case adjudication for the purpose of defining and articulating the standards a regulatory agency must enforce.[13] The proposed standards have been set forth as minimum requirements for inclusion in section 15 agreements. Any agreement which does not contain these required provisions will be presumed to not meet these standards of adequate policing and therefore may be found to be inadequately policed.[14]

Set forth below is a discussion of the self-policing rules themselves and an explanation of the changes which have and have not been made.[15]

Section 528.1 *Scope and Purpose.*

There have been no substantive changes in section 528.1. from that proposed

Section 528.2 *General Requirements; section 15 Agreements.*

The primary change proposed in this section was that self-policing would have to be carried out by neutral persons or bodies. This proposal recognized that policing by a conference chairman or secretary is necessarily ineffective because the demands of other duties and responsibilities do not leave enough time, nor are they able to devote sufficient attention, for the effective discharge of the self-policing functions. While the final rules promulgated herein retain the neutrality requirement generally, an exemption is provided in new section 528.4 where it can be demonstrated that the duties of the conference personnel entrusted with

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[9] *Pacific Coast European Conference v. United States*, 350 F.2d 197 (9th Cir. 1965).

[10] "This contention [that the Commission may proceed only on a case by case basis] has the antique virtues of simplicity and straightforwardness. The difficulty is that it is a doctrinal archaism in moderm administrative law. It comes, indeed, at a time when many knowledgeable voices have been urging the agencies to make greater, rather than less, use of the rule-making authority in the interest of more precise definition of decisional standards." *Pacific European Conference v. F.M.C.*, 376 F.2d 785 (D.C. Cir. 1967).

[11] *Id.* at 788, 789; *Pacific Coast European Conference v. F.M.C.*, 439 F.2d 514, (D.C. Cir. 1970); *Cf. H. Friendly, The Federal Administrative Agencies, the Need for Better Definition of Standards*, (1967).

[12] *Outward Continental North Pacific Freight Conference v. F.M.C.*, 385 F.2d 981 (D.C. Cir. 1967).

[13] *CIBA-Geigy Corp. v. Richardson*, 446 F.2d 466 (2d Cir. 1971).

[14] "The Commission can reasonably 'find', without the necessity of an extended evidentiary hearing, that any conference which refuses to adopt and communicate to the Commission an outline of its policing methods does not adequately police its members." *Outward Continental North Pacific Freight Conference v. F.M.C.*, 385 F.2d 981, 984, 984 (D.C. Cir 1967).

[15] We are denying the request made by one commentator that the Commission stay these rules pending adoption of the UNCTAD Code of Conduct for Liner Conferences Convention. Not only does the UNCTAD code fail to address many of the issues treated by these rules, but the United States is not presently a signatory to the convention.

the self-policing functions, are minimal, the Agreement is limited, the parties to the agreement are small and the trade relatively free of malpractices.

We find, however, that it is desirable that the self-policing body be otherwise independent of the members to the agreement. No member or employee of the policing authority may be retained or employed by or financially interested in any party to the agreement. Since the policing authority will have access to the confidential business records of the members to the agreement, it is absolutely essential that the policing authority not have any connection with or financial interest in any of the members to the agreement. However, if the policing authority is an independent certified public accountant with no connection with a member line other than as an independent contractor, there is little likelihood of compromise of such confidential business records or chance that any bias will enter into the implementation of the functions of the policing authority. As the Commission has noted:

> In view of the fact that the Neutral Body functions are fact finding rather than judicial; that the conclusive facts are usually, if not always, obtained from the books of account and records of the accused; that accounting firms are uniquely qualified both professionally and by procedural and ethical standards, to perform this work; that fees are paid on the basis of time devoted to a case, and without regard to whether the complaint of malpractice is sustained or dismissed; that there is no evidence of actual bias or non neutrality relating to any of the firms heretofore used; and that the application of unduly broad exclusions will disqualify or bring about the disinterest of most, if not all, of the otherwise eligible firms, thereby destroying this self-policing system, contrary to the public interest and to the detriment of commerce, it is found that a Neutral Body should not be disqualified because of a disclosed business relationship, *i.e.*, independent contractor for professional or business services, with a conference member line other than the accused.[16]

However, even an independent certified public accountant would be put into an untenable conflict of interest situation in cases where a firm would be called upon to investigate a client. In such situations the independent certified public accountant should not make the investigation and another independent certified public accountant without such connections with the investigated party should take its place.

Contrary to the assertions of some commentators, this neutrality requirement does not dictate employment practices or require one particular method or procedure of self-policing. We believe that this requirement is sufficiently flexible to accommodate any adequate self-policing system which a conference wishes to employ.

Another proposed amendment to section 528.2 was to broaden the scope of the self-policing rules to apply to all rate-fixing agreements between persons subject to the Shipping Act, 1916. However, the rules were primarily intended to apply to carriers by water and this proceeding has demonstrated that the application of the self-policing rules to terminal rate agreements and other parties involve factors which should be

[16] Final Report quoting Initial Decision, *Agreement 150–21*, 9 F.M.C. 355, 367 (1966).

considered separately. The application of these rules will therefore be confined to conference and other rate-fixing agreements between common carriers by water.

The rules have also been amended to more clearly state the requirements in the proposed rules that: (1) a policing authority must be established, (2) the functions and authority of the policing authority must be stated, and (3) the method or systems used to police the obligations under the agreement must be described. These changes were prompted by comments to the effect that the existing rules requiring a description of "the function and authority of every person having responsibility for administering the system" seem to require that the officer administering the self-policing system be personally named in the conference agreement. That was not the intent of the rule. The intent of the rule was, and is, to require that someone be invested with the power to investigate, adjudicate, and penalize any deviation from the rate-fixing agreement. The members to an agreement may accomplish these tasks by establishing one or more self-policing entities, as they wish. Nevertheless, the functions and authority of each of those entities must be described so that we can ascertain how the policing functions are apportioned and, more importantly, that all required self-policing functions are actually delegated and carried out. The names of the person or persons heading the policing authority and description of their staff, facilities, and budget must be made available to the Commission only on request.

With regard to self-policing procedures, investigations of malpractices or other violations of the agreement which come to the attention of the policing authority in any manner must be undertaken.

Section 528.2, as proposed, also requires self-initiated investigations. We think it is obvious that in order for a self-policing system to be effective, the policing authority must make investigations *sua sponte.*[17] While we are not prepared to establish all the kinds of investigations which must be carried out and set a minimum frequency for each type of self-initiated investigation, it is imperative that each conference does establish, for itself, a program of self-initiated investigations such as surprise audits of books, and examination of records, billings, classifications, bills of lading and other documents. Further, investigations, whether pursuant to a complaint or *sua sponte,* cannot be effective unless the policing authority is authorized to examine or inspect any books, records, billings, classifications, bills of lading, or other documents, cargo and containers, ships, property and facilities. The agreement must, therefore, provide for such authorizations.

A question has been raised regarding the constitutionality of requiring members to submit to surprise audits and other investigations. It was

[17] Report on Ocean Freight Industry, *supra,* n. 10, at 314.

alleged that this provision would violate the constitutional guarantee against unreasonable searches and seizures. Since there is no search or seizure by the Government and no criminal action is contemplated, we do not believe there is a constitutional impediment involved.

The effect of the laws of other nations upon the access of the policing authority to member records has also been brought to question. However, no law of another nation was cited, nor do we know of one, which would preclude a member from giving its records to one of its own agents. The policing authority's access to member records is essential for effective self-policing and is not a requirement that can be waived. Section 528.3 *Self-policing provisions; specific requirements.*

There were no proposed amendments to section 528.3. However, comments were received questioning the use of the phrase "liquidated damages" in this section. As we have already discussed, the concept of self-policing is based upon the ability of the conference to collect damages for breach of contract. The amount of damages for each breach may be calculated upon the amount of the actual damages shown for each particular occurrence or may be calculated in advance (liquidated damages) for each type of breach so that the actual damages do not need to be proven each and every time that type of breach occurs. Because these rules require an advance statement of the amount of damage for each type of breach, the use of the term "liquidated damage" is accurate. Nevertheless, the damages are calculated in the context of "policing" and, therefore, the Commission recognizes the use of terms such as violation, fine, settlement, offense or punishment, by the industry in place of the term "liquidated damages". The Commission has indicated in previous proceedings that the concept, not the terminology, is of importance.

We have also considered the assertion that a distinction should be made in this section between malpractices (defined by a commentator as deliberate acts intended to secure unfair competitive advantage) and misratings (defined by a commentator as inadvertent clerical error), and that only malpractices should be made subject to self-policing sanctions. Although we do not object to a conference establishing separate investigative bodies for different classes of breaches of their agreement, as long as they comply with the self-policing rules, we do not agree that so-called "misratings" should not be subject to self-policing sanctions. Misratings can be an effective and disguised method of rebating and should therefore be one of the prime concerns of an effective self-policing program. The introduction of an exception for misratings could offer an opportunity for abuse and virtually emasculate the self policing rules.

We are also not in agreement with the contention that the right of appeal to neutral arbitrators should be rescinded. Impartial adjudication by persons not connected with the investigation or prosecution is a

feature which both the Commission and the courts[18] have found to be an important and necessary.

One commentator also objected to the provisions of paragraph (c) of this section requiring appeals by the complainant or conference and review *de novo*. The commentator misread the rule, in one respect, in that a *de novo* review is required, not a *de novo* trial. The right of appeal argument of this commentator is not persuasive. The reasons for requiring appeal to be given to the complainant and the conferences were set forth by the Commission in a previous rulemaking. 35 F.R. 16679, Oct. 28, 1970. That rationale continues to be valid.

A proposed addition to section 528.4 was that the reporting of the self-policing activities be done by a coded number for each violator. Numerous commentators objected on the grounds that the code could easily be broken, thus destroying the confidentiality necessary for effective policing and subjecting the parties to the perils of "double jeopardy".

We find these comments to be devoid of merit. There is no "double jeopardy" when a person becomes subject to penalties for violating both his contractual obligations and the criminal statutes of the United States. The question of the efficacy of reporting violations by a coding system does not revolve around the false issue of "double jeopardy" but rather depends upon how the powers of the Commission to surveil the self-policing activities, through the medium of required periodic reporting, can best be used to encourage effective self-policing and uncover ineffective self-policing.

However, there appears to be a concern about how the Commission's enforcement activities affect self-policing activities. It is asserted that it is unreasonable to expect carriers to willingly establish and finance an effective self-policing system if the self-policing records are routinely used to prosecute the members for statutory violations.

While we recognize that it is important to use the enforcement powers of the Commission in such a manner as to promote and not to discourage effective self-policing, we also have a duty to enforce the provisions of the Shipping Act, 1916. Further, the requirement to self-police contained in section 15 of the Shipping Act was not intended to limit the Commission in carrying out its enforcement function. We, therefore, will make every effort to encourage and cooperate with the self-policing authorities, and at the same time will remain committed to the use of enforcement powers to whatever degree necessary to free our waterborne commerce of Shipping Act violations.

The reporting of agreement violations gives the Commission some evidence of how effectively the self-policing activities are being administered. Therefore, the periodic reports must state how many violators are

[18] *States Marine Lines, Inc. v. Federal Maritime Commission*, F.2d 230 (D.C. Cir. 1967); In re *Modification of the Self-policing Provisions of Agreement No. 1509, 3103*, 11 F.M.C. 434 (1968).

caught. Another indication of the effectiveness of self-policing is the frequency of recidivism. We are therefore requiring the report to state the number and general description of other violations by the carrier involved (without identifying it or listing it by number), in the five years preceding the date of the finding of the violation. We believe this information, along with the specific and detailed description of the offense and the exact amount of the penalty (liquidated damages), will enable the Commission's staff to ascertain how effectively the self-policing obligations are being carried out.

Questions have also been raised as to how specific a "specific" description needs to be. Clearly something more than a mere category is required. Statements such as "violation of conference agreement," "rebate" or "misrating" are insufficient. A partial recital of the facts of each case is necessary so that the Commission may ascertain whether specific complaints are effectively and efficiently investigated.[20] The Commission staff occasionally refers the facts of an alleged breach of an agreement to the conference policing authority for disposition. Usually these occurrences have taken place in a foreign country where the conference can more easily make a complete investigation than can the Commission. Thus a recital of the essential facts of each completed investigation in the semi-annual report will allow the staff to ascertain how the referred complaint has been handled without the necessity of securing separate follow-up reports from the conference. Special reports may be solicited when conference action on a referred complaint is neither forthcoming nor apparent from the semi-annual reports. Such reporting will also enable the staff to assess the effectiveness of conference investigations of alleged breaches of which the Commission has independently become aware.

The specific description of the offense also allows the staff to evaluate the level of the penalty (liquidated damages) in terms of how effectively self-policing sanctions are being used to deter breaches and how vigorously recidivistic behavior is discouraged. The Commission does not believe that a statement of the exact amount of the penalty (liquidated damages) is in any way adverse to the administration of an effective self-policing program. Quite to the contrary, we believe that more detailed and specific reporting requirements introduce an element of accountability which has been lacking to date and should prove to be an incentive for more effective policing. The fact that some carriers do not want to know the amount of the fine levied by their self-policing authorities against other lines does not necessarily indicate to us that their primary concern is with better enforcement and certainly is not persuasive that this provision is in any way contrary to the intent of these rules.

Furthermore, the comparison of penalties (liquidated damages) accord-

[20] If a particular occurrence involved a rebate, for example, the report must state how the rebate was made and the amount of the rebate; *e.g.*, cash rebate, $2,500; or indirect rebate of $1,500, shipment described as 10 measurement tons of X at $50 a ton, actually 10 measurement tons of Y which has tariff rate of $65 a ton.

ing to the circumstances of each case, will not lead to controversy between lines unless the penalties are so arbitrary that they should be exposed anyway. The concern is unfounded that the Commission staff cannot appreciate the circumstances which the conference may take into account for mitigating penalties (liquidated damages), unless, of course, those circumstances are purposefully left out of the semi-annual policing reports.

The necessity of the negative reporting requirement of this section has also been questioned. However, the negative reporting requirement serves a useful purpose in informing the Commission that the conference, or parties to a rate making agreement, have no policing activities to report, as opposed to merely being delinquent in filing their reports. Because self-policing programs must have self-initiated investigations as well as investigations of complaints in order to be effective, it is quite important to distinguish between inactivity and delinquent reporting.

Section 528.5 *Filing of amendments to approved agreements.*

This section has been changed to require the filing of amendments to existing agreements to conform with this rule to be filed on or before July 1, 1978.

In preparing these rules for publication, we have become aware of some further problems and inadequacies in the proposed rules. For example, it is clear that the proposed rules in sections 528.2 and 528.3 would require a functionally separate policing authority and impartial adjudicator. We have, therefore, incorporated such a statement into 528.2.

The rules have also been reorganized into a more logical and comprehensive format. For example, section 528.2 sets forth the general requirements for section 15 agreements. Furthermore, the minimum requirements for policing authorities and impartial adjudicators have been set forth in new sections of their own (sections 528.4 and 528.5, respectively).

The new section 528.3 governing the specific requirements of self-policing provisions is, for the most part, a restatement of the requirements under section 528.3 of the existing rules, which were not proposed to be changed. However, paragraph (c), which sets forth the requirements for investigation of violations, has been relocated.

The minimum requirements for policing authorities (section 528.4) have been extensively rewritten. The requirements of qualified personnel, adequate staff, facilities and budget have been made to explicitly apply to all policing authorities.

As indicated above, the general requirement in section 528.4 for the use of a neutral body allows for an exemption upon a showing that the officer's or employee's other duties will not unduly interfere with the policing duties, and the need for vigorous policing is not great because of the nature of the agreement, the scope of the trade, and the history of violations.

This section also allows independent certified public accountants under

specified conditions, to act as the policing authority without violation of the neutrality requirements, even though such accountant has a client which is a member of the Agreement. The rule has also been amended to accommodate policing entities such as those set up by the Associated North Atlantic Freight Conferences.

The section setting forth the minimum requirements for impartial adjudicators (section 528.5) is, for the most part, a restatement of the requirements of section 528.3 in the present rules.

The reporting requirements (section 528.6) have been amended by deleting the coding and emphasizing the reporting of the activities of the policing authorities and the results of their investigations.

Therefore, pursuant to sections 15, 21, and 43 of the Shipping Act, 1916 (46 U.S.C. sections 814, 820 and 841(a)), Part 528 of Title 46 C.F.R. is hereby amended.*

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

*The text of the amendment is reprinted in 46 C.F.R. 528.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 465(I)

A. RAMI GREENBERG

v.

VENEZUELA LINE

NOTICE OF DETERMINATION NOT TO REVIEW

April 21, 1978

Notice is hereby given that the Commission on April 21, 1978 determined not to review the decision of the Settlement Officer in this proceeding served April 10, 1978.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 465(I)

A. RAMI GREENBERG

v.

VENEZUELAN LINE

April 10, 1978

Reparation Denied.

DECISION OF ROLAND C. MURPHY, SETTLEMENT OFFICER[1]

A. Rami Greenberg (complainant) claims $519.81 as reparation on a shipment of four automobile vans from Houston, Texas to La Guaira, Venezuela via the M/S ANZOATEGUI, Voy 64, of the Venezuelan Line, on bill of lading No. 37 dated May 19, 1977.

Complainant alleges that it was overcharged in the amount of $519.81 due to the failure of the steamship company, a member of the U.S. Atlantic & Gulf-Venezuela and Netherlands Antilles Conference, to quote the correct rate prior to booking and at booking of the cargo, and the claimant's inability to resolve the matter with the steamship company within the prescribed six-month period provided for in the Conference Tariff FMC No. 2, Item No. 11.[2]

Complainant originally negotiated the movement of ten automobile vans, and the carrier advised that the vehicles would have to be shipped in separate units. One part of the shipment consisted of four automobile vans and was rated at the contract rate of $48.50 W/M plus surcharges. The second shipment consisted of four automobile vans and was rated at the noncontract rate of $55.75 W/M. The respondent, when notified by the complainant of the alleged mistake, advised the complainant that the $55.75 W/M was the correct applicable noncontract rate. The complainant

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

[2] The complaint was filed with this Commission within the time limit specified by statute; and it has been well established by the Commission that carrier's so-called "six-month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

was not a merchant's agreement signatory with the Conference, therefore, he was not entitled to the lower contract rate.

The respondent readily admits that on occasion that its personnel might be lax in rate quotations, especially informing shippers of the dual rate system contained in the Conference tariff. However, the fact the complainant was erroneously quoted the contract rates is not a criteria for the adjustment of freight charges that have gone forward.[3]

The respondent alleges that the transportation charges that should have been assessed were:

4 Passenger Vans	
2868 cft ($55.75)—40 cft	$3,997.28 (Noncontract)
B/S—40 cft ($4.80)	344.16
C/S—40 cft ($3.00)	215.10
	$4,556.54

Rates that were actually charged:

4 Passenger Vans	
2868 cft ($48.50)—40 cft	$3,477.45 (Contract)
B/S—40 cft ($4.80)	344.16
C/S—40 cft ($3.00)	215.10
	$4,036.71

Undercharge to respondent—$519.83

Complainant paid transportation charges of $4036.71 whereas the correct charge of $4556.54 should have been paid, and the respondent is correct in his position that an undercharge has been assessed in the amount of $519.83.

This undercharge should be properly adjusted between the parties with evidence of such adjustment furnished to complete the record.

(S) Roland C. Murphy,
Settlement Officer.

[3] Section 18(b)(3), Shipping Act, 1916, provides that "No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive 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 its tariffs on file with the Commission and duly published and in effect at the time. . . ."

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 354(I)

SUN OIL INTERNATIONAL, INC. ON BEHALF OF VENEZUELAN SUN OIL, A SUBSIDIARY COMPANY

v.

VENEZUELAN LINE & TTT SHIP AGENCIES, INC., AGENT

NOTICE OF DETERMINATION NOT TO REVIEW

April 26, 1978

Notice is hereby given that the Commission on April 26, 1978 determined not to review the decision of the Settlement Officer awarding reparation in this proceeding, served April 12, 1978.

By the Commission*.

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

*Commissioners Bakke and Kanuk would deny reparation for failure of complainant to meet its burden of proof.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 354(I)

SUN OIL INTERNATIONAL, INC. ON BEHALF OF VENEZUELAN SUN OIL, A SUBSIDIARY COMPANY

v.

VENEZUELAN LINE & TTT SHIP AGENCIES, INC., AGENT

April 12, 1978

Reparation Awarded.

DECISION OF CAREY R. BRADY, SETTLEMENT OFFICER[1]

By complaint filed May 25, 1976, Sun Oil International, Inc. on behalf of Venezuelan Sun Oil, a subsidiary company, alleges that charges in excess of those lawfully applicable for transportation were assessed by Venezuelan Line. While the complainant does not specifically allege a violation of the Shipping Act, 1916, it is presumed to be a violation of Section 18(b)(3) thereof.

The shipment was described on the bill of lading as 4 pallets containing 200 bags of "Jet Blast" which weighed 10,600 pounds and measured 367 cubic feet. Respondent rated the shipment Cargo, N.O.S., at $106.75 per 40 cubic feet,[2] under Item 2(n) in respondent's tariff which provides:

Bills of lading describing articles by trade name are not acceptable for commodity rating. Shippers are required to describe their merchandise by its common name to conform to merchandise descriptions appearing herein. Bills of lading reflecting only trade names will be automatically subject to application of the rate specified herein for Cargo, N.O.S., as minimum.

Freight charges assessed were $1,003.45 plus a bunker surcharge of $45.12 which totaled $1,048.57. Complainant alleges the shipment should have been rated Shells, viz.: Nut, Ground,[3] at $42.75 per 2,240 pounds and the surcharge applicable to the commodity on a weight rather than a

[1] Both parties deemed to have 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 F.M.C. No. 2.

[3] Tariff Item No. 1000, Class 16W, 4th Rev. Page 126 and Item No. 999, Group 1, 6th Rev. Page 68.

measurement basis.[4] Such a classification would have saved the Complainant $796.55.

No response was forthcoming from respondent and accordingly this procedure will be disposed of under Rules 19(2), et. seq., Informal Procedures for Adjudication of Small Claims, Commission's Rules of Practice and Procedure (46 CFR 502.301 to 502.304).

Complainant argues "that it is not the declaration on the bill of lading, but what is actually shipped that determines the applicable rate. 'Jet Blast' is a brand name of the Jet Blast Company, Fort Worth, Texas. 'Jet Blast' is ground nut shells used as an abrasive blasting material for the removal of carbon from metal surfaces, and cleaning of operating jet engines. 'Jet Blast' as produced by the Jet Blast Company is processed in accordance with Military Specification, MIL-G-5634C. The applicable Schedule B Number for 'Jet Blast' is 292.9800."

In The Carborundum Company v. Royal Netherlands Steamship Co., Docket 75-15 Report served January 5, 1977, the Commission reaffirmed the proposition that trade name rules govern only the rating of cargo by the carrier at the time of shipment and cannot be invoked as a bar to a later showing in a proper proceeding before the Commission as to the exact nature of the commodity shipped. If the evidence shows that a more specific tariff item fits the commodity shipped, complainant is entitled to be rated under that item.

The test the Commission applies on claims of reparation involving alleged error of a commodity tariff classification is what the complainant can prove based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description.[5] However, the complainant has a heavy burden of proof once the shipment has left the custody of the carrier.[6]

In support of the claim, complainant has submitted a copy of the bill of lading and a copy of the packing list both of which are devoid of any description of what "Jet Blast" is. In addition, the complainant has submitted copies of letters dated March 22, and May 14, 1976, respectively, wherein the owner of the Jet Blast Company stated "Jet Blast" is the trade name of the company's product which is Ground or Crushed Pecan Shells used for cleaning turbine and/or jet engines. It is further stated "Jet Blast" is made to Federal Specifications MIL-G5634C. A copy of MIL-G-5634C has been submitted. MIL-G-5634 is a Department of Defense specification pamphlet entitled "Grains, Abrasive, Soft, For Carbon Removal" which covers soft abrasive grains to be used as abrasive blasting material for the removal of carbon from metal surfaces

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[4] Amendment 3 to Special Supplement 15 of the respondent's tariff provides that the bunker surcharge is assessed on the basis as the cargo is freighted.

[5] Western Publishing Company, Incorporated v. Hapag-Lloyd A.G., informal docket No. 283 (I) Commission Order served May 4, 1972.

[6] Colgate Palmolive Co. v. United Fruit Co., informal docket No. 115 (I) Commission Order served September 30, 1970.

and cleaning of operating jet engines. Various shells are identified as acceptable for this purpose along with standards for particle size distribution and consistency. Pecan shells are one of those so identified in the pamphlet. Under the heavy burden of proof requirement the above may fall short of meeting that burden. However, the complainant's offer of proof is perfected by the submission of a Shipper's Export Declaration Correction Form amending the Schedule B commodity number to 292.9800 identifying the commodity as Crude Vegetable Materials, N.E.C.

Accordingly, the complainant hereby is awarded reparation in the amount of $796.55.

(S) CAREY R. BRADY,
Settlement Officer.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER A—GENERAL PROVISIONS

[GENERAL ORDER 16, AMDT. 23, DOCKET NO. 77–59]

Part 502—Rules of Practice and Procedure

Conduct of Rulemaking Proceedings

AGENCY: Federal Maritime Commission

ACTION: Final Rules

SUMMARY: The Rules of Practice and Procedure are amended to provide for a single round of comments in rulemaking proceedings unless particular circumstances warrant the filing of replies to comments and to provide for the participation of the Bureau of Hearing Counsel. Multiple rounds of comments and participation of Hearing Counsel have proven unnecessary in some instances. The new procedure provides desirable flexibility.

EFFECTIVE DATE: Upon publication in the *Federal Register*

FOR FURTHER INFORMATION CONTACT:

Francis C. Hurney, Secretary
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523-5725

SUPPLEMENTARY INFORMATION:

The Commission instituted this proceeding by Notice of Proposed Rulemaking published in the Federal Register on December 14, 1977, (42 F.R. 62939) to amend Rules 42 and 53 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.42 and 502.53. The purpose of the proposed amendments was to simplify the conduct of rulemaking proceedings by limiting them to a single round of comments unless there are particular circumstances in which this format would hinder the Commission's ability to formulate a just and reasonable rule. Specifically, Rule 42 would be amended to provide that the Director, Bureau of Hearing Counsel would be party to a rulemaking proceeding only by designation of the Commission. Rule 53 would be amended to provide that no replies

to comments would be allowed unless the Commission determined that the nature of the proceeding warranted replies in order to fashion an adequate rule.

In response to the notice, comments were submitted by the Maritime Administrative Bar Association (MABA), the law firm of Lillick, McHose, and Charles (Lillick), Sea-Land Service, Inc. (Sea-Land), and Wade S. Hooker, Jr. (Hooker), an attorney who practices before the Commission. We have considered these comments carefully and have determined to publish the rules in final form as originally proposed. An analysis of the comments follows.

1. Rule 42. MABA takes no position with respect to the participation of Hearing Counsel although some of its members believe that Hearing Counsel should be permitted to request leave of the Commission to participate. Lillick similarly has no comment on this proposal while submitting that Hearing Counsel's participation is often beneficial. Sea-Land supports the proposal. Hooker has no comment but believes a second round of comments is essential.

As indicated, no commenter opposes this revision. The Bureau of Hearing Counsel always has the power to request an opportunity to participate and, of course, the proposal itself contemplates the Commission's designation of their participation.

2. Rule 53. MABA opposes this proposal on several grounds. First, no criteria are established to determine which proceedings are considered by the Commission to warrant a reply round. Secondly, the parties would be denied the views of others and the opportunity to comment on alternate recommendations made in response to the notice of proposed rulemaking. Thirdly, MABA is of the opinion that a reply round serves to narrow the controverted issues. Lastly, some members suggest that the Commission require that all comments be served on all other commentators to facilitate the filing of meaningful replies.

Lillick urges retention of the current system, expressing concern that the use of one round of comments would not afford a fair opportunity to be heard. Lillick also criticizes the lack of criteria for determining which proceedings will be limited to one round of comments.

Similarly, Sea-Land would have us definitively set forth which proceedings will be limited to one round of comments.

Hooker also expresses concern that the proposals would limit participation in formulation of a rule, urging that the Commission supplement the proposed changes herein to the effect that, should the Commission make substantial amendments to a proposal, another opportunity should be given for comment.

The instant proposals are designed to give the Commission flexibility in the type of rulemaking proceedings it conducts. In this context, we feel that the concerns expressed by the commentators are unfounded. As indicated in the notice instituting this proceeding, the one-round procedure would not be followed in proceedings involving factual disputes or

complex issues. Moreover, the determinations as to what type of proceeding will be employed will not be made necessarily in the initial proposal. It may well be that we will determine to have further submissions after seeing the initial comments. Similarly, the Commission would not make substantive changes to a proposal and finalize without further opportunity for comment; such a procedure would not be permitted by the Administrative Procedure Act.

In summary, we reiterate that the single-round proceeding will not be employed where complex or factual issues are involved. We are therefore adopting the rules as proposed.*

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

1. Section 502.42 is amended by changing all references to "he" and "his" to "the Director" and "the Director's" and by changing the period at the end of the first sentence to a comma and adding the following:

> and in rulemaking proceedings the Director may become a party by designation if the Commission determines that the circumstances of the proceeding warrant such participation.

2. Section 502.53 is amended by changing the colon appearing after the word "manner" in the first sentence to a period and adding the following:

> No replies to the written submissions will be allowed unless, because of the nature ot the proceeding, the Commission indicates that replies would be necessary or desirable for the formulation of a just and reasonable rule:

EFFECTIVE DATE: Inasmuch as the expeditious adoption of these rules is desirable and inasmuch as they are procedural in nature, they shall be effective upon publication in the *Federal Register*.

By the Commission.

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

*Gender specific references in the existing and proposed rules have been eliminated.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 358(I)

UNION CARBIDE CORPORATION

v.

HAPAG-LLOYD A.G.

NOTICE OF DETERMINATION NOT TO REVIEW

April 26, 1978

Notice is hereby given that the Commission on April 26, 1978 determined not to review the decision of the Settlement Officer in this proceeding served April 17, 1978.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 358(I)

UNION CARBIDE CORPORATION

v.

HAPAG-LLOYD A.G.

Reparation Awarded.

DECISION OF CAREY R. BRADY[1]

Complainant seeks reparation in the amount of $305.83 from respondent, claiming a freight overcharge on a shipment from New York, New York to Antwerp, Belgium carried aboard respondent's vessel Weser Express on Bill of Lading No. C 0013 dated July 18, 1975.

Respondent denied the claim solely on the basis of Rule 8, North Atlantic Continental Freight Conference Tariff No. (29) FMC-4 which requires that claims be filed within six months after date of shipment. The Commission has ruled that a claim filed within two years from the date the cause of action arose must be considered on its merits.[2] The bill of lading is dated July 18, 1975 and the claim was filed with the Commission August 16, 1976. The claim has been filed within the two year statutory limit and thus will be treated on the merits.

Respondent does not dispute the claim and offers no defense other than of the claim being time barred under Rule 8 of the Conference tariff.

While the Commission has ruled that a rule similar to the one on which respondent is denying relief cannot be used to defeat a claim properly filed with the Commission the complainant nevertheless has a heavy burden of proof once the shipment has left the custody of the carrier.[3]

The shipment weighed 84,588 pounds and was rated on the basis of $79.75 per 2,240 pounds plus 4.5% currency adjustment factor, producing total charges of $3,147.08. The complainant alleges the commodity should

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

(Note: Decision not to review April 26, 1978).

[2] Colgate Palmolive Company v. United Fruit Company, Informal Docket No. 115(I), 1970.

[3] Ibid.

have been rated Synthetic Resin, NES[4] at $72.00 per 2,240 pounds plus 4.5% currency adjustment. Such a classification would have saved the complainant $305.83.

The bill of lading, carrier's freight bill and the export declaration described the commodity shipped as Synthetic Resin in drums. Item 581.000.650 of the tariff specifically provides a rate on Synthetic Resin at $72.00 per 2,240 pounds. The bill of lading and supporting shipping documentation clearly show the cargo shipped to be Synthetic Resin.

Complainant having met his burden of proof, reparation is awarded in the amount of 305.83.

(S) CAREY R. BRADY,
Settlement Officer.

[4] Tariff item 581.0001.650, 26th Rev. Page 174.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 464(I)

GENERAL TIME CORPORATION

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

April 26, 1978

Notice is hereby given that the Commission on April 26, 1978 determined not to review the decision of the Settlement Officer in this proceeding served April 19, 1978.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 464(I)

GENERAL TIME CORPORATION

v.

SEA-LAND SERVICE, INC.

Reparation awarded in part.

DECISION OF GEORGE D. UNGLESBEE, SETTLEMENT OFFICER[1]

General Time Corporation (complainant) claims the difference between the total freight charges assessed on the basis of the noncontract rate, instead of the contract rate, on thirteen (13) separate overland common point (OCP) shipments of timers and clock parts, originating at Gadsden, Alabama and moving from Oakland, California to Tokyo, Japan, Hong Kong and Inchon, Korea. Total transportation charges of $17,220.32 were assessed, while complainant alleges said charges should have amounted to $15,631.80 and is seeking reparation in the amount of $1,588.52 from Sea-Land Service, Inc. (respondent). The thirteen (13) shipments, consisting of one to Tokyo, seven to Hong Kong, and five to Inchon, were shipped on board respondent's vessels M/S FINANCE, McLEAN, TRADE, EXCHANGE, and/or COMMERCE, between February 16, 1976 and July 6, 1976. The shipments involved were assessed the noncontract rates in effect on the date of shipment from point of origin of the particular shipment as contained in Item 864 0000 00 on 5th Revised Page 291, and Rule No. 1(s) (Rate Conversion Tables for Contract/Non-Contract Rates), of Pacific Westbound Conference Overland Freight Tariff No. 6, FMC-13.[2]

Complainant submitted the claim to respondent on June 21, 1977. On July 22, 1977, respondent denied the claim on the basis that complainant

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

(Note: Determination not to review April 26, 1978.)

[2] Rates to Inchon are constructed by the use of the baseport rate to Busan, Korea found in Item 864 0000 00, plus an outport rate or arbitrary, of $6.00 as set forth on 4th Revised Page 10, Pacific Westbound Overland Freight Tariff No. 6, FMC-13.

was not included on the list of contract signatories of the Pacific Westbound Conference, and at the same time cited the provisions of Rule 43 of the subject tariff which provides in pertinent part:

> "All other claims for adjustment of freight charges must be presented to the Carrier in writing within six (6) months after date of shipment." [3]

The claim was resubmitted to respondent with the advice that complainant signed a merchant's rate agreement with the Pacific Westbound Conference on March 15, 1966 under Contract No. 3553. On September 7, 1977, respondent once again denied the claim, stating that respondent must adhere to the provisions of Rule 43, supra, but advised complainant that Section 22 of the Shipping Act, 1916, allows a two year statute of limitations.

Respondent and complainant confirm, by submission by each of a copy of Contract No. 3553, that the dual rate contract was executed on March 9, 1976. Complainant has amended the total amount of reparation claimed from $1,588.52 to $1,647.54 by properly deleting the overcharges claimed on one shipment made prior to its signing the contract, and by correcting erroneous rate computations made in the overcharge claims on two of the remaining shipments. However, complainant failed to delete the (corrected) overcharge claims on the latter two shipments which were also shipped from point of origin prior to March 9, 1976.[4]

The three shipments that were shipped from point of origin prior to March 9, 1976, are identified in Table I below, and Table II below is a computation deleting the total overcharges claimed on the three shipments in Table I from the total (amended) overcharges claimed.

Table I

	Overcharge Claimed
1. 5 Skids: Timers, shipped from Gadsden, Alabama, March 3, 1976, destined Hong Kong, on Bill of Lading No. 993–365762	$124.99
2. 12 Skids: Clock Parts, shipped from Gadsden on February 6, 1976, destined Inchon, Korea, on Bill of Lading No. 993–365112	83.21
3. 6 Skids: Clock Parts, shipped from Gadsden on March 5, 1976, destined Inchon on Bill of Lading No. 993–365893	80.85
Total	$289.05

[3] The complaint was filed with this Commission within the time limit specified by statute; and it has been well-established by the Commission that the carrier's so-called "six month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

[4] Apparently, complainant did not delete the overcharges claimed on these two shipments because of the dates of March 9, 1976, and March 16, 1976, on bill of lading No. 993–365762 to Hong Kong, and bill of lading No. 993–365893 to Inchon, respectively. However, Rule 1(b) on 4th Revised Page 12 of the applicable conference tariff provides, inter alia, that ". . . rates of freight or other charges applicable are those in effect on the *date of shipment from point of origin*." (emphasis added).

Table II

Total overcharges originally claimed	$1,588.52
Less deletion of overcharge claimed on Shipment No. 2 in Table I	83.21
	$1,505.31
Plus increase in overcharges claimed on Shipments Nos. 1 and 3 in Table 1 due to complainant's corrected rate computations	142.23
Total overcharges claimed (amended)	$1,647.54
Less deletion of overcharges claimed on Shipments Nos. 1 and 3 in Table I	205.84
Total overcharges, as amended and corrected	$1,441.70

Shipments Nos. 1 and 3 in Table I were shipped from point of origin prior to March 9, 1976, the date on which the parties executed Contract No. 3553, and were properly assessed non-contract rates by respondent. Reparation in the amount of $205.84 sought on these two shipments is denied.

The remaining ten shipments were shipped from point of origin subsequent to March 9, 1976, and were improperly assessed non-contract rates by respondent. The amended claim, less the overcharges denied above, is for $1,441.70, or less than the proper total overcharges of $1,625.07 due on the ten shipments. In computing the proper freight charges on the ten remaining shipments, complainant applied the incorrect contract rate on one shipment[5], resulting in an understatement of $183.37 in the overcharges claimed thereon. The following computations apply:

652 cu.ft. / 40	= 16.3MT (rate $122.00, *applied by complainant*)	= $1,988.60	
	16.3MT (arbitrary—$6.00)	= 97.80	
	16.3MT (handling charge—$5.75)	= 93.73	
			$2,180.13
652 cu.ft. / 40	= 16.3MT (rate $110.75)	= $1,805.23	
	16.3MT (arbitrary—$6.00)	= 97.80	
	16.3MT (handling charge—$5.75)	= 93.73	
			1,996.76
			$ 183.37
Total (amended) overcharges claimed			1,441.70
			$1,625.07

Complainant is therefore awarded reparation in the amount of $1,625.07.

(S) GEORGE D. UNGLESBEE,
Settlement Officer.

[5] 11 Skids Clock Parts from Gadsden, shipped March 31, 1976, to Inchon on bill of lading No. 993-703182 dated April 19, 1976.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 482(I)

MITSUBISHI INTERNATIONAL CORPORATION

v.

N.Y.K. LINE

ORDER ON REVIEW OF SETTLEMENT OFFICER'S DECISION

May 2, 1978

The decision of the Settlement Officer in this proceeding was served April 12, 1978, wherein a claim for reparation for overcharge of ocean freight was awarded in part. We agree with much of that decision but modify it to the extent discussed herein.

The Settlement Officer's denial of claim MI–05 is based on the expiration of the statute of limitations. In computing the time under the Commission's rules, the Settlement Officer has interpreted "date of delivery" in Rule 302[1] to mean delivery of cargo to the consignee. The Commission has previously held that a cause of action involving overcharges under Section 18(b)(3) of the Act arises either upon delivery of cargo to the *carrier* or payment of charges.[2] Thus the reference in Rule 302 to "delivery of the property" is to be interpreted to mean delivery to the carrier rather than the consignee. Claim MI–05 is time-barred under either interpretation.

While awarding reparation on the other claims, the Settlement Officer has indicated that because it appears that the freight forwarder may have paid the charges on these shipments, rather than the shipper claimant, respondent is to ensure that the refunds ordered are remitted to the payer of the freights and charges. We too are concerned that refunds not be awarded to persons not entitled to them. However, Section 22 of the Shipping Act, 1916 and Commission precedent would not permit an award of reparation to one not a party to the proceeding. Therefore, the forwarder could not be awarded reparation here. Additionally, reparation may be awarded only to a claimant who has shown that it was *injured* by

[1] Rule 302 states that a cause of action is deemed to accrue . . . "upon delivery of the property or payment of the charges, whichever is later."

[2] *Commercial Solvents Corp.* v. *Moore McCormack Lines, Inc.* 16 S.R.R. 1631 and *U.S.* v. *Helenic Lines, Ltd.* 14 FMC 254, 260.

a violation of the statute.[3] While we agree that violations have occurred here, it has not been shown that claimant has paid the charges or been injured. Claimant has failed to indicate who paid the charges as required by the Commission's Rule 304 and form of complaint. As pointed out by the Settlement Officer there is some indication that the forwarder may have paid them and, if so, we do not know if reimbursement was made.

We conclude therefore, that while a violation of the Act has occurred, claimant cannot be awarded reparation until it demonstrates that it actually paid or reimbursed the forwarder for payment of the charges found to be unlawful. It is ordered that reparation will be denied unless claimant, within 30 days from the date of this order furnishes evidence to the Commission that it has paid the charges in question.

By the Commission.

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

[3] See generally SD 489, Order on Remand served November 29, 1977, Supplemental Decision of the Administrative Law Judge served January 27, 1978, and Notice of Adoption served March 1, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 560

AMERICAN HOME FOODS

v.

SEA-LAND SERVICE, INC.

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

May 3, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on May 3, 1978.

IT IS ORDERED, That applicant is authorized to waive collection of $3,500.00 of the charges previously assessed American Home Foods.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice.

"Notice is hereby given, as required by the decision in Special Docket No. 560 that effective September 10, 1977, for purposes of refund or waiver of freight charges on shipments which may have been shipped during the period from September 10, 1977 through December 6, 1977, the rate on 'Pizza, Frozen' is $11,000.00 per container subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That waiver of the charges will 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) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 560

AMERICAN HOME FOODS

v.

SEA-LAND SERVICE, INC.

Adopted May 3, 1978

Application for permission to waive collections of a portion of freight charges granted.

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

Sea-Land Service, Inc., pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 18(b)(3) of the Shipping Act, 1916, as amended, on January 20, 1978, filed for permission to waive collection of $3,500.00, being a portion of applicable freight charges totaling $14,500.00 on a shipment of a container load of frozen pizza pies from New York, N.Y. (Elizabeth, N.J.) to Dammam, Saudi Arabia, on September 10, 1977.[2]

The rate for the commodity applicable at the time of shipment was $362.50 per 40 cubic feet, minimum 1,600 cubic feet per container.[3] The rate sought to be applied—$11,000.00 per container.[4]

On 8–24–77, a rate of $11,000.00 per container on Pizza, Frozen from POL/NY—POD/Dammam had been quoted by E. Aldridge of Sea-Land's Atlantic Division.

On August 25, 1977, Mr. Aldridge wrote Mr. Paul G. Davis[5] of Sea-Land's Pricing Office as follows:

> Paul, in reference to our telephone conversation of 8/24 please publish for frozen pizza the rate of $11,000 per refrigerated container from Elizabeth to Dammam.
>
> It is imperative that the rate be effective to cover booking number 6–27932 scheduled for sailing on S/L Market ex Elizabeth 9/8/77.
>
> Thanks.

[1] This decision became the decision of the Commission May 3, 1978.
[2] Per bill of lading 901–780999.
[3] Item 678, Sea-Land Tariff 256–A, FMC 136, page 80–B.
[4] Per item 678, Sea-Land Tariff 256–A, FMC 136, 6th RP page 80–C.
[5] Received at Iselin August 29, 1977.

Due to vacations and travel by Mid-East Pricing personnel, there was an inadvertent failure to revise the tariff in accordance with Mr. Aldridge's instructions and the cargo moved without the tariff being amended.

Prior to filing the application for permission to waive the difference between the tariff at time of shipment and the tariff as intended, Sea-Land, on December 7, 1977, amended Tariff 256–A, Item 678, to reflect the rate as intended.

Sea-Land is not aware of any other shipments of the same commodity during the same period or time from another shipper.

The Commission's authority to permit carriers to refund a portion of freight charges collected from shippers or to waive the collection of a portion of freight charges where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff is derived from the provisions of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 17(b)(3).[6] After stating the requirement that common carriers by water in foreign commerce or conferences of such carriers charge only the rates and charges specified in tariffs on file with the Commission, section 18(b)(3) provides, as pertinent:

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

It is concluded and found that there was an error of an administrative or clerical nature within the intent of section 18(b)(3) by the failure to file a new tariff; that the authorization of a waiver of a portion of the freight charges will not result in discrimination among shippers; that prior to applying for authority to waive a portion of the charges, Sea-Land filed a new tariff which sets forth the correct basis, on which the waiver of a portion of the charges would be computed; and that the application was timely filed.

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[6] The Commission's regulations implementing section 18(b)(3) appear in Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a).

In accordance with section 18(b)(3) of the Act, permission is granted to waige a portion of the charges. The waiver authorized is $3,500.00.

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

WASHINGTON, D.C.,
April 6, 1978.

[1] This decision became the decision of the Commission May 3, 1978.
[2] Per bill of lading 901-780999.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 541

A. E. STALEY MFG. CO., DECATUR, ILLINOIS

v.

MAMENIC LINE

ORDER ON RECONSIDERATION

May 5, 1978

This proceeding was initiated by virtue of an application filed by Mamenic Line (Mamenic) requesting permission to waive collection from A.E. Staley Mfg. Co., Decatur, Illinois, of a portion of the freight charges assessed on a shipment of Dextrine, in bags, from New Orleans, Louisiana, to Puerto Limon, Costa Rica.

Mamenic alleged in its application that it had agreed at the shipper's request to file a rate for Dextrin of $70.00 per 2000 pounds but, due to a clerical error, published instead a rate of $70.00 applicable either by weight or measurement.

Administrative Law Judge Seymour Glanzer denied the application upon finding that Mamenic had, in fact, filed neither the $70.00 W/M or the $70.00 W rates in its tariff.

By Notice served January 16, 1978, the Commission adopted the Initial Decision.

Subsequently, Complainant requested the Administrative Law Judge to reconsider his denial of the application. This request was referred to the Commission, which by Notice served January 28, 1978, advised the parties that Complainant's letter would be treated as a petition for reconsideration of the Commission's adoption of the Initial Decision.

In its request Complainant concedes that Mamenic Line may not have filed the $70.00 W rate but points out that it and the carrier had nevertheless agreed on that rate for Dextrin. Complainant submits that had the rate been properly published there would have been no need for applying to the Commission.

While we are not unsympathetic to Complainant's claim, we are without the authority to grant the relief requested. Section 18(b)(3) of the Shipping Act, 1916, reads in part:

> That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce . . . to . . . waive 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 . . . *Provided* Further, That the common carrier . . . *prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based.* . . . (Emphasis added.) 46 USC 817(c)(3).

This provision makes clear that, unless the carrier prior to filing his application publishes a new tariff which sets forth the rate it seeks to apply, the Commission is without authority to consider the merits of the application. This requirement cannot be waived, and as much as the Commission might wish to grant relief in situations such as we have here, where the consequences of subsequent errors by the carrier fall upon the shipper, the Commission, whose jurisdiction is strictly limited by statute, has no power to grant the relief requested.

Accordingly, for reasons stated above, the Commission's adoption of the Initial Decision is hereby affirmed.

It is so ordered.

By the Commission.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 460

U.S. DEPARTMENT OF AGRICULTURE

v.

WATERMAN STEAMSHIP CORPORATION

SPECIAL DOCKET NO. 461

U.S. DEPARTMENT OF AGRICULTURE

v.

WATERMAN STEAMSHIP CORPORATION

NOTICE OF ADOPTION OF INITIAL DECISION

May 5, 1978

Notice is hereby given that, upon review, the Commission has determined to adopt the initial decision of the Administrative Law Judge in these proceedings.

It is ordered that applicant shall effectuate the waiver, publish the appropriate notice and notify the Commission of its actions in the time and manner required by the initial decision,

By the Commission.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 460

U.S. DEPARTMENT OF AGRICULTURE

v.

WATERMAN STEAMSHIP CORPORATION

SPECIAL DOCKET NO. 461

U. S. DEPARTMENT OFAGRICULTURE

WATERMAN STEAMSHIP CORPORATION

v.

Adopted May 5, 1978

Permission granted to waive collection of portions of freight charges in Special Docket Nos. 460 and 461.

C. Neil Johnson and *Richard T. Iwamoto* for complainant.

Ralph E. Casey, Sanford C. Miller and *David S. Zweig* for respondent.

John Robert Ewers, C. Jonathan Benner and *Deana E. Rose* for Hearing Counsel.

INITIAL DECISION[1]
SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

These are two applications, made pursuant to the provisions of section 18(b)(3)[2] of the Shipping Act, 1916, as amended, 46 U.S.C. 817(b)(3), and

[1] This decision became the decision of the Commission May 5, 1978.

[2] After stating the requirement that common carriers by water in foreign commerce or conferences of such carriers charge only the rates and charges specified in tariffs on file with the Commission, section 18(b)(3) provides, as pertinent:

Provided, however, That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper 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 inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: *Provided further,* That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based: *Provided further,* That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the

Rule 92(a)[3] of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), whereby Waterman Steamship Corporation (hereafter Waterman or carrier), respondent, asks permission to waive collection of portions of freight charges for the transportation of a shipment of yellow corn, in bags, consigned by the United States Department of Agriculture (Commodity Credit Corporation) (hereafter USDA or shipper), complainant,[4] from Galveston, Texas, to the U.N.D.P. Resident Representative, Addis Ababa, Ethiopia (Special Docket No. 460), and a shipment of grain sorghum, in bags, consigned by the same shipper from Houston, Texas, to the same consignee at the same destination (Special Docket No. 461). The applications state, respectively, that the shipments were delivered to the carrier's loading berth on October 17, 1973 and November 13, 1973.

Both applications contain the statement that, if the application is granted, respondent agrees to publish notice to that effect in its tariff (or any reissued tariff) and to take such other action as the Commission may require to give notice of the rate on which the waiver is based and that any additional refunds or waivers or other similar shipments will be made in the manner prescribed in the Commission's order. Therefore, in both Special Docket Nos. 460 and 461, the requirements of the third *proviso* of section 18(b)(3) have been met.

In Special Docket No. 460, an initial decision, in part, was served May 29, 1974. It granted permission to waive collection of a portion of the freight charges, representing the difference between those charges under the carrier's General Cargo N.O.S. rate plus a 25% deviation surcharge, on the one hand, and a negotiated rate, on the other hand (hereafter sometimes referred to as the General Issue to distinguish it from the War Risk Surcharge Issue), but deferred action, pending a hearing, on the waiver of collection of charges under the War Risk Surcharge provision of respondent's tariff. Thereafter, Hearing Counsel petitioned the Com-

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

[3] Rule 92(a) provides:

Common carriers by water in foreign commerce, or conferences of carriers may file application for permission to refund a portion of freight charges collected from a shipper or to waive collection of a portion of freight 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 inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Such application must be filed with the Commission within 180 days from the date of the involved shipment. Prior to application, the applicant must file with the Commission an effective tariff setting forth the rate on which such refund or waiver would be based. All such applications shall be made in accordance with the form prescribed in Appendix II(7) and will be considered the equivalent of a complaint and answer thereto admitting the facts complained of. If permission is granted, the Commission will issue an order authorizing refund or waiver. The applicant must agree to publish notice of same in the appropriate tariff and to take such other actions as the Commission may require to give notice of the rate on which the refund or waiver is based. Additional refunds or waivers on other similar shipments will be made in the manner prescribed in the Commission's order.

[4] The second and fourth *provisos* of section 18(b)(3) authorize a carrier to apply for waiver, by filing an application. The format of the application, under Rule 92(a), establishes the shipper as a nominal complainant and the carrier as a nominal respondent. See *International Materials Corp. v. Micronesia Interocean Line, Inc.*, 13 F.M.C. 118, fn. 2 at 119 (1969). Rule 92(a) provides that such applications be handled as Special Docket proceedings, and, for foreign commerce shipments requires the application to be filed in accordance with the form prescribed in Appendix II(7). Appendix II(7) requires the shipper to concur in and execute the application along with the carrier in situations in which refund is sought.

mission for leave to intervene in the proceeding and requested, as additional relief, that the Initial Decision be remanded for hearing and consideration of the issue already decided as well as the War Risk issue and further requested that Special Docket Nos. 460 and 461 (hereafter S.D. 460 or S.D. 461 individually, and S.D. 460 and 461, collectively), be consolidated. By order served August 15, 1974, the Commission granted Hearing Counsel's petition in its entirety.

Hearing was held April 29, 1975, through May 1, 1975. Four witnesses testified. Twenty exhibits were received in evidence.

I. The General Issue

A. S.D. 460

In considering an application for waiver, the Commission is obliged to determine whether the criteria established by the four *provisos* of section 18(b)(3) have been satisfied. In S.D. 460, a sequence of events occurred which caused the applicant to voice a special concern over its compliance with the jurisdictional requirements of the second and fourth *provisos* of section 18(b)(3). It is desirable to deal with these aspects of the proceedings, preliminarily, before going on to the other issues.

The application in S.D. 460 was initially tendered for filing with the Commission on April 9, 1974. However, the respondent had not filed with the Commission an effective tariff setting forth the rate on which such waiver would be based, as required by the second *proviso* of section 18(b)(3) and by the third sentence of Rule 92(a). Accordingly, the Secretary of the Commission rejected the tender, notifying the respondent by letter dated April 9, 1974, that he was returning the application without prejudice to timely resubmission, for under the fourth *proviso* of section 18(b)(3) the Commission lacks jurisdiction to entertain the application unless it is filed within 180 days from the date of shipment. Cf. *Walter Plunkett & Company v. Micronesia Interocean Line, Inc.*, 13 F.M.C. 101, 103 (1969); *Oppenheimer Intercontinental Corp. v. Moore-McCormack Lines, Inc.*, 15 F.M.C. 49 (1971).

On April 15, 1974, prior to 3:00 p.m., respondent's agent made a telegraphic filing of an amendment to respondent's tariff,[5] setting forth the rate on which the waiver would be based. At 3:24 p.m., on that day, respondent resubmitted the application, by hand delivery, accompanied by a transmittal message[6] explaining the reason for delay in filing until

[5] The Commission's General Order 13, 46 CFR 536, authorizes telegraphic filings of tariff amendments. See 46 CFR 536.6(c). Telegraphic amendments resulting in a decrease in cost or no change in cost to the shipper may become effective upon publication and filing. 46 CFR 536.6(a)(3). Effective January 1, 1978, General Order 13 was revised. Under that revision, authorization for telegraphic filings appear at 46 CFR 536.10(c); 46 CFR 536.6(a)(3) now appears at 46 CFR 536.10(a)(3).

[6] The transmittal is time stamped as noted in the text, above. The time of receipt of the telegraphic filing of the tariff is detzrmined by the legend, "Time: 3:00 p.m.," which appears in the immediately subsequent message received by the Commission's telex machine.

April 15th. It attributed the delay to postal difficulties, advising that the Secretary's letter did not arrive until April 15th. In the apparent belief that the 180 day period had expired the previous day, but that a tardy mail delivery might toll the time, respondent added that "Had he been advised last week, this application would have been refiled prior to April 14." This statement would appear to indicate that the respondent made a calculation and reached the result that 181 days elapsed between the date of the shipment and the date of the filing of the application. If the respondent's computation proved out, then, under the express terms of the fourth *proviso* of section 18(b)(3), the Commission would be jurisdictionally barred from considering the application.

However, the respondent calculated erroneously and its apprehension that the application might be barred by the passage of time is groundless. The reasonable explanation for the miscalculation is that respondent started its tabulation by numbering October 17, 1973, as day number one. However, the use of the term "*from* the date of shipment" in the fourth *proviso*, establishes that the count should begin on the first day after the date of shipment. This is the construction applied by the Commission. *Ghiselli Bros. Inc. v. Micronesia Interocean Line, Inc.*, (Initial Decision) 13 F.M.C. 186 (1960), reversed on other grounds, 13 F.M.C. 179, 182 (1969).

However, we do not begin the tally of days with October 18, 1973,[7] for, here, the delivery to respondent's dock was not completed until November 5, 1973, and the bill of lading was not issued until even later—November 22, 1973. Either of those days may be considered the date of shipment for the purposes of section 18(b)(3) and the applicant may be given the benefit of the alternative. *Ghiselli Bros. Inc. v. Micronesia Interocean Line, Inc., supra*, 13 F.M.C. at 187 and 182.[8]

[7] The shipment was made up of eleven separate deliveries to the carrier extending from October 17, 1973 through November 5, 1973. (See eleven daily wharf reports attached to Ex. 1 and Transcript, p. 23.)

[8] Payment of the charges in S.D. 460 and 461 was made by Commodity Credit Corporation Check No. 699,970 on January 2, 1974. In view of the findings made herein (whether under the alternatives offered by *Ghiselli, supra*, by beginning the tally on October 18th, the day after delivery commenced, or November 6th, the day after the delivery to the carrier was completed, or November 23rd, the day after the on-board bill of lading was issued) it is unnecessary to decide whether the 180 day time period fixed by section 18(b)(3) may run from the date of payment. Cf., *Order on Remand*, served July 12, 1976 in Docket No. 76–1, *CSC Intercontinental Inc. v. Orient Overseas Container Line, Inc.*, at p. 2, emphasizing that "The law is well settled that a cause of action based upon a claim for reparation accrues at the time of shipment or upon payment of freight charges, whichever is later. *Aleutian Homes, Inc. v. Coastwise Line, et al.*, 5 F.M.B. 602, 611 (1959); *United States of America v. Hellenic Lines Limited*, 14 F.M.C. 255, 260 (1971); *U.S. ex rel Louisville Cement Company v. I.C.C.*, 246 U.S. 638, 644 (1918)." Claims for reparation are governed by section 22, Shipping Act, 1916, 46 U.S.C. 821, which has a jurisdictional time limit for filing a complaint "within two years *after* the cause of action *accrued*." The operative time limit for filing under section 18(b)(3) is "within one hundred and eighty days *from* the time of *shipment*." Because of the different terminology employed in the two statutes, the date of payment has not been considered a relevant factor in proceedings brought under section 18(b)(3). However, while not entirely free from doubt, there is reason to believe that the term "from the date of shipment" was intended to be synonymous with the term "after the cause of action accrued." If this be so, then the 180 day count under section 18(b)(3) would begin at the time of shipment or upon payment of the freight charges, whichever is later.

"From the date of shipment" is an ambiguous term. It found its way into the statute without legislative discussion. The term was used first by a witness in proposing an amendment dealing with another aspect of the Commission's legislative proposal and was adopted by the Commission later in proposing a jurisdictional time limit for filing applications for relief. But, as explained in the text of this decision, *infra*, granting relief for inadvertent error was not novel at the Commission. The Commission had been doing so for years before it determined it did not have the

Accordingly, I find that the application in S.D. 460 meets the criteria of the second and fourth *provisos* of section 18(b)(3).

On the General Issue, findings were made in the partial initial decision in S.D. 460 based entirely on matters appearing in the application. Since then, no evidence has been introduced and no argument has been made at any subsequent phase of the proceeding to disturb those findings.[9] For that reason and because it will provide a convenient introduction to what follows, pertinent portions of those findings are repeated immediately below.

By written agreement,[10] dated October 3, 1973, the cargo was booked to be carried by respondents vessel, *SS Alex Stephens,* from Galveston to the discharge port of Djibouti, French Somaliland (The French Territory of Afars and Issas) at the rate of $68.75 per long ton plus a 25% Capetown Deviation surcharge. At that time, however, the applicable tariff rate for such shipment was $139.00, weight or measure for General Cargo, N.O.S. (not Dangerous, Hazardous or Refrigerated)[11] plus the aforementioned surcharge.[12] The agreement took this into account and specifically called for the carrier to amend its tariff to correspond to the negotiated rate. This was done,[13] but its effect on this shipment was negated when the shipper decided to change the destination port from Djibouti to Assab. A superseding written agreement, dated October 16, 1973, reflected this new discharge port, and, as did the supplanted agreement, required the carrier to amend its tariff. Otherwise, the aforementioned General Cargo N.O.S. rate would govern. The carrier, however, did not cause its tariff to be amended, as it had agreed.

Thereafter, commencing October 17, 1973, and ending November 5, 1973,[14] the cargo was delivered to respondent's pier at Galveston where it was loaded aboard the *SS Alex Stephens.* That ship then proceeded to Houston, Texas, where, on or about November 13, 1974, it on-loaded

requisite statutory authority. However, in those cases in which relief was granted, it was done within the framework of proceedings instituted under section 22 and that section's two-year jurisdictional filing period which commenced upon accrual of the right to relief, or—upon payment of freight charges. The thrust of the Commission's legislative proposal was authorization to be allowed to do what it mistakenly had been doing in the past and to do it in conformity with the procedures it had employed in the past, but with certain added safeguards. There is nothing to indicate that in proposing as a safeguard a shorter jurisdictional time period for filing in section 18(b)(3) than is provided for in section 22, that the Commission intended to fix a new and different standard for measuring that time period.

[9] In fact, the Memorandum of Law submitted by Hearing Counsel in advance of the hearing unequivocally disclaimed opposition to the conclusion reached on the General Issue in the partial initial decision. At pp. 3–4 of that Memorandum, Hearing Counsel wrote, "Judge Glanzer's conclusion that refunds should be permitted of those portions of freight charges (exclusive of War Risk Surcharges) which exceeded the negotiated rate of $68.75 per 2240 pounds is, in our view, correct. His holding on this issue was confined to the Special Docket No. 460 cargo of corn. We submit that the operative facts relating to the rate assessed on the Special Docket 461 cargo are nearly identical and that similar relief is justified."

[10] Cargo Booking Confirmation (Ocean Carrier, a government form, No. EMS–393).

[11] Waterman Steamship Corporation Tariff F.M.C. No. 73, 3rd rev. p. 54.

[12] *Id.*, original p. 31.

[13] *Id.*, 12th rev. p. 116.

[14] The application states "Shipment was delivered to Carrier's terminal on October 17, 1973." A subsequent letter from respondent, dated May 7, 1974, confirms that delivery of the cargo began October 17, 1973, and was completed on November 5, 1973.

additional cargo,[15] a shipment of grain sorghum from the same consignor to the same consignee at the same destination as here. (The grain sorghum shipment is the subject matter of S.D. 461.) On November 22, 1973, the respondent issued its "on-board" bill of lading for the shipment of 55,115 100-pound bags of corn, the shipment involved in S.D. 460.

Had there been no negotiated tariff rate, the shipment, computed at the General Cargo N.O.S. rate, would have called for charges of $718,217.33.[16] However, the respondent, in accordance with its agreement, billed the complainant at the contractual rate plus a 10% War Risk[17] Surcharge which had become effective October 23, 1973. The complainant paid the charge as billed, less the War Risk Surcharge. A further development of the facts surrounding the War Risk Surcharge appears in the discussion of that issue, *infra*.

The S.D. 460 application prays that respondent be permitted to waive the difference between $718,217.33 and $211,977.09 (the amount collected), the difference being $506,240.24. The application recites that there were no other shipments of the same or similar commodity which moved via respondent's vessels during the same period of time at the rate applicable at the time of the shipment involved in this proceeding.

The purpose of section 18(b)(3) is stated in its first *proviso* in which the Commission is authorized in its discretion and for good cause shown "to permit a carrier to waive collection of a portion of the charges from a shipper when the carrier errs due to inadvertence in failing to file a new tariff" and that such "waiver will not result in discrimination among shippers."

The law was not always thus. After enactment of 18(b)(3) in 1961, as implied in n. 8, *supra,* the Commission initially believed it could provide relief pursuant to special docket procedures in cases of inadvertent error in foreign commerce. See, *e.g., Lutcher, S.A. v. Columbus Line,* 7 F.M.C. 588 (1963). However, in *Ludwig Mueller Co., Inc. v. Peralta Shipping Corp.,* 8 F.M.C. 361 (1965), the Commission held that the earlier decisions were incorrectly decided because the Commission lacked the requisite statutory authority to alleviate burdens which fell upon innocent shippers due to a carrier's inadvertent error in failing to file an agreed-upon rate in the tariff. As a result, after *Mueller v. Peralta, supra,* and until the four *provisos* were added to section 18(b)(3) in 1968,[18] section 18(b)(3) was construed "to prohibit the Commission from author-

[15] In the partial initial decision in S.D. 460, I erroneously stated that the date of loading of the additional cargo was November 19, 1973. November 19th, of course, was the date of issuance of the on-board bill of lading for the additional cargo, the shipment involved in S.D. 461.

[16] Computed on the basis of 2466.6424 weight tons at the General Cargo N.O.S. rate plus the 25% surcharge, the charges for the shipment would be $428,579.11. However, there were 4133.625 measurement tons which would obviously produce greater charges. Under Rule 5(a) of respondent's tariff (F.M.C. No. 13, original, p. 13), it is required to apply the rate (weight or measurement) which produces the greater revenue.

[17] *Id.*, 1st rev. p. 32–A.

[18] Public Law 90–298, 90th Cong.

izing relief where, through a bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be."[19]

Accordingly, the Commission sought to be empowered "to authorize carriers to . . . waive the collection of a portion of their freight charges for good cause such as bona fide mistakes."[20] By way of illustration of the inequity of existing law which would be cured by the amendment, in a case of bona fide mistake, the Commission stated:[21]

> 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 rate.

The foregoing example of bona fide mistake fits the facts of S.D. 460 nicely and satisfies the requirements of the first *proviso*.

Therefore, on the General Issue in S.D. 460, I find that there was a bona fide mistake[22] and that the requirements of the statutory criteria for granting relief under section 18(b)(3) have been satisfied. Thus, there is warrant for the Commission to exercise its discretion, favorably, on the application and to grant permission to respondent to waive the collection of freight charges at the rate provided for General Cargo N.O.S. in its tariff. Since there have been no shipments of the same or similar commodity on respondent's vessels, I find that there is scant likelihood of discrimination.

B. S.D. 461

In S.D. 461, on the General Issue, the facts are substantially the same as those involved in S.D. No. 460 and the same relief is clearly warranted. These are the essential facts:

Prior to the shipment, Waterman and USDA entered into a booking agreement pursuant to which Waterman would establish a rate of $68.75 per 2240 pounds plus a 25% deviation surcharge for grain sorghum from Houston to Djibouti. At that time the applicable tariff rate for the shipment was $139.00 W/M for General Cargo, N.O.S. plus the deviation surcharge. The agreement took this into consideration and specifically

[19] House Report No. 920 (90th Cong., 1st Sess., November 14, 1967) *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*, pp. 3–4.

[20] *Id.*, p. 3.

[21] *Id.*, pp. 3–4.

[22] See Hearings on H.R. 9473 Before the Subcommittee on Merchant Marine, 90th Cong., 1st Sess., Sen. No. 90–11 (1967), p. 88, where Admiral Harllee, then the Chairman of the Commission, assured the Subcommittee that, in the administration of section 18(b)(3) the Commission was committed to an adjudicatory procedure before a hearing examiner to insure that entitlement to relief would be founded upon proof of the bona fide nature of the mistake. The colloquy follows:

> Admiral Harllee. On top of that, the case would come before a hearing examiner, who would seek proof of the bona fide nature of the mistake.
>
> Mr. Edwards. So that, in other words, it wouldn't just simply be a case of a shipowner writing out a check to the Shipper?
>
> Admiral Harllee. No.
>
> Mr. Edwards. There would be something more involved than that.
>
> Admiral Harllee. The case would appear before the hearing examiner, but under a very shortened procedure which we call "special docket procedure," in which there would have to be establishment of the fact that this is a bona fide mistake.

required the carrier to amend the tariff to correspond to the negotiated rate. The amendment was filed but, here too, the effect on the shipment was negated when USDA decided to change the destination port from Djibouti to Assab. A superseding written agreement, changing the destination to Assab was entered into on October 16, 1973, but in all other respects the new agreement's terms conformed to the earlier one. Waterman failed, however, to file a new tariff reflecting the Assab change. The grain sorghum was delivered to Waterman at Houston on November 13, 1973. An on-board bill of lading was issued on November 19, 1973; the conforming tariff setting forth the rate on which the waiver would be based was filed by telegraph April 26, 1974; and the application for waiver was filed April 30, 1974. There were no other shipments of the same or similar commodity during the same period of time at the rate applicable at the time of the shipment involved in this proceeding.

On those facts, on the General Issue in S.D. 461, I find that there was a bona fide mistake and that the statutory criteria for granting relief under section 18(b)(3) have been met. There appears to be no likelihood of discrimination. Therefore, permission is given to Waterman to waive collection of freight charges at the rate provided for General Cargo N.O.S. in its tariff.

II. War Risk Surcharge Issue

As noted earlier, in my Initial Decision, In Part, I deferred action, pending a hearing, on waiver of collection of charges under the War Risk Surcharge provision of Waterman's tariff. In that initial decision, I referred to many questions concerning the War Risk Surcharge Issue, some of which are no longer relevant or material in view of the testimonial and other evidence adduced at the hearing. I will omit any reference here to those matters raised in the partial initial decision which have now become inconsequential.

The application in S.D. 460 did not specifically seek waiver of collection of the War Risk Surcharge. It merely recited that the shipment was delivered to the carrier's terminal on October 17, 1973 (however, see n. 7 and n. 14, *supra*, showing that delivery began October 17, 1973 and was completed November 5, 1973); that Rule 105[23] contains an Effective Date of the Rate Rule providing that date of delivery of cargo to loading berth determines the effective date of the tariff rate; and that respondent "billed the charges at the rates set forth in the booking contract . . . but erroneously added a 10% War Risk Surcharge. The War Risk Surcharge did not become effective until October 23, 1973 (Rule 191 of Carrier's FMC 73) and therefore, when USDA paid the freight, the War Risk Surcharge was correctly deleted." USDA paid and Waterman collected $211,977.09 in freight charges.

[23] Rule 105, respondent's F.M.C. No. 73, original, p. 21, provides, "Cargo delivered to vessel's loading berth alongside or on the wharf, shall be assessed the Rate in effect at the time of such delivery."

Given those limited statements in the application, it was difficult to determine whether the parties viewed it as error to assess the War Risk Surcharge because of the so-called Effective Date of the Rate Rule or because of the *agreement*. In any event, I found that the War Risk Surcharge Issue must be considered within the purview of the proceeding in S.D. 460 although the application did not specifically seek waiver of collection of that Surcharge. However, because of the difficulty in determining what was the error upon which the parties relied and for other reasons set forth in the partial initial decision, a determination of the War Risk Surcharge Issue was deferred.

It is appropriate to note that all parties to the proceeding agree that the War Risk Surcharge Issue is properly before me in S.D. 460. With this understanding, the application for waiver may be deemed amended. As amended, the application should be read as a request for waiver of $790,039.06, computed as follows:

Applicable rate pursuant to Tariff:

4133.625 Measurement Tons	
at $139.00 Cargo N.O.S. rate	= $574,573.87
plus 25% Deviation Surcharge	= 143,643.46
plus 10% War Risk Surcharge	= 71,821.73
Total	$790,039.06

2466.6424 Weight Tons	
at $139.00 Cargo N.O.S. rate	= $342,863.29
plus 25% Deviation Surcharge	= 85,715.82
plus 10% War Risk Surcharge	= 42,857.91
Total	$471,437.02

Rating on the basis of measurement tons produces the greater revenue. Therefore, it is the applicable charge.

Freight charges under the agreement amount to $211,977.06, computed as follows:

2466.6424 Weight Tons	
at $ 68.75 W	= $169,581.65
plus 25% Deviation Surcharge	= 42,395.41
Total	$211,977.06

The difference between the charges under the applicable rate and the charges under the rate sought to be applied (the amount for which waiver is sought) in S.D. 460 is $578,061.97.

Inasmuch as the measurement tons, weight tons, applicable rate, rate

sought to be applied and amount paid in S.D. 461 are the same as those in S.D. 460, the amount for which waiver is sought in S.D. 461 is also $578,061.97.

The applications in both special dockets reveal that on October 3, 1973, the same day that Waterman and USDA entered into their agreement Waterman issued telegraphic instructions to its tariff publishing agent to publish special rates. The message identified the contract by name, number, quantity, size and destination, dates and rate. The rate was given as "$68.75[24] plus 25 percent NSD."[25] Waterman's instructions contained no reference to a War Risk Surcharge or to Rule 190,[26] its tariff rule, at that time, relating to War Risk Surcharge.

It was the next happening in the sequence of events which caused the issues in S.D. 460 to become beclouded and set in motion the need for a hearing to ascertain whether there was a bona fide mistake in connection with the War Risk Surcharge.

The applications show that the tariff publishing agent made a telegraphic filing of the corn and sorghum tariffs on October 10, 1973, and followed this up with a permanent filing of those tariffs, as project rates,[27] on October 15, 1973. The agent complied with the instructions, up to a point. Transposing the instructions into tariff form, the agent published the rate as "$68.75 W NSD subject to Rules 185 [the deviation surcharge rule *and 190*."

No evidence was produced to show the agent's authority for adding the reference to Rule 190. It can only be conjectured that he acted on his own in recognition of the facts that, after he received his instructions, the Yom Kippur War had erupted on October 6, 1973, and that transportation to the destination port might be affected by the hostilities. However, the resolution of the War Risk Surcharge Issue does not turn alone on the *ultra vires* act of the agent. It yet must be determined whether that Surcharge would be applicable even if there had been no reference to Rule 190 in the tariff filing.

Rule 190, provided for sharply graduated surcharges, keyed to specified percentage increases in the war risk hull and machinery insurance rate above that in effect on August 31, 1970, which "will be assessed and added to and will be in addition to all other rates and charges (including any other surcharges) provided in this Tariff." The surcharge was also governed by time and place factors.

On October 17, 1973, Rule 190 was in effect and its provisions would seem applicable. However, other things occurred which negated the applicability of Rule 190.

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[24] By a second message, the same day, Waterman corrected a numerical error in the first message applicable to the sorghum. The first transmission read $68.00 instead of $68.75, as the second message noted the proper rate to be.

[25] NSD means not subject to discount.

[26] F.M.C. No. 73, original, p. 32.

[27] Project rates are authorized by the Commission. Until January 1, 1978, the applicable regulations for project rates appeared at 46 CFR 531.0(n) and 531.7(e)(i). Since January 1, 1978, they appear at 46 CFR 531.2(a) and 531.6(m).

At the tariff page on which Rule 190 appears, there is a notation that on October 17, 1973, Rule 190, which had become effective more than eleven months before, was found to be "in violation of Section (s) 18(b)(2) of the Shipping Act, 1916"[28] and was rejected for the stated reason that "Increases on less than 30 days notice are not allowed." Formal written notice of the rejection occurred on October 23, 1973, when the respondent was advised by a branch chief of the Office of Tariffs and Intermodalism. Apparently, respondent was advised orally of the rejection prior to the branch chief's letter because on October 17, 1973 it sought special permission[29] to file the 10% War Risk Surcharge amendment, and upon issuance of Special Permission No. F-1645-I, it filed the amendment[30] telegraphically on October 23, 1973. As pertinent, the amendment, Rule 191,[31] provides:

> Effective October 23, 1973, a War Risk Surcharge of 10% will apply on all rates and charges (including all other charges), applicable on all traffic moving to or via the Red Sea, Gulf of Suez, Gulf of Aqaba and other ports within the scope of this Tariff.

The foregoing are the factors which set the stage for the hearing.

At the hearing it was established that it was the mutual intention and understanding of Waterman and USDA that no other surcharge, including War Risk, in Waterman's tariff, except the deviation surcharge which was explicitly made to apply, would be applicable to the shipments in S.D. 460 and 461. The evidence shows not only that it was the custom and practice between those parties that rate negotiations which ended in booking contracts often resulted in all inclusive rates, meaning that—every element of the charges, except those expressed as "special additional terms" would be included in the carrier's base (or flat) rate—but, also, that Waterman generally melded potential surcharges, such as War Risk, in the base rate it offered during negotiations with USDA and, in particular, included the potential for War Risk Surcharge, here.

These are some of the pertinent facts:

Testimony concerning the customs and practices of USDA and Waterman in booking cargoes and with respect to the facts of the two bookings in the S.D. proceedings were given by individuals who had considerable experience in booking cargoes for USDA and Waterman. USDA's witnesses were John Hudgins, who had 19 years experience in the Ocean Transportation Division (OTD), Foreign Agricultural Service of USDA, Thomas Rinn, who had eight years experience with OTD, the last three years as the Chief of Cargo Operations Branch of OTD, and

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[28] 46 U.S.C. 817(b)(2).

[29] Applications for special permission to permit increases in rates or issuance of new or initial rates on less than statutory notice were authorized and governed by specified provisions of General Order 13, 46 CFR 536.8. Cf. fn. 5, *supra*.

[30] Despite the requirements of 46 CFR 536.6(d)(ii) and the rejection letter, respondent did not place a notation on its War Risk Surcharge amendment filed pursuant to special permission that it was issued in lieu of the rejected rule. (By a correction to Rule 190, filed December 28, 1973, it did note that there was a rejection of Rule 190 on October 17, 1973.)

[31] F.M.C. No. 73, 1st rev., p. 32-A.

Leonard McCray, who has been a Traffic Management Specialist with OTD since 1967.

Robert Leyh, an employee of Waterman since 1968 and Waterman's Washington Office manager since January 1974, also testified.

The two shipments were made under Title II, Public Law 480, 83d Congress which was enacted in 1954. Under that statute, the United States makes agricultural commodities available to needy people throughout the world. The responsibility of USDA under this statute is to provide agricultural commodities and ocean transportation. OTD's responsibility is to obtain cargo space on ocean carriers to move this cargo. OTD normally makes around 2,000 to 2,500 bookings a year, although in Fiscal 1973, a slack year, there were about 1,200 to 1,300 bookings. Yet, about 2 million tons of cargoes were shipped in 1973. Ocean transportation costs range from $57,000,000, as in Fiscal 1973, to $120,000,000 a year. Except for the Department of Defense, USDA is, usually, the largest shipper of cargo from the United States.

USDA has had a considerable number of bookings with Waterman as shown, for example, by exhibits attached to Hudgins' affidavit (Ex. 1) evidencing 53 bookings in one year to the area near Djibouti and Assab.

Generally, the Minneapolis ASCS Commodity Office of USDA notifies OTD as to the type, quantity, loading port and destination of cargoes. Upon receipt of this information, OTD telephonically solicits bids from carriers which operate trade routes to the port of destination. The carriers are usually required to submit their offers within 24 hours. After all the offers are received, they are reviewed by the employee handling the booking with Rinn and a determination is then made as to which bid to accept or whether to continue further negotiation. Rinn had complete authority to make bookings up to $1,000,000.

OTD uses a work sheet called a "call sheet" in which the record of the telephonic negotiations are recorded. The call sheet shows the offer or replies made by the carriers, the counter-offers made by USDA and the final fixed rate. It also indicates the individuals participating, the dates involved and other data. The call sheet clearly indicates whether the rate fixed was a conference rate or an individual carrier's tariff rate which was negotiated and whether an amended rate was required to be filed by the carrier.

On occasions when Leyh was telephonically advised of a cargo availability by USDA, he would contact Waterman's New York office to consult with them as to the rate Waterman would offer.

After a booking is fixed by telephone, USDA prepares a booking confirmation showing the exact terms agreed to by the parties and the booking confirmation is sent to the carrier. The carrier must sign and return the form to USDA before USDA will pay freight charges. If there were any terms on the cargo booking confirmation form in variance with his understanding of the agreed terms, Leyh would contact USDA in order to make the appropriate changes.

There are two types of offers submitted by carriers. One type is the conference rate which is offered by a conference carrier and the other type is the rate offered by an individual carrier with its own tariff. USDA usually would accept the conference rate without negotiating further with the carrier. However, in cases where there were large quantities involved and Rinn believed that USDA was entitled to a better rate, he would ask the conference carrier to have the rate changed. But, it is recognized that it is cumbersome and time-consuming to change a conference rate because a telephone poll of all the conference carriers has to be taken. Because speed is essential in booking USDA's cargoes, changes in the conference rate are not usually requested in booking cargoes. USDA, however, continues to review conference rates and will request a conference to make rate changes if it believes that a rate is not reasonable.

With respect to the offers made by carriers with individual tariffs, USDA usually negotiates with the carrier to obtain the best possible rate. The rates negotiated by USDA are expressed in many ways depending on how the carrier makes its offer and how USDA counters the offers. USDA does not know why carrier offers sometimes include a surcharge in the base rate and sometimes have the surcharges broken out because the reasons for the practice are personal to the carrier. No one in USDA can tell what the monetary breakdown of the component parts of the negotiated base rate is since only the carrier knows.

One type of negotiated rate is the "all inclusive" rate which is expressed in a dollar amount only. It is shown on the USDA cargo booking confirmation form with a dollar amount in the block entitled "ocean freight rate" and with the words "all inclusive" shown in the block entitled "special additional terms and comments." An all inclusive rate is a rate where every element of the charges made by the carrier is included in a flat rate and the flat rate would include all the rates and surcharges which the carrier has on file.

There are variations of the "all inclusive" rate. In some cases, the base rate will be inclusive of certain charges but will not include one or more other charges. In that case, charges such as diversion charges, currency devaluation charge or other surcharges would be noted in the "special additional terms and comments" section of the cargo booking form.

There has been a custom, conduct and practice in the trade that when a carrier with an individual tariff rate offers a base rate plus surcharge, USDA and the carrier understand that to mean that the carrier intends the base rate to include all other charges that the carrier has on file.

The type of rate agreed to by the parties is shown on the cargo booking confirmation form. If the rate agreed to by the parties is a conference rate, the block on the booking form after the words "conference rate" is checked. If the rate is an individual carrier's tariff rate, the block after the words "carrier tariff" is checked. Sometimes when a rate is negotiated with a carrier publishing an individual tariff, the block after the words "negotiated" is also checked. The words "to amend" are also typed in

after the block entitled "carrier tariff" to indicate that since the rate was negotiated, the carrier must amend its tariff to cover the negotiated rate.

Leyh testified that in making offers to USDA, he would either include everything in the rate or he would offer a rate with other charges broken out. He said that if he wanted a surcharge or any other charges in addition to the base rate, it was his practice to add it into the base rate when he offered it to USDA. Leyh stated that the reason Waterman varied its offers to USDA, sometimes making them "all inclusive" and in other cases, breaking out one or more surcharges, was for cosmetic effect so that the rates appear as attractive as possible.

Rinn and McCray for USDA and Leyh for Waterman booked the cargoes for the two shipments. After McCray was informed of cargo availabilities, he contacted various carriers to inform them and to request offers from them for carriage of the cargoes.

None of the carriers except Waterman expressed any interest in the two shipments. Waterman submitted identical bids for the two shipments—$71.75 per long ton plus 25 percent Capetown deviation surcharge. Leyh testified that the $71.75 per long ton base rate was intended to include all other charges, including the War Risk Surcharge. Rinn and McCray understood that the $71.75 per long ton base rate offered by Waterman included all the surcharges Waterman had on file except the 25 percent deviation surcharge based on their long experience in booking cargoes with Waterman and other non-conference carriers, although there was no mention of this fact in the negotiations.

After discussing the rate offered by Waterman, Rinn and McCray decided to counteroffer a rate of $65 per long ton "all inclusive" which then intended to be a complete counteroffer to Waterman's offer. Rinn made a counteroffer at $65 per long ton because in his judgment such an offer was low enough to enable USDA to find out what possible considerations Waterman could give. Rinn testified that he intended that the $65 per long ton "all inclusive" rate would be the total ocean transportation charge for the movement. McCray believed that the $65 "all inclusive" counter meant that whatever surcharge the carriers had on file would be included in the $65 per long ton rate. Rinn and McCray both understood that the words "all inclusive" meant that there would be no other charges in addition to the $65 rate.

McCray then called Mrs. Milton of Waterman and advised her of USDA's counteroffer of $65 per long ton "all inclusive." Leyh rejected the counteroffer and made a counteroffer of his own of $71.25 per long ton plus 25 percent deviation surcharge. Rinn understood the $71.25 per long ton base rate was to include all other charges and that the only additional charge would be the 25 percent deviation surcharge. Rinn, thereafter, made a counteroffer of $68.75 per long ton plus 25 percent deviation surcharge. Leyh agreed to this counteroffer and the booking was fixed.

Rinn and McCray had no question in their minds that the $68.75 per

long ton base rate agreed to by Waterman included all other charges, except the deviation surcharge.

Although Rinn and McCray never had any discussion with Leyh during the negotiations as to whether the base rate included all other surcharges, except the 25 percent deviation surcharge, they had concluded on the basis of the long practice of their office and the course of dealing with all carriers that when a rate was offered without mentioning other charges which the carrier had on file, such other charges were included in the base rate. Although there could be a discussion with the carrier as to whether a base rate included surcharges when the cargo was a small quantity, when the cargo was large, as in this case, Rinn expected to get a base rate with surcharges included because he expected the carrier to make some concessions on the rate.

McCray and Rinn could not recollect whether they knew that Waterman had a War Risk Surcharge in effect at the time of the negotiations of the two shipments involved. Since Rinn was in charge of all the bookings made by OTD, which numbered into the thousands and covered worldwide ports with many different charges applicable on any shipment, he could not remember what he considered at that time. It was impossible for Hudgins to recapture all the multitudes of factors that went into the knowledge of what the rates were then. However, OTD knew what the carrier's offer really was because OTD ke[illegible] up-to-date tariffs and could check on it and could tell all the elements [illegible] a carrier's tariff at anytime.

Leyh testified that he had considered the possibility of war breaking out in the Red Sea area when he booked the cargoes with USDA and therefore had included the War Risk Surcharge in the base rate which he offered and that the War Risk Surcharge was included in the final fixed rate of $68.75 per long ton. He also testified that Waterman's policy is to cover all costs in fixing its negotiated rate, including all anticipated costs for a particular movement, including those which might activate a War Risk Surcharge.

In response to Hearing Counsel's question as to how Leyh would indicate in Waterman's tariff that a rate included no surcharge, Leyh replied that he would have to have all the surcharges covered in some fashion in his rate. When asked about a rate in the tariff which stated that it was not subject to Rule 191 (War Risk Surcharge), Leyh replied that it meant that Rule 191 was taken into account when the rate was negotiated, and that Rule 191 was not to be applied separately in addition to the rate.

Other transportation documents submitted as exhibits confirm the oral testimony of the witnesses and show that it was the practice between Waterman and USDA to include all surcharges in the base rate unless separately and explicitly broken out.

DISCUSSION AND CONCLUSIONS

The threshhold question on the War Risk Surcharge issue is whether there was a bona fide mistake on the part of Waterman's tariff publishing

agent in making the project rate on sorghum and corn subject to Rule 190. I find that it was a bona fide mistake, first, because the agent acted beyond the scope of his instructions from Waterman. Second, and more significantly, for this reason embraces the overall War Risk Surcharge Issue, I find that it was not the intent of Waterman to make these shipments subject to any surcharges, including War Risk, other than the deviation surcharge, but that it was Waterman's intention to include the potential application of a War Risk Surcharge in the base rate of $68.75 and that USDA entered into the booking contract with Waterman based on that understanding.

The testimony of witnesses who had a great deal of experience in the booking practices of Waterman and USDA and with each other and who negotiated the contracts in S.D. 460 and 461 clearly shows that it was their mutual intention and understanding gained from long-standing custom and usage in dealing with each other to include the potential for a War Risk Surcharge in the base rate. There is evidence, in connection with many other shipments which Waterman carried for USDA, that when those parties intended the War Risk Surcharge to apply, they made specific reference to that Surcharge in their contracts, but that when it was not to apply, that Surcharge was included in the base rate without making explicit reference thereto in the booking contract. Where a contract is silent on a particular matter, evidence of custom and usage may be received to show the tacit intention of the parties. *Edward F. Morgan Co. v. United States,* 230 F.2d 896 (5 Cir. 1956), cert. den'd, 351 U.S. 965 (1956). In that case, the Circuit Court explained the rule and its rationale, 230 F.2d 902:

> The well settled doctrine that custom or usage will not vary the terms of a written contract needs no citation in its support. But evidence of custom and usage may supply the meanings of words or phrases and supply by implication necessary provisions with respect to which the written instrument is silent. The . . . law has been thus stated:
>
> "A valid usage or custom concerning the subject matter of a contract, knowledge of which may be imputed to the parties, is, according to a general rule, incorporated into the contract by implication. This means that where there is nothing in the agreement to exclude the inference, the parties are presumed to have contracted with reference to the usage, provided that it is just and reasonable, and evidence of the usage is admissible, not to vary or contradict the terms of the contract, but to aid in interpreting it and to ascertain with greater certainty what was intended. When an agreement is silent or obscure as to a particular subject, the law and usage become a portion of it and constitute a supplement to it and interpret it.
>
> * * *
>
> "It follows from what is said above that if the language of a contract is ambiguous, uncertain, incomplete or inconsistent, evidence of usage or custom is admissible to show the meaning intended by the parties."

Here, the facts show that Waterman's representative was aware of and did consider the ever present possibility of war breaking out in the Red Sea area when he offered the base rate to USDA and that he blended the potential for War Risk Surcharge into the base rate as part of the cosmetic

package which USDA agreed to. There are other factors to support the findings based on custom and usage. Had Waterman intended to charge separately for War Risk, there was ample time for it to take action to do so during the period after entering into the contract and after hostilities commenced and before deliveries under the contracts were made. During that time period Waterman could have instructed its agent to publish an amendment to the project rates making them subject to Rule 191. However, Waterman's subsequent filing of the conforming tariff is consistent with its intention not to assess a separate War Risk Surcharge on those shipments. In the conforming tariff, it was specified that the base rate and deviation surcharge are "not subject to [Rule] 191."

There is settled precedent for allowing carriers to include surcharges of general applicability in flat rates for government shippers in foreign commerce under a contractual arrangement upon proof that when the contract was made it was reasonably foreseen that the event which might trigger the surcharge was likely to arise during the contract period. *Gulf & South American Steamship Co., Inc. v. United States,* 500 F.2d 549, 553–554 (Ct. Cl. 1974); *Sea-Land Service, Inc. v. United States,* 497 F.2d 928 (Ct. Cl. 1974). It would appear that under those circumstances, even if the surcharge is imposed generally on other shippers, there would be no violation of the Shipping Act. See Non-Assessment of Fuel Surcharges or MSC SRR 526 (1973), modifying 15 F.M.C. 92 (1972).

Therefore, I conclude that the inclusion of Rule 190 in the tariff was the result of bona fide mistake and that Rule 191 has no application to the shipments in S.D. 460 and 461. I further conclude that waiver of the War Risk Surcharge will not result in discrimination against other shippers.

ORDER

Waterman is granted permission to waive collection of $578,061.97 in Special Docket No. 460.

Waterman is granted permission to waive collection of $578,061.97 in Special Docket No. 461.

Waterman shall publish the following notice in its tariff:

> Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket Nos. 460 and 461, that effective October 10, 1973, and continuing through April 25, 1974, inclusive, the Project Rates for the account of U.S. Department of Agriculture on Corn, in bags from Galveston, Texas to Assab, Ethiopia, pursuant to Contract No. 8596B, and on Sorghum, in bags from Houston, Texas to Assab, Ethiopia, pursuant to Contract No. 8596A, for purposes of refunds or waiver of freight charges is $68.75 W per ton of 2240 pounds plus 25% Capetown Deviation Surcharge (Rule 185), such rate subject to all other applicable rules, regulations, terms and conditions of the said rate and this tariff except other surcharges, including War Risk Surcharge (Rules 190 or 191).

Waiver of the charges shall be effectuated within 30 days of service of notice by the Commission authorizing such waiver and Waterman shall

within five days thereafter notify the Commission of the date and manner of effectuation of the waiver.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

WASHINGTON, D.C.,
February 28, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 535

FARR CO.

v.

SEATRAIN LINES

ORDER ON RECONSIDERATION

May 5, 1978

This proceeding was initiated by application filed by Seatrain Lines for permission to waive collection of a portion of the freight charges assessed on a shipment of mechanical air cleaners carried from Los Angeles, California, to Antwerp, Belgium, under bill of lading dated March 28, 1977.

Freight charges were assessed at $43.00 per cubic meter, the rate quoted to the shipper Farr Co. (Farr) by Seatrain Line's (Seatrain) rating clerk, which rate was contained in the Eastbound Pacific European Container Freight Tariff (PEC tariff) published under Agreement No. 10052.[1] Seatrain's clerk, however, failed to mention that the rate would not become effective as to Seatrain until April 1, 1977, so that the shipment which moved under bill of lading dated March 28, 1977, was subject to Seatrain's "landbridge" tariff which at the time of shipment provided a rate of $83.25 per cubic meter.

A freight bill based on the $43.00 rate was submitted to the shipper upon delivery of the cargo at Los Angeles. The Adherence Group, Inc. (TAG), an independent inspection entity, later corrected the bill by computing the charges on the basis of the $83.25 rate. Seatrain acknowledging the error of its rating clerk asked for permission to waive collection of the additional freight charges resulting from the assessment of the higher rate.

Administrative Law Judge Norman D. Kline denied the application. After a discussion of the legislative history of P.L. 90–298, which amended section 18(b)(3) of the Shipping Act, 1916, to give the Commission authority to permit waivers or refunds, the Presiding Officer

[1] The tariff was filed under Rate Agreement No. 10052 between the Pacific Coast European Conference and certain independent lines, Seatrain, an independent, became a party to the agreement effective April 1, 1977.

concluded that misquotation of the applicable tariff was not the type of mistake from which P.L. 90–298 was intended to afford relief.

No exceptions were filed within the time provided in Rule 227 and the Commission on January 17, 1978 determined to adopt the Initial Decision. Complainant Farr has now by letter requested the Presiding Officer to reconsider his denial of the application. This request has been referred to the Commission, which, by Notice served January 28, 1978, advised the parties that Complainant's letter will be treated as a petition for reconsideration of the Commission's Adoption of the Initial Decision.

In its letter, Farr states that approximately 10 months prior to the shipment involved here, in order to remain competitive in the European markets, it decided to avoid the high cost of transportation from Los Angeles by shipping its products from a plant in Illinois. In February of 1977, Seatrain and some other lines suggested that Farr apply to the Pacific Coast European Conference (PCEC) for rates comparable to the rates from Illinois. The Conference agreed and filed the $43.00 rate which, except as to Seatrain, became effective on March 28, 1977. At that time Farr was preparing a shipment to Spain and insists that it discussed the matter specifically with Seatrain's clerk. Only after the consignee received the revised bill from TAG did Farr learn that Seatrain had not filed the lower rate in its tariff and had not joined PCEC until April 1, 1977.

In its reply to the request for reconsideration, Seatrain contends that it intended to filed the $43.00 rate to be effective on March 28, 1977, but due to an administrative error, failed to do so. Seatrain acknowledges that its clerk referred to the joint tariff in quoting a rate of $43.00 but maintains that Seatrain's tariff should also have contained the same rate effective March 28th and further argues that "Should the application be denied, Farr would not be charged the rate both Seatrain and Farr intended to be applied to the March 28, 1977 shipment."

Farr's letter discloses no new fact which would call for a reversal of the Initial Decision.

What clearly emerges from the foregoing is that the Conference and the member lines to the rate agreement, in order to induce Farr to resume shipping from Los Angeles, agreed to and did file the $43.00 rate effective March 28, 1977. This rate was explicitly not made applicable to Seatrain, as to which the rate was to become effective three days later, on April 1, 1977. In its application, Seatrain admits that:

> On or about March 22, 1977 Ms. Ruth Odian called Seatrain to book a container of air cleaners/mechanical to Spain and at the same time inquired about the present rate. She was quoted $43.00 per cubic meter per tariff FMC No. 1 page 296, item 719.2360 (exhibit #1). Our rate person apparently referred to the effective date at the top of the page (March 28) without referring to the small print at the bottom (April 1).
>
> * * *
>
> Farr Co. in all good faith booked and shipped this container on the basis of what

Seatrain told her. We in turn again in all good faith mis-quoted and mis-billed the shipment.

Thus, while there is no doubt that Seatrain intended to charge the $43.00 rate, there is no allegation that the March 28th filing, specifically postponing the effective date of the tariff as to Seatrain, was filed in error, or that Seatrain intended, but failed, to file the $43.00 rate in its *own* tariff. Rather, as Seatrain admits in its reply to the petition for reconsideration,

> *because Seatrain was to enter into a joint tariff with PCEC* and certain independent lines *on April 1, 1977,* the formal act of physically reducing the rates shown in Seatrain's independent tariff with an effective date of March 28, 1977, was never accomplished. (Emphasis added).

It appears, therefore, that Seatrain in fact relied on the Conference's tariff and never intended to file the rate in its *own* tariff.

Section 18(b)(3) provides in part:

> That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper 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 inadvertence in failing to file a new tariff* and that such refund or waiver will not result in discrimination among shippers. (Emphasis added). 46 U.S.C. 817(b)(3).

This provision makes clear, as the Presiding Officer noted, that the error must be in the tariff on file at the time of shipment which, because of that error does not reflect the intended rate. A misreading of the tariff is not the type of mistake contemplated in P.L. 90–298 and cannot, therefore, be a basis for granting a waiver.

Although the shipper was induced by the promise of a lower rate to resume shipping from its Los Angeles facilities and, because of the carrier's misrepresentation, has to pay higher charges than anticipated, the fact remains that unless there is an error of the type contemplated in section 18(b)(3) which makes the tariff inapplicable, the rate in effect at the time of shipment is the only rate the carrier can charge and the shipper must pay. *Ludwig Mueller Co., Inc. v. Peratta Shipping Corporation,* 8 F.M.C. 361 (1965).

Accordingly, for reasons stated above, the Commission's adoption of the Initial Decision is hereby affirmed.

It is so ordered.

By the Commission.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 571

FIRESTONE INTERNATIONAL

v.

UNITED STATES LINES, INC.

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

May 3, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on May 3, 1978.

IT IS ORDERED, That applicant is authorized to refund $822.69 of the charges previously assessed Firestone International.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice:

"Notice is hereby given, as required by the decision in Special Docket No. 571 that effective December 23, 1977, for purposes of refund or waiver of freight charges on shipments which may have been shipped during the period from December 23, 1977, through February 15, 1978 the rate on 'Fabric, Tire Cord' is $110.00 W subject to all applicable rules, regulations, terms, and conditions of said rate and this tariff."

IT IS FURTHER ORDERED, That refund of the charges will 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) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 571

FIRESTONE INTERNATIONAL

v.

UNITED STATES LINES, INC.

Adopted May 3, 1978

Application for permission to refund portion of freight charges granted.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 18(b)(3) of the Shipping Act, 1916, respondent United States Lines, Inc. (USL of carrier), has filed a timely (within 180 days of January 19, 1978, the date of the involved shipments) application for permission to refund for the benefit of and with the concurrence of complainant Firestone International (Firestone or shipper) the sum of $822.63 of aggregate ocean freight charges of $11,000.00, paid by the shipper and actually collected by USL on February 1, 1978. The shipment of Fabric Tire Cord, in 5–40 foot containers, weighing 185,043 lbs. on the carrier's vessel *American Liberty,* under Bill of Lading No. 7001, dated January 19, 1978, from Savannah, Georgia, to Puerto Limon via Balboa, consigned to San Jose, Costa Rico, C. A., was rated under USL's Tariff FMC 85 (Section 2) Item 2140. The freight charges were collected on the basis of 200,000 lbs. at $110.00/2000 lbs (200,000 lbs. ÷ 2000 lbs. = 100 × $110.00—$11,000.00). The rate applicable at the time of shipment was $110.00 per 2000 lbs. minimum 4000 lbs. per TL (trailer load). The rate sought to be applied is $110.00 per 2000 lbs. with no minimum as per Tariff FMC 85 Page 227A effective February 16, 1978.

The application for permission to refund states facts in support thereof the contents of a letter to this Commission from USL dated February 23, 1978, reading as follows:

[1] This decision became the decision of the Commission May 3, 1978.

On December 23, 1977 a temporary telex filing to Item 2140 Tire Cord Fabric on page 227A reducing rate to $110.00 per 2000 lbs. and erroneously stipulated a minimum requirement of 20 weight tons per trailer load effective December 23, 1977.

This new rate was filed for firm of Firestone International at the request of our Marketing and Sales Traffic Department by a memorandum dated December 15th from Mr. A. J. Walkin to Mr. R. A. Wolf, Pricing Director, United States Lines, Eastern Division. The memorandum did not specify any TL minimum also be filed. The previous rate was $97.00 M minimum 30 measurement tons per trailer.

Realizing the $110.00 weight rate might be construed by the FMC to be an increase, the writer did discuss intended filing with Mr. Walkin, determining from him that shipper's average trailer loadability was 40000 pounds (20 tons) and cubic ratio over 40 cubic feet to the short ton of 2000 pounds, whereby filing of higher weight rate would result in a reduction of charges.

After above office conversation with Mr. Walkin, I unintentionally inserted 20 ton minimum reqirement when preparing written telex form for transmission to Commission.

Error went unnoticed until February 15th, when we filed correction deleting minimum effective February 16, 1978. Unfortunately, prior to this, Firestone had several shipments including a few containers that did not meet minimum weight.

We feel under the circumstances that shipper is being unjustly penalized due to a clerical oversight in interoffice department communications and appeal to Commission for permission to delete minimum effective with the initial filing date of December 23, 1977.

The Commissions (sic) consideration of this petition for relief will be greatly appreciated in order that we may reimburse Firestone International for payments made on short weight container shipments.

Upon consideration of the above and the documents presented herein, it is noted the application lists that under Tariff FMC 85 Page 227A effective February 16, 1978, the aggregate freight charges sought to be applied total $10,177.37. The rate is corrected deleting a minimum, leaving the rate at $110/2000 lbs. The shipment weighed 185,043 lbs. 185,043 lbs. divided by 2000 lbs. equals 92.5215 tons. $110 × 92.5215—$10,177.9650 or $10.177.97; $110 × 92.521—$10,177.31; and $110 × 92.52 = $10,177.20. The application arrived at a figure of $10,177.37 and the nearest figure to that is obtained in the use of 3 decimal places and a rate of $10,177.31 to be applied. The latter amount subtracted from the $11,000.00 actually paid leaves $822.69 to be refunded.

With the correction in the amounts as shown above, and consideration of the record herein, the Presiding Administrative Law Judge deems the application for permission to refund a portion of ocean freight charges to comport with Rule 92(a) of the Commission's Rules of Practice and Procedure, and section 18(b)(3) of the Shipping Act, referred to above and that the error is one within their contemplation.

Therefore, it is found and concluded:

(1) There was an error of a clerical or administrative nature (corrected before this application was filed) which resulted in having an ocean freight overcharge.

(2) The permission to refund requested will not result in discrimination as between shippers.

(3) The application, having been timely filed and having shown acceptable cause, should be granted with the corrections in arithmetic referred to herein.

Wherefore, it is

Ordered,

The application of the carrier be and hereby is granted to refund $822.69, collected by it in overcharges, to the shipper.

(S) WILLIAM BEASLEY HARRIS,
April 5, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 554

HERMANN LUDWIG, INC.

v.

WATERMAN STEAMSHIP CORPORATION

F. M. Sevekow for Respondent Waterman Steamship Corporation.

REPORT

May 8, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* Karl E. Bakke, James V. Day and Leslie Kanuk, *Commissioners*)

This proceeding is before the Commission on exceptions from the Administrative Law Judge's denial of permission to waive a portion of the freight charges assessed on two shipments of machinery and equipment materials for cycle power plants in Busan and Inchon, Korea.

The application for a waiver, filed by Respondent Waterman Steamship Corporation (Waterman), pursuant to section 18(b)(3) of the Shipping Act, 1916 (the Act), and Rule 92(a) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.92(a)) was received by the Commission on November 1, 1977. While bill of lading No. 2, covering the carriage from Philadelphia to Inchon, is dated April 28, 1977 and bill of lading No. 12, covering the carriage from Philadelphia to Busan, is dated April 29, 1977, the application refers to May 6, 1977, the date the cargo was put aboard vessel, as the "date of shipment".

It is alleged that, at the request of the shipper, the Far East Conference (Conference), of which Respondent is a member, had approved the filing of special project rates for the two shipments but that Respondent's representative at the Conference meeting inadvertently failed to request that the new rate be filed on the same day the action was taken so as to make it applicable to the two shipments.

The Presiding Officer found that in view of the dates shown on the bills of lading, that is April 28 and April 29, 1977, the application received by the Commission on November 1, 1977 had not been filed within the one

hundred and eighty days from the date of shipment, as required in section 18(b)(3) of the Act. He also determined that "merely applying to the Far East Conference for a project rate did not change the tariff on file or give the carrier any authority to charge less than provided in such tariff." On the basis of these findings, the Presiding Officer denied the waiver request.

Relying on the Commission's decision in *Ghiselli Bros. v. Micronesia Interocean Line, Inc.*, 13 F.M.C. 179 (1969), Waterman excepted to the Presiding Officer's determination that the application was filed too late.

Waterman maintains that the dates appearing on the bills of lading attached to the application were the dates of delivery of the cargo to the carrier, whereas "the date of shipment" as settled in *Ghiselli Bros.* was May 6, 1977, the date the goods were loaded aboard vessel as shown by the "on board" bills of lading. Waterman points out that, when computed from that later date, the application received by the Commission on November 1, 1977, was filed within the one hundred and eighty days provided in section 18(b)(3).

With respect to the merits of the application, Waterman contends that the failure of its representative at the Conference meeting to ask for a telegraphic filing of the rate approved by the Conference so as to make it applicable to the two shipments was an administrative error which resulted in the inadvertent failure to file an intended rate, one of the grounds for the issuance of a waiver contemplated in section 18(b)(3).

Section 18(b)(3) of the Act provides in part:

> That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper 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 inadvertence in failing to file a new tariff* and that such refund or waiver will not result in discrimination among shippers. . . . *And provided further,* That application for refund or waiver must be filed with the Commission within one hundred and eighty days *from the date of shipment.* 46 U.S.C. 817(b)(3) (Emphasis added)

Whether the application here was filed "within the one hundred and eighty days" depends on what date is accepted as the "date of shipment".

In *Ghiselli Bros., supra,* the Presiding Officer in determining the "date of shipment" considered both the date of delivery of the merchandise to the carrier and the date of the on board bill of lading and, giving the parties the benefit of these "alternate dates", computed the statutory period from the date of the on board bill of lading.[1] While it reversed the Initial Decision on other grounds, the Commission without comment relied on the date of the on board bill of lading to arrive at the conclusion that the application had been filed timely.

In our opinion, on the basis of established precedent either the date of

[1] In his Initial Decision, the Presiding Officer cited among others *Coe v. Errol*, 116 U.S. 521 (1886) where the Court held that the transportation begins when the goods are delivered to the carrier *or* when they actually start in the course of transportation.

the delivery of the cargo to the carrier or the date of the on board bill of lading may properly serve as the start-up date for computing the 180-days statutory period of limitation. While section 18(b)(3) specifies the requirements which must be met before relief can be granted, neither the Shipping Act nor the legislative history of P.L. 90–298,[2] which added the refund and waiver provisions to section 18(b)(3), contains a definition or gives any explanation of what Congress meant by "date of shipment". Keeping in mind that P.L. 90–298 is a remedial statute aimed at affording shippers relief from the consequences of certain errors inadvertently committed by carriers or conferences of carriers in the filing of tariffs or in the failure to do so, we believe that a construction which would unnecessarily limit the meaning of that term to the date of delivery of the cargo to a carrier (not necessarily an ocean carrier) would defeat the legislative intent without serving any regulatory purpose. *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B.B. 309, 311 (1934).[3]

One of the two shipments involved in this proceeding was delivered on April 28, 1977 and the other on April 29, 1977. The on board bills of lading are allegedly dated May 6, 1977. Respondent did not file a copy of those bills but maintains that the goods were put aboard vessel on that date as shown by a certificate of inspection performed at the pier on May 6, 1977. Should the date of the on board bill of lading be recognized as the "date of shipment", the application received by the Commission on November 1, 1977, was filed 175 days after that date, that is, within the statutory limit set in section 18(b)(3) of the Act.

In addition to finding that the application had been filed too late, the Administrative Law Judge denied it on the merits on the ground that the "inserted" error was not within the contemplation of the applicable statute. The record, however, contains copies of correspondence between Hermann Ludwig, Inc. and the Conference relating to the filing of the proposed special rates, and although Exhibit 2, purportedly a copy of the minutes of the Conference meeting, is only a recommendation of the Conference Rate Committee to the full Conference, we take official notice that minutes of the meeting of the Far East Conference held on May 4, 1977, and filed with the Commission show that the Conference had agreed to the filing of the rates requested by Complainant. The failure of Respondent's representative at the Conference meeting to request a telegraphic filing of the rates to make them applicable to Complainant's shipments, resulted in the Conference's "inadvertent failure" to file a rate it had approved and intended to file, an error clearly within the ambit of section 18(b)(3) of the Act.

Therefore, all other statutory requirements having been met,[4] the Initial

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[2] House Report No. 920, 90th Cong., 1st Sess., November 14, 1967 (to accompany H.R. 9473); Senate Report No. 1078, 90th Cong., 2nd Sess., April 5, 1978 (to accompany H.R. 9473).

[3] Such construction of the meaning of the term "date of shipment" under section 18(b)(3) would in no manner affect the rights and liabilities of the parties otherwise arising upon delivery of the cargo to the carrier.

[4] Before the filing of the application, the Conference on May 11, 1977, filed a new tariff setting forth the special project rates Respondent seeks to apply.

Decision denying the waiver is vacated. Respondent is granted permission to waive collection of an aggregate of $23,372.49 of the charges which would have been payable on the two shipments,[5] such waiver being contingent upon Waterman Steamship Corporation's filing within thirty days from the service of this Report either copies of the two on board bills of lading or an affidavit attesting to the date the shipments were placed aboard ship, in the absence of which the application shall be denied.

It is so ordered.

By the Commission.

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

[5] The waiver authorizes the carrier to collect $93,112.22 in freight charges based upon the project rates it seeks to apply.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 359(I)

DURITE CORPORATION, LTD.

v.

SEA-LAND SERVICE, INC.

Reparation Awarded.

REPORT

May 12, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman;* James V. Day, *Commissioner*)

By complaint filed August 20, 1976 Complainant Durite Corporation, Ltd., seeks reparation in the amount of $1,762.14 for alleged freight overcharges by Respondent Sea-Land Service, Inc. (Sea-Land) on a shipment of "Woodworking Machinery" carried by Sea-Land from Elizabeth, New Jersey to Arecibo, Puerto Rico, via San Juan. Settlement Officer Waldo R. Putnam denied reparation. The Commission determined to review the decision of the Settlement Officer.

The shipment moved under bill of lading dated June 20, 1974. In accordance with the description in the bill of lading Sea-Land assessed the rate applicable to "Machinery N.O.S." Freight charges in the amount of $7,869.18 were paid on February 18, 1975, by Canadian Foreign Minerals Limited, Hamilton, Bermuda, a parent of Complainant, Durite Corporation.

The cargo was destined for use in the construction of the "wall panel manufacturing plant". As agreed by both parties, the shipment qualified for the carrier's published project rate for "Equipment, machinery and materials used in the construction of a wall panel manufacturing plant". This project rate was not applied, however, because the requisite presentation to the carrier of a certificate of (proprietary) use as of, or prior to, this kind of shipment was lacking, as was the requisite annotation of this information on the bill of lading.

In support of its claim that the project rate should have been applied and that reparation is in order, Complainant has furnished a copy of the

certification (dated August 10, 1976). Complainant also relies upon this Commission's holding in *Cities Service International, Inc. v. Lykes Bros. Steamship Co., Inc.*, (Docket No. 75–52, Adoption of Initial Decision, served April 30, 1976).[1]

Sea-Land denies the overcharge even though, as noted above, it does not contest the proprietary nature of the cargo. Sea-Land does not consider the decision in *Cities Service, supra,* as controlling. Sea-Land would distinguish that case on the basis that in *Cities Service* the missing proprietary use certification was only incidental to the contention that the contract rate applied to the shipment of an unlisted subsidiary of the shipper, a signatory to the Merchant's Freighting Agreement. (That agreement required that the contract shipper list beforehand the subsidiaries which were to be covered by the agreement). Here, according to Sea-Land, the special permission issued by the Commission specifically requires that the bill of lading contain a statement as to the prioprietary nature of the cargo.[2] Sea-Land argues that because Complainant failed to comply with the requirements of its tariff a subsequent rendering of such certificate does not constitute compliance with the tariff provision. Sea-Land thus concludes, that the Shipping Act's prohibition against the carrier departing from its tariff and Complainant's failure to insert the proprietary clause in the bill of lading bars recovery in this proceeding.

The Settlement Officer agreed and denied recovery. He distinguished the *Cities Service* case as involving tariff rules based upon agreements between the shipper and the carrier, whereas here, he found that the Commission, in granting special permission, set the terms and conditions upon which the project rate could be filed, including the requirement of a proprietary clause in the bill of lading. He found that Sea-Land had complied with the Commission's rules in publishing the project rate and that it had properly applied its tariff.

The Settlement Officer did not find controlling the line of cases which hold that the nature of the goods moved determines the properly applicable rate. Pointing out that there was no dispute here as to what was actually shipped, the Settlement Officer merely concluded that Complainant had not met the conditions upon which application of the lower rate was predicated, and that failure of Complainant, "to comply with the mandatory provisions of a lawfully applicable tariff provision, is sufficient to require dismissal of the complaint".

The distinction drawn by the Settlement Officer and by Sea-Land between *Cities Service* and this case is inappropriate. The Commission has consistently held with respect to overcharge claims that what actually was shipped determines the proper rate and has permitted shippers, who had failed to comply with some tariff provision, to cure the defect by later introduced evidence. *Cities Service* followed this policy.

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[1] In *Cities Service*, the Commission awarded reparations notwithstanding that the shipper had not complied with the requirements of the Merchant's Freighting Agreement (dual rate contract).

[2] On this point, see our discussion at page 5.

Here the special rate sought to be applied was published under special permission issued pursuant to Rule 531.7(e) of the Commission's rules governing the filing of freight rates and tariffs in the domestic off-shore trade. Rule 537.7(e)(2)(iii) requires carriers applying for permission to publish a special project rate, to include in their application, among other:

> a statement that the bill of lading used to move cargo under the project rates will be claused "All materials included in this bill of lading are of a wholly proprietary nature and may not be resold at destination or otherwise placed in commercial channels for resale". 46 CFR 531.7(e)(2)(iii).

While Sea-Land provided the necessary statement in its project rate application, the *requirement* is directed only to the carrier who publishes the tariff and not, as implied by the Settlement Officer, to the shipper. Commission Rule 537.7(e)(2)(iii) does not itself impose any obligation on the shipper. That being so, there is nothing to distinguish this case from the long line of cases wherein we held what actually is shipped governs the rate to be applied.

Because the proprietary nature of the cargo is clear and undisputed, we find that Respondent collected from Complainant freight charges in excess of those provided in its tariff for this type of cargo, in violation of section 18(b)(3) of the Shipping Act, 1916. Accordingly, the decision of the Settlement Officer is vacated and Complainant is granted reparation in the amount of $1,762.14.

It is so ordered.*

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

Commissioner Karl E. Bakke, dissenting. I dissent. The issue here is whether the legal requirements precedent to the shipper's entitlement to a project rate were complied with. They were not. It follows that the Settlement Officer's denial of reparation was correct and should have been sustained.

The Commission majority have, I fear, allowed themselves to be mesmerized by the gaudy glitter of "precedent" that has no ascertainable link either to the facts or to the principle of law involved in this particular case.

We are not dealing, as in the precedents relied upon by the majority, with litigation over a contractual relationship between a shipper and a carrier where a question has arisen as to the weight, measure or description of the goods actually shipped or whether the shipper was an undisclosed subsidiary of a party to a conference dual rate contract. Rather, we are dealing with the question whether the requirements of a Commission regulation were complied with.

Section 531.7(e)(2)(iii)(b) of the Commission's regulations governing the filing of tariffs in the domestic offshore trades requires, in effect, that in

*Commissioner Bakke's dissenting opinion is attached.

order for a shipment to qualify for a project rate under the carrier's tariff, *the bill of lading must be claused as follows:*

All materials included in this bill of lading are of a wholly proprietary nature and may not be resold at destination or otherwise placed in commercial channels for resale.

In accordance with these regulations and the Special Permission granted the carrier to publish the particular project rate involved in this proceeding, the carrier's tariff did require that the bill of lading include the proprietary and non-resale clause in order to qualify for the project rate. It is conceded by the parties that the bill of lading covering the subject shipment did not contain such a clause.

In this connection, it is important to bear in mind that, absent the special permission granted by the Commission, the carrier could not have published project rates at all without violating one or more provisions of the Commission's domestic tariff filing requirements. Thus, the Commission's regulations concerning publication of and entitlement to project rates in the carrier's tariff are, *pro tanto,* a waiver of otherwise applicable standards of Commission tariff filing regulations and, as such, must be strictly construed.

The majority casually wave this undisputed fact aside with the commercially unrealistic argument that the regulation in question imposes no obligation on the shipper seeking a project rate to include the requisite clause in the bill of lading. I ask, however, who *but* the shipper (or his agent) can assert what is, in essence, a statement of commercial intention at the time the shipment takes place?

Furthermore, the requisite clause in the bill of lading serves an important regulatory purpose that is at the very core of the shipper's entitlement to a project rate; namely, to put the consignee on notice of the shipper's undertaking that the goods are not to be resold or otherwise placed in commercial channels for resale. As a practical matter, neither the carrier nor the Commission can effectively police this restriction once the goods are in the hands of the consignee, and the bill of lading is, therefore, the only tangible evidence of even lip service to the shipper's implicit obligation, as the party best situated, to insure that the extrinsic conditions precedent to project rate entitlement are met and adhered to. In addition, without insistence that the requisite clause be in the bill of lading at the time of shipment, the Commission has lost even a tenuous enforcement claim against a shipper, under the "false classification" provision of section 16 (First) of the Shipping Act, 1916,* in the event the proprietary goods are later resold.

In light of the foregoing, the doctrine adopted by the majority in this case is puzzling to me, to say the least. Since the bill of lading was not properly claused, the carrier would have committed a violation of law if

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

the shipment had been rated as project cargo. And since the only rate that the carrier could legally have charged the shipper was the non-project rate, it follows that by authorizing reparation the majority is, in effect, sanctioning retroactive application of an illegal rate. To explain how that squares with the Commission's own line of cases holding that an illegal transaction cannot be validated by approval after the fact calls for an exercise in metaphysics that is, I am frank to admit, beyond me.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–55

UNIFORM RULES AND REGULATIONS GOVERNING FREE TIME ON IMPORT CONTAINERIZED CARGO AT THE PORT OF NEW YORK

PARTIAL ADOPTION OF INITIAL DECISION

May 15, 1978

This proceeding was instituted to determine whether the provisions of General Order 8 (46 C.F.R. 526), which establish rules and regulations governing free time and demurrage on breakbulk import cargo at the Port of New York, should be extended to apply to containerized cargoes. In addition, the Commission proposed that container detention free time be set out separately from demurrage free time and begin upon the removal of the container from the terminal facility.

Administrative Law Judge Stanley M. Levy has issued an Initial Decision, wherein he concluded that the "record in this proceeding fails to disclose any practice which is unjust and unreasonable and which therefore would justify and authorize, pursuant to section 17, promulgation of the proposed rules." The Presiding Officer accordingly discontinued the proceeding.

Exceptions to the Initial Decision have been filed by the New York Foreign Freight Forwarders and Brokers Association, Inc. (Association) and Commission Hearing Counsel. Replies were submitted by Sea-Land Service, Inc. (Sea-Land), Puerto Rico Maritime Shipping Authority (PRMSA) and seven ocean conferences.[1]

The Association contends that the general rulemaking provisions expressed in section 43 of the Shipping Act provide the requisite authority for the Commission to promulgate the proposed demurrage rules notwithstanding the fact that there is no finding of unjust and unreasonable practice under section 17. In support, the Association cites *New York Foreign Freight Forwarders and Brokers Association, et al. v U.S., et al.*, 337 F.2d 289, *cert. den.* 380 U.S. 910 (1964); *Pacific Coast European Conference v. FMC*, 376 F.2d 785 (1967); and more recently, Docket No.

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[1] Australia-Eastern U.S.A. Shipping Conference; Continental North Atlantic Westbound Freight Conference; Iberian/U.S. North Atlantic Westbound Freight Conference; Marseilles North Atlantic U.S.A. Freight Conference; North Atlantic Westbound Freight Association; Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference; and West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference.

73–66, *Austasia Container Express, Possible Violations of Section 18(b)(1) and General Order 13,* (1977), reversed on other grounds. It is noted that in *Austasia Container Express,* the Commission stated:

> Since 1961, the Commission's rulemaking authority has resided in Shipping Act Section 43. This authority has been broadly interpreted by the courts and permits the adoption of substantive rules in furtherance of general Shipping Act objectives without a prior finding that a specific Shipping Act violation has occurred. (Mimeo Dec. p. 15).

According to the Association, these authorities establish "that the Commission may, by rule, require carriers and terminals to establish free time and demurrage practices to prevent 'potential' problems without making a preliminary finding of a Shipping Act violation." Therefore, the Association concludes that because the Presiding Officer "erroneously limited the extent of the Commission's rulemaking authority, his conclusion that the proceeding should be discontinued should be reversed by the Commission."

The Association requests that the Commission use its authority under section 43 to establish fair and reasonable practices to assure that importers have a minimum of five days' free time to process their shipments through the port; that carriers not assess demurrage when they fail to provide undercarriage equipment; that free time be extended when an importer is unable to pick up his merchandise because of carrier disability; that carriers and/or terminals should be required to furnish proper documentation to substantiate demurrage claims, and that only first period demurrage should be charged when the shipment is under official inspection.

While Hearing Counsel does not disagree with the ultimate conclusion reached in the Initial Decision that the record in the proceeding does not support the amendments to General Order 8 proposed by the Commission, they except to the Presiding Officer's determination that such amendments could only be based on a prior finding of a section 17 violation. Hearing Counsel urge the Commission to address this and other miscellaneous issues they believe deserve the further attention of the Commission.

The Commission is also asked to clarify the scope of Commission General Order 35 (46 C.F.R. 551.1(i)).[2] Both Hearing Counsel and the Association take the position that carriers should be required to extend free time when the carrier is unable to fulfill its obligation to supply undercarriage equipment (chassis) necessary for removal of the container. The Presiding Officer found such a rule unnecessary because General Order 35 already imposed that requirement on carriers. Hearing Counsel argue that if the Presiding Officer's interpretation of General Order 35 is erroneous, the Commission should take this opportunity to rule that free time applies during the period of a carrier's refusal or inability to fulfill its obligations to provide necessary undercarriage equipment.

[2] General Order 35 provides in part that: "Steamship companies responsible for house-to-house movements of containers . . . are responsible under this part for delay occasioned by a lack of sufficient chassis. . . ."

Hearing Counsel also urge the Commission to find unlawful the present practice of certain carriers conditioning the availability of additional free time for multiple containers on the requirement that such containers be covered by a single bill of lading. Hearing Counsel had contended that carriers should be required to provide additional free time when more than eight containers are received by a single consignee on a single vessel. The Presiding Officer rejected Hearing Counsel's argument, declaring instead that multiple container tariff provisions should be left to the carriers and terminals and promulgated in response to the requirements of particular commodities and particular trades.

Finally, Hearing Counsel seeks clarification of certain burden of proof issues and further urges adoption in an appropriate proceeding of several proposed amendments to General Order 8 which would apply to breakbulk cargo.

Sea-Land, PRMSA, and the Conferences generally contend that the issue of the proper legal standard to be applied in promulgating amendments to General Order 8 is not relevant in light of the clear finding on the record that no rules need be adopted.

We have reviewed the record in this proceeding and agree with the Presiding Officer's conclusion that there has not been demonstrated a need for the proposed extension of General Order No. 8 to containerized cargoes. Our determination is based on the absence of present practices which require remedial action or a showing that there exists a potential for future violations of the Shipping Act sufficient to warrant corrective action at this time. For this reason, the Presiding Officer's ultimate conclusion will be affirmed.

While we concur in the Presiding Officer's ultimate disposition of this proceeding, we do not agree with all of his reasons therefor. The Commission finds the Presiding Officer's interpretation of the Commission's powers under section 43 of the Act to be unduly restrictive and erroneous. The Commission's section 43 rulemaking authority has been "broadly interpreted by the courts and permits the adoption of substantive rules in furtherance of general Shipping Act objectives without a prior finding that a specific Shipping Act violation has occurred." Docket 73–66, *Austasia Container Express, supra,* and cases cited therein. This view of this agency's rulemaking powers has also been fully supported by the courts. *New York Foreign Freight Forwarders and Brokers Association, Inc., et al., v. U.S., et al., supra; Pacific Coast European Conference v. F.M.C., supra.* In *Pacific Coast European Conference,* the court, after noting that section 43 of the Act "clothe the Commission with a broad authority . . ., going well beyond what it has possessed before," further explained that:

> . . . the Commission in rulemaking is not confined to the redress of demonstrated evils as distinct from the prevention of potential ones." 376 F.2 790.

This last point appears to have been overlooked by the Presiding Officer

in reaching his conclusion that only upon a finding of a violation can the Commission promulgate a rule under the substantive provisions of section 17. For, while section 17 allows the Commission to prescribe a "just and reasonable regulation" to correct one found unlawful, that section may also form the substantive basis for establishing a rule of general applicability under section 43. Thus, section 17 can serve to redress "demonstrative" ills and, when used with section 43, "potential" ones as well. We are satisfied, however, that the record herein does not indicate a need for the proposed amendments under our general rulemaking authority.

For the most part the remaining points raised by the Association and Hearing Counsel deal with matters properly considered and disposed of by the Presiding Officer. Thus, the further amendments suggested by the Association and Hearing Counsel have already been found to be not justified on the present record, or are outside the scope of this rulemaking. We will, however, direct the Commission's staff to review the recommendations of Hearing Counsel and the Association listed at Appendix A of the Presiding Officer's Initial Decision and monitor any activities relating to these recommendations to determine whether further Commission action is warranted.

In regard to Hearing Counsel's requested clarification of the scope of Commission General Order No. 35, the specific provision under discussion applies only to penalities assessed under the detention rule and the consignee's obligation to pay demurrage to an independent terminal operator is not relieved where the carrier has failed to provide chassis necessary for the movement of a house-to-house container and as a result, free time is exceeded. In such a situation and pursuant to the provisions of the truck detention rule, the consignee or his agent could file a penalty claim against the water carrier responsible for the house-to-house movement.

However, where the water carrier publishes free time and demurrage provisions in its own tariff and is also responsible for providing a chassis for the container, the assessment of demurrage in a situation where free time is exceeded due to the lack of chassis could result in a practice violative of section 17. While the record is void of any evidence indicating sufficient lack of chassis or undercarriage equipment such as would warrant the promulgation of a remedial rule, the philosophy embodied in existing General Order 8 should serve as a guide to terminal operators, water carriers and importers/exporters with respect to the handling of containerized cargoes. Further, we intend to remain responsive to conditions that may arise in the future which warrant Commission action.

Upon a careful review and consideration of the record in this proceeding, as well as the exceptions and replies of counsel, we conclude that except, as amended herein, the Presiding Officer's findings and conclusions with respect to the discontinuance of this proceeding are

proper and well founded. We, accordingly, adopt his Initial Decision as our own, subject to the discussion above, and discontinue the proceeding.

It is so Ordered.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 467(I)

J.T. BAKER CHEMICAL CO.

v.

BARBER BLUE SEA LINE

NOTICE OF DETERMINATION NOT TO REVIEW

May 12, 1978

Notice is hereby given that the Commission on May 12, 1978 determined not to review the decision of the Settlement Officer in this proceeding served May 2, 1978.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 467(I)

J. T. BAKER CHEMICAL CO.

v.

BARBER BLUE SEA LINE

Reparation Awarded.

DECISION OF MARVIN H. WHITTEVEEN, SETTLEMENT OFFICER[1]

J. T. Baker Chemical Company (complainant) claims $393.28 as reparation from Barber Blue Sea Line (respondent) for an alleged overcharge on a shipment that moved from New York, New York to Bangkok, Thailand aboard the SS PHEMIUS under bill of lading number 62 dated February 25, 1976. While the complainant does not specifically allege a violation of the Shipping Act, 1916, 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 shipment. Complainant submitted claim to respondent on May 25, 1977. On October 7, 1977, respondent, as a conference member, denied the claim citing Rule Number 10 of the Atlantic and Gulf-Singapore Malaya and Thailand Conference Tariff No. 15, FMC–13 quoted in part below:

". . . Claims for adjustment in freight charges, if based on alleged errors in weight and/or measurement, will not be considered unless presented to the carrier in writing before shipment involved leaves the custody of the carrier; however, such requests will not be considered if the goods are covered by Standard Weight/Measurement Agreement, in which case the weights or measurements as shown in the agreement shall govern. Any expenses incurred by the party responsible for the error, or, if no error be found, by the claimant. *All other claims for adjustment of freight charges must be presented to the carrier in writing within six (6) months after date of shipment.*"[2]

Respondent on June 16, 1977, had initially declined complainant's claim referring to Item 695 of Atlantic & Gulf-Singapore, Malaya and Thailand

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof. (Note: Determination not to review May 12, 1978.)

[2] The complaint was filed with this Commission within the time limit specified under Section 22, Shipping Act, 1916. It has been well established by the Commission that carrier's so-called "six-month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

Conference Freight Tariff No. FMC-3 as shown on Twelfth Revised Page 121. Item 695 indicates rates on Dangerous or Hazardous Cargo, *NOS*, i.e., Commodities shown in Code of Federal Regulations—Title 46 Shipping, Chapter i—Coast Guard Department of Treasury, prescribing storage regulation and other required conditions for transportation; and Atomic Energy Commission regulation where applicable. Item 695 continues listing commodities such as Corrosive Liquids, Non-Inflammable Gases, Inflammable Solids and Oxidizing Material, Inflammable Liquids, etc. It specifies a contract rate of $251.25 per ton of 40 cubic feet or 2,000 pounds to Bangkok, when not restricted to on deck stowage. This is the rate applied by respondent.

Complainant bases his claim upon Item 65 in the above tariff which indicates rate on Alcohol, Viz: Butyl (Butanol), Denatured, Diethylamine Ethanol, Ethyl Butyl, Hexyl (Hexanol), Isobutyl (Isobutanol), Isopropyl (Isopropanol), Methyl (Methanol), etc., specifying a contract rate of $174.25 per 40 cubic feet or 2,000 pounds to Bangkok. Complainant states that Item 65 listed a specific rate for Methanol under Alcohol as above rather than the general listing under Dangerous or Hazardous Cargo, NOS.

In the *Materials Handbook* by George S. Brady, published by McGraw-Hill Book Company, Inc., at page 389, Methyl Alcohol (specifically shown in Item 65 Atlantic & Gulf-Singapore, Malaya and Thailand Conference Tariff No. FMC-3) is described as follows: "Methyl Alcohol. Commonly known as Wood alcohol and called Methanol when made synthetically." In the *American College Dictionary*, Methanol is described as "methyl alcohol, or wood alcohol."

The Commission laid down the rule of reasonability in dealing with the interpretation of tariff terms in *National Cable and Metal Co. v. American Hawaii S. S. Co.* 2 U. S. M. C. 471 (1941). At page 473 it stated: "In interpreting a tariff the terms used must be taken in the sense in which they are generally understood and accepted commercially and neither carriers nor shippers could be permitted to urge for their own purposes a strained and unnatural construction. Tariffs are to be interpreted according to the reasonable construction of their language; neither the intent of the framers nor the practice of the carriers controls, for the shipper cannot be charged with knowledge of such intent or with carrier's canons of construction. *A proper test is whether the article may be reasonably identified by the tariff description.*" (Emphasis added)

In this case the complainant may have caused some confusion by showing the commodity on the bill of lading under the general heading of flammable liquids, however, the commodity is clearly shown as methanol. The respondent does not deny that methanol was actually shipped.

The portion of the shipment on which the claim was entered consisted of 3 pallets of Methanol weighing 10,215 pounds. Shipment moved from New York to Bangkok, Thailand aboard the Barber Blue Sea Line's vessel SS PHEMIUS under bill of lading No. 62 dated Feburary 25, 1976.

Freight charges were assessed at a rate of $251.25 per 2,000 pounds for a total of $1,283.26. (5.1075 tons × $251.25). Charges should have been assessed at a rate of $174.25 per 2,000 pounds for a total of $889.98. (5.1075 tons × $174.25).

Section 18(b)(3) of the Shipping Act, 1916, prohibits the assessment of freight charges in excess of those lawfully applicable at the time of the shipment. The involved commodity was improperly rated by the carrier and the complainant was overcharged in the amount of $393.28.

Therefore, it is ordered that respondent Barber Blue Sea Line be required to refund to the complainant J. T. Baker Chemical Co. the amount of overcharge in the sum of $393.28.

(S) MARVIN H. WITTEVEEN,
Settlement Officer.

FEDERAL MARITIME COMMISSION

No. 73–55

UNIFORM RULES AND REGULATIONS COVERING FREE TIME ON IMPORT CONTAINERIZED CARGO AT THE PORT OF NEW YORK

December 8, 1977

The rules proposed to amend General Order 8 are not required to enforce just and reasonable practices relating to free time and container detention time on import containerized cargo at the Port of New York.

This proceeding is discontinued.

Gerald H. Ullman for New York Foreign Freight Forwarders and Brokers Association, Inc.

Stanley O. Sher, David C. Jordan and *Howard A. Levy* for Australia-Eastern U.S.A. Shipping Conference; Continental North Atlantic Westbound Freight Conference; Iberian/U.S. North Atlantic Westbound Freight Conference; Marseilles North Atlantic U.S.A. Freight Conference; North Atlantic Westbound Freight Association; Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference; and West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference.

Paul J. McElligott for Sea-Land Service, Inc.

Thomas D. Wilcox for New York Terminal Conference.

Amy Loeserman Klein and *Robert L. McGeorge* for Puerto Rico Maritime Shipping Authority.

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

Thomas E. O'Neill for National Association of Alcoholic Beverage Importers.

John Robert Ewers and *Paul J. Kaller,* Hearing Counsel.

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

General Order No. 8, 46 CFR 526, sets forth rules and regulations regarding free time and demurrage on breakbulk import cargo applicable to common carriers by water moving through the Port of New York but

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[1] This decision was partially adopted by the Commission May 15, 1978.

does not now apply to containerized cargo.[2] The Federal Maritime Commission instituted this proceeding to determine whether the provisions of General Order 8 should also be made applicable to containerized cargo.

The Commission, on August 28, 1973, proposed a rule[3] whereby free time on import containers at the Port of New York would be five days (exclusive of Saturdays, Sundays and legal holidays), computed from the start of business on the first day after complete discharge of the vessel; and that this minimum free time of five days would apply on all cargo except that which was of a special nature so as to require earlier removal. The Commission proposed further that free time on cargo in temperature-controlled or insulated trailers/containers (reefer containers) and bulk liquid tank containers would not be less than two days, Saturdays, Sundays and holidays excluded. The proposed rule would also apply the strike provisions of General Order 8 to containerized cargo. Finally, the Commission proposed that container detention free time should be set out distinctly from demurrage free time and should begin upon the removal of the container from the terminal facility.

On March 13, 1974, by Supplemental Notice of Proposed Rulemaking, the Commission determined, in light of comments, requests and recommendations submitted pursuant to the August 28, 1973 Notice of Proposed Rulemaking, that the complex nature of the containerization issue warranted a full evidentiary hearing. In addition, the Commission directed that evidence be received on the subject of container detention free time.

Hearings were held before me in New York City from May 10 through May 12, 1977.[4] The transcript consists of 438 pages and eleven exhibits were admitted into evidence.

Upon conclusion of the hearing, briefs in support of amendments to General Order 8[5] were submitted by the New York Foreign Freight Forwarders and Brokers Association, Inc. (hereinafter Association), and by Hearing Council.[6] Briefs opposing amending General Order 8 were submitted by the Puerto Rico Maritime Shipping Authority (hereinafter PRMSA), the New York Terminal Conference, Sea-Land Service, Inc., as well as one on behalf of seven ocean conferences whose memebers discharge containerized cargo at the Port of New York.

The Port Authority of New York and New Jersey filed a brief limited to contesting a statement in Hearing Counsel's Brief (page 3) that "There is more congestion at the Port of New York than at other ports."

[2] *In The Matter of Free Time and Demurrage Practices on Inbound Cargo at New York Harbor*, 11 FMC 238 (1967); *Free Time and Demurrage Charges at New York*, 3 FMC 89 (1948).

[3] 38 *Federal Register* 23540.

[4] Proceedings in this Docket were suspended for a considerable length of time pending completion of an environmental assessment.

[5] Not necessarily as originally proposed by the Commission.

[6] These parties also filed Reply Briefs, November 8, 1977.

ISSUES

Some import cargo at the Port of New York is presently subject to a free time and demurrage rule. 46 CFR 526. The primary issue in this proceeding is whether the scope of that rule should be broadened to include containerized cargo. Subsidiary to that is, if so, whether the rule should encompass container detention time, *i.e.*, time between removal of the container from the terminal and its return.

DISCUSSION

This proceeding was instituted pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553) and sections 17, 22 and 43 of the Shipping Act (46 U.S.C. 818, 821 and 841(a)).

Section 22 of the Shipping Act authorizes the Commission to investigate any violation of the Act. Section 43 authorizes the Commission to make such rules as may be necessary to carry out the provisions of the Act. Section 4 of the Administrative Procedure Act sets forth the procedure for rulemaking. As such, sections 22, 43 and 44 establish the Commission's jurisdiction and methodology.

Section 17 of the Shipping Act, however, is substantive in nature and sets forth the statutory requirements which must be met before a rule may be promulgated pursuant to the Commission's jurisdiction under appropriate procedures. Section 17 provides that the Commission may prescribe a just and reasonable practice "whenever it finds that any regulation or practice [of carriers or other persons subject to the Act which relate to the receiving, handling, storing or delivering of property] is *unjust or unreasonable* . . . ." (Italics added.) Absent a finding that a regulation or practice is unjust or unreasonable, the Commission cannot pursuant to section 17 promulgate a rule prescribing just and reasonable practices. As set forth in greater detail below, the record in this proceeding fails to disclose any practice which is unjust and unreasonable and which therefore would justify and authorize, pursuant to section 17, promulgation of the proposed rules. Accordingly, the proceeding to amend General Order No. 8 is discontinued.

The Commission received certain complaints in 1969 to 1972 about the then-existing period of two days free time on import containers at New York, and also about demurrage bills following a longshoremen's strike in 1971.[7] Written inquiries to the Commission regarding container demurrage at New York occurred in 1970 and 1971 and were only four in number.[8] Only one complaint since 1971 was received.[9] None of the complaints concerned container detention charges.[10] In no case were the complaints directed to the Puerto Rican trade or any other offshore domestic trade.[11]

[7] Ex. 1, p. 2.

[8] Tr. 10–11, 12, 89–90.

[9] Tr. 90–91, 111.

[10] Tr. 90–91, 103.

[11] Tr. 83–84.

Mr. Stakem, Chief of the Commission's Office of Domestic Commerce, testifying in support of a rule to establish uniform free time and demurrage rules on containerized cargo through the Port of New York[12] pointed out that inasmuch as more container cargo than breakbulk cargo was now being handled in the Port that General Order 8 was presently applicable to less than half the cargo moving through the Port. In his view, the rules should be amended to cover all cargoes moving through it.

Mr. Stakem testified that it should require less time for a consignee to pick up a container than to pick up 20,000 to 40,000 pounds of breakbulk cargo.[13] One reason for this is that, unlike breakbulk cargo which is available to consignees only after completion of discharge, containerized cargo is frequently available one or two days prior to completion of vessel discharge and prior to the beginning of free time.[14] He testified that the Commission's staff is not in a position to determine how much free time on containerized cargo at New York should or should not be allowed.[15]

Mr. Stakem stated that the staff was not necessarily committed to a five day minimum free time period, as proposed, if the evidence establishes that "containers can reasonably be removed from pier facilities in two, three, or four days . . . ."[16] He did not favor a rule limiting maximum free time a tariff could provide.[17] Nor did he believe that container cargo should have more free time than breakbulk, *i.e.*, five days.[18]

A primary concern of consignees regarding free time and demurrage charges arises out of strike situations where cargo removal has not been possible.[19] Accordingly, even if a rule establishing free time and demurrage is not necessary for normal conditions in the Port, it may be desirable to provide some rule to govern in a strike or other abnormal situation.[20]

The rule proposes that if because of an inability of the carrier to tender the cargo, as for example during a strike, the cargo would for the duration of the inability remain in the same status as it was at the beginning of the disability. The proposed rule is flexible to the extent that it permits the carrier in its tariff to specify that if the condition of inability arises after the expiration of free time, *i.e.*, while first period demurrage is being charged, the demurrage would not further accrue during the period of the carrier's inability. The option of the carrier in its tariff to continue first period demurrage during the period of inability is not precluded by the proposed rule.

[12] Exs. 1 and 2.
[13] Tr. 43.
[14] Tr. 232–233; Ex. 6, pp. 7–8.
[15] Tr. 47–48, 62.
[16] Ex. 2, pp. 1–2.
[17] Tr. 47, 48.
[18] Tr. 46–47.
[19] Tr. 87–88.
[20] Tr. 88.

On the question of whether first period demurrage or penal demurrage should be assessed for cargo remaining on the terminal beyond the normal first demurrage period because of delays in government inspection, Mr. Stakem was of the opinion that first period demurrage only should be assessed since delay in removal is not by reason of fault on the part of the consignee.[21]

The Association questions when free time begins to run. Underlying this issue requires a determination of when has the carrier properly tendered the containerized cargo for removal by the consignee. Does the carrier meet its obligation by merely tendering a container or must it also tender a chassis—the undercarriage equipment[22]—in order that the consignee may be able to pick up and remove the container from the terminal?

The rule sets forth that free time starts when the carrier tenders. Whether the carrier is or is not going to furnish a chassis is a matter to be spelled out in the tariff. Thus the carrier tenders—with or without a chassis—as it contracts with its shippers in its tariff.

A factor in determining what is a proper and reasonable amount of free time is how fast most cargo normally moves through a terminal or a port. Using normal flow patterns would give some basis for deciding how much time is reasonably necessary for a consignee to remove cargo. This determines the time beyond which it would be reasonable to charge demurrage.[23]

In addition, the cost to carriers and terminal operators in extending the amount of free time must be balanced against the economic consequences to shippers and consignees of demurrage charges if free time is not extended.[24]

In any event, consignees of inbound domestic offshore containers would need less free time than consignees of foreign imported containers where customs clearance and documentation requirements are time-consuming.[25]

Mr. Stakem testified "As of today [May 10, 1977], I do not recognize that there is a problem [in New York] insofar as the amount of free time that is being offered."[26] And the same for all other North Atlantic ports.[27] Nor did he have knowledge of any complaints regarding detention.[28] He further testified that most conferences serving the Port have filed tariffs providing free time and demurrage consistent with the

[21] Tr. 40, 42.
[22] Often referred to as "bogies."
[23] Tr. 63.
[24] Tr. 66.
[25] Tr. 112.
[26] Tr. 97.
[27] *Ibid.*
[28] Tr. 103.

proposed rules;[29] a random sample by the Commission staff in 1975 and again in 1977 found that most conferences were allowing five days free time on containers except for reefers and other specialized equipment and cargoes.[30] This is in general conformity with the proposed rules. There are situations where no free time is allowed on hazardous cargoes or on gold or jewelry or where piers are not equipped to handle certain cargoes.[31] This is not a problem which the proposed rules are proposing to rectify.

Despite the lack of complaints now, Mr. Stakem testified that a rule providing for free time and demurrage was preferable to tariff provisions to the same effect because "if there aren't any rules there's nothing to prohibit the carrier's reverting to a lesser number of days."[32] He expressed a fear that if this proceeding was discontinued without a rule and then the carriers reduced free time that complaints would start to come to the Commission and a new proceeding would have to be commenced. "I'm generally unsuccessful in attempting to have carriers do something on a voluntary basis without an established rule."[33] Further, since considerable confusion has arisen in the past regarding applicable free time and demurrage under strike situations, he believed "adoption of the rules proposed in this proceeding [would] provide guidance necessary to deal with these types of situations."[34] Mr. Stakem testified that absent a uniform rule on free time and demurrage that consignees at different terminals but otherwise similarly situated might be assessed differently.[35] He believed that "they should all be treated equally."[36]

In summarizing Mr. Stakem's testimony, it is found and concluded that in large measure there is no present problem which the proposed rules propose to rectify. The best that can be said in this vein is that the proposed rules are designed to "freeze" the tariff rules which generally prevail now in the Port.

Mr. Klestadt, Chairman of the Import Committee of the Association, testified that ships today are very fast and often they are faster than the mails. Customs brokers experience delays in the receipt of documents

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[29] In the domestic offshore Puerto Rican trade, only two days of free time is offered. It is noted that no complaints have been received by the Commission relative to this trade. The record indicates that customs clearance, currency conversions, letters of credit or other delays typical to foreign trade do not occur in domestic offshore trades. Tr. 112, 281.

[30] Tr. 12–13. Historically the Australia Conference has offered no free time for refrigerated cargo (Ex. 5, p. 5). Consignees have not complained about the Conference's "no free time" rule, and no more than 5 percent of the refrigerated cargo transported in the trade ever enters a demurrage status (Ex. 5, pp. 5–6). Virtually none of the refrigerated cargo ever incurs second period demurrage (Tr. 162). Witness Stakem testified that where zero free time is offered on refrigerated cargo in a trade and very little of that cargo ever enters a demurrage status, there is no need to increase the free time offered (Tr. 63–64). Hearing Counsel agree that the Australia Conference should be permitted to continue offering zero free time on refrigerated cargo, and no one has submitted testimony or argument in opposition to this position (Hearing Counsel Brief, p. 10).

[31] Tr. 73–74.

[32] Tr. 111; Ex. 1, p. 3.

[33] Tr. 111.

[34] Ex. 1, p. 4.

[35] Tr. 109.

[36] Tr. 110.

from abroad and very frequently cargo coming from Europe arrives in New York one or two days before the documents are in.[37] After receipt of the documents additional time is necessary to prepare the delivery order and relay instructions to the trucker to pick up the import.

In the past brokers were permitted to prelodge the delivery order at the pier and notify the truckman that he could go down and pick up the cargo, thus saving time. Current rules of the Commission no longer permit prelodging of delivery orders.[38] A broker must wait until he has a proper release from customs before he can direct the trucker to pick up the cargo.[39] Additional time is then required to transfer the delivery order from the broker's office to the truckman.[40]

The Association, in part, urges that a five day minimum free time rule be promulgated because consignees of foreign cargo may face delay problems occasioned by government inspections. The Association does not suggest that free time be extended to include the period of government inspection.[41] It contends that during a period of government inspection the consignee should be required to pay only first period demurrage.

Accordingly, the Association recommends that §526.1(d) be changed by inserting in the first parenthetical clause after "trucking strikes" the words "government inspections."[42] Staff witness Mr. Stakem agreed that where a consignee is unable to remove his cargo from the pier during the course of a government inspection, he should not be charged at a penal rate.[43]

The record is far from compelling in regard to delays caused by government inspections,[44] but in any event, the Commission has accepted the premise, with respect to breakbulk cargo in the Port, that delays caused by inability to remove cargo shall not result in imposition of penal demurrage.[45] Nevertheless, the situation relating to government inspection is no different in the Port of New York than at any other North Atlantic port.[46] There is no evidence to support a finding that penal demurrage is being assessed against containers for delays caused by government inspections in the Port of New York.[47]

In summary, Mr. Klestadt testified that a five day free time minimum is required because of delays in receiving documents from overseas, because of the time needed to prepare the delivery order and lodge it with the trucker, because of the time required to obtain a proper release from customs and by reason of all other ministerial functions that must be performed to arrange for the clearance of the cargo.

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[37] Tr. 136.
[38] Tr. 150.
[39] Tr. 148.
[40] Tr. 153–154.
[41] See *Free Time and Demurrage Practices at New York Harbor*, 11 FMC 238, 259–260.
[42] Ex. 4, p. 3.
[43] Tr. 40–42.
[44] Tr. 40; Ex. 4.
[45] General Order 8, 46 CFR §526.1.
[46] Tr. 154, 317.
[47] Ex. 4 generally supports the position taken but contains no evidence of any unjust or unreasonable practice.

The Association admits that the carriers, for the most part, in their discretion do allow this period, but argues that importers have no guarantee that this minimum will always be available. It contends the Commission should prescribe a minimum free time period of five days on import containers.[48]

The Association contends that absent a rule, the Steamship Conferences will be able to reduce free time without consulting importers by the filing of a tariff change on the basis of allegedly improved facilities. The Association argues that importers need protection against such unilateral action.

Assuming the Conferences were to reduce free time, such unilateral action, however, would not necessarily be an unjust or unreasonable practice from which importers should be protected. The Commission cannot predetermine what conditions would then be prevailing which might determine whether such reduced free time was a just or unjust, a reasonable or unreasonable practice. Terminal facilities might well be improved. Technological changes might well require changes in present tariffs relating to free time and demurrage. It is as likely that computerized documentation will speed up the time now necessary for processing as that terminal facilities will be inadequate to move cargo within the present permitted free times. One can speculate either way. But the record in this proceeding does not support a finding that in the light of current conditions, present practices are unjust or unreasonable.

In addition to urging promulgation of a five day free time rule, the Association believes that free time should not begin to run until not only is the container tendered but that the container should not be considered to be tendered until there is also made available a bogie or other undercarriage equipment to the trucker to permit the removal of the container from the pier. Without such equipment, it is the position of the Association, the consignee is unable to remove the container from the terminial.

It urges that a distinction should be drawn in §526.1(b) with respect to the obligations of the carrier on each type of cargo. Accordingly, in subparagraph (b)(1) after the word "holidays," they desire that there be inserted "on the breakbulk cargo." In addition, a new sentence should be added to this subparagraph reading as follows:

Free time of five (5) days (exclusive of Saturdays, Sundays, and legal holidays) on cargo in containers, such as house-to-house and pier-to-house containers, is adequate free time on such cargo in containers at New York under present conditions, provided, however, that such free time shall commence when the carrier tenders and makes available the container and such undercarriage equipment as may be necessary.[49]

The Association believes that subparagraph 526.1(c) should conform to the above-suggested revision with respect to cargo in containers by requiring the carrier not only to tender the container but also make it

[48] N. Y. Foreign Freight Forwarders and Brokers Association Opening Brief, p. 5.
[49] Ex. 3, pp. 1–2. Hearing Counsel support this; Opening Brief, p. 9.

available by providing the necessary undercarriage equipment. Accordingly, after the word "tender" in the second line of subparagraph (c), there should be added "and make available."[50] The rule proposed by the Association would delay the commencement of free time until the container is paired with a chassis.

The record herein indicates that the parties are in general agreement that the movement of containers from terminals is dependent upon the availability of undercarriage equipment; that while the operation of some carriers, as for example, Sea-Land, is based on a full chassis system,[51] others, because of the capital investment involved, operate on the basis of supplying and shifting chassis from container to container as the need arises to move a given container from the terminal.

The rule proposed by the Association is not required in order to impose on carriers the obligation to extend free time where by contract it is the carrier's obligation to supply undercarriage equipment and the carrier fails to do so. The carrier witnesses testifying in this proceeding recognized this duty.[52] The Commission's truck detention regulations already impose this obligation.[53]

Hearing Counsel contends that the obligation imposed by section 551.1(i) relates to the assessment of penalties under the Commission's Truck Detention Rule and "has nothing at all to do with extension of free time."[54] Hearing Counsel err in their ultimate conclusion. Although General Order 35 does indeed concern itself primarily with the problems of truck detention, nevertheless it is against the financial interest of the carrier to create a "delay occasioned by lack of sufficient chassis." When a carrier precludes such delay, *i.e.*, as having sufficient chassis, it enables the consignee to remove his shipment within the free time period and avoid imposition of demurrage charges.

The Association also contends section 551.1(i) does not cover the situation. It argues that General Order 35 is only concerned with houst-to-house containers, whereas its proposed rule covers pier-to-house containers as well. It asserts that merely reciting that the steamship company is "responsible" for delay caused by lack of chassis does not deal with the specific problem. It asks who would the steamship companies be responsible to? The terminals whose space they occupy? Or the consignee who is unable to remove his container? Or possibly both? Furthermore, being "responsible" does not mean that the free time period will necessarily under the cited rule be extended until a bogie is tendered with the container. The consignee will still get a demurrage bill if free time is exceeded due to the lack of a bogie.[55]

[50] Ex. 3, p. 2.
[51] Tr. 235–236; Ex. 6, p. 4.
[52] Tr. 171, 183, 236.
[53] General Order 35, 46 CFR 551.1(i) provides: "Steamship companies responsible for house-to-house movement of containers . . . are responsible under this Part for delay occasioned by lack of sufficient chassis . . . ." 46 CFR 551.1(i).
[54] Hearing Counsel Reply Brief, p. 8.
[55] Association Reply Brief, p. 8.

The Association does not suggest that the terminal should not be compensated for space occupied by a container for which a chassis has not been provided thus occasioning delay. It agrees that the terminal is entitled to be paid,[56] but not by the consignee. If it is the carrier that is responsible for the inability of the consignee to remove the container because of failure to tender undercarriage equipment, then it should be the carrier, rather than the consignee, which should pay the terminal.

The concern of the Association is understandable. The Commission might well consider the advisability of publishing an interpretive order clarifying the questions raised by the Association. However, insofar as promulgation of the rule proposed is concerned there has been no showing, on this record, that a condition exists in the Port of such a chronic lack of chassis or undercarriage equipment as to amount to an unjust or unreasonable practice warranting the promulgation of the rule proposed by the Association.

The Association points out that there are occasions when a carrier is unable to deliver the cargo, *e.g.*, it has been lost at the pier. Accordingly, it suggests that the Commission should consider amending the rules on import free time which permit distinctions to be made in the treatment to be given to cargo that was in free time as distinguished from cargo that was in first period demurrage. The Association believes that when a carrier is unable to tender and make available cargo through a disability it is suffering, the treatment afforded the cargo, whether in free time or in a period of demurrage, should be the same in order to prevent unreasonable discrimination. For example, under §526.1(c) in the case of carrier inability to tender cargo, free time is extended for a period equal to the duration of the carrier's disability. But, if the disability arises after the expiration of free time, the carrier may under the rule assess either no demurrage or first period demurrage.

The Association argues that this latitude in the carrier creates an opportunity for discrimination in two areas. Firstly, there is no reason why cargo in free time should have the free time extended at no cost to the consignee while cargo in first period demurrage should have to continue to pay such demurrage even though it is the carrier's inability and no default by the consignee that has brought about the unavailability of the cargo. The Association believes that any time there is a disability to deliver by a carrier, there should be no assessment on the cargo at all, regardless of whether it is in free time or first period demurrage. Secondly, under this rule, discretion is left with the carrier as to whether no demurrage or first period demurrage should be assessed if the disability arises after the expiration of free time. This means that depending upon the carrier's or terminal operator's tariff, some consignee will be assessed demurrage in this situation while others will not. The Association says that there is no cogent reason for this opportunity for discrimination

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[56] Association Reply Brief, p. 9.

between consignees. The Association recommends, therefore, that §526.1(c) be changed to read as follows:

Where a carrier is, for any reason, unable, or refuses, to tender and make available cargo for delivery, whether such cargo is in free time or demurrage, the carrier shall not assess any charge for demurrage for a period equal to the duration of the carrier's disability or refusal.[57]

Staff witness Mr. Stakem agrees that under the present language of subparagraph (c) on the identical factual situation two consignees can be treated differently by two carriers with respect to the assessment of demurrage.[58] He is of the view that in conformity with the general theory of the Shipping Act, all consignees in a demurrage situation should be treated equally.[59]

The Conferences contend that the Association is incorrect in its assertion that the present rule permits "unreasonable discrimination" because consignees using different carriers might be treated differently depending on the rules in the carriers' tariffs.[60] The Conferences claim that there can be no discrimination where, as is the case under the present rule, similarly situated shippers are treated equally under the tariff of the same carrier. Mere differences in tariff provisions of competing lines do not establish discrimination.[61]

The Conferences point out that the Commission carefully considered the issue raised by the Association when section 526.1(c) was first adopted. The conclusion of the Commission was that is is permissible, but that a carrier is under no obligation, to extend free time if the disability to tender cargo occurs after the expiration of the free time period. Thus, the Commission established the present section 526.1(c) fully recognizing and approving the fact that tariff provisions would differ from carrier to carrier.[62]

The Association admits that the Commission in *Free Time and Demurrage Practices on Inbound Cargo at New York Harbor* so decided. It points out that while the Commission granted the option to the carrier, it felt that the fair treatment would be to extend free time, saying:

Nor do we mean to imply a carrier may not grant free time whenever it can not tender cargo for delivery, as is the present practice of many of the carriers. Indeed, this appears to be the more equitable approach and should be encouraged inasmuch as an assessment of demurrage after the expiration of free time when the consignee does present himself for pickup of his cargo and the carrier refuses or is unable to tender it acts to require payment from a consignee for a service he no longer needs or desires. 11 FMC at 253.

Now the Association says it is time for the Commission to adopt the "more equitable approach." It contends that there is no reason why a

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[57] Ex. 3, pp. 3–4.
[58] Tr. 109.
[59] Tr. 110.
[60] See Association Opening Brief, p. 10.
[61] *Rates, Charges, and Practices of L. & A. Garcia and Co.*, 2 USMC 615, 618 (1941); *North Atlantic Mediterranean Freight Conference—Rates on Household Goods*, 11 FMC 202, 213 (1967).
[62] See *Free Time and Demurrage Practices on Inbound Cargo at New York Harbor*, 11 FMC 238, 252–253 (1967).

consignee should be required to pay for space it is forced to use because of carrier fault. Where a consignee is "thwarted in its bona fide effort to pick up its goods," there should be no demurrage.[63]

In any event, there is no evidence that the present practice has worked harshly or is otherwise unjust or unreasonable and there is no statutory basis for adopting the Association's proposed rule.

CONTAINER DETENTION

Container detention refers to the cargo assessed for the use of container equipment as distinguished from demurrage charges which are assessed for use of the terminal facility.[64] Demurrage may be payable to the terminal operator whereas container detention charges may be payable to the owner of the container, the carrier, who may not necessarily own or operate the pier.[65]

The proposed rule contemplating imposition of container detention charges only after the container leaves the terminal is opposed by the carriers and by Hearing Counsel. They argue that containers are expensive equipment; free time should contemplate the time appropriate for the consignee to take possession; that once he takes—or should take—possession charges for use of the container should begin to accrue. Presently a container not removed during free time would thereafter be assessed demurrage and, in addition, container detention charges.

The Australia-Eastern U.S.A. Shipping Conference does not follow this approach. It provides for five days free time on general cargo in containers before assessment of demurrage but only two days free time before assessment of container detention charges.[66] Once the consignee pick up the container detention charges cease. "After pickup, the costs of the container, if any, are governed by interchange agreements with inland carriers."[67]

Hearing Counsel contends it is an unreasonable practice to assess container detention charges based on a different free time schedule then utilized for assessment of demurrage.[68]

The Conference's witness, Mr. Egan, testified that despite the fact that the problems attendant upon customs clearance and documentation may inhibit a consignee's ability to remove a container in less than four or five days, nevertheless, it was fair and reasonable for the Conference to allow only two days free time before charging for container detention. ". . . our costs are calculated on certain turn around of equipment. If that free time for detention was increased, then that is an additional cost to us which might be reflected somewhere than in a cost, in a charge, whether it was a freight rate or whatever."[69]

[63] Association Reply Brief, p 11; citing in support *Midland Metals Corp. v. Mitsui O.S.K. Line*, 15 FMC 193, 199.
[64] Tr. 98–99.
[65] Tr. 177, 199; Ex. 5, p. 12.
[66] Tr.175–176, 199, 205.
[67] Ex. 5, p. 12. To the same effect, see Tr. 241–243; Ex. 6, p. 17.
[68] Hearing Counsel Opening Brief, p. 14.
[69] Tr. 206.

Despite Hearing Counsel's contention that it is an unreasonable practice if free time for demurrage and free time for detention are not identical the evidence in this proceeding indicates that the cost elements relating to terminal space—which bear on free time and demurrage—and the cost elements relating to container equipment are different and therefore the amount of free time for demurrage and for container detention need not be identical. Accordingly, a tariff which specifies different free time for demurrage than for container detention is not *per se* an unjust or unreasonable practice. Neither Hearing Counsel nor any other party has introduced evidence establishing or even tending to establish that the Conference's two day free time for container detention is not based on valid economic considerations of capital investment or is otherwise unjust and unreasonable.

Nor is there any evidence in this proceeding which would establish that the imposition of a charge for container detention prior to removal from the terminal is an unjust or unreasonable practice which would warrant a rule precluding such charge until after the container leaves the terminal. Accordingly, the proposed rule on container detention cannot be justified as correcting an unjust or unreasonable practice.

DOCUMENTATION

The Association proposes an additional rule which would require that the carriers furnish certain documentation to the consignee relating to assessment of demurrage in order that the consignee may determine if he is being properly assessed.[70] For example, carrier records as to when the truck appeared; when it was discharged or let go.[71]

"It is sort of a discovery rule . . . ."[72]

The Conferences contend that such a rule is unnecessary. Regulations already require terminal operators to provide truckers (the agents of consignees) with copies of such documentation at the time they arrive at the terminal to pick up shipments. Section 551.2(a)(1) provides in relevant part:

> Motor carrier vehicles having physical possession of delivery orders or dock receipts immediately shall be issued a sequentially numbered and time-stamped gate pass by order of arrival. When dock receipts are lodged with the terminal operator or steamship company, the sequentially numbered and time-stamped gate pass immediately shall be issued upon tender of the dock receipt to the gateman by the motor carrier vehicle driver. The sequential number and all time stamps and notations recorded on the gate pass and any other arrival document shall be recorded on the copy of the delivery order or dock receipt retained by the motor carrier. 46 CFR 551.2(a)(1).

Section 551.2(f) of the regulations also provides:

> If documents are rejected by the terminal operator, or service is refused for any other reason, the terminal operator shall provide the motor carrier written explanation, time

[70] Ex. 3, pp. 4–5.
[71] Tr. 127.
[72] Tr. 128.

stamped, of the deficiencies in documentation or other reason(s) for refusal of service . . . . 46 CFR 551.2(f).

The Association responds to such that demurrage claims usually arise several months after the cargo has been removed and to obtain copies of the pertinent documents from a motor carrier who may be located inland is "obviously a difficult chore."[73]

The Association further agrees that section 551.2(a)(1) would not be helpful to a consignee in the event that a trucker is shut out or not otherwise admitted to the pier. Its witness, Mr. Klestadt, claimed that there are frequently occasions where a truckman will appear at a terminal at 8:00 a.m., and after standing in line he finds that the cargo is refused because the delivery clerk has not received a freight release from his main office, even though the necessary bills of lading have been surrendered. The consignee is not at fault. But the truck will lose its place on line and it is unable to pick up the freight on that day. According to Klestadt, records are very rarely kept of these attempted pick-ups by the truckmen.[74]

With regard to section 551.2(f), the Association says it assumes a situation where the trucker reaches the pier clerk. Where he stands on line and is then "shut out," it argues the rule would be inapplicable and of no help to consignees.

The arguments of the Association are not convincing. There is no unreasonable practice under section 17 of failure to provide documentation. The documents necessary to support any position of a consignee in a demurrage dispute are presently being supplied its agent. That to obtain the records of the agent may be "a difficult chore" is scarcely a sufficient reason to publish a rule which in effect duplicates a rule already in effect and requires terminals to supply documentation to two parties in interest.

The situation described by Mr. Klestadt may arise on occasion but there is no evidence that they are chronic or that such conditions are so prevalent as to seriously increase the congestion which General Order 35 was designed to combat so as to warrant correction by utilization and implementation of General Order No. 8.

Further, present discovery rules are sufficient to meet the needs of any consignee for information in the event that a demurrage dispute is the subject of a proceeding before this Commission.

Mr. Baltz, import manager for Heublein Spirits Group, testified that in disputes over demurrage "we have to guarantee the demurrage to the terminal operator or else they hold our container for ransom . . . ."[75] "I had a case just three weeks ago where we owed the line two days demurrage, it was $18.50 and they refused to release the container [so] that [it] incurred an additional $9.90 because we owed them $18 or $19."[76] Mr. Baltz did not contend that there was any refusal to release a

[73] Association Reply Brief, p. 13.
[74] Tr. 125.
[75] Tr. 385.
[76] Tr. 386.

second shipment still in free time because of an outstanding demurrage bill on a prior shipment.[77] Only where a prior demurrage bill was outstanding and a second shipment was in a demurrage status was the terminal unwilling to release the second shipment under guarantee of payment but demanded actual payment. Thus until the payment is made in cash, a delay can occur resulting in accrual of additional demurrage charges.[78] No specific suggestions were put forth by Mr. Baltz ". . . but there is much room for improvement in many of these operations."[79] In any event, no complaint has been lodged by Mr. Baltz with the Commission alleging violation of terminal tariffs or of the truck detention rules.

MULTIPLE-CONTAINER RULE

Intervenor National Association of Alcoholic Beverage Importers[80] sponsored witnesses Bernstein and Baltz, who testified in favor of a multiple container rule.[81] Many import shipments of alcoholic beverages consist of multiple container loads of ten or more.[82] Hearing Counsel believes it is an unreasonable practice not to grant additional free time to consignees of multiple container shipments[83] but although NAABI suggests a schedule of additional free time, the record contains no convincing evidence as to why NAABI's suggestion is reasonable, nor what a precise schedule of additional free time should be.[84] That is probably because what free time is necessary may depend on the nature of the commodity and trade in question and may not be susceptible to a universal rule.

Although NAABI recommends that shipments of more than four containers should entitle the consignee to additional free time, Hearing Counsel believes that it is reasonable to expect a consignee to remove eight containers from a New York pier facility within five days free time, but if a consignee is receiving more than eight containers on a single vessel, Hearing Counsel argues that such consignee ought to be entitled to additional free time to remove those containers. They suggest a rule establishing that when a consignee receives nine or more containers, eight containers must be removed during the normal five days free time in order for the consignee to qualify for additional free time.[85]

Certain conferences and carriers presently offer a multiple container rule only when one consignee has a multiple container shipment on one vessel and where all the containers are moving on a single bill of lading.

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[77] Tr. 397–398.

[78] Tr. 398–399, 407–408.

[79] Tr. 400.

[80] Though it participated in this proceeding, NAABI filed no brief.

[81] Tr. 339–346, 378 *et seq.* Hearing Counsel Opening Brief, pp. 14–17, supports a modified multiple-container rule.

[82] For one importer more than 50 percent of containers were received in shipments of ten or more containers. Tr. 420.

[83] Hearing Counsel Opening Brief, p. 15.

[84] Hearing Counsel Opening Brief, p. 15.

[85] Hearing Counsel Opening Brief, p. 16.

Hearing Counsel oppose this single bill of lading requirement. They argue that the important consideration is the number of containers which a consignee must absorb, and not the number of bills of lading which cover the shipments.[86]

However, this raises a problem where a single vessel is carrying containers moving under many different conference tariffs. In that situation, Hearing Counsel takes the position that the multiple container rule should only apply to containers on a single vessel destined to a single consignee moving under one conference tariff to avoid problems relating to section 15 of the Shipping Act.

It may well be that alcoholic beverage importers have problems peculiar to their industry which might warrant particular consideration. But the same undoubtedly could be said for many trades. The particular requirements of a particular commodity in a particular trade do not lend themselves well to rulemaking. Rulemaking must have a broader oversight. Whatever the merits of multiple-container tariffs, it would seem that their promulgating can best be left to the carriers and terminals who, within the strictures of sections 16 First, 17 and 18(a) of the Shipping Act, 1916, are well suited to deal with the requirements of particular commodities in particular trades.

The evidence in this case does not support a finding that any carrier or terminal has promulgated or failed to promulgate tariffs relating to multiple-containers which amount to an unjust or unreasonable practice. No rule, therefore, need be issued.

PUERTO RICAN DOMESTIC OFFSHORE TRADE

The Puerto Rico Maritime Shipping Authority (PRMSA) contends that the proposed rules, if adopted, should not be applicable to containers received from Puerto Rico in the domestic offshore trade.

Carrier tariffs on inbound containers from Puerto Rico presently permit two days free time on general cargo in dry containers, one day free time on refrigerated containers and one day free time on tank containers.[87]

Carriers in this trade currently publish less free time than is largely prevalent for the foreign trades in the Port because there is no customs inspection, no currency conversion problems, nor letters of credit.[88] The only import document necessary to receive the container is the delivery order which the motor carrier obtains from the consignee.[89] Consignees in this trade consequently do not face the same customs and documentation problems as consignees in the foreign trades, and therefore, do not require as much time to remove containers from pier facilities.

The experience of the Australia-Eastern USA Conference is that not more than 5 percent of the general cargo containers go on demurrage.[90]

[86] Hearing Counsel Opening Brief, p. 17.

[87] Tr. 355; Ex. 10, attach.

[88] Tr. 112, 281.

[89] Tr. 139, 369.

[90] Tr. 193.

PRMSA's experience in the Puerto Rican domestic offshore trade indicates a somewhat higher percentage of containers incur demurrage. A 1975 survey by PRMSA at New York found only 12 percent of containers incurring demurrage. A further survey in February 1977 found only 13 percent of containers incurring demurrage. Another survey in March found 9 percent of containers incurring demurrage.[91]

Nevertheless, because no complaints have been received regarding free time and demurrage problems in the Puerto Rican trade, Hearing Counsel takes the position that the free time provisions presently operative in the Puerto Rico trade on inbound containers are reasonable.[92]

The Association, the only other party in this proceeding advocating adoption of rules pertaining to import containers in the Port, did not in either its opening or reply brief specifically address itself to containers in the domestic offshore trade. The thrust of its position being that a minimum of five days or more was necessary because of documentation and procedures involved in the foreign trades, including customs clearance, government inspections and monetary matters. Its position relating to supply of undercarriage equipment presumably would be the same whether a container was in a foreign or domestic offshore trade.

In any event, since the free time and demurrage rules presently in effect in the Puerto Rican domestic offshore trade are not unjust or unreasonable practices, there is no basis for prescribing rules which can only be adopted upon a finding that present practices are unjust and unreasonable and which practices the rules are designed to make just and reasonable.[93]

CONCLUSION

Since existing free time and demurrage provisions are essentially the same as the rules proposed here, the record is clear that there are no present problems which adoption of the rules are designed to remedy. The argument, however, for promulgating the rules is the contention that without them a carrier or conference could at any time alter its free time and demurrage provisions.[94]

If this were to occur, it does not necessarily follow that such a change would *per se* be unjust and unreasonable. It would be mere speculation as to conditions which might prevail at the Port in the future warranting or not warranting a change in free time or demurrage rules.[95] In such case, an investigation might then be instituted by the Commission to determine if the changes were proper and whether to issue a rule appropriate in the then-existing situation. Hearing Counsel argues that a rule is needed now to preclude the possibility of a future potentially time-consuming proceeding. It is also true, however, that if the situation were to change in the

[91] Tr. 351, 360–361; Exs. 9, pp. 6–7; 10, p. 2.
[92] Hearing Counsel Opening Brief, p. 12.
[93] Section 17, Shipping Act, 1916.
[94] Tr. 13; Ex. 1, p. 3. Hearing Counsel's Opening Brief, p. 4; Freight Forwarders' Brief, p. 5.
[95] Tr. 187, 188, 202, 204; Ex. 5, p. 4.

Port that an equally time-consuming proceeding might be necessary for a Commission rule to be changed to meet the then-existing situation. No problem exists now.[96] A change in rules by the carriers would not necessarily create a problem if conditions in the Port warranted such change. Nothing is to be gained now by promulgating a rule which resolves no problem and which itself may result in a problem if future Port conditions warranted a change. The public interest is well served if the Commission remains vigilant and acts appropriately where changed conditions warrant action by it. To adopt the approach advocated by Hearing Counsel is to suggest that the Commission could not effectively resolve a future problem if and when it arises.

In the past when the Commission or its predecessors have established free time and demurrage rules, there have always been compelling reasons for imposing the regulations.

In 1937 the free time on import cargo at New York was limited to ten days because carriers were allowing import cargo to remain on the piers indefinitely causing severe congestion. *Storage of Import Property,* 1 USMC 676 (1937).

In 1941 the Commission's predecessor requested carriers to reduce free time on import cargo at New York from ten to five days in order to reduce congestion at the Port, and in 1946, as a result of congestion during strikes against steamship and trucking companies in New York, rules were adopted for free time and demurrage on import cargo during strike situations. *Free Time and Demurrage Charges at New York,* 3 USMC 89, 94, 106 (1948).

A longshoremen's strike in 1965 resulted in further modification of the free time and demurrage rules on import cargo at New York, but since the Commission found no evidence of problems with respect to containerized cargo, the rules were limited to non-containerized cargo. *Free Time and Demurrage Practices on Inbound Cargo at New York Harbor,* 11 FMC 238, 260 (1967).

Finally, in 1968 the Commission established rules for free time and demurrage on export cargo at New York and Philadelphia because unlimited free time was being permitted on export cargo at those ports resulting in waste, inefficiency, and congestion at the terminals. *Free Time and Demurrage Charges on Export Cargo,* 13 FMC 207–210 (1970).

Commission rules have been adopted in the past only in specific response to serious problems demanding remedial action. Where there has been no evidence of unjust o unreasonable practices (such as in 1967 when on problems were shown to exist with regard to containerized cargo at New York and in 1970 when no ports other than New York and Philadelphia offered unlimited free time on export cargo), the Commission has declined to impose free time and demurrage regulations.

The problems relating to pier congestion in the Port of New York

[96] Tr. 97.

affecting import breakbulk cargo which gave rise to the promulgation of General Order 8 do not, based on the record in this proceeding, currently exist in the Port insofar as import containerized cargoes are involved. The current tariffs and practices prevalent in the Port, insofar as they relate to import containerized cargoes, result in few, if any, complaints by consignees as to amount to unjust or unreasonable practices.

Consignees would prefer a Commission freeze on free time allowances but their testimony does not suggest or support a finding that additional free time is warranted. To issue such a rule would, however, confirm that the present practice is just and reasonable. The Commission's statutory authority does not permit it to act unless it finds a practice to be unjust or unreasonable so as to warrant corrective regulatory action.[97]

Hearing Counsel admits that the Conferences are correct when they assert that at the hearing "no details were provided as to why consignees considered [present] free time inadequate or whether the situation complained of involved unusual circumstances in a particular trade or related to particular commodities. Hearing Counsel thus suggests that "the details which are now of such interest to the Conferences could have been developed on cross-examination, but were not."[98]

Hearing Counsel misconstrue the requirements for promulgation of a rule. Section 17 of the Shipping Act requires a finding that a present practice is unjust or unreasonable so as to warrant changing such practice by promulgating a rule which will result in a just and reasonable practice. As such, the burden is on those who assert the existence of an unjust and unreasonable practice to prove it. If "no details are provided as to why consignees considered free time inadequate," it can hardly be blamed on the Conferences' failure to elucidate same on cross-examination since the Conferences have no burden to justify the present free time and demurrage practice.

The conclusion to be drawn from the record in this proceeding is inescapable: Adoption of the proposed rule to make General Order 8 applicable to containerized cargo is not required by reason of any current unjust or unreasonable practices relating to containerized cargoes in the Port of New York.

Since 1971 relatively few complaints have been received and at the time the record was closed there were no present problems regarding free time and demurrage of which the staff of the Commission were aware.[99]

Absent a rule permitting unlimited free time, it is unlikely that demurrage would never occur. Thus, the fact that some demurrage does

[97] Section 17, Shipping Act, 1916.

[98] Hearing Counsel Reply Brief, p. 7.

[99] Tr. 97, 111, 114. Current tariffs generally prevalent in the Port of New York met and alleviated in the substance of the complaints previously made to the Commission.

occur despite the five day free time rule generally in effect does not mean that five days free time is unjust or unreasonable.[100]

Therefore, in consideration of the entire record in this proceeding and for all the reasons herein above set forth, it is found and concluded that the rules proposed to amend General Order 8 are not required to enforce just and reasonable practices in the Port of New York relating to free time and container detention time on import containerized cargo and this proceeding is, accordingly, discontinued.

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

WASHINGTON, D.C.,
December 7, 1977.

[100] For example, a random sampling of vessels in Sea-Land's North Atlantic-European service between August 1974 to February 1975 showed a decline in the percentage of containers incurring demurrage from 18 percent to approximately 4 percent. Average demurrage day were constant at 3.2 in 1974 and 3.3 in 1975. Another sampling found 7.2 percent of containers incurring demurrage in November 1976, with a reduction to 5 percent in February 1977. Average demurrage days declined from the initial sample to 2.9 in November 1976 and again declined to 2.6 in February 1977. Consignees who incur demurrage include those who use the pier for storage to save inland trucking and warehouse charges, those having no immediate market for the goods, and those who sometime are not able to get cargo cleared. Tr. 244, 257, 281–82; Ex. 6, pp. 8–9, 15.

APPENDIX A

Hearing Counsel puts forth certain recommendations relating to implementatio or clarifying General Order 8.

It is the finding of the Presiding Administrative Law Judge that the matters relative thereto do not correct any unjust or unreasonable practices within the meaning and requirements of section 17 of the Act.

The Commission, however, may wish to give consideration to their implementation in a manner otherwise within its authority.

Hearing Counsel recommendations are as follows:

Section 526.1(c)

Section 526.1(c) relates to a carrier's disability which precludes delivery to the consignee. Under this provision if the disability arises after the expiration of free time, the carrier may, under the rule, assess either no demurrage or first period demurrage.[1] Hearing Counsel believes this result may cause a disadvantage as between two competitors using different lines or terminal facilities. They suggest the Commission should consider eliminating this source of potential competitive disadvantage.

They believe tha the Commission also should examine a possible clarification of the intended application of paragraphs 526.1(c) and 526.1(d). If cargo is lost, or documents are lost, or some other similar cause relating to carrier fault precludes delivery, section 526.1(c) applies to extend free time for the duration of the carrier's disability. On the other hand, in the event of a strike, etc., section 526.1(d) applies.

A question was raised during the hearing as to the validity of certain aspects of the strike provisions. Hearing Counsel is of the view if cargo is in demurrage when a strike commences, it should stay in demurrage and pay compensatory storage charges because that cargo should have been picked up during the allotted free time period. On the other hand, if the cargo is in free time when the strike begins, it should stay in free time because the carrier has not completed its obligation to the consignee.

Delay Caused by Action or Inaction of a Government Agency

The New York Foreign Freight Forwarders and Brokers Association raises the question of delays caused by action or inaction of a government agency. Hearing Counsel agree with the Association's position that it is reasonable to assess compensatory (first period) demurrage upon expiration of free time even where the inability of the consignee to obtain the cargo during free time was the result of action or inaction of a government agency. However, Hearing Counsel also agree that it is unreasonable to assess penalty demurrage (second or third period demurrage) during such a delay. Since the cause of the delay is not within the control of the consignee, penalty assessments will not achieve their intended purpose of encouraging expeditious removal of containers. On the other hand, the terminal operator should be compensated for the use of their pier after expiration of free time through collection of first period demurrage.

[1] See Ex. 3, pp. 3–4.

Records Applicable to Demurrage Charges

Hearing Counsel also agree with the position of the New York Foreign Freight Forwarders & Brokers Association that when a dispute arises over a demurrage assessment, the carrier should be required to provide the consignee, on request, all documents relating to the shipment which bear on the propriety of the assessment. While it is true that the motor carrier or consignee may maintain records, Hearing Counsel is concerned that ocean carriers and conferences will not always recognize the validity of those records when a demurrage charge is disputed.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 519(I)

FRITZI OF CALIFORNIA

v.

K-LINES

NOTICE OF DETERMINATION NOT TO REVIEW

May 12, 1978

Notice is hereby given that the Commission on May 12, 1978 determined not to review the decision of the Settlement Officer in this proceeding served May 5, 1978.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 519(I)

FRITZI OF CALIF.

v.

K LINES

Reparation Awarded.

DECISION OF ROLAND C. MURPHY, SETTLEMENT OFFICER[1]

Fritzi of Calif. claims $294.37 as reparation from "K" Lines for equalization with respect to five different shipments of such varied commodities as cotton denim jeans, twill jeans, polyester piece goods and cotton clothing transported from suppliers in Hong Kong to Fritzi of Calif., the bills of lading for which indicate that San Francisco, California is the port of discharge. The truck movements (Bonded Trucking Company, Inc.) from "K" Lines' port of delivery at Oakland to the consignee at San Francisco took place on March 16, 1976; March 15, 1976; April 15, 1976; June 1, 1976; and July 2, 1976. The claims were filed with the Commission on March 13, 1978, within two years from the date the cause of action arose and must be considered on their merits as ruled by the Commission in *Colgate Palmolive Company v. United Fruit Company,* Informal Docket No. 115(I), served on September 30, 1970.

The equalization claims are based on the excess of the trucking rates from Oakland to San Francisco[2] which were paid by Fritzi.

Rule No. 177 of "K" Lines' Tariff FMC-60 provides as follows:

> "When a shipment is consigned in a carrier's Bill of Lading to a port covered by this Tariff, the carrier at its option may arrange for movements of the shipment via rail, truck, or other conveyance from port of actual discharge to such port of destination named in the carrier's Bills of Lading at carrier's expense."

It is clear from the documentation presented by the complainant that "K" Line had discharged its cargo at a discharge port other than that

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

(Note: Determination not to review May 12, 1978.)

[2] Fritzi has submitted freight bills covering the truck movements of the subject shipments from "K" Lines in Oakland to Fritzi in San Francisco.

specified by the bills of lading. The carrier had two options regarding the shipment in question: (1) they could have delivered the cargo at the designated ports indicated on the bills of lading; or (2) move the cargo from the port of diversion to the designated ports at its own expense. "K" Line chose the latter course of action.

Based on the aforementioned rule, that since the carrier has elected to arrange ground transportation when it discharges cargo at a port other than that specified in the bill of lading, the consignee pays only the amount which it would have cost him to arrange transportation from the proper port to a point of destination.[3]

Listed below are the computations in Fritzi's claim for equalization reparation by "K" Lines:

Claim FR–122
3/17/76 ASIA MARU V/48, B/L K991–01000 & 01001

F/B 76587 Oak. to S.F.	Charged	$ 98.50
S.F. to S.F. 3972 as 4000 × 100 =		$ 40.00
Frt. Equalization		$ 58.50

3/15/76 ASIA MARU V/48, B/L K225–53317

F/B 76460 Oak. to S.F.	Charged	$143.40
S.F. to S.F. 18,241 × 72 =		$131.34
Frt. Equalization		$ 12.06

Claim FR–123
4/15/76 ASIA MARU V/7049A, B/L K225–53506

F/B 78088 Oak. to S.F.	Charged	$ 98.50
S.F. to S.F. 4285 × 100 =		$ 42.85
Frt. Equalization		$ 55.65

Claim FR–124
4/15/76 ASIA MARU V/49, B/L K991–01135,36

F/B 78087 Oak. to S.F.	Charged	$125.40
S.F. to S.F. 8939 × 90 =		$ 80.45
Frt. Equalization		$ 44.95

Claim FR–125
6/2/76 QUEENSWAY BRIDGE V/37, B/L K991–01298,297

F/B 80366 Oak. to S.F.	Charged	$ 98.50
S.F. to S.F. 2387 × 129 =		$ 30.79
Frt. Equalization		$ 67.71

Claim FR–126
7/2/76 QUEENSWAY BRIDGE V/36, B/L K991–01445,447

F/B 82075 Oak. to S.F.		Charged	$167.86
S.F. to S.F.	13143 × 81—106.46		
	1% Inc. 1.06		$112.36
	4.5% Inc. 4.84		
Frt. Equalization			$ 55.50
Total Equalization Charges			$294.37

[3] *Konwall Co. Inc., v. Orient Overseas Container Line*, Informal Docket No. 326(I), 1975.

Respondent denied the claims solely on the basis of Rule No. 28 in Tariff FMC-60 which requires that claims be filed within six-months after date of shipment.[4]

The foregoing indicates that "K" Lines is in violation of Section 18(b)(3) of the Shipping Act, 1916, for receiving a different compensation for the transportation of property of any service in connection therewith than the rates and charges specified in its tariff. Therefore, Fritzi is awarded reparations in the amount of $294.37.

(S) ROLAND C. MURPHY,
Settlement Officer.

[4] The complaint was filed with this Commission within the time limit specified by statute; and it has been well established by the Commission that carrier's so called "six-month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 561

SUNPAK MOVERS, INC.

v.

SEA-LAND SERVICE, INC.

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

May 11, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on May 11, 1978, subject to the following clarifications.

The application for relief states that the tariff change was intended to be published no later than August 19, 1977. The date of shipment, however, was August 17, 1977. It is unclear from this whether the rate sought was in fact intended to apply to this shipment. However, a memo attached to the application unequivocally shows that the tariff filer was instructed to file the rate effective August 16, 1977, thereby establishing the requisite intent.

Applicant states that the shipper was billed at the 1520 cu. ft. minimum for two containers and seeks permission to waive $2,822.09. We find that application of the "overflow rules" contained in Rules 147 and 235 of the applicable tariff would have required billing only for the actual contents of the second container rather than the minimum. The amount to be waived would then be $509.25.

IT IS ORDERED, That applicant is authorized to waive $509.25 of the charges otherwise applicable on the shipment in question.

IT IS FURTHER ORDERED, That applicant shall publish promptly in its appropriate tariff, the following notice:

"Notice is hereby given, as required by the decision in Special Docket 561 that effective August 16, 1977 for purposes of refund or waiver of freight charges on shipments which may have been shipped during the period from August 16, 1977, through September 1, 1977, the rate on 'Effects, Household or Personal', Minimum 1400 cu. ft. per container is $169.75 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 will 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) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 561

SUNPAK MOVERS, INC.

v.

SEA-LAND SERVICE, INC.

Adopted May 11, 1978

Permission granted for carrier to waive, for benefit of shipper, collection of $2,822.09 aggregate freight charges.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) and section 18(b)(3) of the Shipping Act, 1916, the respondent Sea-Land Service, Inc. (Sea-Land or carrier) has filed a timely (within 180 days of August 17, 1977, the date of the involved shipments) application for permission to waive, for the benefit of Sunpak Movers, Inc. (shipper or complainant) collection from the shipper of $2,822.09 aggregate freight charges. The $2,822.09 would be, if not waived, in addition to the $12,678.91 freight charges paid by the shipper to the carrier on October 10, 1977, totalling $15,501.00, for shipment of used household goods from Long Beach, California, to Tehran, Iran, via Bandar Abbas, on the carrier's vessel *Venture—V90E*, under Bill of Lading No. 995731915 dated August 17, 1977.

Bill of Lading No. 995731915 shows shipment of two 35 foot containers said to contain used household goods. Container No. 51269. with a gross weight of 10,932 lbs., measured 1,400 cubic feet. Container No. 307473, with a gross weight of 5,863 lbs., measured 975 cubic feet. Under Sea-Land Tariff 253, FMC 126, Item 0400, the rate in effect at the time of shipment was $169.75 per 40 cubic feet, minimum 1,520 cubic feet per container. Each container was regarded as measuring 1,520 cubic feet, a total of 3,040 cubic feet. 3,040 cubic feet divided by 40 cubic feet equals 76. 76 × $169.75 equals $12,901.00. There is also shown on the Bill of Lading, as well as Sea-Land's Home Ofc Acctg copy a "Beyond

[1] This decision became the decision of the Commission May 11, 1978.

Transportat Ch'' or BT—80.0 @32.50 per T.M. = $2,600.00. The application does not state, but it is assumed that there is no dispute as to the $2,600.00 charge and that it covers the land transportation charge from Bandar Abbas to Tehran. The $2,600.00 added to $12,901.00 equals $15,501.00.

The rate sought to be applied is $169.75 per 40 cubic feet, minimum 1,400 cubic feet per container. Container No. 51269 measured 1,400 cubic feet. Container No. 307473 measured 975 cubic feet. Together they measure 2,375 cubic feet, which divided by 40 cubic feet equals 59.375. 59.375 × $169.75 equals $10,078.91. To the $10,078.91 is added the $2,600 BT charge, making a total of $12,678.91. The $12,678.91 is the amount the shipper, in concurrence with this application, certifies it paid and bore.

The application for waiver states as facts in support the following:

> On August 8, 1977 Sea-Land's Seattle sales representative for the Mid East Services, D. A. Koenig, requested that the minimum of 1520 cu. ft. per container in item 0400 of Sea-Land tariff No. 253 FMC No. 126, ICC No. 102 be reduced to 1400 cu. ft. per container. The tariff change was to be published no later than August 19, 1977. Through error, the tariff change wasn't published until September 2, 1977.
>
> On August 17, 1977 Sun Pack Movers of Seattle tendered a shipment from Long Beach, California to Teheran, Iran.
>
> They were billed at the 1520 cu. ft. minimum rather than the expected 1400 minimum plus overflow. Sun Pak has paid the freight charges based on the expected 1400 cu. ft. minimum. In reviewing the charges the first container was paid as 1400 cu. ft. and the second container @975 cu. ft. per Rules 147 and 235 of Tariff No. 253. Respondent requests that it be allowed to waive the charges of $2,822.09. The error in not publishing the rate to be effective on the date requested was clerical in nature and therefore we request relief.

Upon consideration of the above, a review of the applicable tariff, and the documents submitted with the application, the Presiding Administrative Law Judge deems the application for permission to waive collection of portions of the freight charges comports with Rule 92, Special Docket Applications, Rules of Practice and Procedure, and section 18(b)(3) of the Shipping Act, 1916, referred to above, and the error to be one within the contemplation of said Rule and Act.

Therefore, upon said considerations, it is found,

(1) There was an error of a clerical or administrative nature (corrected by effective tariff before this application was filed), which resulted in having freight charges due if not waived.

(2) The waiver requested will not result in discrimination as between shippers.

(3) The application, having been filed timely and having shown acceptable cause, should be granted.

Wherefore, it is
Ordered
The application be and hereby is granted.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

WASHINGTON, D.C.,
April 11, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 558

AERO MAYFLOWER TRANSIT CO.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION

May 17, 1978

No exceptions having been filed to the initial decision in this proceeding, and the Commission having determined not to review same, notice is given that the initial decision became the decision of the Commission on May 17, 1978.

It is ordered that applicant shall publish and serve tariff notices, refund monies, and report to the Commission in the manner prescribed by the initial decision.

By the Commission.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 558

AERO MAYFLOWER TRANSIT CO.

v.

SEA-LAND SERVICE, INC.

Adopted May 17, 1978

Carrier, when republishing its tariffs, unintentionally subjected military household goods to a separate, additional bunker surcharge through clerical or administrative error. Its application for permission to refund or waive portions of freight charges qualifies for relief under P.L. 90–298 and, subject to certain conditions, is granted.

The carrier, having identified 56 "shippers" who moved the goods in question during the time the erroneous tariff was in effect, should make refunds to those persons who actually bore the extra costs resulting from the carrier's tariff-filing error, not to nominal "shippers" who bore no loss. Since the 56 "shippers" are in reality household goods forwarders who may not have borne the cost, a procedure is established whereby Sea-Land can make refunds to the actual shippers who did bear the cost.

An administrative agency is expected to maintain flexibility to meet novel problems and to tailor appropriate procedures to deal with such problems.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE[1]

This proceeding was commenced by an application filed by Sea-Land Service, Inc. (Sea-Land) pursuant to section 18(b)(3) of the Shipping Act, 1916 (the Act), 46 U.S.C. 817(b)(3), as amended by P.L. 90–298, and Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a). In its application filed January 13, 1978 (the date it was received by the Commission's Secretary), Sea-Land stated that it wished to refund a portion of freight charges collected from the shipper Aero Mayflower Transit Co. (Aero) on four shipments of used military household goods which sailed from Houston, Texas, and New Orleans, Louisiana, under bills of lading dated August 16, August 19, and September 8, 1977, destined for Greece, Italy, and Spain. The aggregate amount of freight sought to be refunded on the four shipments is $1,076.88.

As I discussed below, this particular application was filed on behalf of

[1] This decision became the decision of the Commission May 17, 1978.

Aero, but the error in tariff filing affected 55 other shippers of the same type of goods who shipped such goods during the period August 13, 1977, and September 9, 1977. Rather than file 55 other special-docket applications, Sea-Land, quite properly in my opinion, identified the other affected shippers, and requests that any order of the Commission permit Sea-Land to refund or waive, as appropriate, portions of the freight charges so that all similarly situated shippers receive equal treatment.

Sea-Land submitted its sworn statement explaining the nature of the alleged error and provided pertinent tariff pages and shipping documents. On the basis of these materials, I find that an error occurred as follows.

Sea-Land has been engaging in a program of simplifying and updating its various tariffs. One particular tariff, FMC–48, had been in effect since 1970 and had grown to unmanageable size. Therefore, Sea-Land decided to break it up. The European and Mediterranean sections of that tariff were published in a new Tariff, No. 272, FMC–152, effective August 13, 1977. The particular tariff item involved in this proceeding is Item No. 625. This item was described in the earlier tariff (FMC–48) and in the new tariff (FMC–152) as follows:

Household Goods and Personal Effects also unaccompanied Baggage of Military or other U.S. Government Personnel Moving on a Through U.S. Government Bill of Lading.

When Tariff FMC–48 was canceled by Sea-Land, it was Sea-Land's intention to republish Item No. 625 without change.[2] This meant that Sea-Land had not intended to change either the base rates nor the practice which included within such rates a portion to compensate for bunker costs. In other words, Sea-Land did not intend to assess a separate bunker surcharge on top of the base rates. However, in republishing Item No. 625, Sea-Land inadvertently omitted a notation which had appeared in the previous tariff (FMC–48) which had signified that no separate bunker surcharge would apply.[3] The result was that Item No. 625 was republished in Tariff FMC–172, page 36, subject to the additional assessment of a bunker surcharge. This new tariff page became effective August 13, 1977.

As soon as Sea-Land realized the error, it made a telex filing on September 9, 1977, making Item No. 625 not subject to rule 45, the

[2] The application erroneously stated "without charge" instead of "without change." The tariff pages attached to the application demonstrate that this was a typographical mistake.

[3] In the previous tariff (FMC–48), Item No. 625 had appeared on 1st Revised Page 23–D. At the top of that page of the tariff a notation appeared which stated "Rates Brought Up to Include Bunker Surcharge Rule 45." This notation signified that the base rates had already included the surcharge. In other portions of that tariff involving other trade areas, a separate surcharge was assessed on top of the base rate because of peculiar contractual arrangements between household goods forwarders and military agencies. The inclusion of bunker surcharges in base rates for military shipments has been permitted. See *Non-Assessment of Fuel Surcharges on MSC*, 13 SRR 526 (1973), modifying 15 F.M.C. 92 (1972); *Gulf & South American Steamship Co., Inc. v. United States*, 500 F.2d 549, 553–554 (Ct. Cl. 1974); *Sea-Land Service, Inc. v. United States*, 497 F.2d 928 (Ct. Cl. 1974).

The notation at the top of the previous tariff page, however, was not republished in Sea-Land's new tariff (FMC–172) because someone failed to reproduce the complete tariff page with the notation when using a Xerox machine.

bunker surcharge rule. The telex filing was followed by a permanent tariff page. See Tariff FMC–152, 1st Revised Page 36, effective September 9, 1977.[4] Thus, as Sea-Land states, because of this clerical error, a 19-percent bunker surcharge was in effect from August 13, 1977, until the tariff was corrected on September 9, 1977. Furthermore, not only Aero, the nominal complainant here, but 55 other shippers, who shipped similar goods during this period of time, were affected by the error.

Discussion and Conclusions

The question to be decided in this case, as in all special-docket proceedings, is simply whether the application for permission to refund establishes that the type of error contemplated by P.L. 90–298 occurred and whether the application meets all other requirements established in that law regarding the time of filing the application and the corrective tariff and the assurance that no discrimination among shippers will result if the application is granted. In my opinion, there is sufficient evidence to establish that these requirements of law have been met.

P.L. 90–298, which amended section 18(b)(3) of the Act, was designed to remedy inequities and financial harm visited upon shippers which resulted from inadvertent errors in tariff-filing by carriers. Thus, when a carrier intended to apply a lower rate on a particular shipment but failed to file an appropriate tariff conforming to the carrier's intention and usually the shipper's understanding, prior to the enactment of P.L. 90–298, the carrier was bound to charge the higher, unintended rate even if the shipper had relied upon the carrier's representations that a lower rate would be charged and that an appropriate tariff would be filed. Or, if the carrier, through inadvertence, republished a tariff and caused the tariff to reflect an unintended, higher rate, prior to the enactment of this remedial law, the carrier nevertheless was compelled to charge the higher rate, again causing shippers to suffer financial loss. These inequitable results were unavoidable because of the governing principles of law requiring strict adherence to tariffs effective at the time of shipment regardless of equities. See *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361, 365 (1965); *United States v. Columbia S.S. Company*, 17 F.M.C. 8, 19–20 (1973).

In recognition of the fact that this hard and fast doctrine could result in inequities and hardships, Congress passed P.L. 90–298. The legislative history to P.L. 90–298 illustrates the types of mistakes which the statute was designed to remedy as follows:

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[4] The Commission's tariff-filing regulations permit telegraphic filings of tariff amendments. If they reflect a reduction in or no change in costs, the rate is effective when so filed. At the time of these filings, these regulations were found in 46 CFR 536.6(c) and 46 CFR 536 6(a)(3). The telex filing must be followed by a permanent tariff page, as was done by Sea-Land See 46 CFR 536.6(c)(5), the regulation then in effect

> 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.[5]

The Senate Report 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.[6]

Accordingly, section 18(b)(3) of the Act, 46 U.S.C. 817(b)(3), was amended in pertinent part to read as follows:

> 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.

In the instant case it is clear that there was "an error in a tariff of a clerical or administrative nature." The materials submitted clearly demonstrate that in republishing its tariff, Sea-Land inadvertently allowed an error to become incorporated therein. Thus, while not intending that Item No. 625 be subject to an additional separate surcharge, Sea-Land's new tariff page was published in such a fashion that the goods in question became subject to the additional surcharge. This is the same type of clerical or administrative error in tariff publication shown in the legislative history to P.L. 90–298 such as when the carrier, in republishing its tariff, erroneously publishes a rate of $73 instead of $37. See House Report No. 920, cited above, p. 4; Hearings on H.R. 9473 Before the Subcommittee on Merchant Marine, 90th Cong. 1st Sess. (1967), p. 102. It is also clear that it was Sea-Land's intention prior to the shipments in question not to assess an additional bunker surcharge. As the legislative history to P.L. 90–298 illustrates, the element of the carrier's pre-shipment intention is essential. See Senate Report No. 1078, 90th Cong. 2nd Sess., April 5, 1968 [to accompany H.R. 9473], p. 1, referring to an "intended" rate. See also *Munoz y Cabrero v. Sea-Land Service, Inc.*, 17 SRR 1191, 1193 (1977).

The basis for the above findings is not merely the sworn statements in

[5] House Report No. 920, 90th Cong. 1st Sess., November 14, 1967 [to accompany H.R. 9473], pp. 3, 4.
[6] Senate Report No. 1078, 90th Cong. 2d Sess., April 5, 1968 [to accompany H.R. 9473], p. 1.

the application. The tariff pages attached to the application corroborate these statements. Thus, Sea-Land's previous tariff applicable to shipments of military household goods (FMC–48) clearly shows that it was not Sea-Land's practice to assess a separate bunker surcharge on top of the base rates on shipments to Greece, Spain, and Italy, the relevant destinations in this case. The sudden disappearance of the notation appearing in the previous tariff (FMC–48, 1st Revised Page 23–D) which in effect had exempted military household goods moving to the named destinations from an additional bunker surcharge would be inexplicable except if it were the result of a clerical error in republishing the tariff page. Further corroboration of Sea-Land's good faith is provided by the fact that Sea-Land took pains to canvass its records to uncover 55 other shippers who are entitled to refunds or waivers of portions of freight charged and has requested that the Commission's order consider these other shippers as well as Aero. Taken as a whole, the application and supporting documents give every appearance that a bona fide error occurred and that Sea-Land is attempting to make amends under the law.[7] I therefore find that there was an error in Sea-Land's tariff of a clerical or administrative nature within the meaning of P.L. 90–298. The main problem that arises in this case, however, is not that proof is lacking regarding the fact that the tariff was in error. It is the fact that the proceeding is, in effect, a class action filed on behalf of 56 companies who, because they are household goods forwarders, may not have borne the cost of the surcharge.

The Problem of Ascertaining Who Bore the Extra Cost

In the usual special-docket case, the nominal complainant is an exporter, importer, or manufacturer who qualifies as a shipper and has borne the financial loss caused by the carrier's error. On occasion, however, the Commission has encountered special-docket proceedings in which the nominal complainant has really not borne the extra costs involved. Thus, ocean freight forwarders or customs house brokers have on occasion been named as complainants in such cases instead of the real shipper and have not borne financial harm either because they have not paid the freight or because they have been reimbursed by the real shipper. See, e.g., Special Docket No. 519, *Buckley & Forstall, In. v. Gulf European Freight Association for Combi Line,* Notice of Adoption of Initial Decision, December 16, 1977; Special Docket No. 489, *Williams Clarke Company, Inc. v. Sea-Land Service, Inc.,* Order on Remand, November 29, 1977; Special Docket Nos. 537, 538, 539, *Salentine & Co., Inc. and M.E. Dey & Co., Inc. v. Europe Canada Lakes Lines,* March 16, 1978 (I.D.); adopted April 18, 1978 (F.M.C.). In the cited cases, the nominal complainants were ocean freight forwarders or customs house

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[7] The legislative history to P.L. 90–298 reveals that the then Chairman of the Commission represented to the Congress that special-docket proceedings would require a showing before a qualified judicial officer of "proof of the bona fide nature of the mistake." See Hearings on H.R. 9473 Before the Subcommittee on Merchant Marine, cited above, p. 88.

brokers who did not bear the cost of the freight. Accordingly, in each case it was necessary to insure that the refunds permitted would benefit the actual person who bore the loss, who, in each case, was not the forwarder or broker but the underlying shipper. Upon determining who bore the loss, the forwarder or broker usually submitted an affidavit promising to remit any refunds to the actual shipper.

The problem in the instant case is similar but more complicated. Nor only is Aero Mayflower Transit apparently a household goods forwarder, but there are 55 other similarly situated companies who appear on Sea-Land's shipping documents as "shippers." All of the movements consisted of military household goods. The underlying shipper is obviously the U.S. Government paying for the transportation probably under contractual arrangements between military household goods forwarders and military agencies. The application acknowledges that these types of shipment move under such arrangements and that in some trade areas and under some contracts bunker surcharges are passed on to the U.S. Government. It is not clear from the application, however, whether Aero passed on the surcharge or absorbed it. However, I have been advised by employees of Aero that the surcharges were passed on to the Government in the four shipments.[8] This statement, being a statement against its own financial interest, is entitled to be believed.[9]

Since Aero has suffered no apparent financial harm from Sea-Land's error, the question must be asked whether any of the 55 other forwarders also passed on the various surcharges. Unless we make sure that the refunds are made to the actual person who suffered the financial loss, a grave injustice can occur, since the household goods forwarders may receive compensation not only from the U.S. Government but also from Sea-Land for the same expense. As discussed above, P.L. 90–298 was enacted to remedy inequities, not to create them. Furthermore, the law requires that the granting of refunds or waivers must not result in discrimination among shippers. Accordingly, permission to grant refunds in the instant case must insure that 1) the real shippers who bore the financial harm on account of Sea-Land's error receive the benefit of the refund and 2) that all such persons be treated equally. In previous cases in which only one forwarder and one shipper were involved, such as the five special-docket cases cited above, it was a relatively simple matter to accomplish these dual objectives by requiring the nominal complainant to swear in an affidavit that if he had not borne the loss, he would act as agent of the person who did and remit the refunds to that person. When 56 forwarders are involved, however, the problem is more complicated.

[8] Because of the apparent status of Aero as a forwarder and the lack of clarity in the application explained above, I inquired whether Aero had in fact passed the surcharge on to the U.S. Government. Mr. William Lowry of Aero advised me by telephone that Aero had in fact passed the surcharge on. I instructed Mr. Lowry to confirm his advice to me in writing. See 46 CFR 502.92(e). As of the date of this decision, the confirming letter has not been received.

[9] A statement which is made by a declarant against his own pecuniary or proprietary interest has long been recognized as being entitled to belief and as an exception to the hearsay rule. See, e.g., *Chambers v. Mississippi*, 410 U.S. 284 (1973); Federal Rule of Evidence 804(b)(3), 28 U.S.C.A.; McCormick, *Evidence*, § 277 (2d Ed. 1972).

Not only are 55 of these forwarders not parties to the case and thus not subject to orders of the Commission but the applicant carrier Sea-Land cannot be expected to ascertain from its records who the actual shipper was or who bore the freight since Sea-Land presumably deals only with the household goods forwarder and other companies whose names appear on Sea-Land's records.

In such a problematic situation, the problem calls for administrative ingenuity. Administrative agencies are supposed to maintain flexibility and ingenuity in fashioning procedures tailored to meet novel situations. As the Court in *American Airlines v. CAB,* 359 F.2d 624, 633 (D.C. Cir. 1966) stated:

> It is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expeditious adjustment in the light of experience.

In a similar vein the courts have encouraged administrative agencies to disentangle themselves from procedural morass and to structure appropriate expedited proceedings to fit peculiar problems. See, e.g., *Marine Space Enclosures, Inc. v. Federal Maritime Commission,* 420 F.2d 577, 588 (D.C. Cir. 1969), *Consumer Federation of America v. F.P.C.,* 515 F.2d 347, 355, n. 46 (D.C. Cir. 1975), *Shell Oil Company v. F.P.C.,* 520 F.2d 1061, 1075 (5 Cir. 1975), cert. den. 426 U.S. 1941 (1976).[10]

Therefore, I believe that the dual objectives of insuring equality of treatment among shippers and insuring that refunds are made to the persons who actually bore the financial harm can be achieved if Sea-Land notifies each forwarder and company shown on its records as "shippers" that each forwarder or company should submit to Sea-Land an appropriate affidavit identifying who bore the cost of the erroneous surcharge so that Sea-Land can make refunds to the proper person. Upon receipt of the affidavit, Sea-Land can make payments and report its action to the Commission, furnishing the affidavits in support of its action to the Commission. To insure that each forwarder or other company shown as "shipper" on Sea-Land's records is aware of its rights to file claims, Sea-Land should mail copies of the tariff notice regarding such rights to each such person. To insure further that the U.S. Government contracting office understands the situation, if it bore the cost, each such office should receive copies of the tariff notices together with payment of refunds by Sea-Land with appropriate explanations. In case the forwarders' or companies' affidavits, through some error, state that the forwarder or company rather than the Government has borne the cost of the surcharge, and Sea-Land accordingly makes payment on such a representation, each government military office involved should be sent

[10] In the *Shell Oil* case the Court made the following appropriate remarks citing *City of Chicago v. F.P.C.*, 458 F.2d 731, 743–744 (D.C. Cir. 1971), as follows

> The ability to choose with relative freedom the procedure it will use to acquire relevant information gives the Commission power to realistically tailor the proceedings to fit the issues before it, the information it needs to illuminate those issues and the manner of presentation which, in its judgment, will bring before it the relevant information in the most efficient manner.

copies of the tariff notices and an explanation by Sea-Land that payment has been made to the forwarder or company handling the military shipment, so that corrections can be made. Finally, a time limitation will insure that claimants are diligent in exercising their rights to refund and relieve Sea-Land of an indefinite state of uncertainty as to whether it will be required to dispense moneys. See Docket No. 69–57, *Agreement No. T–2336—New York Shipping Association Cooperative Working Arrangement,* Order Determining Amount and Directing Satisfaction of Remaining Valid Claims, April 3, 1978. In that case, which involved numerous claimants entitled to benefits because of past overassessment under a section 15 agreement, the Commission required claimants to assert their claims within 60 days of the date of the date of service of its order and to furnish supporting information so that the validity of the claim could be verified.[11] In granting claimants the right to seek benefits provided that they did so within the 60-day period, the Commission stated:

> To have cut off the rights of these additional claimants without notice would have been unfair to them, just as to allow the Damoclean sword of possible adjustment claims to hang forever over the head of NYSA would have been unfair to it. *Id.*, p. 11.

It should be noted that P.L. 90–298 provides that "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.*" (Emphasis added.) Rule 92(a), 46 CFR 502.92(a), contains identical language.

A 30-day period of time should be ample to enable Sea-Land to accumulate the necessary information and report to the Commission within 15 days thereafter as to how it has made refunds. In the event that some forwarders or companies do not assert claims and the underlying shipper, i.e., the U.S. Government, may be entitled to a refund, the Commission can take such steps as may be necessary to insure that a refund will ultimately be made.

I therefore make the following findings and orders:

1. The application was filed within the 180-day period prescribed by law. As noted above, the application was received by the Commission's Secretary on January 13, 1978. The shipments moved under freight bills showing dates of August 16, 1977, August 19, 1977, August 19, 1977, and September 8, 1977.[12]

2. Sea-Land filed a corrective tariff by telex, as permitted by the Commission's regulations, on September 9, 1977, prior to the filing of the application, as required by law.

3. If the application is granted, no discrimination among similarly

[11] See same case, Order of Reopening, February 23, 1977.

[12] The documents which Sea-Land has furnished to specify the dates of shipment look like freight bills. The documents show dates as follows: "F.B. Date 08/16/77, F.B. Date 08/19/77, F.B. Date 08/19/77, F.B. Date 09/08/77." Sailing dates are shown on these documents as: "08/14/77, 08/17/77, 08/17/77, 09/04/77." Since all of these dates are well within the 180-day period of time prescribed by law (the application being filed, i.e., received, on January 13, 1978), it is not necessary to determine whether date of issuance of bill of lading, sailing date, or date of payment is used to determine the "date of shipment" for purposes of P.L. 90–298.

situated shippers will result for the following reasons. First, Sea-Land has canvassed its records to identify every other household goods forwarder who was affected by the erroneous publication regarding the bunker surcharge and requests that every affected shipper be treated equally. Second, as discussed above, Sea-Land will be ordered to send copies of an appropriate tariff notice to all affected forwarders, which notice will provide that each such forwarder will be entitled to seek refund upon submission of an affidavit specifying whether it bore the financial loss rather than the U.S. Government. Third, following submission of this information to Sea-Land, Sea-Land will make refunds to the forwarder or U.S. Government, as appropriate, to insure equality of treatment, and report to the Commission of the action it has taken. Finally, in order to insure that no shipper is harmed because Sea-Land's bunker surcharge was in effect from August 13, 1977, up to and including September 8, 1977 (the corrective tariff being effective on September 9, 1977), the tariff notice which Sea-Land will be ordered to publish will, in effect, eradicate the erroneous surcharge during that period of time.[13]

It is therefore ordered that upon adoption of this decision by the Commission and subject to any modifications to this decision or to the following orders which the Commission may make:

1. Sea-Land shall promptly publish the following notice in an appropriate place in its tariff:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 558, that effective August 13, 1977, and continuing through September 8, 1977, inclusive, the rates on Household Goods and Personal Effects also unaccompanied Baggage of Military or other U.S. Government Personnel Moving on a Through U.S. Government Bill of Lading, are not subject to Bunker Surcharge published in Rule 45, but are subject to all rules, regulations, terms and conditions in this tariff otherwise applicable. This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the goods described which may have been shipped during this period of time.

2. Immediately below the preceding notice, Sea-Land shall publish the following notice in its tariff:

> Notice is further given, as required by the decision of the Federal Maritime Commission in Special Docket No. 558, that requests for refunds may be submitted by any household goods forwarder or other company which has shipped the goods described in the notice above during the period specified. Such requests shall be accompanied by an affidavit specifying whether the forwarder or company bore the cost of the bunker surcharge which shall identify the military contracting office for whom the shipment was undertaken. If the latter office bore the cost of the surcharge, the affidavit should so state. Any requests for refund shall be submitted to Sea-Land Service, Inc. within 30 days after the effective date of this notice.

3. Copies of the above tariff notices shall be mailed to each of the 56 household goods forwarders or other companies shown as "shippers" on the list which Sea-Land has attached to its application.

[13] The legislative history to P.L. 90–298 contains a suggestion that remedial action could take the form of issuance of a correction as of the date the error occurred. See Hearings, cited above, p. 103

4. Within 15 days after receipt of the requests for refunds and the affidavits, Sea-Land shall make refunds to the forwarder, company, or Government military office, depending upon which of these bore the cost of the surcharge, and shall file a report with the Commission as to the action it has taken, together with the supporting affidavits received. Refunds made to the U.S. Government military office shall be accompanied by a copy of the tariff notices with appropriate explanations. If refunds are made to the forwarder or company shown as "shipper" on Sea-Land's records, Sea-Land shall send a copy of the tariff notices to the Government military office identified in the affidavits with the notification that payment has been made to the forwarder or company which has certified in its affidavit that such forwarder or company bore the cost of the surcharge.

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

WASHINGTON, D.C.,
April 24, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 570

DEUTSCHE SCHAGHTBAU-UND TIEFBOHRGESELLSCHAFT MBH

v.

LYKES BROS. STEAMSHIP CO., INC.

NOTICE OF DETERMINATION TO REVIEW

May 17, 1978

Notice is hereby given that the Commission on May 17, 1978 determined to review the initial decision of the Administrative Law Judge in this proceeding served April 21, 1978.

By the Commission.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 570

DEUTSCHE SCHACHTBAU-UND TIEFBOHRGESELLSCHAFT MBH

v.

LYKES BROS. STEAMSHIP CO., INC.

Application for permission to waive $16,611.45 of freight charges granted.

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

By application timely filed on March 22, 1978, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) and section 18(b)(3) of the Shipping Act, 1916 (the Act), Lykes Bros. Steamship Co., Inc., seeks authority to waive $16,611.45 of the total applicable freight charges of $31,079.20, on a shipment of oil well equipment (one drilling rig), bill of lading, dated September 25, 1977, from Houston, Texas, to Bremen, West Germany. The application is concurred in by the consignee-complainant, Deutsche Schachtbau-Und Tiefbohrgesellschaft MBH, which paid and bore freight charges of $14,467.75 on the shipment.

In September 1977, before the shipment moved, Lykes Bros. negotiated with the complainant's forwarder, acting on behalf of the complainant, a rate of $2.05 per cubic foot, including heavy lift and extra length charges, berth terms, plus a 4 percent currency adjustment factor.

Due to an administrative error, Lykes Bros. inadvertently filed the agreed rate of $2.05 showing New Orleans as the port of loading, rather than Houston (attachment #1 to the application, first revised page 186–A of the tariff), effective September 23, 1977.

At the time of the shipment on September 25, 1977, the applicable rate from Houston was on oil well equipment (attachment #2, 5th revised page 185), effective September 22, 1977. The applicable charges are computed as follows: The shipment weighed 65,040 pounds and measured 6,786 cubic feet. The applicable rate was $104.50, W (2,240 pounds) or M (40 cubic feet). The shipment measured 169.65 tons. This times $104.50

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission. Rule 227, Rules of Practice and Procedure, 46 CFR 502.227.

resulted in $17,728.43 basic freight charges. A heavy lift charge of $56.25 per ton applied, and this times 169.65 tons was $9,542.81. An extra length charge applied at 55 cents per foot for length over 30 feet. The extra 28 feet length times 55 cents resulted in an extra length charge of $15.40 per ton. This times 169.65 tons became a charge of $2,612.61. The total applicable charges were $29,883.85, exclusive of a currency adjustment charge of 4 percent of the previous total or $1,195.35. The total applicable charges were $31,079.20.

The complainant paid charges based on the agreed rate of $2.05 per cubic foot times 6,786 cubic feet, or $13,911.30, plus the 4 percent currency adjustment of $556.45, or a total or $14,467.75.

The difference between the applicable charges of $31,079.20 and the agreed charges of $14,467.75 is $16,611.45, which is the amount sought to be waived.

Lykes Bros. is a participant in Gulf European Freight Association Agreement No. 9360–3, and all pertinent tariffs are those of GEFA. Lykes Bros. has filed with group concurrence in the GEFA tariff the agreed rate of $2.05 per cubic foot, plus 4 percent currency adjustment factor (attachment #6, 4th revised page 186–A of the tariff), effective January 19, 1978, prior to the filing of this application, providing for application of the agreed rate from Houston to Bremen.

During the period in issue, no shipments of other than complainant's of the same or similar commodities moved via Lykes Bros., which believes no discrimination among shippers will result from approval of the sought waiver herein. Lykes Bros. agrees to the publication of a notice or of such action as the Commission may direct if permission for the waiver is granted.

The statutory requirements for the sought waiver have been met. It is concluded and found that there was an error of an administrative or clerical nature in that the negotiated or agreed rate was published from New Orleans rather than from Houston; that the authorization of a waiver of a portion of the applicable freight charges will not result in discrimination among shippers; that prior to applying for authority to waive a portion of the applicable charges, a new tariff has been filed which sets forth the application of the agreed rate from Houston, on which rate basis the waiver of a portion of the applicable charges would be computed; and that the application was timely filed.

In accordance with section 18(b)(3) of the Act, permission is granted to waive a portion of the applicable charges. The waiver authorized is $16,611.45.

(S) CHARLES E. MORGAN,
Administrative Law Judge.

WASHINGTON, D.C.,
April 21, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 534

CUTLER-HAMMER DENVER

v.

LYKES BROS. STEAMSHIP CO., INC.

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

May 17, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on May 17, 1978.

It is Ordered, That applicant is authorized to waive collection of $21,061.38 of the charges previously assessed Cutler-Hammer Denver.

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 534 that effective November 30, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from November 30, 1976 through March 3, 1977, the rate from Houston to Helsinki on 'Printing Press K.D.' in 40' containers house to house is $2,100.00 lumpsum 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) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 534

CUTLER-HAMMER DENVER

v.

LYKES BROS. STEAMSHIP CO., INC.

Adopted May 17, 1978

Application to waive collection granted.

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

Pursuant to the Commission's Order on Remand issued March 14, 1978, this is a supplemental initial decision responding to the Commission's direction to afford the parties an opportunity to furnish additional evidence determined to be missing from the originally-filed application, and likewise held to be insufficient to support the Administrative Law Judge's Initial Decision of January 12, 1978.

As more fully set forth in the January 12th Initial Decision, this is a proceeding under 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), wherein the Lykes Bros. Steamship Co., Inc. (Lykes or Applicant) has sought permission to waive collection of a portion of the freight charges on a shipment of printing press parts, which moved from Houston, Texas to Helsinki, Finland under bill of lading dated February 10, 1977.

Lykes asserted that a verbal agreement had been reached in March 1976 with a freight forwarder for a lump sum rate to cover the subject shipment. On November 30, Lykes filed such a lump sum rate, but failed to include Houston as a port of loading. The Commission held that: "No evidence has been furnished which would substantiate that a prior agreement was reached to establish a rate to include Houston as a loading port or that the exclusion of Houston from the tariff was inadvertent." (Order, p.1.) The Commission pointed out that even though the applica-

[1] This decision became the decision of the Commission May 17, 1978

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

tion was submitted under the sworn statement of an official of the carrier (Applicant), "(n)onetheless, . . . under the circumstances of this case independent evidence should be required and if it is necessary to resort to sworn statements, it is appropriate that such statements indicate that they are from persons who were involved in forming the alleged agreement . . . ." (Order, 2.)

In response to the Commission's March 14 Order On Remand, the presiding Administrative Law Judge sent a letter on March 15, 1978 to Lykes (with copy to Complainant and copy filed in public docket file), together with a copy of the Commission's Order, requesting the additional documentation sought by the Commission. A deadline of thirty days was imposed (but later extended at request of Applicant), in order to ensure compliance with the Commission's overall 45-day requirement for issuance of the supplemental decision.

Additional documentation has been supplied by the Applicant and I find this further evidence to be sufficient to now support the original findings of fact (Initial Decision, January 12, 1978, at 4). Those findings of fact and the conclusions of law set forth in that original Initial Decision are hereby incorporated by reference in this Supplemental Initial Decision as if fully set forth herein.

A brief summary of the nature and contents of the additional correspondence and further evidence from the Applicant (Lykes) is as follows:

EXHIBIT "A": April 10, 1978 letter from Lykes manager David W. Gunther to the Secretary of the Commission establishing necessity for extension of time beyond that established by the Administrative Law Judge.

EXHIBIT "B": April 18, 1978 letter from Lykes manager David W. Gunther to Judge Reilly enclosing original and three copies of two sworn affidavits responding to Judge's letter of March 15 (and Commission's Order On Remand); also contains statement that all Lykes files have been reviewed and they are unable to locate any "existing written evidence as to the verbal negotiations and agreement involved here"; that they are therefore submitting in lieu thereof affidavits from the parties directly involved in the negotiations.

EXHIBIT "C": April 10, 1978 affidavit of G.B. Chatelain, a Lykes Bros. official, attesting to the March 1976 verbal negotiations with John McGary, official of the shipper's freight forwarder (Schenkers International), and the subsequent tariff filing error.

EXHIBIT "D": April 13, 1978 affidavit of John McGary, an official of Schenkers International Forwarders, Inc., attesting to the March 1976 verbal negotiations with G.B. Chatelain, Lykes Bros. official.

Accordingly, permission is granted to the applicant, Lykes Bros. Steamship Co., Inc., to waive collection of a portion of the freight charges, specifically the amount of $21,061.38. An appropriate notice must be published in Lykes' tariff.

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

WASHINGTON, D.C.,
April 21, 1978.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 569

GEORGIA-PACIFIC CORPORATION

v.

GULF UNITED KINGDOM CONFERENCE

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

May 17, 1978

No exceptions having been taken to the initial decision in this proceeding and the Commission having determined not to review same, notice is hereby given that the initial decision became the decision of the Commission on May 17, 1978.

IT IS ORDERED, That applicant is authorized to refund $1,595.19 of the charges previously assessed Georgia-Pacific 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 569, that effective January 11, 1978, for purposes of refund or waiver of freight charges on any shipments which may have been shipped from January 11, 1978 through February 9, 1978, the rate from Baton Rouge to Leith on 'Woodpulp', unitized in bales, measuring up to 1.2 CBM per ton, minimum 2250 metric tons is $43.50 per 2240 lbs. subject to all applicable rules, regulations 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 5 days thereafter notify the Commission of the date and manner of effectuating the refund.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 569

GEORGIA-PACIFIC CORPORATION

v.

GULF UNITED KINGDOM CONFERENCE

Adopted May 17, 1978

Application o make refund 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 Commissions Rules of Practice and Procedure (46 CFR 502.92), the Gulf United Kingdom Conference (GUKC or Applicant) has applied for permission to refund a portion of the freight charges on a shipment of bales of woodpulp, which moved from Baton Rouge, Louisiana, to Leith, Scotland, under four bills of lading dated January 10, 1978, issued by Phillips-Parr, Inc., as agents for Harrison Line (a member of the (Gulf United Kingdom Conference). The application for permission to refund was filed March 15, 1978.

The subject shipment moved under Gulf/United Kingdom Conference Tariff No. 39, FMC–18, 3rd revised page 230, effective January 9, 1978,[3] under the rate for "Woodpulp, Unitized in bales, measuring up to 1.2 CBM per Ton, min. 2250 metric tons, Baton Rouge/Leith thru February 10, 1978." The aggregate weight of the shipment was 5,115,600 pounds (2,283.75 long tons or 2,320.42 metric tons). The rate applicable at time of shipment was $43.50 per *metric* ton (a ton of 2204.6 pounds). The rate sought to be applied is $43.50 per *long* ton (a ton of 2240 pounds),

[1] This decision became the decision of the Commission May 17, 1978.

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

[3] Although the cited tariff page bears a January 11th effective date at the top, there is a footnote specifically relating to the subject commodity stating "Filed by telex to FMC, Jan. 9, 1978." A reference to the telex on file in the Commission's official tariff files reveals that the telex itself expressly provides that it is to be effective January 9, 1978 ("EFF JAN 9") The Commission's General Order 13, 46 CFR Part 536, authorizes telegraphic filings of tariff amendments. See 46 CFR 536 6(c) Telegraphic amendments resulting in a decrease in cost or no change in cost to the shipper may become effective upon publication and filing. 46 CFR 536.6(a)(3). Effective January 1, 1978, General Order 13 was revised. Under that revision, authorization for telegraphic filings appear at 46 CFR 536.10(c); 46 CFR 536.6(a)(3) now appears at 46 CFR 536.10(a)(3).

pursuant to GUKC Tariff No. 39, FMC–18, 6th revised page 230, effective February 15, 1978.

Aggregate freight charges payable, pursuant to the rate applicable at time of shipment, amount to $100,938.32. Aggregate freight charges at the rate sought to be applied amount to $99,343.13. The difference sought to be refunded is $1,595.19. The Applicant is not aware of any other shipment of the same commodity which moved via the Harrison Line during the same time period at the rates involved in this shipment.

GUKC offers the following explanation as grounds for granting the application:

(4) The rate on Woodpulp in Gulf United Kingdom Tariff 39 (FMC–18) is "OPEN", subject to filing by individual Member Lines. Prior to December 15, 1977, tariff rates were based on long tons of 2,240 lbs. or measurement tons of 40 cubic feet, and Harrison Line had a rate filing as follows:

Woodpulp, Unitized in bales measuring up to 45 cuft per ton [2240 lbs.], minimum 1800 long tons—

Baton Rouge/Leith—Thru Dec. 31, 1977 . . . $40.00 W [2240 lbs.]

(See 12th Rev Page 136, Gulf United Kingdom Tariff 38—FMC–17)

On December 15, 1977, the Gulf United Kingdom Conference converted its tariff to the metric system—rates per metric ton of 2,204.6 lbs., or per cubic meter. Harrison Line's filing (as shown above) was converted as follows:

Woodpulp, Unitized, in bales, measuring up to 1.2 cubic meters per ton [2,204.6 lbs.], minimum 2250 metric tons—

Baton Rouge/Leith—Thru Dec. 31, 1977. . .$39.50 W [2204.6 lbs.]

(See Original Page 230, Gulf United Kingdom Tariff 39—FMC–18)

However, prior to the conversion to the metric system, Phillips-Parr Inc., agents for Harrison Line, had been corresponding with the shipper (Georgia-Pacific Corporation) with regard to a rate on Woodpulp beyond the December 31, 1977 expiration date; and in a letter dated December 14, 1977, Phillips-Parr quoted a rate of $43.50 per 2,240 lbs. for shipment during 1978.

On January 9, 1978, Phillips-Parr instructed the Conference Office to the Woodpulp filing (which had expired December 31, 1977) at a rate of $43.50, for 30 days. The Conference Office filed a rate of $43.50 W by telex to the FMC on January 9, 1978, and issued 3rd Revised Page 230 to the Tariff FMC–18, failing to take into account that the "W" basis was now per metric ton (2,204 6 tons) (*sic*, should read "2,204.6 *pounds*") instead of per long ton (2,240 lbs.)

On February 10, 1978, the Conference Office filed 6th Rev Page 230, at rate of $43.50 per 2240 lbs. for a period of thirty days

Respondent requests to grant Harrison Line permission to refund a part of the ocean charges on basis of misunderstanding on part of the Conference Office in filing the rate on a metric ton basis rather than a long-ton basis, due to recent conversion of the tariff to a metric basis.

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.[4]

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

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

1. There was an error in a tariff of a clerical or administrative nature, resulting in the inadvertent failure to file the agreed rate based on a "long ton" (of 2240 pounds per ton) instead of on a "metric ton" (2204.6 pounds per ton) basis, occasioned, at least in part, by confusion during the conversion to the metric system, and contrary to the negotiated agreement worked out in advance of the shipment.
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 Conference (GUKC) 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 the Harrison Line to refund a portion of the freight charges to the complainant, Georgia-Pacific Corporation, specifically the amount of $1,595.19. An appropriate notice wil be published in GUKC's tariff.

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

WASHINGTON, D.C.,
April 19, 1978.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 430(I)

NATIONAL STARCH & CHEMICAL CORP.

v.

HANSA LINE

NOTICE OF DETERMINATION NOT TO REVIEW

May 19, 1978

Notice is hereby given that the Commission on May 19, 1978 determined not to review the decision of the Settlement Officer in this proceeding served May 9, 1978.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 430(I)

NATIONAL STARCH & CHEMICAL CORPORATION

v.

HANSA LINE

Reparation Denied.

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

By complaint filed August 12, 1977, National Starch and Chemical Company, (complainant) alleges that it was overcharged an amount of $522.39 as result of Hansa Line (carrier) failing to apply an allowance for palletization on a shipment of Rubber Cement carried aboard the steamer STERNANFELS from New York to Kuwait May 29, 1976. The dispute at issue centers upon whether Rule 8,[2] *EXPLOSIVES, DANGEROUS OR HAZARDOUS CARGO,* of the applicable freight tariff, "The 8900 Rate Agreement Freight Tariff No. 5, F. M. C. 5", in some manner voids the application of Rule 26[3], entitled, *PALLETIZED CARGO,* as it relates to exemption of DANGEROUS and HAZARDOUS cargo.

Rule 8 above addresses itself in pertinent part to whether cargo shall be stowed *on* or *under* deck of the vessel based upon the requirements of the Code of Federal Regulations, Title 46-Shipping, as amended. The Rule additionally defines the rate level, i.e., *Dangerous/Hazardous Cargo*

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[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

(Note: Determination not to review May 19, 1978.)

[2] 8 *EXPLOSIVES, DANGEROUS OR HAZARDOUS CARGO.*

a. Dangerous or Hazardous Cargo, unless otherwise specified, shall be determined in accordance with Code of Federal Regulations, Title 46-Shipping, as amended. Unless otherwise specifically rated, commodities for which the ONLY stowage is "ON DECK IN OPEN" or "ON DECK PROTECTED" shall take Dangerous Cargo Rates.

Dangerous or Hazardous Cargo bearing standard caution on labels as required by the U. S. Code of Federal Regulations—Title 46 but which may be stowed under deck in conformity with such regulations shall be assessed the Cargo N. O. S. Rate Item 215, unless a specific commodity rate is provided.

[3] 26 *PALLETIZED CARGO*

1 The provisions in these rules will apply only to pre-palletized cargo on shipper's non-returnable pallets, *except not applicable* to the following commodities.

Tariff Items	*Commodities*
. . . . .	All Dangerous and Hazardous Cargo Items in accordance with Rule 8

or *General Cargo, N. O. S.*, which shall be applicable in the absence of a specific commodity rate.

In contrast, Rule 26, relating to *PALLETIZED CARGO*, provides for a palletization allowance of 10 percent of the overall cubic measurement of the unit load if freighted on a volume basis, or a 5 percent allowance of the gross weight if freighted on a weight basis, plus a further discount of the three dollars ($3.00) per revenue ton for cargo moving under the terms and conditions of the rule, *with exceptions as provided in the rule*.

In support of its petition, the complainant alleges that the cargo described on the Bill of Lading as Rubber Cement, Flammable Liquid Label, Flash Point of 15 Degrees Fahrenheit, is considered NON-HAZARDOUS for rating purposes per Rule 8 of the Tariff.[4] Ostensibly the NON-HAZARDOUS classification entitles the cargo to a palletization allowance. No further explanation however, is offered to support the allegation that such an allowance should have applied on the shipment, or that the cargo is in fact NON-HAZARDOUS.

Rule 8, covering DANGEROUS AND HAZARDOUS CARGO, provides that where such cargo may be carried *under* deck pursuant to governing regulations, the General Cargo N. O. S. rate is applicable in the absence of a specific commodity rate listing. Alternatively, where cargo is restricted to *on* deck stowage and again, no specific commodity listing is provided in the tariff, the higher level DANGEROUS CARGO rate is applicable. With reference to this rule, and in the carrier's denial of the complainant's claim, the carrier allegedly stated that: "DANGEROUS OR HAZARDOUS CARGO bearing standard caution on labels . . . . but which may be stowed under deck shall be assessed the Cargo N. O. S. rate . . . It does not imply that it is Cargo N. O. S., but only differentiates it from that cargo that can only be stowed on deck." This Settlement Officer finds the carrier's statement represents a proper interpretation of the tariff.

Rubber Cement, having a flash point of 80 degrees or less, is classified as Label and Hazardous type cargo in the U. S. Code of Federal Regulation, Title 46-Shipping. Freight Tariff Rule 26, PALLETIZED CARGO, lists numerous freight commodities upon which the palletization allowance shall not apply. Notably, the Rule provides that Dangerous and Hazardous Cargo items in accordance with Rule 8, (which, by reference to Code of Federal Regulations, Title 46-Shipping, includes the commodity at issue), are not entitled to the palletization allowance. Whether the ordinary General Cargo N. O. S. rate may be applicable on certain DANGEROUS or HAZARDOUS CARGO which are not otherwise specifically provided for by commodity description does not change the fact Rule 26 exempts the application of a palletization allowance on Rubber Cement having a Flash Point of less than 80 Degrees Fahrenheit.

[4] Also see the penultimate paragraph of Complainant's letter addressed to Mr. S. Muessig of F. W. Hartmann & Co., Inc., dated May 13, 1977.

Accordingly, the claim of complainant for reparation is hereby, denied; and its complaint dismissed.

(S) RONALD J. NIEFORTH,
Settlement Officer.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–1

PACIFIC FAR EAST LINE—CERTIFICATE (PERFORMANCE) NO. P–88

PACIFIC FAR EAST LINE—CERTIFICATES (CASUALTY) NO. C–1084 AND C–1182

NOTICE OF REVOCATION AND DISCONTINUANCE

May 30, 1978

The Commission commenced this proceeding in order to determine whether or not the certificate of financial responsibility for nonperformance of transportation, numbered P–88, previously issued to Pacific Far East Line, Inc. (Respondent), should be revoked or modified. An Initial Decision has been issued, and exceptions to that decision have been filed with the Commission. Subsequent to the filing of those exceptions, Respondent withdrew the vessels *S.S. Monterey* and *S.S. Mariposa* from service. Those vessels were the subject of this proceeding.

Respondent had also been issued certificates of financial responsibility for death or injury to passengers or other persons on voyages on the named vessels. Those certificates are numbered C–1084 and C–1182. Certificate C–1182 expired on April 9, 1978.

Respondent has returned certificates numbered P–88, C–1084, and C–1182 to the Commission.

Because Respondent no longer has need of certificates numbered P–88 and C–1084, and because they have been voluntarily returned by Respondent for revocation, they will be revoked, and there is no longer any issue to be resolved by the proceeding docketed as number 77–1. Consequently, the Commission will vacate the Initial Decision in that proceeding, and discontinue it.

THEREFORE, IT IS ORDERED, That, pursuant to Part 540 of Title 46, Code of Federal Regulations, certificates of financial responsibility numbered P–88 and C–1084, heretofore issued to Pacific Far East Line, its affiliates, predecessors, successors or assigns, covering either the *S.S. Monterey* or *S.S. Mariposa*, or both, are revoked, effective immediately.

IT IS FURTHER ORDERED, That the Initial Decision issued on December 23, 1977, in Docket No. 77–1, *Pacific Far East Line, Inc.—*

Certificate (Performance) No. P–88 is vacated, and the proceeding is discontinued.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 405(I)

PARAMOUNT EXPORT COMPANY

v.

SEA-LAND SERVICE, INC.

REPORT

June 6, 1978

BY THE COMMISSION: (Richard J. Daschbach, *Chairman*; Thomas F. Moakley, *Vice Chairman*; James V. Day, *Commissioner*)

By complaint filed under section 22 of the Shipping Act, 1916, Complainant Paramount Export Company seeks reparation from Respondent Sea-Land Service, Inc. (Sea-Land) for alleged freight overcharges in violation of section 18(b)(3) of the Act.

Complainant delivered to Respondent two vans loaded with fruit and produce, packed and sealed by the shipper, for transportation from Oakland, California, to Hong Kong.

One of the vans moved aboard Sea-Land's vessel the S.S. McLEAN—Voyage No. 81 under bill of lading dated September 7, 1976. As to this particular container, the complaint alleges that:

> Our investigation confirmed that 90 crates of plums were never shipped. This fact is confirmed by the weight certificates as received from Sealand Service Inc. showing the difference of approximately 3000 lbs. representing the weight of 90 crates of plums. This shortage was also confirmed by Wood & Browne's survey in Hong Kong. Also, Superior Packing Co. confirmed that 90 crates were never shipped and refunded the FOB value of the plums.

Sea-Land denied any overcharges and urged dismissal of the complaint for lack of proof that a shortage had occurred. Sea-Land also contends that its tariff prohibits payments on such claims; that it had no opportunity to inspect the contents of the container; and that Complainant had not submitted to the Department of Commerce the necessary forms concerning the shortage.

In a decision issued February 7, 1978, Settlement Officer Ronald J. Neiforth held that Complainant had not proven its claim. The contention with respect to the quantity of goods stuffed in containers packed and

sealed by the shipper in CY/CY transportation[1] should, in the opinion of the Settlement Officer, be proven by indisputable evidence.

The Settlement Officer also found that Rule 70(B)(9) of the tariff barred recovery[2] and concluded that Complainant had not sustained its burden of proof and that reparation could not be granted under the governing tariff.

We disagree with the Settlement Officer's conclusions. First, we find the Settlement Officer's reliance on Rule 70(B)(9) of the applicable tariff as bar to recovery to be misplaced. In our view, that rule is not directed to the question of *freight charges* but is rather a disclaimer on the part of the carrier of any *liability* for shortages in or damage to cargo received in shipper packed and sealed containers.

Under the terms of CY/CY transportation the carrier receives from the shipper and delivers to the consignee sealed containers. As the Settlement Officer properly pointed out, this type of transportation benefits shippers and carriers alike as reduced handling of the cargo by the carrier is translated into lower rates for the shipper. By accepting delivery of sealed containers the carrier for all practical purposes relinquishes control over the contents of the containers, and must rely on the information supplied by the shipper on the bill of lading for rating the cargo. The question then becomes whether a shipper who chooses the benefits of CY/CY transportation is estopped from later contending that the bill of lading contained errors of description which caused the carrier to misrate the shipment.

In *Cone Mills Corporation v. Trailer Marine Transport*, Informal Docket No. 369(I), Commission Order of Adoption served January 30, 1978, freight overcharges were claimed on four shipments of piece goods delivered to the carrier in shipper loaded and sealed trailers. The shipper's clerk, it was alleged, had by error omitted to state the measurements of the cargo in the bills of lading. Complainant in that case sought to have the freight charges adjusted in accordance with the measurements shown in the invoices. Because the tariff provided that unless the shipper stated in the bill of lading the cubic measurements of cargo rated on a per cubic foot basis, freight would be charged upon 100 percent cubic capacity of containers delivered sealed by the shipper, the settlement officer there found that, by sealing the containers, the shipper had prevented the carrier from using space which might otherwise have been available. He, therefore, denied reparation. The Commission agreed, holding that by sealing the containers the shipper had in effect leased and moved entire containers.

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[1] PACIFIC WESTBOUND CONFERENCE Freight Tariff FMC–12, Rule No 70, Cargo in Containers.

(A) *DEFINITION OF TERMS AS USED IN THIS RULE.* (9) CY/CY: The term CY/CY means containers packed by shippers off carrier's premises, delivered by shipper to carrier's CY, accepted by consignee at carrier's CY and unpacked by consignee off carrier's premises, all at the risk and expense of cargo

[2] RULE NO. 70(B)(9) *CY CONTAINER "SHIPPER" LOAD AND COUNT*

(a) When containers are packed and sealed by shipper, the carrier or his authorized agent will accept same as "Shipper's Load and Count" and the bill of lading shall be so claused.

(b) Carrier will not be directly or indirectly responsible for:

(2) Any discrepancy in count or consealed damage. (sic)

Section 18(b)(3)requires the carrier to assess and collect freight charges only for what it actually carries and at the rate in effect at the time of shipment. This requirement places upon the carrier the obligation of collecting *only* such charges as are provided in its tariff *for what actually moved.*[3]

In the *Cone Mills* case the piece goods packed in cartons were all assessed the same container rate. In the instant case the carrier assessed various commodity rates and charged freight according to the quantity of *each* commodity shipped. Clearly, under section 18(b)(3) the carrier may not, under these circumstances, collect freight on 400 crates of plums if, in fact, only 310 were shipped. For here the carrier did not charge a rate per container, as in the *Cone Mills* case, but rather a commodity rate on *each* of the items carried.

As the tariff rule mentioned by the Settlement Officer does not, in our opinion, bar recovery, the question is whether Complainant has sustained its burden of proof. We believe the Settlement Officer erred in holding that it had not.

Complainant has submitted an extract from a survey report prepared by the firm of Wood & Browne in Hong Kong at the request of Complainant and of the consignee, which asserts that a survey of the container revealed that while the seal on the container that arrived on the S.S. McLEAN was intact as were the packages inside the container, only 310 crates of plums of the advised quantity of 400 were found in the container. Complainant also submitted an invoice from the supplier of the plums, the Superior Packing Co., for 400 crates and a refund for the 90 crates short shipped. On the basis of the foregoing, we are of the opinion that Complainant has sustained its claim by substantial evidence and with reasonable certainty.

The decision of the Settlement Officer is therefore reversed and Complainant is awarded reparation in the amount of $368.10.

IT IS SO ORDERED.

By the Commission.*

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

Commissioner Leslie Kanuk dissenting. I would deny reparation in this proceeding and would uphold the Settlement Officer's decision to dismiss the complaint.

The shipper in this instance had the option of (1) delivering his cargo

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[3] In *Chicago B & Q R. Co. v. Ready Mix Cement Co.*, 487 F.2d 1263, 1266 (8th Cir. 1975) in considering section 6(7) of the Interstate Commerce Act which parallels section 18(b)(3) of the Shipping Act, the court, citing *Boston & Maine R.R. v. Hooker*, 233 U.S. 97 (1914), stated

"So strong is this anti-discrimination provision that the courts have generally refused to recognize an otherwise justifiable defense of estoppel."

*Commissioner Leslie Kanuk dissents; her dissenting opinion is attached.

the the carrier's yard for stuffing or (2) taking advantage of the lower CY/CY rate and stuffing and sealing the containers in his own yard. He chose the former option, thus precluding the carrier from examining the contents of either van.

The shipper then complained that one van was short 90 cases of plums, and cites as "evidence":

- a differential of 3,000 lbs. in weight between the two vans which was reported by Sea-Land;
- a survey by a Hong Kong firm that attests to the fact that the seal was intact and that the total shipment contained 90 cases of plums fewer than was listed on the bill of lading;
- a credit invoice by the packer to the Complainant for the value of 90 cases of plums.

I do not find the burden of proof sufficient to find for the Complainant. At no time did the carrier have the opportunity to examine the contents of either van. Nowhere in the record do we find an admission by the Complainant as to where the shortage occurred and who was responsible. In no way can we be certain that the "intact" seal has any corroborative utility, since the record does not support the finding that the seal at the end of the journey was in fact the same seal which was applied at the beginning of the journey.

Furthermore, I do not consider the weight differential between the two vans as constituting a heavy burden of proof. There is no reason to assume that the two vans should have been identical in weight. The differential could have been due to a variance in cargo composition or to a variance in cargo distribution between the two vans. The only "evidence" we are given as to the presumed contents of each van are the bills of lading provided by the shipper—one of which the shipper now claims was erroneous. Factors other than cargo weight discrepancies, singularly or combined, could also have accounted for the weight differential of the two vans. To borrow from Respondent's Reply to Complaint: "Chassis weight, cab weight, whether the scale was at true zero, all have a bearing on whether the weight is correct and accurate."

Since its inception, containerized shipping has provided substantial benefits to shippers and carriers alike, but these benefits to shippers and carriers alike, but these benefits are not realized without occasional problems. In this instance, the shipper had perishable cargo and elected to pack his own reefers and to enjoy the lower CY/CY rate. A condition precedent to the CY/CY rate is that the shipper must supply weight documentation which could be relied on by the carrier. The Complainant had the option of tendering his cargo to Respondent's container freight station for stuffing, thus passing the responsibility for container contents on to the carrier, but instead he opted to do his own packing.

In my opinion, the present case does follow the precedent set in *Cone Mills, supra,* regardless of whether one tariff or several tariffs were applied to the contents of one container. In both instances, the carrier

had to rely on the shipper's documentation. In both instances, the shipper was exclusively responsible for loading and sealing the containers and for completing the bills of lading. Verification by the carrier was never intended.

I believe that the precedent in *Cone Mills* should be upheld. Furthermore, there has been no refutation that the CY/CY tariff involved here was unlawful. The carrier had no choice but to charge its lawfully filed rate, and the shipper must be charged with knowledge of the governing rules and regulations involved with such application.

I must, therefore, conclude that the law lies fully with the Respondent in this proceeding, and that the Complainant should be denied reparation.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–35

PUBLICATION OF INACTIVE TARIFFS BY INDEPENDENT CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

ORDER

June 6, 1978

On February 6, 1978, the Commission issued a final Order in the above-styled proceeding (Order), directing the cancellation of some 500 inactive steamship tariffs, including A.P. Moller-Maersk Line (Maersk Line) Tariff No. FMC–67 governing transportation to U.S. Atlantic and Gulf Ports from Red Sea and Gulf of Aden Ports.

Now before the Commission is a Petition for Reconsideration (Petition), filed by Maersk which requests that Maersk Line Tariff No. FMC–67 be reinstated because Maersk actually was providing vessel calls to the Red Sea and Gulf of Aden ports in question—despite its earlier representations to the contrary. The Commission's Bureau of Hearing Counsel replied to the Petition.

The Commission takes official notice that Maersk Line has filed a new tariff covering Red Sea and Gulf of Aden Ports which became effective on May 1, 1978 (Tariff No. FMC–90), and is apparently extending common carrier service pursuant thereto. Under these circumstances, the issues raised by Maersk Line's request to reconsider the February 6th Order have become moot.

THEREFORE, IT IS ORDERED, That the Petition for Reconsideration of A.P. Moller-Maersk Line, be dismissed as moot.

By the Commission.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–35

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

DOCKET NO. 74–42

POUCH TERMINAL, INC.

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

ORDER DENYING RECONSIDERATION

June 7, 1978

The Commission has before it for decision two petitions requesting partial reconsideration of its Order conditionally approving the above-captioned agreements (Order), one from the Port Authority of New York and New Jersey (Port Authority) and another from the five terminal operator respondents (Operators).[1] Both Petitioners seek retroactive approval of all six mini-max terminal leases investigated in this proceeding to the time of their stated effective dates in August and September, 1973,[2] and also ask for a finding that no section 15 violations concerning the various Brooklyn Marine Terminal facilities covered by these leases have occurred.

In support of this relief, Petitioners allege that: the Order misstates the expiration date of UMS's pre-existing (nonmini-max) lease for Piers 1 and 2; there is no evidence that Respondents implemented an unapproved "cooperative working arrangement;" the Commission failed to "promptly approve or disapprove" the mini-max agreements filed December 14, 1973 as required by the last sentence of Shipping Act section 15; and, the

[1] The Operators are: Barber Lines, A S Pittston Stevedoring Corp (Pittston), Nippon Yusen Kaisha (NYK); Universal Maritime Service Corp. (UMS) and International Operating Co. (ITO).

[2] Three of the six agreements were approved April 28, 1977 after being modified as required by the Commission's Order The other three agreements were disapproved after the Commission was advised that Pittston had abandoned all use of Piers 10 and 12 and NYK ITO wished to negotiate a different type of lease arrangement Pittston abandoned Pier 12 on November 1, 1975

failure to grant retroactive approval might unjustly injure three of the five Operators.[3]

There is some merit to the first of these arguments.[4] Accordingly, we shall amend the Order to find that UMS' pre-existing lease for Piers 1 and 2 expired October 1, 1973 instead of May 1, 1973—thereby reducing by five months the period of time during which an unapproved cooperative working arrangement was implemented as to those piers. Further reconsideration of the Order is not warranted.

Petitioners claim there is no evidence to support a finding that they have implemented an unapproved section 15 "cooperative working arrangement" since signing the mini-max agreements. There is, however, ample evidence in the record that eight of the nine Brooklyn mini-max piers were designated "public piers" with the understanding that provisions of Public Tariff PA No. 9 would not be actually applied to them pending resolution of the instant proceeding. These agreements were not filed for approval and were continually implemented in violation of section 15 from the date the respective piers were declared "public" until occupancy either ceased or became based upon an approved agreement. Pier 7 was never declared a public pier and no violations of section 15 were found as to NYK and ITO in the instant proceeding. The basis for any occupancy of Pier 7 by NYK/ITO subsequent to June 7, 1976 has yet to be reviewed by the Commission, however.[5]

Petitioners also stress the lengthiness of the instant proceeding and state that the Commission's final approval of the mini-max agreements should have accomplished all which would have been accomplished had approval occurred "promptly" as required by section 15.[6] This argument quickly reduces itself to a request for retroactive approval for which there is no support in law.

The mini-max leases were executed in August and September of 1973, but were not filed at the Commission until December 14, 1973, despite the fact that section 15 requires the "immediate" filing of subject

[3] The alleged injury to Pittston, ITO and UMS is described as "potential" (Operators' Petition, at 8) and depends upon the Port Authority's successful collection of substantial unpaid "on account" and "pre-existing contract" rents. If an attempt to collect these unpaid rents were made, it would necessarily require an adjustment in the Operators' favor to accurately reflect the lower Public Tariff PA No. 9 charges in effect for most of the period in question (*i.e.*, Piers 1 and 2—all but 2 months; Piers 4 and 5—all but 4 months, Pier 7—none, Pier 10—all but 12 months; Pier 12—5 out of 25 1/3 months). The details of this account are neither provided by Petitioners nor discernible from the record. We note, however, that if the balance did favor the Port Authority, the three Operators would be "injured" only to the extent that the Port Authority held them to the terms of their freely negotiated nonmini-max lease agreements which expired at the time their respective facilities were declared "public piers."

[4] The pre-existing lease for Piers 1 and 2 was signed April 4, 1968 to expire April 30, 1973 with no month-to-month hold over provision. Two weeks before its expiration—at a time when mini-max negotiations had already begun—the parties signed a modification agreement permitting UMS to hold over on a monthly basis which was neither filed with nor approved by the Commission. Under these circumstances, there is a substantial question as to whether the April 16, 1973 modification was truly part of the prior lease or part of a new cooperative working arrangement. Because this issue is not clearly resolved in the record, we shall give Respondents the benefit of the doubt.

[5] The inapplicability of section 530.5(b)(2) of the Commission's Rules to the Operators' occupancy of the Brooklyn Piers is well set forth in the Administrative Law Judge's December 14, 1974 "Denial of Motion to Dismiss for Lack of Jurisdiction" which was incorporated by reference in his Initial Decision and from which no exceptions were taken. Appendix hereto, at 11–18

[6] The last sentence of section 15 states that "[t]he Commission shall promptly approve, disapprove, cancel or modify each such agreement in accordance with the provisions of this Section "

agreements. The proposed leases had widely varying initial terms and provided for indefinite occupancy under hold over tenancies. The only thing which would have been "accomplished" by immediate approval would have been immediate relief from the higher monthly payments of the pre-existing leases—the very fact which was the basis for Pouch Terminal, Inc.'s complaint. Allegations of urgency or immediacy of economic gain or loss will not alone defeat the hearing rights of a protestant raising substantial and material questions as to the legality of a proposed agreement. See *Marine Space Enclosures v. Federal Maritime Commission,* 420 F.2d 577 (D.C. Cir. 1969).

Most of the pre-existing leases expired or shifted to a monthly tenancy 17 days after the mini-max agreements were filed (December 31, 1973) and whatever need there might have been for immediate relief from the rental specified in those agreements disappeared at that time for UMS and Barber.[7] The Commission is as mindful of and concerned with the length of time required to complete formal adjudicatory proceedings as are Petitioners. It can sympathize, up to a point, with businesses which must engage in additional planning to assure that their activities do not become the subject of administrative litigation. The Commission cannot, however, excuse persons subject to the Shipping Act from the necessary responsibility of taking steps realistically designed to protect their concerted dealings from running afoul of the laws it administers. Whatever else might be intended by section 15's requirement that agency action occur "promptly" (consistent with due process), that statute does not authorize the approval of otherwise unapprovable agreements or the implementation of unapproved agreements whenever the proponents demonstrate that adjudication has not been "promptly" completed.

The command of section 15 is absolute. Violations do not require a showing of bad faith or even of intent, and the Commission lacks general equity powers to assure that "fairness" is achieved in all matters over which it possesses regulatory jurisdiction. Administrative agencies may only exercise authority conferred by their enabling statutes, *Transpacific Freight Conference of Japan v. Federal Maritime Commission,* 302 F.2d 876 (D.C. Cir. 1962). The Commission may not sanction past violations of the Shipping Act by retroactively approving an agreement under section 15. See *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 222 (1968); *River Plate & Brazil Conference v. Pressed Steel Car,* 227 F.2d 60, 63 (1955).

[7] UMS and Barber occupied six of the nine piers in question. Pittston's pre-existing lease for Pier 10 expired August 30, 1974 and that for Pier 12 expired April 30, 1975, *but Pittston did not pay any rents which accrued after August 1974* (Exs. 70, 71). The pre-existing lease for Pier 7 was held jointly by NYK and ITO and continued until June 30, 1976. The only "relief" which would have followed from the approval of the Pier 7 lease before 1976 would have been a saving of the *difference* between the fixed pre-existing rent and the $2.00 per ton flexible assessment provided by the mini-max lease. In 1974 this difference was about $81,000 (Exs. 36, 40) and cargo handled that year was low because of depressed worldwide trade conditions. The Port Authority anticipated mini-max revenues to quickly rise towards maximum levels in subsequent years (Tr., at 264–265). Moreover, ITO was permitted to fall at least $360,000 behind in its rental payments by August, 1975 (Tr., at 168).

THEREFORE, IT IS ORDERED, That the Commission's March 31, 1977 "Order Adopting Initial Decision" is corrected by:

(1) deleting the last sentence of numbered paragraph 5 on page 3 and inserting the following:

> UMS's prior lease with the Port Authority for Piers 1 and 2 contained a fixed term which expired April 30, 1973, and also provided for month-to-month occupancy thereafter. These facilities were declared Public Piers by the Port Commissioners effective October 1, 1973.

(2) deleting the fourth full sentence on page 7.

and;

IT IS FURTHER ORDERED, That the "Petition for Reconsideration" of the Port Authority of New York and New Jersey and the "Petition for Reconsideration" of Barber Lines A/S, Pittston Stevedoring Corp., Nippon Yusen Kaisha, International Operating Co., and Universal Maritime Service Corp., are denied.

By the Commission.

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

APPENDIX

FEDERAL MARITIME COMMISSION

No.74–35

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

No. 74–42

POUCH TERMINAL, INC.

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED; MOTION FOR SEPARATE HEARING ON JURISDICTION ISSUE DENIED; MOTION TO VACATE INTERROGATORIES DENIED; LEAVE GRANTED FOR INTERLOCUTORY APPEAL

The Port Authority of New York and New Jersey (Port Authority), respondent herein, has moved to discontinue the investigation in Docket No. 74–35 and dismiss the complaint in Docket No. 74–42 for the reason that the subject matter of the investigation and complaint is not within the jurisdiction of the Federal Maritime Commission under the Shipping Act, 1916. Respondents Barber Lines A/S, Pittston Stevedoring Corporation, International Terminal Operating Co., Inc., Universal Maritime Service Corporation join in the motion.

The subject matter and issues involved in the investigation in No. 74–35 and the complaint in No. 74–42 concern the making and carrying out of the following lease agreements between Port Authority and terminal operators and steamship lines:

No. T–2880, as amended, with Barber Lines A/S;

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

No. T–2883, as amended, with Nippon Yusen Kaisha, Limited, and International Terminal Operating Company; and

No. T–2884, as amended, and No. T–2885, as amended, with Universal Maritime Service Corporation.

Respondents contend that a landlord-tenant lease, in order to come within the purview of section 15 of the Shipping Act, 1916, or the Commission's jurisdiction, in addition to its lease characteristics as a conveyance and demise of real estate, must contain a provision or provisions doing or authorizing the doing of some of the activities enumerated in section 15. See *Greater Baton Rouge Port Commission v. U.S.*, C.A. 5, 1961, 287 F. 2d 86, certiorari denied 368 U.S. 985. Section 15 of the Act does not embrace any agreement unless two or more of the parties to it are subject to the Commission's jurisdiction and, even as between such parties, section 15 does not extend to all agreements which they may make. Section 15 describes the kinds of agreements covered, the language of the section as to the kinds of agreements covered being as follows:

> fixing or regulating transportation rates or fares;
>
> giving or receiving special rates, accommodations, or other special privileges or advantages;
>
> controlling, regulating, preventing, or destroying competition;
>
> pooling or apportioning earnings, losses or traffic;
>
> allotting ports or restricting or otherwise regulating the number and character of sailings between ports;
>
> limiting or regulating in any way the volume or character of freight or passenger traffic to be carried;
>
> or in any manner providing for an exclusive, preferential, or cooperative working arrangement.

It is respondent's position that none of the lease agreements made the subject of investigation in No. 74–35 or the complaint in No. 74–42 contains any terms or provision falling within the activities described in section 15; and neither such agreements nor the Port Authority as the maker thereof are subject to the Commission's jurisdiction.

The Commission has determined that an ordinary landlord-tenant lease, without more, is not subject to section 15 and that in order to bring such an agreement under section 15 some of the activities described in that section must be covered by the agreement.[1]

The Commission's interpretive rulings set forth that a landlord who does not control the lessee's rates or competitive practices is not an "other person subject to this Act." The ruling issued by the Commission provided that landlords would be considered to be "other persons" only where such control was retained, the ruling being in the following words:

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[1] By interpretive rulings, dated June 25, 1965 (46 C.F.R., Section 530–5), the Commission has defined those agreements between persons subject to the Shipping Act, 1916, which are required to be filed under section 15.

Landlords, *when not acting merely in the capacity of a lessor of realty,* but who maintain some control over lessee's rates or competitive practices either by unilateral action or by mutual agreement;

Respondents argue that none of the lease agreements subject to these proceedings provide for any control of the lessee's "rates or competitive practices" and that the Port Authority has not acted as an "other person" in making the agreements and will not be an "other person" in carrying them out.

While generally only a landlord and not an operator of terminal properties, Port Authority concedes that as to certain piers and properties other than those covered by the leases here involved it acts in the capacity of an "other person" under the Shipping Act, 1916, in that as to such other properties the Port Authority carries on the business of "furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." These activities are covered by and the charges therefor provided in the Port Authority's tariff F.M.C.—PA—9. However, it is the Port Authority's position that although it does engage in certain activities as an "other person" subject to the Act this nevertheless does not render its lessor business dealings with lessees subject to section 15 and therefore does not render such lessor business dealings by the Port Authority subject to the Commission's jurisdiction.

Each of the Port Authority lease agreements involved in these proceedings contains provisions requiring lessee to provide berthing for one or more ocean common carriers. The Port Authority contends, however, that this "use" provision requiring that the property leased be used for its intended purpose does not alter the landlord-tenant character of the agreement. It says, in support of its argument, that landlord-tenant leases in the business and commercial world frequently, and probably usually, provide the use to which the lessee may put the property involved. This, however, begs the question. If the lease provides the use to which the leasee may put the property it may be that very control by the landlord which brings it within the ambit of section 15.

The Port Authority points out that two lease agreements similar to the agreements which are the subject of these proceedings have previously been determined by the Commission not to be subject to section 15.[2]

The Port Authority claims that a comparison of agreements No. T–2880, as amended, and No. T–2883, as amended, will show that there is no material difference, as here pertinent, between the two agreements here involved and those ruled by the Commission to be not subject to the Act. It argues further that a comparison of the other agreements involved in these proceedings (Nos. T–2881–1, T–2882, T–2882–1, T–2884 and T–2885) with the agreements referred to above and held by the Commission

[2] By letters dated June 10 and June 12, 1964, an agreement between the Port Authority and Nippon Yusen Kaisha, Limited referred to as Agreement No. T–866, and by letter of July 24 1964 an agreement of the Port Authority with Barber Lines (formerly Martinsen and Company) designated T–863

to be not subject to the Act will show no material differences as to character or as to provisions as relevant to the issue of Commission jurisdiction.

The Port Authority issues certain rules and regulations. The leases set forth that each leasee is subject to all Port rules and regulations and, further, that the lessee is restricted from operating cold storage facilities on the leased premises. The Port Authority claims that these rules and regulations are almost entirely directed to safeguarding the safety of persons and property and that they do not fix or control or restrict in any way the rates or charges which the lessee may assess; nor do they contain any provision which in any way could be interpreted as providing any restriction upon the competitive conduct of the lessee. Hence, says the Port Authority, none of the activities subject to regulation under section 15 of the Shipping Act, 1916, is in any way involved in or touched by these rules and regulations and the Port Authority's rules and regulations do not, therefore, provide any basis for Commission jurisdiction of the leases here involved.

Each of the leases provides that "the Lessee shall not maintain or permit on the premises any refrigerating or cold storage facilities." However, the Port Authority has never interpreted or applied this provision as barring the lessee from providing on the leased property refrigerating facilities needed or desired by the tenant in the handling of ships' cargo or ships' stores. This provision has been understood as merely preventing the lessee from going into the general business of providing refrigeration or cold storage services on the leased premises.

The Port Authority argues that the restriction against the tenants entering the general cold storage business relates to a business activity performed before the ocean carrier transportation service is begun or after the transportation service is completed. Thus, it believes the cold storage restriction relates to commercial activities and business wholly outside the Commission's concern or jurisdiction. It contends that the general cold storage business is as remote from the Shipping Act, 1916, as manufacturing chemicals or carpets or shoes in Illinois, a thousand miles distance from the port and that the Commission has no jurisdiction over the general business of providing refrigerating or cold storage facilities in Brooklyn even though a business concern so engaged might provide storage facilities and service on articles previously transported or subsequently to be transported by an ocean common carrier, such storage occurring after the completion of, or before the beginning of, the ocean transportation service.

Pouch Terminal, Inc. (Pouch), complainant herein, and Hearing Counsel have each filed replies opposing the motion to discontinue and to dismiss the complaint.

Each of the agreements involved herein provides a formula pursuant to which the respondent tenants, some of whom are common carriers by water in the foreign commerce of the United States and the others of

whom are stevedoring companies who operate terminals in connection with common carriers by water in the foreign commerce of the United States, will receive a reduced rental from that which would otherwise be applicable for the piers rented from the Port Authority pursuant to the agreements. In the event that cargo moving over the piers falls below prescribed limits, the rental which each respondent paid prior to the amendment of the leases by the addition of the formula was established as the maximum rental which could be paid; in the event that the number of revenue tons moving over the pier in any one year, multiplied by $2.00 per ton, produces a figure which is equal to or is in excess of the maximum annual rental, only the maximum annual rental will be paid. If the number of revenue tons moving over the pier in any one year multiplied by $2.00 per ton produces a figure which is less than the maximum annual rental but in excess of one-half of the maximum annual rental, then such amount will be paid as the annual rental. Finally, if the number of revenue tons moving over the pier in any one year multiplied by $2.00 per revenue ton produces a figure which is equal to or is less than one-half of the maximum annual rental, then a minimum rental of one-half the maximum annual rental will be paid.

Pouch's position is that the Port Authority's use of the rental formula will result in rentals which are non-compensatory; that such use has deprived and will continue to deprive Pouch of tenants of the piers which it owns and which are now vacant; that Pouch's only substantial source of income is from its pier rentals and adjacent warehouse operations; and that the Port Authority's utilization of the formula in its leases is intended to and will drive Pouch out of business.

In determining whether an agreement is subject to the Commission's section 15 jurisdiction, it is important to consider the standards governing the Commission's authority under section 15. In *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968), the Supreme Court stated:

> Nothing in the legislative history suggests that Congress, in enacting § 15, meant to do less than . . . subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry. *Id.* at 276.

Thus, the Court in reviewing the legislative history of section 15 placed great importance on the fact that Congress intended the section 15 filing requirement to be very broadly interpreted so that numerous agreements would be subject to the Commission's careful and expert scrutiny.

As previously set forth, section 15 provides that certain kinds of agreements must be filed with and approved by the Commission before they may be carried out. The issue therefore is whether the agreements involved in this proceeding contains clear and specific provisions which bring it within the categories of agreements subject to section 15. The crux of Pouch's contention is that it is a competitor of the Port Authority in the leasing of terminal facilities and that Port is using these lease

agreements, which provide for non-compensatory rents, as a device to damage and destroy Pouch as its competitor.

The Port Authority sets forth that two of the basic lease agreements have previously been determined by the Commission not to be subject to section 15.[3] These non-jurisdictional agreements have subsequently been amended, are at issue in this proceeding and denominated Agreement Nos. T–2880 and T–2883. The Port Authority argues that the amendments subsequently made to these agreements in no way change the basic character of the agreements as ordinary landlord-tenant leases and inferentially argues that the earlier rulings are binding and controlling.

The contention must fail on several grounds. Any determination made in 1964 by the staff or the Commission does not bind the Commission since it may modify or even reverse past policies and rulings if sufficient basis exists, as hereinafter set forth.[4] In any event the subsequent *Volkswagenwerk* ruling has enlarged the interpretation and scope of agreements subject to section 15. Even if the 1964 rulings were correct for T–863 and T–866, the agreements now before us contain numerous terms and conditions any of which, as set forth below in this ruling, are sufficient to bring the present leases within the ambit of Commission jurisdiction and scrutiny pursuant to section 15.

Although the Port Authority asserts in its motion that "none of the lease agreements subject to these proceedings provides for any control of the lessee's rates or competitive practices," this assertion is not necessarily so. Each of the subject agreements contain written provisions whereby the Port Authority impinges on the operating freedom of the lessee.

With respect to the Port's agreements with UMS and Pittston, each of these lease agreements provides:

> *The lessee shall have the right to berth* in the berthing area *seagoing vessels* operated by persons, firms or corporations for which the Lessee acts as stevedore or terminal operator and *which shall have the prior and continuing consent of the Port Authority* to be granted, withheld and withdrawn in the sole discretion of the Port Authority, carrying or about to carry general cargo . . . (Underlining added.)

Hence, each lessee may only berth those seagoing vessels operated by persons, firms or corporations which have the prior and continuing consent of the Port Authority. Thus, under these agreements the Port Authority reserves to itself an absolute veto as to which vessels may use the terminal facilities which it rents to the lessees.

The agreements with Barber and NYK differ somewhat. In the case of Barber, Barber is given specific authorization to berth the vessels of designated subsidiaries or affiliates; however, Barber may berth seagoing vessels of two other operators at such terminal facilities with the prior and continuing consent of the Port Authority. In the case of the agreement with NYK and ITO, NYK may only berth seagoing vessels owned or

[3] No T–863 between the Port Authority and Barber Lines (formerly Martinsen and Company) per letter of July 24, 1964; No T–866 between the Port Authority and Nippon Yusen Kaisha, Limited, per letters of June 10 and 12, 1964.

[4] *Marine Space Enclosures, Inc. v. F.M.C.*, 420 F. 2d 577, 585 (D C. Cir 1969)

operated by it or by entities for which ITO acts as stevedore or terminal operator.

These provisions of the leases limiting the vessels which may call at the piers bring the agreements within the regulations of the Commission which define the agreements subject to the Commission's jurisdiction under section 15. One such provision is contained in 46 CFR § 530.5(b)(2) which requires filing of an agreement by any person, firm or governmental subdivision which owns or leases property used as a terminal in connection with a common carrier by water when the landlord maintains "some control over lessee's rates or competitive practices either by unilateral action or by mutual agreement." It also comes within the provision of 46 CFR 530.5(c)(3)(iv) which requires filing of agreements covering the lease of terminal facilities, when they control, regulate, prevent or destroy competition by "[o]bligating the lessee to discriminate against one carrier or shipper in favor of another."

The position of the Port Authority as the landlord in these agreements, is basically identical to that of the Port of Seattle in *Agreement 8905—Port of Seattle and Alaska S.S. Co.*, 7 F.M.C. 792 (1964). There, Seattle argued that by virtue of its terminal lease with Alaska Steamship Company, it had abdicated its position as terminal operator and thus was not within the section 1 definition of an "other person." However, the Commission recognized the Port of Seattle had reserved the right to control the berthing of vessels and therefore concluded that Seattle had not abandoned its function of furnishing terminal facilities at the pier.

Under the Commission's interpretive regulation, a landlord need only "maintain some control over [a] lessee's rates or competitive practices" (46 CFR section 530.5(b)(2)) to bring it within the Commission's section 15 jurisdiction.[5] On the basis of the agreement provisions previously set forth it would appear that the subject agreements do provide for some control by the Port over its tenants' competitive practices.

Nor are these the only examples of the lease agreements curtailing the competitive practices of the Port's tenants. In addition, as previously mentioned, each agreement provides that the lessee "shall not maintain or permit on the premises any refrigerating or cold storage facilities." Thus, the agreements further control how the facilities shall be used by limiting the kind of cargo that can be handled.

The Port Authority contends that this prohibition is inoperative insofar as it bars the lessee from providing refrigerating facilities necessary to handle ships' cargo. In other words refrigerating or cold storage facilities for maritime commerce is permitted but only refrigerating or cold storage

[5] This regulation provides:

Any person, firm, company, corporation, or government subdivision providing marine terminal services, or which owns or leases property used as a terminal, in connection with a common carrier by water, including, but not limited to the following designated categories, is an "other person subject to this Act" * * * (2) Landlords, when not acting merely in the capacity of a lessor of realty, but who maintain some control over lessee's rates or competitive practices either by unilateral action or by mutual agreement

facilities for non-maritime commerce is barred. However, since this prohibition on its face appears all encompassing the Port Authority has not cited any instances where lessees are aware of their right to provide refrigerating or cold storage services and facilities to maritime commerce by establishing such facilities pursuant to leases providing that "the Lessee shall not maintain or permit on the premise *any* refrigerating or cold storage facilities." (Underlining added.)

The Port Authority admits that each of its tenants is required to observe the "Rules and Regulations of the Port Authority" pursuant to the subject lease agreements; but contends that such Rules and Regulations contain no provision which in any way could be interpreted as providing any restrictions upon the competitive practice of the lessee.

Despite this contention, Items 120 and 130 of its Rules and Regulations specifically prohibit the carrying on of any commercial activity without the consent of the Port Authority and which gives to the Port Authority, in its sole discretion, the right to assign railroad cars using the tracks at its terminals to any specified location at a terminal, and to limit the number of such cars permitted in any area at a terminal. Thus, the Rules and Regulations do in fact contain provisions which substantially affect the operations and competitive practices of the terminal facilities by tenants. The incorporation by reference into the agreements of the Port Authority's Rules and Regulations bring the agreements within the purview of Commission's interpretive regulation 46 CFR § 530.5(c)(1)(ii) which requires the filing of agreements covering the lease of terminal facilities when they fix or regulate the rates, rules, regulations or charges by requiring lessee to "conform to rates, rules or regulations established by lessor. . . ." The Port Authority admits that it operates "public wharves or public work facilities" at the Port of New York and that the charges for the use of these facilities "are those provided in its tariff, FMC Schedule No. PA–9." It further states that the charge made pursuant to Tariff PA–9 is closely comparable to $2.00 per ton, the basis upon which the minimum rental, pursuant to the agreements is computed, the agreements further provide that if the cargo moving over the pier is insufficient to produce the maximum rental at the rate of $2.00 per ton, the agreements provide for an abatement of rent. Thus, there is a deviation as to the rentals charged under the lease agreements to respondents as compared to those persons using the Port Authority's public cargo piers under PA–9, three of which are at the Port Authority's Brooklyn Marine Terminal. This deviation results in the agreements falling within the purview of the Commission's interpretive regulation 46 CFR § 530.5(c)(2)(i) which requires filing of agreements covering the lease of terminal facilities when they give or receive special rates, accommodations or privileges by "[d]eviating from established tariff charges through a fixed rental in lieu of tariff rates, or rental payment based on tariff charges with a maximum payment established."

This regulation is also applicable since not all of the Port Authority's

tenants at its Brooklyn marine terminal are afforded the benefit of a reduced rental as is provided in the agreements. The respondents occupy six of the 12 terminals at the Port Authority's Brooklyn marine terminal. Three of the remaining piers in Brooklyn are not leased. Therefore, the other three which are leased do not have agreements which would entitle the lessee to an abatement of rent if the cargo moving over the pier is insufficient to produce the maximum rental at $2.00 per ton; hence, the agreements give special rates to respondent tenants not given to other tenants of its Brooklyn piers by this deviation from established tariff charges. This alone would be sufficient to establish that the leases are section 15 agreements. In *Agreement No. T-4; Term. Lease Agree., Long Beach, Calif.*, 8 F.M.C. 521, 530 (1965), Oakland and Long Beach received a fixed monthly rent in lieu of terminal charges. The Commission said:

> The rental provisions in agreements T-4 and T-5 are expressly stated to be "in lieu of" all terminal charges prescribed in the tariffs of lessors. The tariffs of Oakland and Long Beach provide that the regular charges to be assessed the user of a terminal facility are the charges which appear in their respective terminal tariffs, and it is equally clear that agreements T-4 and T-5 provide for the assessment of a charge based on other than tariff rates. All other users of lessors' facilities are assessed terminal charges by gross register ton of the vessel in the case of dockage and by the number of tons in the case of wharfage.
>
> In docket 1097—*In the Matter of Agreement 8905, Seattle-Alaska Steamship Co.*, March 20, 1964, the Commission found that a terminal lease which provided for payment at tariff rates not to exceed a specified maximum was a special rate, accommodation, or privilege sufficient to bring that agreement within the ambit of section 15. Thus, the Commission in agreement 8905 found *a lease to be a section 15 agreement because it contained a rental charge based upon other than tariff rates* This is the fact pattern present in agreements T-4 and T-5. On this record, we find that Long Beach and Oakland, in granting Sea-Land, through a *terminal lease*, the exclusive use of a berth for a consideration *which substantially deviates from tariff charges applicable to others, have given* Sea-Land *a special rate which brings the leases within the meaning of section 15. Since we have determined the leases to be section 15 agreements on this ground, we need not further discuss nor make findings on other theories offered by parties on this issue.* (Underlining added.)

The Commission's interpretive regulation 46 CFR § 5305.5(c)(5) requires filing of agreements covering the lease of terminal facilities when they "provide that earnings or losses received from a marine terminal operation shall be divided between two or more persons subject to the Act; except that rental payments based directly upon the amount of cargo handled will not be considered an appointment of earnings."

The Port Authority has told the Commission that the purpose of the supplement is to provide the maximum agreed rental to the landlord, if the traffic is sufficient to permit the lessee to make the required payments. In essence, there is substituted for the previous fixed annual rental a maximum-minimum formula, the minimum payment being one-hald the previously fixed annual rent.

Thus rental payments are based upon the amount of cargo handled only when the amount of cargo brings the rental between the prescribed

maximum and minimum rental. When the amount of cargo exceeds the maximum or falls below the minimum the rental paid is not based on the amount of cargo but is a fixed amount. Hence the rental payments are not based directly upon the amount of cargo handled but only in some instances and not in others. That the Port Authority intended the terms, at least in some degree, to provide that earnings or losses shall be divided between the parties is revealed in its statement to the Commission that:

> ***The facilities are employed by the tenant for the handling of break bulk cargo. The advent of container shipping has reduced the traffic moving over the facilities. As a result, the lessee is experiencing some financial hardship. The purpose of the supplement is *to alleviate lessee's burden but at the same time to provide the maximum agreed rental to the landlord if the traffic is sufficient* to permit the lessee to make the required payments." (Underlining added.)

This is a form of dividing risk—a form of profit or loss sharing.

These leases are not simple landlord-tenant real estate transactions in which the interest of the landlord is remote from the maritime commerce of the United States. The landlord's interest is directly and financially involved in the cargo which moves through the terminal. This is further exemplified by the Port Authority's statement that the leases are in furtherance of its mandate "to protect and develop the trade and commerce of the Port of New York District."

Of particular interest in this regard is the observation of the Court in *Greater Baton Rouge Port Commission v. United States*, 287 F. 2d 86, 93 (5th Cir. 1961), *cert. den.* 368 U.S. 985 (1962):

> ***It is part and parcel of an over-all scheme for the greater commercial development and use of the Baton Rouge port area. An agreement pertaining to the exclusive operation of such an elevator, dealing with preferences and rates, maritime services and facilities, has such a significant maritime connection as to fall well within the jurisdiction and scope of authority of the Federal Maritime Board.

The Port Authority argues that if the Commission determines that the agreements here involved are landlord-tenant leases not subject to section 15, it follows that the Port Authority in making such leases is acting as a landlord and owner of real estate and is not acting as an "other person" subject to the Shipping Act, 1916, or in any other capacity as a regulated entity under the statute. Thus, a ruling that the lease agreements involved are not subject to section 15 necessarily results also in a ruling that the Port Authority in making and carrying out such leases has not acted and is not acting as a regulated person or entity under the Shipping Act.

The Commission's order of investigation herein states as one of its purposes:

> that it be determined whether these agreements subject Pouch to undue or unreasonable prejudice or disadvantage or establish unjust and unreasonable regulations and practices in connection with the receiving, handling, storing or delivery of property in violation of sections 16 and/or 17 of the Shipping Act, 1916. . . .

The complaint of Pouch presents the same issues: that even if it be found that the landlord-tenant lease agreements, the subject of this

investigation and complaint, are not section 15 agreements there remains under the order of investigation and under the Pouch complaint the section 16 and section 17 issues for resolution; and that, therefore, the investigation should not be discontinued and the complaint dismissed without a hearing even though it be determined that the agreements are not subject to section 15. Thus, neither the order of investigation nor the complaint are dependent for their existence upon whether the agreements are subject to the Commission's section 15 jurisdiction.

The crux of the Port Authority's argument is that although it is admittedly an "other person" subject to the Shipping Act, 1916, in regard to other activities elsewhere in New York Harbor, absent a finding that the instant leases are subject to section 15 it follows that the activities of the Port Authority with respect to these leases are insufficient for it to be classified as an "other person" as defined in section 1 of the Act. Section 1 provides:

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

In support of its position the Port Authority cites *New Orleans Steamship Assn. v. Bunge Corp., Etc.,* 8 F.M.C. 687, 695 (1965).See also *G. C. Schaefer v. Encinal Terminals,* 2 U.S.M.C. 630, 631 (1942), wherein the Commission recognized that a regulated "other person" may engage in a "separate" business free of and beyond regulation.

In the first of these cases, Bunge Corporation owned and operated a waterfront terminal grain elevator located in Destrehan, Louisiana. Through a wholly-owned subsidiary, it also owned and operated the Port Richmond Elevator at the Port of Philadelphia, Pennsylvania. The Commission concluded that although it was an "other person" subject to the act with respect to its Philadelphia operation, the Louisiana operation was not subject to Commission jurisdiction.

Bunge's situation, however, is quite distinguishable from that of the Port Authority in the instant proceeding. In *Bunge,* the Commission refused to assert jurisdiction over a Louisiana grain elevator merely because Bunge operated an elevator over 1000 miles away in Philadelphia where there was no relationship between the operations. However, in the instant proceeding, the Port Authority is engaged in operations subject to Commission jurisdiction within the very same port and indeed at its very same Brooklyn Marine Terminal. These operations at the Port of New York are related since the Port Authority has stated that the lease agreements involved herein are part of its general plan for the over-all development of the Port of New York.

In *G. C. Schaefer,* the second case cited, the complainant instituted a complaint proceeding against Encinal Terminals in connection with Encinal's pool car service which involved use of Encinal's wharves and other terminal facilities. The Commission found that Encinal's pool car

business "is an independent, private venture, separate and apart from its terminal operation"; nevertheless, the Commission rejected the motion of Encinal to dismiss the proceedings on jurisdictional grounds and, in fact, the Commission determined the issues raised by complainant on the merits. Thus, this case supports the proposition that the Commission does have jurisdiction over the Port Authority if it is otherwise subject to Commission jurisdiction under section 1.

More persuasive of the proposition that the Commission has jurisdiction to determine section 16 and 17 issues relating to these leases because the Port Authority is within section 1 definition as an "other person" was determined in *Agreement No. T-4: Term. Lease Agree. Long Beach, Calif.*, 8 F.M.C. 521 (1965). In that case the two ports claimed that although they were with respect to certain of their operations within the definition of an "other person" within the jurisdiction of the Commission, with respect to the particular terminal lease agreements there under investigation by the Commission, they were not operating as such an "other person" and were therefore outside the Commission's jurisdiction. The Hearing Examiner rejected this argument, saying:

> This condition is without merit. It serves no useful purpose to attempt to establish split personalities. Section 1 lists the functions that bring an "other person" within the Act. Once the Commission finds that a person is performing those functions, that person is subject to the jurisdiction of the Commission for the purposes set forth in the Act. In this manner, the Commission is carrying out the pattern contained in the Shipping Act that requires the regulation of persons subject to the Act and an investigation into their activities. Once having made a jurisdictional determination, it would serve no useful purpose for the Commission to go through the same jurisdictional process each time an activity of that person comes to the Commission's attention. (5 SRR 491 at 509, footnotes omitted.)

The Commission concurred in this finding, stating:

> The examiner predicated his finding upon the fact that Oakland and Long Beach own certain terminal facilities and retain wharfage and dockage charges at these facilities. To that extent, they furnish terminal facilities within the meaning of section 1 of the Shipping Act and are, therefore, other persons subject to the act. We adopt this finding. (8 F.M.C. at 527)

The Port Authority has moved that, before ruling on the jurisdictional issue, we grant an evidentiary hearing limited to presentation of facts relevant to the Commission's jurisdiction. We see no benefit to be gained from such a procedure. The Port Authority has filed an extensive brief in support of its motion as well as a supplemental brief in support. The question of jurisdiction is essentially a legal issue in which the leases are the factual evidence. The movant has had ample opportunity to explain the leases and why they are not within section 15. An interlocutory appeal to the Commission is being permitted. Rule 10(m). The expedition which the Port Authority says it seeks in its request for evidentiary hearing on jurisdiction is more expeditiously accomplished by interlocutory appeal.

Believing that the Commission has jurisdiction of all the matters in this proceeding and that hearing on the merits must consequently eventuate

the suspension of pending discovery matters set forth in my order of October 23, 1974, is hereby lifted. All parties will proceed with such discovery procedures permitted by Subpart L of the Commission's Rules of Practice and Procedure as they may deem appropriate in the circumstances.

Wherefore, upon consideration of the foregoing, it is

Ordered,

1. The motion to dismiss for lack of jurisdiction is denied;
2. The motion for an evidentiary hearing on jurisdiction issue is denied;
3. Leave is granted to appeal these rulings to the Commission;
4. The previously ordered suspension of discovery procedures is lifted.

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

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–24

INTERCONEX, INC.

v.

SEA-LAND SERVICE, INC.,
AMERICAN EXPORT LINES, INC.,
U.S. LINES, INC.

DISMISSAL OF COMPLAINT

June 8, 1978

On June 5, 1975, Colt Industries (Colt), on its own behalf and as an agent for the Government of the Republic of Korea, filed a complaint before us against Interconex, Inc. (ICX), and Sea-Land Service, Inc. (Sea-Land), American Export Lines, Inc. (AEL) and U.S. Lines, Inc. (USL), seeking reparation for alleged overstatements of weight or measure. This proceeding was designated Docket No. 75–19. ICX subsequently filed a counterclaim against Colt in Docket No. 75–19 as well as a separate complaint which initiated this proceeding.

The ICX complaint advised that this proceeding (Docket No. 75–24) was instituted primarily to toll the two-year statute of limitations with respect to any claims ICX may have had against Sea-Land, AEL, and USL as a result of any ICX liability to Colt arising from Docket No. 75–19.

Thereafter, the Presiding Administrative Law Judge dismissed both Colt's claim and ICX's counterclaim in Docket No. 75–19 acknowledging a negotiated settlement reached among Colt, the Republic of Korea and ICX. The parties did not appeal the Administrative Law Judge's dismissal.

The Presiding Officer also granted motions to dismiss the proceedings in Docket No. 75–24. This dismissal was appealed to us.

On appeal, the Commission affirmed the Presiding Officer's dismissal, explaining, *inter alia:*

> This dismissal [issued by the Presiding Officer] of the underlying Colt complaint [in Docket No. 75–19] destroys the possibility of a finding of ICX liability in that proceeding which would give rise to any claim by ICX in this proceeding. Therefore, ICX has no claim as to which, under any set of circumstances, as framed, it would prevail.

ICX sought review of that ruling in the United States Court of Appeals for the Second Circuit. That court found error in the Commission's denial of permission to ICX to amend its complaint and its subsequent dismissal of such complaint with prejudice. It accordingly remanded the proceeding to the Commission with directions to allow ICX to keep its cause of action alive by amending its complaint.

ICX has now advised by letter of counsel that:

> . . . Interconex . . . has settled its disputes with all underlying carriers named as respondents in Docket 75–24 over shipments covered by Interconex's complaint in that case. Therefore, it will not be necessary for the Commission to assign this case for hearing on remand.

In light of this clear indication that Interconex, Inc. does not intend to pursue its complaint, we have determined to dismiss that complaint and discontinue the proceeding. So Ordered.

By the Commission.

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